[2013] JMSC CIVIL 23

**IN THE SUPREME COURT OF JUDICATE OF JAMAICA**

**CLAIM NO. 01902 HCV 2012**

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| **BETWEEN** | **CITY PROPERTIES LIMITED** | **CLAIMANT** |
| **AND** | **NEW ERA FINANCE LIMITED** | **DEFENDANT** |

**Mr. Nigel Jones and Ms. Kashina Moore instructed by Nigel Jones & Company for the Claimant**

**Mr. Leroy Equiano instructed by Duncan Ellis & Company for the Defendant**

**Heard:** **17th January 2013**

**Application to strike out statement of case-Section 26 3 (1) (c) of CPC- Whether reasonable grounds for bringing defence- construction of new rules.**

**CORAM:** **JUSTICE DAVID BATTS**

[1] On the 17th January 2013, a notice of application for summary judgment and to strike out statement of claim came on for hearing. The application was filed by the claimant. On that date both parties agreed that due to the late service of affidavits, the application for summary judgment would be adjourned to another date but that the application to strike out statement of case would be heard.

[2] After hearing submissions from both parties the following orders were made:

a. Application to strike out defendant's defence and counter claim is dismissed.

b. Application for summary judgment is adjourned to the 10th July 2013 at 2:00 p.m. for two (2) hours.

c. Case Management Conference fixed for the 10th July 2013 at 2:00 p.m.

d. Parties are to proceed to mediation forthwith.

e. Leave to appeal the Order at (a) above granted.

f. Costs to be costs in the claim.

g. Formal Order to be prepared, filed and served by the claimant.

[3] I promised to put in writing my reasons for the dismissal of the application to strike out pleadings and this I now do.

[4] The claimant prepared submissions in writing and these were supplemented by oral submissions by Ms. Kashina Moore. The submissions relied on Rule 26 3(1) (c) of the Civil Procedure Rules that is, the pleading disclosed no reasonable grounds for defending the claim or for bringing the counter claim.

[5] Reliance was placed on the judgment of my brother, the Honourable Mr. Justice Bryan Sykes in **Sebol Ltd and Another v Ken Tomlinson (as the receiver of Western Cement Co. Ltd.) and Other** delivered on the 9th October 2007 and which was upheld by the Court of Appeal (SCCA 115/2007).

The Court of Appeal's judgment was not cited but reliance was placed on the following passage from the judgment of Sykes J:

> *"Let us look at what rule 26 3(1) (c) actually says. The rule does not speak of reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a defendant are wider than under the old rules ... It does not necessarily follow, however, that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing the claim and not just whether the pleadings disclose a reasonable cause of action."*

[6] The claimant submitted further that as the defendant's pleading admitted the existence of a monthly tenancy, that no lease was signed and that they commenced

paying rent in June 2003 as particularized in the statement of account in respect of rent and maintenance, there could be no basis to defend the claim. More so because there was no written lease and the details of the relationship of landlord and tenant were created by conduct. It was clear, submitted the claimant that the defendant had unilaterally tried to change the terms of the arrangement.

[7] The claimant also made submissions in respect of a tenant not being permitted to challenge his landlord's title however, as Mr. Equiano for the defendant has made it clear that such a challenge forms no part of the defence I will say no more on that matter.

[8] Mr. Equiano submitted that the defence rests primarily on a construction of the contract. Essentially, the defence contends that the agreement was for maintenance to be based on actual expenses incurred and not for it to be a flat rate. The issue has come to a head because the premises ought to have been insured, however, when the premises were damaged it emerged there was no insurance in place. The defendant therefore seeks an account of money allegedly paid for maintenance but not used to pay insurance premium as the defendant contends it ought to have been. There is also a counter claim for losses and/or set-off. Mr. Equiano submitted that whatever construction is placed on Section 26 3 (1) (c) it is clear that there are reasonable grounds for the defence and counter claim.

[9] On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.

[10] Therefore it seems to me that when the rule refers to "reasonable grounds" for bringing a claim it means nothing more or less than that the claimant has disclosed in the pleading that he has a reasonable cause of action against the defendant. He does

this by pleading facts supportive of the existence of a cause of action or defence as the case may be. Having read the judgment of Sykes J in **Sebol Ltd**., the learned judge appears to have juxtaposed the bare necessity to show a cause of action known to law with the need to show reasonable grounds for bringing the action. He then proceeded to say the rule as it was now had been expanded. However, it never was the case that a claimant needed only to plead a cause of action known to law. Indeed a claim even under the old rule might be struck out if for example a known cause if action (say negligence) was pleaded but the pleaded facts failed to allege a connection between the defendant and the claimant(by for example not pleading the driver of a motor vehicle was the defendant's servant or agent).

[11] I doubt that the new rule invites any further examination than an examination of the statements of case to ensure that the facts as alleged support a reasonable cause of action against a defendant. It seems to me that the new wording more accurately reflects the approach the courts took to the interpretation and application of the old rule.

> It may be, and Sykes J is respectfully correct in this regard, that occasions may arise when a pleading discloses an unreasonable cause of action or defence on its face. I suppose if for example, it fails the *de minimis* test as regards quantum. However, as litigants are not to be driven from the judgment seat without a hearing on the merits, it ought to be an extremely rare case indeed where a court will find a cause of action or defence in existence but that it is "unreasonable" for the claimant or defendant to be allowed to rely on it, and to do so at an interlocutory stage of the proceedings.

[12] It is therefore my respectful view that on an application such as this, the court is to examine the pleadings to determine whether the facts alleged establish a reasonable cause of action or defence. I am emboldened to take this approach because when one examines the decision of the Court of Appeal in **Sebol Ltd**., the Lord President expressed the view that Sykes J's discussion about a distinction between "unreasonable claim" and "reasonable grounds for bringing the claim" was "unnecessary."

He expressed no view on the distinction posited. Justice of Appeal Dukharan although expressing agreement with Sykes J's analysis felt that on the facts of that case either analysis would apply. Harrison JA was content to express agreement with Dukharan JA. It appears to this court therefore, that the precise interpretation has not received the blessing of an Appellate Court. In the final analysis "reasonable grounds for bringing the claim or defence" is determined in the way the courts have always done it, by examining the particular pleading.

[13] In this case, I have considered the submissions of the parties and the relevant pleading. The defence which is being challenged is rather inelegantly pleaded. Paragraph 2 for example states "it is submitted", and submissions really have no place in pleadings.

Nevertheless, the allegations in the defence are sufficiently clear and if adequately supported by evidence which is accepted by a court at trial can afford a defence to the claim and establish a valid counter claim.

[14] This is demonstrable by reference in particular to paragraph (3) of the defence and counter claim in which the defendant contends:

a. Rent and maintenance were to be treated as separate charges in the agreement.

b. Denies that they failed to pay the full rent since 2004.

c. Payments for maintenance was agreed to be on a reimbursable basis that it was by way of reimbursement for expenses incurred.

d. Items such as insurance, taxes and rates, etc., were not agreed to be paid as part of maintenance package.

e. The maintenance was charged towards a loan for which the defendant has no responsibility.

f. Some items were agreed by conduct others were challenged.

[15] As regards the counter claim, the defendant alleges that he paid rent and maintenance since 1999. The claimant, however, maintained control over and was responsible for the common areas including the area in which a fire commenced which

destroyed the building rented by the defendant. The fire cost the defendant loss and damage. The defendant therefore counter claimed for among other things:

a. The money paid as maintenance apportioned toward insurance premium and in which insurance it is said the defendant had no insurable interest be refunded to the defendant.

b. Damages reflecting damage to the defendant consequent on the fire which spread from the claimant's property (common area) to the defendant's property.

c. A restitutionary claim to a refund of maintenance wrongly collected.

[16] The language of the pleading has much to be desired, however, it discloses a reasonable basis for defence and counter claim. That is "reasonable grounds for brining or defending the claim", or to put it in the way the rule does, when regard is had to the pleaded defence and counter claim it cannot be said that, the statement of case, "discloses no reasonable grounds for bringing or defending a claim."

[17] Indeed I would go further and say that one can think of no more reasonable defence to a claim for non-payment of rent and maintenance and recovery of possession than that:

a. The rent has been paid.

b. The claim to maintenance is baseless as the amount claimed was not agreed.

c. There has been overpayment of maintenance and these sums are to be bought into account.

d. Maintenance was paid for an insurance policy in respect of which the defendant could get no benefit after a fire and hence should be accounted for.

[18] As regards the counter claim, the above-stated facts and, the fact that the fire had started on premises which the claimant possessed are relied upon to ground a claim to damages.

[19] The question on this occasion is not whether the defendant has a real prospect of success with his defence or counter claim. Rather, the question is whether the statement of case filed by the defendant discloses reasonable grounds for bringing or defending the claim. Manifestly, the defence and counter claim, as clumsily worded and structured as it is, do disclose reasonable grounds.

[20] It is for this reason that I dismissed the application to strike out a statement of case pursuant to Section 26.3 (1) (c) of the Civil Procedure Rules (2002).

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**David Batts**
**Puisne Judge**