

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division

2004/CLE/GEN/FP/227

BETWEEN

DUMOR LIMITED
Plaintiff

AND

STAR GENERAL INSURANCE AGENCY
(GRAND BAHAMA) LIMITED
Defendant

BEFORE: The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES: Mr Norwood Rolle for the plaintiff
Mr R. Rawle Maynard for the defendant

2010: 19 October; 16 December

2011: 28 January

RULING

Gray Evans, J.

1. This is an application by the plaintiff by Notice for Further Directions filed 22 September 2010 under Order 25 rule 7 of the Rules of the Supreme Court (RSC) for an order pursuant to Order 20 rule 5 RSC that the plaintiff be at liberty to amend its writ of summons and statement of claim herein. Exhibited to the Notice is a copy of the proposed amended statement of claim.
2. This action commenced on 30 December 2004 by a specially indorsed writ of summons whereby the plaintiff claims from the defendant rent for the period September 2004 to April 2005, pursuant to a lease agreement between the plaintiff and defendant
3. In its defence filed 11 February 2005 the defendant denies that it owes the rent claimed by the plaintiff and in its counterclaim filed 23 May 2007 the defendant seeks an accounting of the security deposit held by the plaintiff and payment thereof with interest from 1 October 2004.
4. Attempts at alternative dispute resolution having failed, the case management process commenced on 19 May 2008, on which date this Court gave directions for further conduct of the action and a pre-trial review conference was scheduled for 30 October 2008.
5. On that date the parties had not yet complied with the directions order and the matter was adjourned to 9 February 2009. Thereafter the pre-trial review conference was further adjourned on several occasions to: 15 June 2009; then to 30 July 2009; then to 12 April 2010 on which date the trial was scheduled for 13 September 2010.
6. The trial commenced on 13 September 2010 and was adjourned to 19 October 2010 for closing submissions. However, on that date the defendant sought to have heard its application for leave to amend.
7. Not surprisingly, counsel for the defendant objected to the application proceeding at that time, not only because of its lateness in the proceedings but also on the ground that he had not had proper notice thereof. The matter was further adjourned and eventually heard on 16 December 2010.
8. The plaintiff is the owner and landlord of premises known as Shops 6 through 10, Regent Centre, Explorer's Way, Freeport, Grand Bahama. The defendant is an insurance company incorporated under the laws of The Bahamas and carrying on business in Freeport aforesaid.
9. By a lease agreement dated 1 May 1999 ("the said lease") between the plaintiff and the defendant, the plaintiff agreed to lease the aforesaid premises to the defendant on a 3-year term at an annual rent of \$74,777.00 (a fixed minimum rent) payable in monthly installments of \$6,231.00 plus an additional rent in the sum of \$1,179.00 during the said term.
10. The said lease made provision for renewal at the end of the three year term for a further three years upon the same terms, save for the option to renew and at an increased rent. Renewal was not automatic. The tenant was supposed to request the renewal in writing at least three months before the expiration of the said lease.
11. The said lease expired on 30 April 2002. The defendant did not submit a written request for renewal thereof nor did it vacate the premises on that date. Instead, the defendant continued in occupation and by letter dated 7 November 2003, wrote to the plaintiff giving notice of its intention to "terminate the subject lease" effective 30 June

2004. In response to that letter the plaintiff wrote on 5 December 2003 "to formally advise that [the] lease will remain in effect until 30 April 2005." The defendant eventually vacated the premises in early September 2004. During the 28 months that the defendant remained in occupation of the said premises after the expiration of the said lease, the defendant paid the sum of \$7,943.00 per month, as billed by the plaintiff, with respect to lease fees, the last payment having been made in August 2004.

12. The plaintiff's case as pleaded is that following the expiration of the said lease on 30 April 2002, the parties continued in a landlord/tenant relationship on the basis of a new lease for a further three years to 30 April 2005; that the defendant having vacated the premises prior to that date, the plaintiff is entitled to be paid rent from the date the defendant vacated the said premises to 30 April 2005. The plaintiff therefore claimed "rent for the period September 2004 to April 2005."

The proposed amendment

13. By its proposed amendment, the plaintiff seeks, as an alternative to its present claim, to recover double rent pursuant to the terms of the aforesaid lease and in its amended statement of claim the plaintiff alleges at paragraphs 5 and 7 that:

5. By clause 2(44) the defendant was to pay monthly rental equal to twice the sum of the monthly installment of fixed minimum rent payable during the last month of the said lease and be subject to all other terms covenants conditions provisions and obligations.
7. That the defendant continued in occupation of the premises after the expiration of the lease without paying the double rent as called for under clause 2(44).

14. The plaintiff also gives the following particulars:

Rent for the period May 2002 to August 2005 at double rent:

Rent due	\$444,808.00
Less rent paid	<u>\$222,404.00</u>
Balance	<u>\$222,404.00</u>

15. As indicated, although no amount was specified, in its original statement of claim the plaintiff claimed rent for the period September 2004 to April 2005, interest and costs. In its proposed amended statement of claim the plaintiff claims:

1. Rent for the period May 1st, 2002 to August 2005 at twice the monthly rental viz \$222,404.00 (28 months).
2. Alternatively, the balance of rent due under a yearly contract i.e. rent for the period September 2004 to April 2005.
3. Further, alternatively the balance of rent due under a contract for a term of three years (viz 1st May 2002 to 30th April 2005) i.e. rent for the period September 2004 to April 2005.
4. Interest and costs

16. So, in addition to its proposed claim for double rent for the period which the defendant continued in occupation of the said premises after the expiration of the said lease, the plaintiff also seeks by the proposed amendments to claim the balance of rent due under an annual lease, although it does not plead an annual lease agreement.

17. Further, although the plaintiff contends that the lease should have expired on 30 April 2005, its proposed amended claim is for double rent for the period 1 May 2002 to August 2005. Presumably that is in error, but such is the state of the plaintiff's proposed amended statement of claim.

18. The defendant objects to the plaintiff's application for a number of reasons.

19. Counsel for the defendant submits that the plaintiff's application is procedurally improper in that it should have been brought by summons rather than by notice under the summons for directions. That objection is, of course, met by Order 2 of the Rules of the Supreme Court which provides that failure to comply with procedural requirements is to be treated as an irregularity which the Court is empowered to correct.

20. However, as for the more substantive objections to the plaintiff's application for leave to amend its statement of claim, counsel for the plaintiff points out that the plaintiff's claim is based upon a lease in writing for three years, for a fixed term of three years and there is nothing in the original statement of claim, about double rent. Further, counsel contends that to make a claim for double rent now, necessarily requires the plaintiff to abandon completely the claim for rent for lawful possession. Therefore, he argues, the effect of the proposed amendments, if allowed, would be to add a new cause of action to the plaintiff's statement of claim, which cause of action would have accrued on 1 May 2002, more than six years before the application for leave to amend, and would now be statute barred by virtue of sections 5 and 31 of the Limitation Act, 1995, Chapter 83, Statute Laws of The Bahamas.

21. Consequently Mr Maynard for the defendant submits that to allow the amendment would result in injustice to the defendant not capable of being compensated by an award of costs as, he points out, not only does the plaintiff continue to hold the defendant's deposit, but, in his submission, the costs of litigating a new issue at this stage of the proceedings and the defendant being deprived of the benefit of the Limitation Act cannot be compensated in costs.

22. While not conceding that the proposed amendment raises a new cause of action, or that the provisions of the Limitation Act apply, counsel for the plaintiff argues that even if that were the case, the Court still has power to allow the amendment and if allowed, the defendant would have an opportunity to respond to the pleadings. He points out that the provisions of Order 20 rule 5 aforesaid empowers the Court to grant leave to amend the writ or pleadings notwithstanding that the effect of the amendment will be to add or substitute a new cause of action once the new cause of action arises out of the same or substantially the same facts as the original and even though the application for such amendment is made after the expiry of the relevant period of limitation current at the date of the issue of the writ. In his submission, the proposed relief now sought existed at the date when the writ was initially issued and arise out of the same facts.

23. Counsel for the defendant disagrees with that latter submission. In his submission, the new cause of action does not arise out of the same or substantially the same facts as the cause of action in respect of which relief has already been claimed in

the writ. He points out that in the case of the original writ, the facts relate to the lawful possession and payment of rent under a lease, whereas, in the case of the proposed amendment, they relate to unlawful possession holding over, a claim for damages and mesne profits and a penalty of double rents.

24. In any event, counsel for the plaintiff submits that the facts relating to the proposed amendments were “canvassed or mentioned in the pleadings” and were “fully canvassed and fully ventilated” during the trial; that the issue of non-payment of rent in accordance with the holding over provision was “canvassed” in the evidence, both during examination-in-chief as well as during cross examination, of witnesses for both sides.

25. Counsel for the plaintiff submits further that even though the evidence in the trial has been completed, no new evidence would be required in relation to the proposed amendments, and the proposed amendments could be made without causing any injustice or injury to the defendant that could not be compensated by costs.

26. Therefore, he submits, based on the facts and the law, the plaintiff should be granted leave to amend its pleading to enable the real issues between the parties to be stated in the pleadings and tried.

The Law and Authorities

27. The principles regarding amendments are well settled.

28. Firstly, whether or not leave to amend is granted is a matter for the discretion of the judge, who should be guided in the exercise of such discretion by an assessment of where justice lies (*Ketteman v Hansel Properties Ltd* [1987] AC, 189).

29. Secondly, the power to amend is available at any stage of the proceedings (*Roe v Davies* (1876) 2 CH D 729, 733; *Cropper v Smith* (1884) 26 Ch D, 710) even if the effect of the amendment is to substitute a new party, alter the capacity in which a person sues or add or substitute a new cause of action after the expiration of any relevant limitation period. See Order 20 rule 5 RSC.

30. Thirdly, as a general rule, “however negligent or careless may have been the first omission and however late the proposed amendment...it should be allowed if it can be made without injustice to the other side” and “there is no injustice if the other side can be compensated with costs.” Per Brett, MR in *Clarapede & Co. v Commercial Union Assn* (1883) 32 W.R. 262 at page 263.

31. In summary, therefore, the “rule” with regard to amendments appears to be that “amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if such allowance would not result in injustice to the other party not capable of being compensated by an award of costs.”

32. So, what are the “true issues in controversy between the parties to be resolved”?

33. On the case as pleaded, there appears to be no dispute that the nature of the parties’ relationship post 30 April 2002 was one of a landlord and tenant. The dispute, however, appears to be as to the nature of that tenancy. The plaintiff contends it was on the basis of a three-year lease from 1 May 2002 to 30 April 2005, on the same terms and conditions as the said lease, except for the option to renew and the amount of the rent, which had been increased from \$7,410.00 to \$7,943.00 per month. Whereas, the defendant contends that it was on the basis of a month-to-month tenancy, from 1 May 2002 to September 2004 at a monthly rent of \$7,943.00.

34. Consequently, as I understand the submission of counsel for the defendant, in order for the plaintiff to maintain an action for double rent, it would have to abandon its claim of the defendant's lawful possession under a purported three year lease in favour of a claim for unlawful possession, as double rent is a penalty and is permissible only by statute. In support of that submission Mr Maynard relies on the provisions of section 2 of the Landlord and Tenant Act (No. 2), Chapter 162, Statute Laws of The Bahamas, which provides that a claim for double rent can only be made in a case where the defendant holds over unlawfully, that is: *"after demand made and notice in writing given for delivering the possession thereof by his or their landlords."*

35. Further, although, as argued by counsel for the plaintiff, during the course of the trial the issues of "holding over" and "double rent" did in fact arise and were, as he said, "canvassed", I accept Mr Maynard's submission that the term "holding over" as used by the witnesses appear to have been used not in its legal sense but in the sense of the defendant simply remaining in occupation of the premises after the said lease expired on 30 April 2002. Indeed, the evidence of the plaintiff's witnesses is that the plaintiff was of the view that the said lease had been renewed; that the plaintiff never considered the defendant a trespasser nor did it serve the defendant with a notice to vacate the premises; nor in fact, did it ever bill the defendant double rent during such occupation.

36. Further, the plaintiff's manager testified that the plaintiff operated on the assumption that the defendant was carrying on "the lease under the same terms and conditions" as the said lease, as, in her words: "because if you do not hear from the tenant, we are under the assumption that they are continuing the lease."

37. On the other hand, the defendant's witness, Mrs Grant, testified about a meeting between representatives for both parties where the issue of the defendant's "holding over at twice the monthly rent or alternatively is obliged to continue for the duration of the second three-year term" had been discussed; that the defendant's position was that it was not considering the payment of double rent; that there was no agreement for double rent, although the meeting ended without either side moving away from their respective position.

38. It is unclear from the evidence when the aforesaid discussions regarding double rent took place, but it was certainly before the commencement of the trial. Nevertheless, no claim for double rent was made in the writ of statement and no application for leave to amend up to the commencement of the trial. Indeed, the following exchange during Mr Maynard's cross examination of one of the plaintiff's witnesses, Mrs. Martinborough, is instructive:

Mr Maynard: And you also said you were not regarding them as trespassers. They were there legally as a tenant....They could not have extended the lease and at the same time be liable to pay double rent, could they?

Mr Rolle: My lady, no one has charged that. There is no claim for double rent. There is no claim for double rent. Looking at the pleading, there isn't any. And that's not my learned friend's case on the pleadings, so he ought to stick to his pleadings.

Mr Maynard: I have no argument about that except that you raised it. I agree absolutely there is no pleading. There is no claim for double the rent, but that was what was put before the court this morning.

39. Although, it is clear from the authorities cited that in appropriate circumstances the Court has discretion to grant leave to amend at any time during the proceedings, in the case of *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38; [1987] A.C. 189, on which both sides rely, Lord Griffiths expressed the view, with which I respectfully agree, that different considerations apply to different stages and no doubt there is a difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence or claim to be raised for the first time.

40. Further, as pointed out in the case of *Hipgrave v Case* [1985] 28 Ch. D 356 at 361, although leave to amend is sometimes given at the trial, the Court will not readily allow at the trial an amendment, the necessity for which was abundantly apparent months ago, and then not asked for. Then, in *Ketteman* Lord Griffiths at page 62 opined:

“...to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence. Another factor that the judge must weigh in the balance is the pressure on the courts, caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently.”

41. The question then is whether this is a case in which “appropriate circumstances” exist for leave to amend to be granted?

42. To my mind, an application made at the close of the defendant’s case, when the plaintiff’s counsel during the course of the trial made it clear, in my view, that he was not pursuing a claim along the lines of the defendant’s examination of his own witness and cross examination of the plaintiff’s witnesses, could be said to be the appropriate circumstances for an application for leave to amend to be granted.

43. Further, counsel for the defendant points out that if leave to amend is granted, the defendant will need to be given an opportunity to amend its defence and it may, notwithstanding counsel for the plaintiff’s argument to the contrary, be necessary either to call or recall witnesses, which, of course, will create further delays in the completion of this matter.

44. I agree. I also accept the submission of counsel for the defendant that to permit the plaintiff to amend its statement of claim in the manner sought would deprive the defendant of a limitation defence which could not be compensated in costs.

45. In the circumstances of this case, it would, in my view, be prejudicial to the defendant for the plaintiff to be allowed at this late stage of the proceedings, after the evidence on both sides has been given, to amend his pleadings in the manner sought, and in that regard, I bear in mind the following comments of Lord Griffiths in *Ketteman*:

“Justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other.”

46. In the exercise of my discretion, therefore, I refuse the plaintiff's application for leave to amend at this late stage in the proceedings and would order that the plaintiff pay the defendant's costs, such costs to be taxed if not agreed.

DATED this 28th day of January 2011

Estelle G. Gray Evans
Justice