IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. L008 1989

BETWEEN	LANE INVESTMENT LIMITED	PLAINTIFF/RESPONDENT
A N D	UNITED GROCERY &COMPANY LIMITED.	DEFENDANT/APPLICANT

Dr. Lloyd Barnett and Mrs. P. Levers for Plaintiff

Mr. Crayton Miller and Miss N. Anderson for Defendant.

6th, 7th, 8th & 12th June, 1989

COOKE,J. (Actg.)

On the 6th, 7th and 8th June, 1989, arguments were heard in chambers in respect to three summonses by which the Defendant/Applicant asked the Court to:

(a) set aside a judgment and give leave to file its defence and counterclaim out of time

(b) to stay and set aside the writs of seizure and sale and possession issued pursuant to (a) supra and

(c) to strike out the writ of summons and Statement of Claim.

The Court recognizing that urgency attended this matter delivered an oral judgment on the 12th June 1989 and undertook to reduce that judgment to writing. This is it.

From at least since 1984 the Defendant/Applicant has been conducting business in Lane Plaza under the name of United Pharmacy in premises tenanted to it by the Plaintiff/Respondent. I set out hereunder the sequence of events between these two parties which are relevant to the issues to be decided.

(1) Demand dated February 18, 1988 from Dunn, Cox and Orrett Attorneys-at-Law for the Plaintiff for the sum of $31,500 for arrears of rent.

(2) Apparently some correspondence took place between the Defendant's Attorney-at-Law and the firm Dun Cox and Orrett pertaining to the demand made. However by June 1988, Mrs. P. Levers, Attorney-at-Law, now had conduct of the Plaintiff's Cause and in response to communication from her the Defendant by letter dated July 18, 1988 set out in detail a compilation of its financial accounting by which the Defendant at that time is owed the sum of $10,300 (Exhibit PL 4). It is agreed that the invitation from the Defendant in the last sentence of that letter to "Kindly let us hear from you in respect to these matters" until now has not been accepted.

(3) On 27th January, 1989 the Plaintiff files a writ with a statement of claim endorsed thereon.

(4) By letter dated 1st February, 1989 the Defendant requests further and better particulars.

(5) On 2nd February, 1989, an Appearance is entered by the Defendant.

(6) By letter dated 13th February, 1989 the Plaintiff supplied particulars (Exhibit A).

(7) On 22nd March 1989, a signed judgment was lodged in the Registry to be entered.

(8) On or about the 6th April, 1989, a request of the Plaintiff by the Defendant that a consent be given to file its Defence and Counter Claim out of time was denied.

(9) On 9th May, 1989 judgment is entered.

(10) On 10th May, 1989, the Defendant filed a summons under section 199(a) of the Judicature (Civil Procedure Code) Law for leave to file its Defence and Counter Claim out of time.

(11) On the 18th May, 1989, writs for seizure and sale and for Possession were issued to the plaintiff.

(12) On or about the 22nd May 1989 the Defendant was aware of the existence of these writs of seizure and sale.

(13) On 29th May the summons mentioned in (10) Supra was adjourned sine die "as it no longer had any significance, Final Judgment having been entered against the Defendant" See para 9 of the Affidavit of Miss Nancy Anderson in support of summons to stay execution.

(14) On the 29th May 1989, the Defendant informed the Plaintiff of its intention to shortly file a summons to set aside the judgment and the plaintiff indicated that a contest would ensure thereon.

(15) On the 30th May, 1989 the writ of possession was fully consumated and the writ of seizure and sale partially consumated.

(16) On the 1st of June the sum of $50,067,64 was paid by the Defendant to the Bailiff in respect of the Writ of Seizure and Sale. This was stated by Mr. Miller in argument who made it clear that this payment was in no way an admission of liability in that regard.

I now set out the Statement of Claim in full.

STATEMENT OF CLAIM

1. By Lease dated the 12th day of January, 1987 the Plaintiff demised to the Defendant the shops numbered 19, 20 and 21 at Lane Plaza, Old Hope Road, in the parish of Saint Andrew for the term of three (3) years commencing from the 1st day of January, 1986.

2. The said Lease contains a convenant whereby the Defendant convenated with the Plaintiff to pay its rent for the premises during the said term as follows:-

(1) During the first year commencing 1st January, 1986. - $54,000 p.a.

(2) During the second year commencing 1st January, 1987. - $63,000 p.a.

(3) During the third year commencing 1st January, 1988. - $72,000 p.a.

3. The Defendant is in arrears with said rent in the sum of $44,250.00 which is due and payable.

4. And the Plaintiff claims possession in view of the arrears of rent due and payable.

PARTICULARS OF CLAIM

And the Plaintiff claims interest on the said sum from the date of the Writ until Judgment.

Sgd. PRIYA A. LEVERS (MRS.)
ATTORNEY-AT-LAW FOR THE PLAINTIFF

SUMMONS TO STRIKE OUT WRIT OF SUMMONS AND STATEMENT OF CLAIM

Mr. Miller launched a two - pronged attack on the statement of claim. Firstly, he would have the Writ of Summons and Statement of Claim struck out, in that the "mandatory provisions" of section 10 of the Judicature (Civil Procedure Code) Law hereinafter referred to as the "Code" was offended. Secondly he contends that the Statement of Claim ignored section 230 as no reasonable cause of action is pleaded. As to the first he points out, which is fact, that the address of the Defendant is not 122 Old Hope Road, but 121 Old Hope Road. Ipso Facto the writ is invalid. There is obviously no merit in this submission which pays scant regard to the mischief of that section and disregards sections 678 and 679 of the Code. I will only quote section 679 which is as follows:-

> "No application to set aside any pro 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."

On the 2nd limb it is argued that there is no full and complete statement of the cause of action and the authority Trahauf v. Grouesnor - (1892) 67 L.T. 350 is relied on. It is said that the claim is not particularised nor does it reveal an entitlement to possession and "it is devoid of clothing". I do not agree. The cause of action quite plainly is the recovery of possession. If the Defendant is prejudiced in filing its defence because it thinks that more is needed than appears there are ample mechanism whereby that which is needed may be sought.

SUMMONS TO SET ASIDE JUDGMENT AND LEAVE TO FILE DEFENCE AND COUNTERCLAIM OUT OF TIME

Mr. Miller in seeking the aid of Section 258 of the Code has submitted that in respect of that part of the Judgment which pertains to arrears of rent there is no claim - merely a statement as to an alleged state of affairs. Therefore the judgment is irregular. In general, he argues that the overiding criterion which should influence the exercise of my discretion is whether or not the defendant by its proposed defence has demonstrated that there is a triable issue. He does not regard the Defendant's delay as inordinate and he states that there was much checking to be done of the alleged figures which required meetings with the Defendant's accountants. Finally he says the Plaintiff/Respondent always knew that issue had been drawn and that a defence was to be filed and steps had been taken which clearly indicated enthusiasm and action to engage in contest.

Dr. Barnett's answer was that the cause of action for arrears of rent is clearly stated. The relief, namely claim for payment, is not specifically stated but the clear inference is that this is also being claimed and this has been so understood by the Defendant who has in fact exhibited a draft Defence in answer to the claim. Further in the alternative if there is no claim, an amendment would provide a cure. He describes as a spurious the Defendant/Applicant's assertion that time was needed to investigate figures since no complex accountancy was involved. Over a year had elapsed since the dispute started and 4 months since the writ had been filed. Accordingly the delay is inexcuseable. In any event the application to set aside the judgment and file Defence and Counterclaim out of time is related to and dependent on the application to set aside writs of

seizure and sale and possession which have already been consumated, because a failure to obtain a setting aside of these writs must necessarily result in failure of the instant application.

Section 195 of the Code states that:-

> "Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative ....."

It is not my view that this requirement permits an inference to be drawn. If authority be needed, I make reference to Faitfull v. Woodley 1890 43 Ch.D at page 289 where North J said:-

> "I am not aware of any case in which relief not asked by the Statement of Claim has been given against a Defendant who did not appear at the trial of the action."

Presumably the latter part of the sentence quoted envisages a situation where at the trial there could be an amendment which brings me to the contention that an amendment could effect a cure. Section 259 of the Code is as follows:-

> "The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsements or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The real question in controversy, Dr. Barnett says is whether rent is due and payable and therefore the likelihood of an amendment being granted is real. It is unnecessary for me to comment on this, as the factual situation is that a judgment has already been entered

in circumstances where there is no claim and unless and until such amendment is granted the Plaintiff/Respondents stands or falls on what now obtains.

In this matter the Plaintiff/Respondent has insisted on its procedural rights within the Code. It has acted with expedition. The Defendant/Applicant's position in respect of the delay is not convincing.
However it has not been argued that this delay has resulted in any prejudice to the plaintiff. This is not a situation where delay was accompanied by silence and/or inactivity on the part of the Defendant/Applicant. There was every indication that the issues were to be contested and it cannot be said that procrastination was been employed as a tool to frustrate the realization of the rights of the Plaintiff/Respondent. I respectfully adopt the word of Carey J.A. in Manteca Warehouse Limited v. Anthony Chin-Que et al Scc C.A. No. 45/87 (unreported) where he said:-

> "In order that a litigant should be driven from the Judgment seat, some very good reasons should be shown to allow that to take place. Delay by itself and that has been demonstrated here, is not in my Judgment enough."

The Defendant/Applicant proposes to fight the action on the ground that it has over-paid the plaintiff because monies which have been so far collected from it is excess of what was payable under the Rent Restriction Act and when the amount overpaid is set arrears alleged, there will be no debt. It has not been even faintly argued that the Defendant's position is without merit. I will be further guided by the principle adumbrated by Lord Wright in Evans v. Bartlam [1937] 2 AER 646 at 656 where he said that in considering whether a

default judgment should be set aside.

> "The primary consideration is whether he has merits to which the Court should pay heed. If merits are shown the Court will not prima facie desire to let pass a judgment on which there has been no proper adjudication."

In this case the defendant should be allowed to have its day in Court. In view of my decision pertaining to the summons to set aside the writs of execution it is unnecessary for me to deal head on with Dr. Barnett's last submission on this aspect. Suffice it to say that as a general proposition, that submission does not seem to bear the stamp of authority.

STAY OF EXECUTION AND SETTING ASIDE WRITS OF SEIZURE AND SALE AND POSSESSION.

Possession by the Plaintiff/Respondent having been effected and Writ of Seizure and sale having been satisfied, the question of a stay of execution was

not canvassed. As regards setting aside the writs of execution Mr. Miller's starting point was reference to section 597 of the Judicature (Civil Procedure Code) Law which is:-

> "The Court may at any time, upon reasonable cause being shown, stay or set aside any writ of execution on such terms as justice may require."

The burden of Mr. Miller's contentions were firstly that the judgment had to be served on the Defendant/Applicant before the writs of execution could properly be consumated in order that the Defendant/Applicant could know what the obligations were, especially as the writs were pursuant to a Default Judgment. This was a bald unsupported assertion which finds no favour with the Court. Secondly, he argues that if the judgment is set aside it would necessarily follow that the writs of execution should be set aside. Thirdly, he says that the plaintiff ought not to be allowed under the colour of the process of the Court to reap the benefits of a judgment which has been set aside. This submission is based on the judgment of Culeridge J. is Due dem Stratford v. Shail. (1844) 2 Dowe and L 161 and is in fact Isissima Verba in respect of that the penultimate sentence in that judgment.

Dr. Barnett submitted that once the writs had been consumated the question of setting aside could not canvassed. The tenancy was at an end. Even if a consumated writ could be set aside the Defendant has not shown reasonable cause in that no reasonable grounds have been shown for delay by the Defendant in not filing its defence. Further it is contended that sections 596 and 597 of the

Code should be read together and accordingly the Defendant/ Applicant has failed to show "the ground of facts which have risen too late to be pleaded." (Section 596). Finally setting aside the writ of possession would be an exercise in futility since the tenancy held by virtue of a lease (Exhibited) expired on the 31st of December 1988 and that in accordance with the terms of Clause 4 (3) of the said lease a notice to quit had been given to the Defendant and accordingly the effect of that notice was that since the 28th February 1989 legal relations between the Plaintiff/Respordent and the Defendant/Applicant as landlord and tenant had terminated.

Mr. Miller countered the submission of Dr. Barnett as regards the consumated writ by relying on the following passage from Halsbury Laws of England 3rd Edition Volume 1t at page 67 para. 104;

> "When the judgment is reversed or the judgment and the writ of possession are set aside after execution has been completed an order will be made that the plaintiff do restore possession to the defendant ....."

He extracts from that passage the principle that the fact that, as in the instant case, the Defendant/ Applicant has been dispossed is no bar to the setting aside of the writ of possession. He cited in support the following cases; Doe d Williams v. Williams (1834) 2Ad & EL p. 381 (ii) Doe d Stratford v. Shail (1888) 2 Dowl & L 161 (iii) Doe d Whittington v. Hards (1851) 20 LJ QB 406. This position is supported from a passage in the Supreme Court Practice 1967 Vol.1 at para. 46/3/2 where it is stated that:-

> "Where a plaintiff has entered under a judgment for possession and a writ of possession issued thereunder and where the judgment is subsequently set aside and the plaintiff nevertheless fails to restore possession to the Defendant; the defendant should apply by summons to a Master for an order setting aside the writ of possession ..... to issue writ of restitution."

It is therefore clear that a writ of possession having been consumated is no bar to the setting aside of the writ by which possession had been assumed. The discussion so far has been specifically with the writ of possession but there is no reason why the same principle should not inform the position with respect to the writ of seizure and sale.

Has there been reasonable cause shown? It seems indisputable that the Defendant is on sure ground in respect to the writ of seizure and sale. As has already been decided there was no claim on which a judgment could be entered and therefore all that follows therefrom is irredeemable tainted. In any event, the sum "claimed" for which the judgment is entered was inaccurate in that $6,500 was being "claimed" for the month of January 1989 when only $6,000 ought to have been "claimed" by virtue of the leased agreement. (See Muir v. Jenkins 1913 2 K.B. p.412). There is no warrant either in principle or authority why sections 596 and 597 should be read together. Accordingly there is no need for the Defendant to adduce facts which have arisen too late to be pleaded. As regards delay that issue has already been dealt with. In this case it would seem to follow that once the judgment is set aside the writ should also be set aside. But Dr. Barnett says this

would be an exercise in futility. The short answer to this is that the question of restitution is not before me.

In passing, the Court querried whether the correct procedure had been followed in respect of the entry of judgment in the recovery of possession in default of defence being filed. It is submitted that in the instant case the answer is yes and reliance was placed on sections 75 and 76 of the Code. I was also told this was the practice in the profession. However, it may well be that those sections are limited to default of appearance or where a limited Defence has been filed and the appropriate section is that of 250 of the code in which case he who seeks to enter judgment in default of defende in recovery of possession matters must if represented by an attorney-at-Law produce a certificate or if unrepresented an affidavit to show that "the action is not one to which section 250A of this law applies."

In conclusion my decision are (i) The summons to strike out writ of summons and Statement of Claim fails.

(ii) The Judgment in Default is set aside and leave is given for the Defendant/Applicant to file its Defence and Counterclaim within 14 days hereof.

(iii) The writs of Seizure and Sale and Possession are set aside.

There shall be costs in the cause, Certificate for counsel for both parties.