JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 85/95

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	HYACINTH RONALDO TOMLINSON	APPELLANT
AND	DENNIS TOMLINSON	1ST RESPONDENT
AND	JEFFREY NORDLIE)	
AND	JOYCE NORDLIE)	2ND RESPONDENTS

Charles Piper and Anthony Levy for appellant

Miss Carol Davis for 1st respondent

Miss Leila Parker for 2nd respondents

October 29, 30 and December 20, 1996

RATTRAY, P.:

I agree with the judgment of Patterson, J.A., its reasoning and conclusion.

PATTERSON, J.A.:

On the 25th September, 1995, Paul Harrison, J. heard at Chambers a summons filed by the 1st respondent ("the 2nd defendant") for an Order that:

> "1. Service of the Writ of Summons and Statement of Claim herein and all subsequent proceedings be set aside on the ground that the Writ of Summons

"had expired at the time of service on the 2nd Defendant.

2. That the Pleadings filed herein in relation to the 2nd Defendant be struck out on the ground that they disclose no reasonable Cause of Action against the said 2nd Defendant.

3. That cost of today and costs thrown away be the 2nd Defendants.

4. Further or other relief."

All parties were represented, and the learned judge made the following order:

"**1.** That the Writ of Summons Statement of Claim against the Second Defendant be struck out.

2. Costs to the second Defendant and to the Plaintiff to be agreed or taxed.

3. Certificate for Counsel granted to the second Defendant and to the Plaintiff.

4. Leave to appeal granted."

This is an appeal from part of that order, but it is couched in a somewhat different way. It is stated to be against that part whereby it was ordered that:

"**1.** The Writ of Summons and Statement of Claim be struck out against the Second Defendant.

2. Costs of the application and costs thrown away to the Plaintiff and the Second Defendant against the First Defendant to be agreed or taxed."

In the notice of appeal the appellant ("1st defendant") seeks that:

"**1.** The decision of the Learned Judge be set aside.

2. The First Defendant/Appellant be awarded the costs of this Appeal and costs of the proceedings in the Supreme Court to be agreed or taxed.

> **"3.** There be such further or other Order as to the Court may seem just."

The background to this appeal is of some importance to its resolution. Jeffrey Nordlie and Joyce Nordlie, who are the 2nd respondents ("the plaintiffs"), brought an action against the 1st defendant by filing a generally indorsed writ of summons on the 23rd March, 1994. The writ of summons was accompanied by a Statement of Claim which reads:

> **"1.** By an agreement in writing dated September 2, 1991, the Defendant agreed to sell and the Plaintiffs agreed to buy the property known as Lot No. 22 Llandovery in the parish of St. Ann and registered at Volume 1068, Folio 271 of the Register Book of Titles for a price of J$1.2m.
>
> **2.** By the said agreement the Defendant was requested to pay a deposit of $120,000 and the balance by instalments payable between October 15, 1991 and August 1, 1992.
>
> **3.** The said agreement further provided that possession should be given on or before October 15, 1991 on payment by the second instalment. The Plaintiffs paid the said instalment and was put into possession.
>
> **4.** The said agreement also provided that completion should be on payment of all moneys payable by the Plaintiffs under this agreement in exchange for a registrable transfer and the duplicate Certificate of Title.
>
> **5.** Subsidiary to the said agreement and contingent therein the Plaintiffs and the Defendant entered into a written agreement dated September 2, 1991 for the sale by the Defendant to the Plaintiff of certain items of furniture and fixtures on the said property for the sum of J$800,000. By its terms, this agreement for sale of personalty was expressly made conditional on the completion of the agreement for

"the sale of the real estate referred to at paragraphs 1-4 hereof. The Plaintiffs will crave leave to refer at the trial of this action to both agreements for their full terms and true effect.

6. The Plaintiffs completed the payment of the purchase price for the lot on June 12, 1992 but the Defendant has failed and/or refused to complete the said agreement.

7. In breach of the said agreement the Defendant on February 15, 1993 served a Notice to Complete on the Plaintiffs and has thereafter purported to rescind the agreement and has treated it as terminated.

8. Despite the Defendant's said breach of contract and failure to complete the agreement for sale of the lot, the Plaintiffs in November 1993 paid the sum of US$31,000 to the Defendants in respect of the agreement for the sale of the personalty.

9. Despite the foregoing the Defendant in breach of contract has continued to refuse to complete the agreements for the sale of the said lot and personalty while the Plaintiffs have remained ready, willing and able to complete the same.

AND the Plaintiffs claim:

(1) Specific performance of the agreement for the sale of the lot;

(2) Specific performance of the agreement for the sale of the furniture and fixtures;

(3) Further or alternatively, damages for breach of contract;

(4) Such further or other relief as the Court may deem just;

(5) Cost."

It is not clear just when the writ of summons and statement of claim were served, but an appearance was entered. By notice of motion dated 8th November, 1994, the plaintiffs sought leave to enter judgment stating that no defence had been filed. The motion was set for hearing on the 19th January, 1995. On or about the 29th December, 1994, the plaintiffs obtained an appointment for a summons for interlocutory injunction against the 1st defendant to be heard on the said 19th January, 1995. This seemed to have prompted the 1st defendant into action. A defence and counter-claim dated 18th January, 1995, was filed, a long way out of time, without the leave of the court or the consent of the plaintiffs. However, on the 19th the parties consented to the adjournment of the motion to allow the 1st defendant time to put her house in order.

By the 14th February, the 1st defendant regularised her pleadings and on the 24th February the plaintiffs filed their reply and defence to counter-claim. The pleadings having been closed, the plaintiffs lost no time in taking out the summons for directions. The 20th April, 1995, was fixed for its hearing, and on the 4th April, 1995 the 1st defendant served a "Notice under Summons for Directions" supported by an affidavit. That notice expressed the intention of the 1st defendant to apply for an order that Dennis Tomlinson's name be added as a 2nd defendant, and for consequential amendments to the writ of summons and the pleadings. The plaintiffs and the 1st defendant were represented at the hearing of the summons for directions before the Master on the 20th April, 1995, and the relevant part of the order made reads as follows:

> "**4.** Dennis Tomlinson's name be added as Second Defendant in these proceedings on the ground that his presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all of the questions involved in the cause herein.
>
> **5.** The Writ of Summons be renewed for service on Mr. Dennis Tomlinson. The Writ of Summons and Statement of Claim be amended to add the word 'First' before the word 'Defendant' in the heading to the said documents and the remainder thereof.
>
> **6.** The Defence and Counterclaim be amended as indicated in the proposed amended Defence and Counterclaim attached hereto.
>
> **7.** The Plaintiffs effect service of the Amended Writ of Summons and the Amended Statement of Claim on the said Dennis Tomlinson and the Defendant, Hyacinth Rolando Tomlinson, effect service of the Amended Defence and Counterclaim on the said Dennis Tomlinson.
>
> **8.** The Plaintiffs have leave to file and deliver an Amended Reply to the Amended Defence and Counterclaim, if so advised, within 14 days of the date of Delivery of the Amended Defence and Counterclaim."

There is no doubt that the Master had jurisdiction to make the order, and no such issue was raised before us. The authority for such an order is to be found in section 100 of the Judicature (Civil Procedure Code) Law. It must be noted, firstly, that the 2nd defendant was not a party to the hearing of the summons for directions, and so far as he is concerned, the order was made exparte. Secondly, the application was not made by the plaintiffs who are entitled, prima facie, to choose the persons against whom they desire to proceed. Thirdly, the plaintiffs in their statement of claim, did not seek any relief against the 2nd

defendant; indeed, he was not mentioned at all. Fourthly, the 1st defendant did not mention the 2nd defendant either in her defence or in the counter-claim. The issues joined were clearly between the plaintiffs and the 1st defendant. However, it was the plaintiffs who introduced the 2nd defendant in the reply to the defence. This is what was stated in the reply which was before the Master:

> "**1.** Save where the same consists of admissions, the Plaintiffs join issue with the Defendant on her Defence.
>
> **2.** The Plaintiffs further say that the Defendant authorised her son Dennis Tomlinson, an attorney-at-law, to sell the said property and permitted him to advertise it for sale and to show it to prospective purchasers, including the Plaintiffs.
>
> **3.** After the agreement was made the Defendant visited the Plaintiff at the said property, confirmed that the said Dennis Tomlinson was her agent and requested that the Plaintiff should allow her to retain certain articles which were included in the sale of chattels. Subsequently, the Defendant visited the Plaintiffs, at the said property and inquired how much they had so far paid in respect of the transaction. The Plaintiff says that at all material times the Defendant thereby represented and held out the said Dennis Tomlinson as having authority to effect the said sale on her behalf and the Plaintiffs entered into the contract in the belief induced by such holding out that the said Dennis Tomlinson had the authority to effect the said sale on her behalf. In the premises, the Defendant is estopped from denying the authority of the said Dennis Tomlinson.
>
> **4.** Further or alternatively, the Plaintiffs say that by acting as aforesaid the Defendant confirmed and ratified the said agreement."

So the reply of the plaintiffs seems to have given fodder to the 1st defendant's notice under summons for directions mentioned earlier, which was supported by an affidavit of her attorney-at-law. That affidavit referred to one sworn by the 1st defendant on the 17th January, 1995, in which she denied signing any agreement for sale of her property or chattels, and she also denied that she had authorised the 2nd defendant to sign any document on her behalf. It is quite clear, therefore, that the Master had enough material to support the order made.

A further provision of section 100 of the Judicature (Civil Procedure Code) Law reads:

> "Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter after mentioned, ... and the proceedings, as against such party, shall be deemed to have begun only on the service of such writ or notice."

The order of the Master enjoined the plaintiff, so it seems, to amend the writ of summons and statement of claim by adding "the word 'First" before the word 'Defendant' in the heading to the said documents and the remainder thereof" and presumably, by adding also in like manner, the words "Dennis Tomlinson" and "Second Defendant", and thereafter to effect service thereof on the said Dennis Tomlinson.

Leave was granted for the defence and counter-claim to be amended and served by the 1st defendant on the said Dennis Tomlinson.

The amended writ of summons and statement of claim were served on the 2nd defendant on the 10th May, 1995, and he entered a conditional appearance on the 30th May, 1995. The amended writ is equivalent to a new writ issued against the added defendant, and when he is served he is placed in the same position of a person on whom a new writ of summons is served. The consequences of an amendment are far-reaching. The writ, as amended, replaces the original writ and the action continues as though the amended writ was the original writ. Of course, the date of the issue of the writ remains the same as the original writ, and the indorsement, unless amended, remains the same. The pleadings are in a similar position but, if amended, then the amended pleadings replace the original pleadings and the relevant issues to be tried are those set out in the amended pleadings.

The 2nd defendant, having been served with the writ of summons and statement of claim, must enter an appearance if he intends to defend the suit. Generally speaking, he is not entitled to take any step in the matter before entering an appearance, although one exception is that he may apply to set aside the writ or service of the writ before entering an appearance. But the 2nd defendant, with leave, did enter "a conditional appearance" thus reserving the right to apply to set aside the writ or the service thereof within fourteen days: (see section 679 of the Judicature (Civil Procedure Code) Law).

The learned judge was asked to set aside the service of the writ and the statement of claim on the ground that the writ of summons had expired at the time of service on the 2nd defendant, that is, on the 10th May, 1994. An original

writ of summons remains valid for the purposes of service for a period of twelve calendar months from the date of its issue. But the validity of the writ of summons may be renewed, and the Master had so ordered, and it had been renewed. Therefore, that could not have been a ground for setting aside the service of the writ.

The other order sought by the 2nd defendant was aimed at the striking out of the pleadings in relation to him on the ground that they disclosed no reasonable cause of action against him. The rules of pleading require the pleading to contain in a summary form only the material facts on which the party relies to prove his claim or substantiate his defence. A party is not required to state the evidence by which he will prove the averments in the pleading: (Section 168 of the Judicature (Civil Procedure Code) Law). It is a cardinal principle of pleading that every defence or reply must state specifically any fact showing fraud or illegality which it is alleged makes any claim or defence not maintainable or which raises issues of fact not arising out of the preceding pleading. And further, where there is a claim for the recovery of possession of land, the defendant must state specifically every ground of defence on which he relies. It must be borne in mind that the defence to a counter-claim must be pleaded in accordance with the rules applicable to the defence to a statement of claim.

Now, what are the pleadings that the learned judge had before him when he heard the summons to strike out the pleadings? They were:

Firstly, the amended statement of claim in identical terms to the original statement of claim, with the addition of the name of the 2nd defendant.

Secondly, the amended defence and counter-claim of the 1st defendant which replaced the original one.

Thirdly, the reply and defence to counter-claim which replaced the original one.

It is necessary to set out the contents of the second and third pleadings referred to above. The amended defence and counter-claim reads:

"**1.** The First Defendant denies that she entered into an agreement in writing dated 2nd September, 1991 to sell to the Plaintiffs the property known as Lot 22 Llandovery in the parish of Saint Ann being the land registered at Volume 1068 and Folio 271 of the Register Book of Titles (hereinafter called 'the said land') as is alleged in paragraph 1 of the Statement of Claim or at all. The First Defendant states that she made no agreement to sell the said land to the Plaintiffs and that insofar as the Plaintiffs rely on an agreement for sale which purports to bear the First Defendant's signature, such signature was not placed on the document by her and is a forgery.

2. The First Defendant denies having requested the Plaintiffs to pay a deposit as is alleged in paragraph 2 of the Statement of Claim or at all and repeats paragraph 1 hereof.

3. Further and in answer to paragraphs 3 and 4 of the Statement of Claim, the First Defendant states that all the terms contained in the alleged agreement for sale are unlawful and unenforceable as having been procured without her knowledge consent or approval and by reason of the fact that said agreement was not made or executed by her and the First Defendant repeats paragraph 1 hereof.

4. The First Defendant denies entering into or executing a written agreement dated 2nd September, 1991 for the sale of furniture and fixtures to the Plaintiffs as is alleged in paragraph 5 of the

"Statement of Claim or at all. The First Defendant states that she made no agreement with the Plaintiffs to sell to them the alleged or any furniture and fixtures and that in so far as the Plaintiffs rely on an agreement for the sale to them of the said furniture and fixtures which purports to bear her signature, such agreement was procured without her knowledge, consent or approval and her alleged signature was not placed on the document by her and is a forgery.

5. The First Defendant denies receiving from the Plaintiffs the sum of $1,200.000.00 for the sale of the land, or the sum of US$31,000.00 for the sale of personalty as is alleged in paragraphs 6 and 8 of the Statement of Claim or at all.

6. Paragraphs 7 and 9 of the Statement of Claim are denied and, as regards paragraph 9 of the Statement of Claim, the First Defendant repeats paragraphs 1 to 4 hereof.

7. In further answer to the Plaintiffs' claim, the First Defendant says that in or about 1990 or 1991 she agreed to permit the Second Defendant to identify a purchaser for the said land and agreed to pay to him a commission on such sale in the event of the conclusion of the sale to a purchaser located by him.

8. In or about March, 1992 upon discovering that the Plaintiffs were in possession of the said land and were claiming to have purchased same, the First Defendant called upon the Second Defendant to provide her with copies of the purported agreements by which the Plaintiffs were claiming to be purchasers, whereupon the Second Defendant produced to her copies of:

(a) the said purported agreements dated September 2, 1991 purportedly executed by the First Defendant;

(b) A Power of Attorney dated the 5th April, 1991 purportedly executed by the First Defendant in favour of the Second Defendant and on which the said Second Defendant's

"signature appears as witness to the execution thereof; and

(c) The first page of a purported Agreement dated 15th March, 1992 between the First Defendant and the Plaintiffs purporting to vary the aforesaid agreements of the 2nd September, 1991.

9. The First Defendant says that the Second Defendant had no authority to enter into, execute or cause the alleged or any agreements to be executed in favour of the Plaintiffs or anyone, in connection with the said land or the said or any furniture and fixtures and the First Defendant repeats paragraphs 1-7 inclusive hereof.

10. In the premises, the First Defendant says that the said agreements are void and unenforceable by reason of fraud and the First Defendant repeats paragraphs 1-9 inclusive hereof.

11. Save as is hereinbefore expressly admitted, the First Defendant denies each and every allegation contained in the Statement of Claim as if same was herein set forth and traversed seriatim.

COUNTERCLAIM

12. By way of Counterclaim, the First Defendant repeats paragraphs 1 to 9 of the Defence.

13. The First Defendant says that the Plaintiffs are in unlawful occupation of the said land and of the said furniture and fixtures having entered into occupation and having taken possession thereof under and by virtue of the aforesaid fraudulently executed agreements from in or about October 15, 1991.

AND THE FIRST DEFENDANTS COUNTERCLAIMS FOR:

(i) A declaration that the Agreement for Sale of the said land and the Agreement for Sale of Personalty dated September 2, 1991 are void and unenforceable against the First Defendant by reason of fraud.

"(ii) Further or alternatively, a declaration that the Agreement for Sale of the said land and the Agreement for Sale of Personalty are void and unenforceable against the First Defendant they having been executed without the knowledge, authority or consent of the First Defendant.

(iii) An order for possession of the said furniture and fixtures and of the said land being the property known as Lot 22 Llandovery in the parish of Saint Ann and being the land registered at Volume 1068 Folio 271 of the Register Book of Titles.

(iv) An order for the payment of mesne profits by the Plaintiff for their use and occupation of the said land from the 15th October, 1991 to the date of possession.

(v) Such further or other relief as may be just."

The amended reply and defence to counter-claim reads:

" REPLY

1. Save where the same consists of admissions the Plaintiffs join issue with the First Defendant on her Defence and Counter-Claim.

DEFENCE TO COUNTERCLAIM

2. The Plaintiffs repeat the allegations set out in their Statement of Claim and say that in the premises the first Defendant is not entitled to the relief claimed or any relief."

The allegations against the 2nd defendant contained in those pleadings clearly disclose a cause of action against the 2nd defendant, and it is to be noted that the learned judge did not grant the application for them to be struck out. The

2nd defendant was served with the amended defence and counter-claim pursuant to the order of the Master.

No written judgment of the judge in the court below was included in the record of appeal, and I presume that none was given. But an oral judgment would have been delivered by the learned judge, as is the custom in these matters at Chambers. I am of the view that some record of the oral judgment would have been made by one or more of the attorneys-at-law who represented the parties, and so I had expected to see such judgment included in accordance with the provisions of section 27 of the Court of Appeal Rules. However, that was not done. It is for that reason that, on looking at the orders which the 2nd defendant sought in his summons to strike, and the order granted by the learned judge, I concluded that the pleadings were not struck out. I have concluded further, that the writ of summons and statement of claim were struck out on the ground that the writ of summons had expired at the time of service on the 2nd defendant. I have shown that that was not so, and therefore, the learned judge had fallen unwittingly in error.

It is my judgment, therefore, that the order of the learned judge cannot stand. I would allow the appeal and order that the judgment of the court below be set aside and that the 2nd defendant's summons be dismissed with costs to the 1st defendant and the plaintiffs both here and in the court below.

The effect of this judgment is that the Master's order of the 20th April, 1995, remains in full force and effect. The 2nd defendant has been added as a party to the action, and the service of the writ of summons and the pleadings

are extant. It appears to me that it is now the duty of the 1st defendant to apply by summons to a judge in Chambers or the Master for further directions to provide for the trial of the issues stated by the 1st defendant in her defence and counter-claim. The summons must be served on the 2nd defendant and the plaintiffs. The court's discretion in that regard is not fettered; it is wide and quite flexible. The court may, therefore, give all such directions as may appear necessary to enable a complete and effectual adjudication and determination upon all issues and questions involved in the cause.

BINGHAM, J.A.:

I am in complete agreement with the reasoning and conclusion of Patterson, J.A. and there is nothing further that I could usefully add.