COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2020/CLE/gen/01023

BETWEEN

MS. DECHRISTA ANDERSON

Plaintiff

AND

MR. GARETH LEWIS
MRS. TONI LEWIS

Defendants

Before: The Honourable Madam Justice Tara Cooper Burnside (Ag)

Appearances: J. Michael Saunders for the Plaintiff

Bernard Ferguson for the Defendants

Hearing Date: 11 December 2020

RULING

[1] This is an application by the Defendants, Gareth and Toni Lewis (together for convenience "**the Landlord**") under the Rules of the Supreme Court for (i) summary judgment pursuant to Ord 14, r 5 (ii) leave to enter final judgment in default of Defence to Counterclaim pursuant to Ord 19, r 6 and r 7, or alternatively (iii) an order pursuant to Ord 18, r 19 striking out the Plaintiff's claim in the Writ of Summons.

[2] The procedural background is important: The Plaintiff is a tenant of the Landlord. Acting *pro se*, on 14 October 2020, the Plaintiff issued a Writ of Summons against the Landlord, endorsed as follows:

"1. The Plaintiff's claims are related to a Residential (unfurnished) Apartment and Lease Agreement made on or about September A. D. 2018 between the Plaintiff and the Defendants. The Defendants claim to be the owners of the said Apartments.

2. The Plaintiff is entitled to peaceful possession of the subject matter property until April 1st 2021. The Defendants have engaged in unlawful and inhumane tactics to force the Plaintiff to terminate her lease prematurely and without compensation. On a number of occasions the Defendants have purposely disconnected the water supply to the Apartment causing the Plaintiff injury pain and suffering.

3. The Defendants have neglected to maintain the said apartment and have allowed the apartment to be infested with termites and other pest. The Plaintiff utilizing the services of a professional company discovered that her furniture's are infested with wood eating termites. The Plaintiff has suffered loss and damage as a result of the said infestation.

4. The Defendants have no right to vacant possession until April 2021 and the Defendants are liable to the Plaintiff for the cost of replacing the damaged Furniture and any other damages caused by the infestation of the apartment.

THE PLAINTIFF CLAIMS against the Defendant for:

1. General damages;
2. The Sum of $12,625.00;
3. Damages in the amount of $5,000[.]00 or to be assess[ed] by the Court for wrongful disconnection of the water supply;
4. The Plaintiff claims interest on damages pursuant to the Civil Procedure (Award of Interest) Act 1992,
5. Further and other relief the Honorable Court deems just and/or necessary."

[3] On 19 October 2020, the Landlord entered an appearance to the Action and on 27 October 2020, filed a Defence and Counterclaim. On the same date, the Plaintiff issued a Summons against the Landlord claiming injunctive relief to restrain the Landlord from, *inter alia*, interfering with her peaceful occupancy of her apartment. The Plaintiff's Summons has not yet been heard.

[4] At no time did the Plaintiff file a Reply to the Landlord's Defence or a Defence to the Landlord's Counterclaim.

[5] On behalf of the Landlord, Mr Ferguson contended that "An applicant is entitled to final judgment in default of defence where a party has failed to enter a Reply to Defence and Counterclaim pursuant to Order 14 rule 5 and Order 19 Rule 7" of the Rules of the Supreme Court.

[6] Additionally, he submitted that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ, or anything in any pleading or in the endorsement on the ground that (a) it discloses no reasonable cause of action or defence or (b) it is scandalous, frivolous or vexatious or (c) it may

prejudice, embarrass or delay the fair trial of the action, or (d) it is otherwise an abuse of the process of the Court. Contrary to established practice, however, the particular ground(s) upon which the Landlord's application is based is not specified in the Landlord's Summons.

[7] On behalf of the Plaintiff, Mr Saunders, who indicated that he had recently been instructed, took the position that the Landlord's Defence and Counterclaim was filed and served prematurely. He argued "It is trite law that the rules provide for the service of a generally endorsed Writ which is normally followed by an appearance being entered by the Defendants, at which time the Plaintiff has 14 days to file and serve a detailed Statement of Claim particularizing the cause of action. The Defendants proceeded to file and serve a Defence and Counterclaim without the benefit of having received a Statement of Claim."

Is summary judgment or judgment in default of Defence to Counterclaim available

[8] The first question which arises is whether the Landlord was permitted to file their Defence and Counterclaim at the time which they did.

[9] It is undeniable that the Writ of Summons filed in this case is a generally indorsed writ. While at a cursory glance, it might appear to be a layman's attempt at a statement of claim, it is clearly titled "General Endorsement". Moreover, the substance of the drafting is sufficiently adequate to constitute a concise statement of the nature of the claim made or the relief or remedy required in the action, which are the requirements of a general indorsement.

[10] The procedure for bringing a defence and counterclaim is set forth in Ord 18, r 2 and Ord 15, r 2, collectively, the relevant parts of which are set forth below:

> **Ord 18, r 2**
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> "**2.** (1) ...a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, **serve a defence after the time limited for appearing or after the statement of claim is served on him**, whichever is the later.
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> **Ord 15, r 2**
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> "**2.** (1) ...a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so **he must add the counterclaim to his defence**."

(my emphasis)

[11] In ***The Gniezno, Popi (Motor Vessel) (Owners) v SS Gniezno (Owners)*** [1967] 2 All ER 738, Brandon J. considered, among other things, the prescribed method for bringing a counterclaim and the application of Ord 15, r 2(1). After reviewing Ord 15, r 2, he stated (at page 749):

> "It is, however, right to say that, under the rule, the mode by which the counterclaim is to be made is by the service of a counterclaim added to the defence. It follows from that that a defendant cannot, under that rule, make a counterclaim until a statement of claim has been served on him because it is not until then that he can serve a defence."

[12] I agree with Brandon J. A Defendant cannot properly file a counterclaim until a statement of claim has been served on him since to do, so falls foul of the Rules of Court and is irregular. It follows that the filing of the Landlord's Defence and Counterclaim on 27 October 2020 is irregular because, at that time, the Plaintiff had yet to file her Statement of Claim. It is therefore *a fortiori* that neither summary judgment nor judgment in default of Defence to Counterclaim may be granted to the Landlord at this time. Accordingly, the Landlord's application for such relief is dismissed and their Defence and Counterclaim shall be struck out.

Should the Plaintiff's claim be struck out

[13] The jurisdiction of the Court to strike out an indorsement or pleading and stay or dismiss proceedings on the basis that the same is frivolous, vexatious or otherwise an abuse of process is derived both from the Rules of the Supreme Court and the inherent jurisdiction of the Court. Ord 18, r 19(1) provides:

> "**19.**(1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[14] The inherent powers of this Court were considered by Thompson J. in ***Re Roberts*** [2003] BHS J. No. 181 where this Court adopted with approval the sentiments expressed by I.H. Jacob in his seminal Article entitled "The Inherent Jurisdiction of The Court (Current Legal Problems" 1970 at p. 23-52) I.H. Jacob explained (at p. 27):

> "For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed or abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its imminent attribute. Without such a power, the court would have form, but lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law."

[15] The inherent strike out powers of the Court are also addressed in The Supreme Court Practice, 1999 Ed., at paragraph 18/19/26, which states as follows:

> "**Inherent jurisdiction** - Apart from all rules and Orders, and notwithstanding the addition of para. 1(d), the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of the process (see *Reichel v. Magrath* (1889) 14 App.Cas. 665). In such cases, it will strike out part of an indorsement of a writ (*Huntly v. Gaskell (No. 1)* [1905] 2 Ch. 656); or set aside service of it (*Watkins v. N. A. Land Co.* (1904) 20 T.L.R. 534); or will stay, or dismiss before the hearing, actions which it holds to be frivolous or vexatious (*Metropolitan Bank v Pooley* (1885) 10 App. Cas. 210*; Lawrence v Lord Norreys* 15 App. Cas. 210 at 219..."

[16] The strike out powers of the Court should only be exercised in exceptional circumstances, where the case clearly warrants such a remedy. The rationale for this approach was helpfully explained by Salmon LJ in ***Nagle v Feilden*** [1966] 2 QB 633 as follows:

> "It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable."

Such comments are equally applicable to a generally indorsed writ.

[17] When a defendant applies for an order to strike out a plaintiff's claim on the basis that it discloses no reasonable cause of action, no evidence is admissible and only the pleadings may be considered. In this case, having reviewed the Plaintiff's Writ, it is my opinion that the indorsement discloses questions fit to be decided by this Court, *viz:-* whether the Landlord contravened the provisions of their lease with the Plaintiff and/or

interfered with her quiet enjoyment. These questions disclose in my view, a reasonable cause to be determined.

[18] The Landlord states in paragraph 13.2 and 13.3 of their Affidavit in support of their application that they are advised and verily believe, that, among other things, the Plaintiff's claim is scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of this action, or it is otherwise an abuse of this Court. However, there are no facts set forth in the Affidavit which clearly support this position. Indeed, when one disregards the paragraphs which deal with the Plaintiff's failure to file a Defence to the Landlord's Counterclaim, the gravamen of the Landlord's Affidavit may be summarised as follows (i) the Plaintiff is in breach of various provisions of her lease, including the covenant to pay rent (ii) her failure to pay rent has adversely impacted the Landlord's financial affairs and they wish to enforce their right of re-entry (iii) the relationship between the parties has broken down, and (iv) it is believed by the Landlord that this action was commenced by the Plaintiff to delay her eviction because the action was brought when proceedings before the Magistrates' Court to obtain such relief were afoot.

[19] Having considered the factors set forth in the Affidavit, it is not clear and obvious to me that the Plaintiff's Writ is scandalous or tends to prejudice, embarrass or delay the fair trial of this action. It is also not clear that the Plaintiff's claim is doomed to failure or "obviously unsustainable", as Lindley LJ put it in ***Attorney-General of the Duchy of Lancaster v London and North Western Railway Company*** [1892] 3 Ch. 274, 277. In my opinion, the Plaintiff may raise the claims set forth in her Writ whether or not she is in breach of her lease and the Landlord has a right of re-entry. In the circumstances, I do not find that the Plaintiff's claim is frivolous and/or vexatious.

[20] In ***Lonrho v Fayed (No. 5)*** [1993] 1 WLR 1489, Stuart-Smith stated:

> "If an action is not brought bona fide for the purpose of obtaining relief but for some ulterior or collateral purpose, it may be struck out as an abuse of the process of the court. The time of the court should not be wasted on such matters and other litigants should not have to wait till they are disposed of. It may be that the trial judge will conclude that this is the case here; in which case he can dismiss the action then. But for the court to strike it out on this basis at this stage it must be clear that this is the case."

[21] Having reviewed the Affidavit, I am not persuaded that this action was commenced for some ulterior or collateral purpose. While the commencement of this action may have scuttled the efforts of the Landlord in the Magistrates' Court proceedings, the evidence presented does not, in my view, meet the threshold required to demonstrate that this action is not brought bona fide.

[22] In addition to the foregoing I am mindful that, although Ord 18, r 19(1) permits an application to be made "at any stage", a court should be slow to strike out a plaintiff's case before service of the statement of claim: ***Wright v Prescot Urban Council*** (1916) 115 LT 772.

[23] In all the circumstances, the Landlord's application for an order striking out the Plaintiff's claim is denied.

[24] Pursuant to Ord 18, r 1, the Plaintiff was required to serve a statement of claim within 14 days after the Landlord entered an appearance in this action on 19 October 2020. The Plaintiff's Statement of Claim is more than a month out of time and I shall make directions for the filing and service of the same.

[25] I make no order as to costs.

DATED this 18th day of December, 2020

TARA COOPER BURNSIDE
JUSTICE (AG)