[2016] JMSC Civ.142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 00630

BETWEEN	**BARBICAN HEIGHTS LIMITED**	**CLAIMANT**
AND	**SEAFOOD & TING INTERNATIONAL LIMITED**	**DEFENDANT**

IN CHAMBERS

Mrs. Sandra Minott-Phillips, Q.C. and Ms. Rachel McClarthy instructed by Myers, Fletcher & Gordon for the Claimant/Applicant

Ms. Gillian Burgess for the Defendant/Respondent

Heard: July 21, July 29 and August 17, 2016

CIVIL PROCEDURE - CIVIL PROCEDURE RULES 2002, PART 15.2 - APPLICATION FOR SUMMARY JUDGMENT - REAL PROSPECT OF SUCCESSFULLY DEFENDING THE CLAIM - LEASE AGREEMENT - DEFENCE OF BARE DENIAL - FRAUD - ESTOPPEL.

COR: STEPHANE JACKSON-HAISLEY
MASTER-IN-CHAMBERS (Ag.)

[1] The concept of saving expense, conserving resources and achieving expedition is an appealing one, even more so today when trial dates are far away and the cost of going to trial can be significant. In striving to achieve this concept many litigants apply for summary judgment in instances where it appears that the other party has no reasonable prospect of success.

[2] The dicta of Lord Wolfe in **Swain v Hillman** [2001] 1 All ER 91 provides guidance on how a judge should exercise his discretion in deciding whether or

not to grant summary judgment. In assessing the provisions of Part 24 of the Civil Procedure Rules of the United Kingdom which is similar to Part 15 of the Civil Procedure Rules of Jamaica, this is what Lord Wolfe MR had to say at paragraph 7 of that decision:

> *"It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success ... they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*

At paragraph 14 he continued:

> *"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing he or she gives effect to the overriding objectives contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice."*

[3] No doubt motivated by the prospect of securing an early resolution the Claimant/Applicant filed a Notice of Application for Court Orders on May 5th 2016 and secured a hearing date of 21st July, 2016. The Claimant/Applicant is a limited liability company incorporated under the Laws of Jamaica with its registered office at 107 Old Hope Road, Kingston 6 in the parish of St. Andrew. The orders sought pursuant to Parts 74 and 15 of the Civil Procedure Rules (CPR) are as follows:

1. Mediation be dispensed with;
2. Judgment Issue for the Claimant on its claim in the sum of US$241,500.00 or its Jamaican Dollar equivalent at the date of payment; and
3. Costs of the action are awarded to the Claimant to be taxed if not agreed.

The grounds upon which the Claimant is seeking the Orders are as follows:

1. Good faith efforts to settle have been made and were not successful;

2. The Defendant has failed to co-operate in having mediation convened;
3. The Defendant has no real prospect of successfully defending the claim.

[4] The Defendant is also a limited liability company incorporated under the Laws of Jamaica. Its registered office is located at 5 Lindsay Crescent, Kingston 10 in the parish of Saint Andrew. The Defendant opposed the Claimant's application.

[5] Briefly, the facts concern the rental of residential premises situated at 22 Millsborough Avenue, Kingston 6 in the parish of Saint Andrew. It is being alleged by the Claimant that it rented the premises to the Defendant for a term of five years commencing August 1, 2009. In support of this position the Claimant relies on a lease agreement purported to be signed by both parties. The Defendant denies that it entered into a lease agreement bearing that date but indicates that it did enter into a lease agreement bearing the date August 1, 2004 which ended July 31, 2009.

[6] On July 21, 2016 when the matter came up for hearing, counsel for Defendant, Ms. Burgess sought an adjournment but this was strongly resisted by the counsel for the Claimant. The Defendant's attorney-at-law based its application for an adjournment on the fact that she had only come into the matter two days prior and hence had not filed any affidavits in response. Queen's Counsel indicated that they would not mount any opposition to the Defendant filing affidavits at a later date and so the Defendant's affidavits in response were filed subsequent to the commencement of the matter. This is noteworthy because under CPR 15 which governs summary judgments, CPR15.5 (2) indicates that a respondent who wishes to rely on evidence must file affidavit evidence and serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing. The Defendant's attorney-at-law although indicating at the outset that they were opposed to this application had not complied with this section hence it became important to consider whether time would be extended for the Defendant to file affidavits in response. In

keeping with the overriding objective of the CPR the time within which to file affidavits in response was extended. The application for adjournment which was sought by counsel for the Defendant was refused.

The Applications

[7] In support of its application the Claimant indicated that it intended to rely on the pleadings, other court documents and the affidavit of Ms. Sheryl Thompson. The claim is for Special Damages of US$241,500.00 and continuing plus interest and costs. The interest was not pursued at the summary judgment application.

[8] By way of the Particulars of Claim filed on February 6, 2014 the Claimant alleges that both parties entered into a lease agreement dated August 1, 2009 pursuant to which the Claimant leased to the Defendant premises located at 22 Millsborough Avenue, Kingston 6 pursuant to which rent was payable to the Claimant in the sum of US$11,500.00 per month. On May 1, 2012 the Defendant defaulted in its monthly rental payments. By letter dated March 6, 2013 the Claimant, through its attorneys-at-law sent a letter demanding payment of the rental owed together with interest and legal fees.

[9] It is duly alleged that at the time of filing the claim the Defendants were still in possession of the premises so rent continued to accrue and that the Defendant has failed, neglected and/or refused to pay the sums outstanding. It is also alleged that pursuant to Clause 3.7 of the lease agreement the Defendant agreed not to assign, sublet or part with possession of the leased premises without the Claimant's written consent, which consent the Claimant has never given. Further that pursuant to Clause 5.8 of the lease agreement, the lease may only be terminated in writing with six (6) months notice being given and that no such notice has ever been received by the Claimant. Appended to the Particulars of Claim is a copy of the signed lease agreement.

[10] In support of the application, affidavit evidence was presented from Sheryl Thompson, legal counsel for Guardsman Group of Companies of which BHL is a

part. Ms. Thompson pointed out that the Defendant was the lessee with responsibility for payment of the rent which it paid regularly until it fell into default in May 2012. Since that time the Defendant has been in default of its obligation to pay the rent and all efforts to collect the outstanding rent from the Defendant have been unsuccessful. Ms. Thompson emphasized that at no time did the Claimant give permission in writing for the leased premises to be assigned, sublet or otherwise parted with. In fact the Claimant only became aware of the Defendant's subletting arrangement with DYC Fishing Limited (DYC) when it commenced proceedings for recovery of possession against the Defendant in the Resident Magistrate's Court, now Parish Court. The Claimant recovered possession on March 12, 2014. Ms. Thompson adds that all efforts to convene mediation with the Defendant in accordance with the Court's Rules have failed.

[11] The Claimant alleges that the Defendant has no real prospect of successfully defending the claim. Ms. Thompson has exhibited copy correspondence which she suggested illustrate a lack of co-operation on the part of the Defendant in respect of mediation. The details of the correspondence is as follows:

1. Letter dated May 11, 2015 from Rattray Patterson Rattray addressed to the Registrar of the Supreme Court asking that the matter be referred to mediation;

2. Letter dated May 11, 2015 from Rattray Patterson Rattray addressed to Phillipson Partners, then attorneys-at-law on the record enclosing the referral to mediation forms and asking that they complete their portion;

3. Letter dated May 28, 2015 from Phillipson Partners addressed to Livingston Alexander & Levy and copied to Rattray Patterson Rattray indicating that they no longer have conduct of the matter and returning the mediation referral forms.

The Defence and Response

[12] In its Defence the Defendant indicates that it did enter into a lease agreement with the Claimant dated August 1, 2004 which ended on July 31, 2009. However it denies entering into a lease agreement dated August 1, 2009 and puts the

Claimant to strict proof. Further the Defendant says that the lease agreement with the Claimant ended in October 2009 when it gave up possession of the property and another entity DYC took up occupation and paid rent to the Claimant which it accepted without demur until May 2012 when DYC ceased to make any further payments to the Claimant. According to the Defendant, the Claimant had full notice of the change of occupancy prior to and during the Defendant's relocation from the Claimant's premises. At no time did the Claimant make any complaint of any breach of its lease agreement and in particular clause 3.7, which restricts assignment, subletting or parting with the premises without the lessor's written consent, until December 24, 2012. The Claimant is therefore estopped from resiling from its acceptance of DYC as its tenant or from now claiming any breach of its expired lease agreement with the Defendant. In the circumstances, the Defendant is denying that it is indebted to the Claimant.

[13] This Defence is signed by one Donna-Marie Roberts (now deceased), the then authorized representative of the Defendant. The Claimant filed affidavits in response to the application for summary judgment, from Solomon Wentworth, director and Roger Chuck, casual director of the Defendant. Mr. Wentworth swore to the fact that the lease agreement between the parties ended July 31, 2009 and having seen a copy of the lease agreement, (the document attached as Appendix "A" of the Particulars of Claim), he averred that he has not been provided with the original lease with the original signatures and seals so that comparisons may be made and the document examined forensically. Further that until that is done he is unable to speak to the authenticity of the document purporting to bear the signature of Ms. Roberts. He indicated further that he is in the process of going through the records of the Defendant and that up to the time of swearing his affidavit he has not seen any evidence that the Defendant paid rent for the period October 2009 to 2012.

[14] Mr. Wentworth also pointed out that in the Particulars of Claim no documentary evidence is produced to support the Claimant's claim. The Defendant, he claimed

had given up possession of the property and this was well known to the Claimant's chairman and managing director Mr. Kenneth Benjamin. He asserted that a Frank Cox, principal director of DYC was in a relationship with Ms. Roberts which broke down and resulted in Ms. Roberts vacating the premises in October 2009. He alleged that Ms. Roberts informed Mr. Kenneth Benjamin that she had vacated the premises and that Ms. Roberts passed away on November 5, 2015. Mr. Wentworth ended by stating that the Defendant has a real prospect of successfully defending the claim.

[15] Roger Chuck's evidence is that on the passing of his sister Donna Roberts, he was appointed temporary director of the company and that he is in the process of going through the records of the Defendant and has found bank drafts evidencing payments to BHL for the period 2004 to 2009 which he has exhibited to his affidavit.

[16] In respect of mediation Mr. Wentworth indicated that the Claimant made no efforts to set the matter down for mediation until a year after the pleadings were closed. The Defendant, he alleged, is unaware of the efforts made by the Claimant to convene mediation with them.

[17] There are two main questions for the court to consider. Firstly the question of whether or not summary judgment ought to be granted and secondly the question of whether or not mediation ought to be dispensed with. Although the applications are intertwined, the determination of the second is dependent on the resolution of the first. In other words if the application for summary judgment is granted there would be no need to consider the application to dispense with mediation. If the application for summary judgment is denied then the question of mediation must be resolved. In light of that I will consider firstly the question regarding summary judgment.

The Application for Summary Judgment

The Claimant's Submissions

[18] The submissions provided by the Claimant were quite thorough. Although I have considered all of them there is no compelling need to recount all of it so I will only highlight some aspects which I consider crucial. Queen's Counsel submitted that the claim is founded on a written contract of lease annexed to the Claimant's Particulars of Claim as Annexure "A". In making her submissions she pointed out that the contractual arrangement between the parties is strictly proven by the written document executed by them. This lease, she argued, is additionally verified by the affidavit evidence of Ms. Sheryl Thompson. She highlighted that the lease was for a term of five years commencing August 1, 2009 and among the terms of the lease agreement is a restriction on assigning, subletting or parting with possession of the premises without the lessor's prior consent in writing. Termination of the lease prior to the expiration of the 5 year term would require on either part 6 month's written notice or on the part of the Defendant 6 month's rent in lieu of notice. The said lease purports to have been signed by the late Donna Marie Roberts in the presence of an attorney-at-law.

[19] The Defence she submitted is a bare denial as there is nothing in it that questions the validity of the lease. Further, that in fact the Defence has no general or specific allegation of the 2009 lease being fraudulent and even if it did have a general allegation of fraud, that would be insufficient as the authorities have enunciated that, with respect to fraud, general allegations however strong are insufficient to amount to an averment of fraud of which the Court ought to take notice. She relied on the decision of the Court of Appeal in **Harley Corporation Guarantee Investment Co Ltd v Estate Rudolph Daley et al** [2010] JMCA Civ. 46 where at numbered paragraphs 54 a quotation from the House of Lords in **Wallingford v The Directors of Mutual Society** [1880] 5 AC 685 at 697 was mentioned:

> *"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated are insufficient ever to amount to an averment of fraud of which any Court ought to take notice..."*

[20] Queen's Counsel further advanced that the Defendant has failed to comply with CPR 28:19 which requires a party who wishes to challenge the authenticity of a document disclosed to it to serve notice on the other party not less than 42 days before trial. Summary judgment, she argued is a trial on the merits and if they wanted to challenge the authenticity of the lease they ought to have served the Claimant with a notice to that effect not less than 42 days before the trial began on July 21, 2016. Having not done so they are deemed to admit the authenticity of "Annexure A". It is therefore not open to the Defendant to now seek to supplement its bare denial of not having entered into the 2009 lease agreement by belatedly challenging the authenticity of the lease.

[21] She reiterated that the Defendant has no real prospect of successfully defending the claim and further submitted that the lease being for a term exceeding 3 years and being in writing and signed by the parties creates a valid lease. Queen's Counsel also submitted that leases of land for a term of years in excess of 3 years must be effected by deed or notice in writing signed by the party granting same and in reliance on **Cross on Evidence 6th edition** submitted that extrinsic evidence is generally inadmissible if it has the effect of adding to, varying or contradicting the terms of a transaction required by law to be in writing. This principle is well known as the parole evidence rule which cannot operate to challenge the written contents of a lease. She submitted therefore that the evidence of Solomon Wentworth should not be taken into account.

[22] She points out that the lease agreement was not entered into with the late Donna Marie Roberts but with the company and so her death does not affect the contractual arrangement. Moreover Ms. Roberts' departure from the premises does not equate to a termination of the tenancy and in any event the Defendant has now admitted to remaining on the premises up until October 2009. Further

that even if the late Ms. Roberts had told the principal director Mr. Kenneth Benjamin that she had vacated the premises that does not equate to the Defendant vacating the property.

[23] The issue of estoppel was raised by the Defendant and the Claimant's response is that it is not in dispute that the rent was being paid until mid-2012 and so the Claimant would have no need to complain before the end of 2012 and therefore the legal criteria for an estoppel does not exist. She submitted that it is incumbent on the Defendant to prove that it has a reasonable prospect of successfully defending the claim and that for the Defence to succeed the court would have to be provided with some kind of material which would cause it to believe that the lease agreement is fraudulent.

[24] Reliance was placed on **ED&F Man Liquid Products Ltd v Patel and Anor., 2003 EWCA** Civ. 472, a case which dealt with setting aside a default judgment and where it was enunciated that the Defendant had to demonstrate that they had a "real prospect of successfully defending the claim". Queen's Counsel submitted that there is no difference in the phrase as used in that context and as used in the context of summary judgment and that the burden of proof is with the applicant in either case, whether he be the Defendant seeking to set aside a default judgment or the Claimant seeking summary judgment. That case she argued was approved of and applied by the Jamaican Court of Appeal in **Tikal Limited et al v Amalgamated Distributors Limited** [2015] JMCA App 11(Judgment delivered February 6, 2015) where there was an application for leave to appeal the refusal to set aside a default judgment against the Applicants. The Applicants needed to establish that their appeal would have a real prospect of success and therefore needed to show the court that they had a real prospect of successfully defending the claim, a standard which they were unable to meet. Similarly in **Island Car Rentals Ltd. (Montego Bay) v Headley Lindo** [2015] JMCA App 2, they were unable to show the real prospect of successfully defending the claim.

The Defendant's Submissions

[25] Counsel for the Defendant submitted that it is a defence in law to say that the document produced to the court was not entered into by the Defendant. She argued that on an application for summary judgment the burden is on the applicant to show conclusively that the Defendant did sign this document and it cannot do that by merely presenting the document. Ms. Thompson she contends does not give any evidence as to the due execution of the lease nor does she say that she was present and witnessed the signing of the lease agreement. Further she doesn't say she is familiar with the signature of the signee nor does she seek to rebut the defence in any way other than to re-present the document which is being impugned. This she argues is not conclusive evidence that this lease agreement is authentic.

[26] In respect of the issue of the defence being a bare denial she submitted that under the new dispensation a pleader is merely required to plead facts and not the legal consequences which flow from the facts and so it is enough to say that I did not enter into a lease agreement without going further to posit a theory as to how the impugned document came into existence. She relied on the case of **Medical and Immunodiagnostic Laboratory Ltd v Johnson** [2010] JMCA Civ. 42, para. [53] to support her contention. Although she conceded that it would have been better to set out the defence of fraud or forgery she submitted that it is sufficient for the Defendant to say what happened at this stage, which is that it did not enter into a new lease agreement.

[27] She posited further that the Defendant has put forward an equitable defence of estoppel which has not been answered by the Applicant. She submitted that common law principles support the fact that a written lease can be determined "by surrender by operation of law". This defence, she argues does not depend on the terms of the lease but instead operates in equity to prevent a litigant from relying on the written terms of the lease even though the conduct of the parties show that they were acting inconsistently with the lease. Further that it is

therefore not parole evidence seeking to alter the written terms of the document but an equitable defence which has not been answered by the Claimant. She adds that the application of the Claimant has proceeded on the basis that it does not matter that DYC was in possession, paying the rent and it did not care from whom it got the money.

[28] She also submitted that the issues in this claim cannot be resolved on an application for summary judgment. Further that for a judge to embark on a resolution of the issues the judge must find as a fact that the defence is either not good in law because the facts, if proved, do not affect the judgment or that there is contemporaneous documentary evidence so inconsistent with the pleaded case that the credibility of the witness is shredded beyond repair so that it would not assist the case if the judge heard oral evidence and the person is subjected to cross-examination.

[29] She argued that it is the Claimant who ought to rebut the defence and that the case of **Island Car Rentals Ltd (Montego Bay) v Headley Lindo** [2015] JMCA App 2 makes it clear that the burden of proof rests on the applicant. Further that summary judgment is discretionary and is a serious step and that in this case there are substantial disputes as to facts. If summary judgment were to be granted the Defendant would be deprived of the opportunity to put forward its own issues and have those issues ventilated. She suggested that summary judgment is not intended to be a mini-trial and so CPR28.1 does not apply to summary judgment but in any event the averment made by the Defendant that the lease is denied is tantamount to notice. This section she says relates only to standard disclosure and not disclosure in a statement of case.

The Law

[30] CPR 15.2 gives the court the power to grant summary judgment on the claim or on a particular issue if it considers that either the Claimant has no real prospect of succeeding on the claim or the issue or that the Defendant has no real

prospect of successfully defending the claim or the issue. In dealing with evidence for the purpose of the summary judgment hearing CPR 15.5 requires an applicant to file affidavit evidence in support of the application as well as it requires a respondent who wishes to rely on evidence to file affidavit evidence.

[31] In **Celador Productions Limited v Melville and another and Conjoined Cases** [2004] EWHC 2362 (Ch), Sir Andrew Morritt V-C in his examination of the principles which govern applications for summary judgment said:-

> *"...The relevant test is laid down in CPR r 24.2. The court may give summary judgment against a claimant or a defendant if it considers that the claimant or defendant has "no real prospect of succeeding" on its claim or defence as the case may be and that "there is no other compelling reason why the case or issue should be disposed of at a trial". I have been referred to a number of relevant authorities …namely* ***Swain v Hillman*** *[2001] 1 All ER 91, 94-95,* ***Three Rivers District Council v Bank of England*** *(No.3) [2003] 2 AC 1, 259- 261, [2000] 3 All ER 1 paras. 90-97 and* ***ED&F Man Liquid Products Ltd v Patel*** *[2003] EWCA Civ. 472 paras. 8-11. In addition I was referred to the notes in Civil Procedure 2004 Vol.1 paras. 24.2.1, 24.2.3-24.2.5. [7] From these sources I derive the following elementary propositions: a) it is for the applicant for summary judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be; b) a "real" prospect of success is one which is more than fanciful or merely arguable; c) if it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies then his prospects of success are not real; but d) the court is not entitled on an application for summary judgment to conduct a trial on documents without disclosure or cross-examination".*

[32] CPR 15.6 sets out the power of the court on an application for summary judgment, and confirms that the court has a discretion whether to grant summary judgment. It provides that:

> *"(1) On hearing an application for summary judgment the court may-*
>
> *(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit."

[33] In a recent decision of the Court of Appeal, **Taylor-Wright (Marvalyn) v Sagicor Bank Jamaica Ltd, [2016] JMCA Civ. 38,** Phillps J after an examination of relevant case law came to this conclusion:

> *"From a reading of these cases, it is evident that to succeed on an application for summary judgment, the prospects of success must be "realistic" as opposed to "fanciful" and in making an order on this assessment, regard must be had to the overriding objective, and the interests of justice. However, if there are serious issues which require investigation, these ought to be determined in a trial and not on a summary judgment application."*

Analysis

[34] The main issue for me to determine is whether or not the Defendant has a real prospect of successfully defending the claim. However before I can determine that substantive issue there are other issues for me to resolve. Based on the submissions made and the evidence relied on there are three peripheral issues for my consideration:

1. Whether the Defence constitutes a bare denial;
2. Whether the Defendant is deemed to admit the authenticity of the lease because of its non-compliance with CPR 28.19; and
3. Whether the issue of estoppel arises.

Whether the Defence constitutes a bare denial

[35] The making of a bare denial is not permitted under the CPR. In the unreported judgment of Sykes J in the case of **Janet Edwards v Jamaica Beverages Limited** Suit No CL 2002/E-037 delivered 23 April 2010, counsel for the Claimant argued that the Defence consisted of bare denials. Sykes J on an examination of that Defence, which was set out in full in the judgment, found favour with that argument. This is because the Defendant simply denied the particulars without setting out any reasons for its denials. Sykes J., found that the defence did not conform to the requirements of Rule 10.5 and made the following commentary:-

> *"According to Part 10 of the CPR, it is no longer possible to have a series of bare denials. Rules 10.5 (1) says that the defendant must set out all facts on which it relies to dispute the claim. Rule 10.5 (3) says that the defendant 'must [that word again] say which (if any) of the allegations in the claim form or particulars are admitted; which (if any) are denied; and which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove' (my emphasis). Rule 10.5 (4) specifically states that where the defendant denies any of the allegations in the claim form or particulars of claim the defendant 'must state the reason for doing so; and if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence' (my emphasis). Rule 10.5 (5) specifically states that where a defendant does not admit an allegation or does not admit the allegation and does not put forward a different version of events, 'the defendant must state the reasons for resisting the allegation' (my emphasis). Neutrality is not a viable option under the CPR."*

[36] In order for me to decide whether or not the Defence constitutes a bare denial I must examine it closely. The Defendant denies entering into this lease agreement dated August 1, 2009 and puts the Claimant to strict proof. It doesn't stop there but goes on to indicate that there was a prior lease agreement with the Claimant which ended July 31, 2009 and that that lease agreement came to an end when the Claimant moved out of the leased premises in October 2009. Further that another entity, DYC Fishing, took up possession and paid rent to the

Claimant which the Claimant accepted without demur up to 2012. The Defendant indicates that the Claimant had full notice of the change of occupancy prior to and during the Defendant's re-location and did not complain about any assignment of the lease until over three years later, supposedly when DYC Fishing defaulted. Hence the Defendant suggests that the Claimant is now estopped form resiling from its acceptance of DYC Fishing.

[37] The Defendant's pleadings with respect to this lease agreement are indeed sparse. The late Ms. Roberts who signed the Defence is the alleged signatory under the lease. The Defendant has not said that this lease contained a forgery of her signature or that the document was fraudulent. It would no doubt have been more desirable for the Defendant to explain why it is saying that this lease agreement appended to the Particulars of Claim was not entered into by the Defendant although it bore a signature purporting to be that of Ms. Roberts, the then representative of the Defendant. I have to consider whether or not the failure of the Defendant to provide such an explanation is fatal to its case. I am guided by the wealth of authorities that deal with what constitutes a bare denial.

[38] In the Trinidadian decision of **M.I.5 Investigations Ltd. v Centurion Protective Agency Ltd.** Civ. App. No. 244 of 2008, Mendonca JA, in dismissing an appeal against an Order that a defence be struck out, warned that "the days when a defence may be filed containing a bare denial are over." The learned Justice of Appeal went on to say this:-

> *"Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events from that given by the claimant he must state his own version. I would think that where the defendant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5(4)(a) without a specific statement of the reasons for denying the allegation".*

Rule 10 of the Trinidadian CPR is similar to the Rule 10 of the Jamaican CPR.

[39] The dicta of Lord Wolfe in **McPhilemy Times Newspapers Ltd and others**, [2001] EWCA Civ. 933 at pages 792-793, is also quite instructive:-

> *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."*

[40] The case **McPhilemy Times Newspapers Ltd and others** has been cited with approval in a number of cases before the Jamaican Court of Appeal, in particular **Akbar Limited v Citibank** NA [2014] JMCA Civ. 43 where, at paragraph 64, Phillips JA opined that a defendant must not be taken by surprise and is entitled to know the claim being made by the claimant and the amount being claimed. While there is no longer a need for extensive pleadings, they are not superfluous. She added that they are still required to mark out the parameters of the case of each party and to indentify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet.

[41] Support for this position can also be gleaned from the dicta of Morrison JA in **Capital & Credit Merchant Bank Limited v The Real Estate Board** [2013] JMCA Civ. 29 at paragraph 142 where he opined:-

> *"In my view, firstly, the pleader is required to set out a short statement of the material facts relied on in support of the remedy sought, sufficient to reveal the legal basis for the claim, but not the*

legal consequence which may flow from those facts. Secondly, once the claim form itself is generally in compliance with the rules, full details of the claim may be supplied by the affidavit or affidavits filed in support of it (together with any accompanying documents upon which the claimant relies), provided that the documentation, taken all together, is sufficient to enable the defendant to appreciate the nature of the case against him, and the court to identify the issues to be decided."

[42] In the course of my research I have unearthed a precedent from the High Court of South Africa, Free State Division, Bloemfontein, **Patrick Thaband Kgotlagomang v Petrus Johannes Joubert**, (A203/2013) [2014] ZAFSHC 143, 4 September 2014. Although this case is merely persuasive I find it necessary to refer to it because of its remarkable similarities with the instant case. In that case the Applicant/Defendant appealed against a summary judgment granted in favour of the Respondent/Plaintiff. The matter concerned a lease for a residential unit allegedly entered into by the parties. It was the Respondent's case that there were sums due and payable and notwithstanding lawful demand the Appellant wrongfully neglected to pay. The Respondent applied for summary judgment and in his supporting affidavit he verified that the Appellant was indebted to him on the grounds as set out in the summons; that the Appellant had no bona fide defence to the claim; and that the Appellant had entered appearance to defend for the sole purpose of delaying the finalisation of the action. The Appellant in response filed a notice of intention to oppose the application for summary judgment and stated in his affidavit that he was not contractually indebted to the Respondent as alleged or at all; that after receipt of the letter of demand, he visited the Respondent's attorney and informed him that he did not sign the lease agreement; and that he had no knowledge of the alleged agreement and that after receipt of the respondent's summons, he once again visited the respondent's attorney and again informed him that the signature appended to the lease agreement by the alleged tenant was not his. He asserted, therefore, that he had a *bona fide* defence to the respondent's claim.

[43] It is noted that the test for the grant of summary judgment against a defendant in that jurisdiction is whether or not there is a bona fide defence whereas in this jurisdiction the test is a whether or not the defendant has a “real prospect of success”. In granting summary judgment the magistrate described the appellant’s version as a classic example of a bare denial. He then came to the conclusion that such a denial did not constitute a bona fide defence. The Court of Appeal upheld the decision of the lower court and found that the appellant was required to do more than his simple denial. The Court commented that he dismally failed to disclose fully the material facts on which the nature of his implied defence of fraud was crafted and that any suggestion that the respondent acted fraudulently had no substance at all. The court indicated that if they were to accept the position of the appellant they would have to find that some mischievous individual stole his very private documents, fooled the Respondent’s estate agent and falsely represented that such fraudster fraudulently signed the lease agreement, occupied the premises and paid rental in the name of the appellant for months. The Appellant had therefore failed to satisfy the court that he had a defence that was bona fide and good in law.

[44] In the instant case although there are similarities with the South African case it is distinguishable. If all the Defendant herein had done was to issue a denial of entering into the lease agreement without more then I would have had to rule that this was in fact a bare denial and no doubt proceed to enter summary judgment, but there is more than that in the Defence in the instant case. The Defence does not stop at just a stark denial of the lease agreement. The Defendant’s position is that there was a previous lease agreement which it had entered into.

[45] The Defendant highlights circumstances in support of the denial by seeking to show that not only did it not enter into this lease agreement but in furtherance of not entering into a second lease the late Ms. Roberts moved out of the premises a few months after the expiration of the first lease, and another entity, not a phantom entity or a figment of the Defendant’s imagination, but rather a named

entity, DYC Fishing took up possession of this property. This entity was the said entity that the Claimant through the affidavit of Ms. Thompson indicated that they became aware of when the Claimant commenced proceedings for recovery of possession in the Resident Magistrate's Court, now Parish Court. The Defendant is also contending that it did not sublet the premises but this entity took up possession with the consent of the managing director of the Claimant, Mr. Kenneth Benjamin.

[46] In determining the issue of whether or not the Defence constitutes a bare denial I have to revert to the Particulars of Claim and assess whether the Defence addresses claims made therein. In respect the of lease agreement the Claimants simply aver that the Defendant entered into this lease agreement dated August 1, 2009. There is no indication in the Particulars of Claim as to the circumstances under which the Claimant did so and the circumstances under which the late Ms. Robert's signature came to be on that document. The response of the Defendant is that it did not enter into this lease agreement. It was open to the Claimant to provide a Reply to this Defence and to indicate the circumstances under which the lease agreement was duly executed. It was also open to the Claimant in this application for summary judgment to expand on those circumstances. The affidavit of Sheryl Thompson does not address the circumstances under which the lease agreement was entered into. It is noteworthy that although the Claimant has appended a lease agreement which bears a signature purporting to be that of the late Donna Roberts, the alleged witness is an unnamed attorney-at-law.

[47] In light of the paucity of information in the Particulars of Claim with respect to how the parties to the lease agreement entered into this agreement, I find that the averments made by the Defendant in its Defence, though sparse, provide a sufficient reply to the Particulars of Claim. Further, that the details provided about the Defendant giving up possession and another entity taking up occupation and paying rent to the Claimant supplement this denial. In the circumstances I therefore find that the Defence does not constitute a bare denial.

Is the Defendant deemed to admit the authenticity of the lease?

[48] The Defendant up to the time of the application for summary has not pleaded fraud. No such allegation was made by the Defendant at the time when the Defence was crafted and no such allegation has been made in the affidavits filed in response to this application. The Claimant had argued that the Defence has no general or specific allegation of fraud and even if it did it would be insufficient. The authorities relied on by the Claimant support the position that fraud must be distinctly alleged and distinctly proved and that it was not allowable to leave fraud to be inferred from the facts. The Defendant however has not pleaded this as a part of its Defence. I do not find that the failure to do so is detrimental to its case because it has not indicated an awareness of a fraud being committed or that it is aware of the details of any fraud. Allegations of fraud are serious allegations, no doubt because this could take a matter into the criminal arena. Such allegations should not be made lightly and certainly not without evidence to support it.

[49] Mr. Wentworth in his affidavit has said that the Defendant is unable to speak to the authenticity of the lease and it would like an opportunity to have the lease agreement forensically examined and at trial to call evidence as to the due execution of the lease agreement and further that at trial they would wish to cross-examine witnesses who allege that the document is genuine. It is clear from this that the Defendant wishes to embark on a process of investigation with respect to the lease agreement in order to ascertain whether or not it is in fact authentic. Therefore I have to address the issue of whether or not the failure of the Defendant to challenge the authenticity of the lease agreement in accordance with CPR 28.9 means that the Defendant is deemed to admit the authenticity of the lease and cannot seek to supplement its “bare denial” by belatedly challenging the authenticity of the lease.

[50] Queen’s Counsel contends that the Defendant can no longer challenge the authenticity of the lease as the time within which it could do so has passed. In determining this issue I have to first determine whether CPR 28.19 relates to

disclosure in a statement of case. CPR 28.17 refers to documents referred to in statements of case and provides that a party may inspect and copy a document mentioned in the claim form, a statement of case, a witness statement or summary, an affidavit or an expert's report. The lease agreement is appended to the statement of case and so I find that it has been disclosed for the purpose of these proceedings and so the usual rules of disclosure apply.

[51] The second issue is whether or not CPR 28.19 applies to summary judgment applications. The Claimant has submitted that because summary judgment is a trial on the merits then that Rule applies. The Defendant's response is that it does not apply because this is not a trial and even if it does apply they would have given notice by virtue of the denial in the Defence.

[52] CPR 28.19 sets out the provisions governing how a party who wishes to challenge a document should go about it and provides as follows:

> (1) A party shall be deemed to admit the authenticity of any document disclosed to that party under this part unless that party serves notice that the document must be proved at trial.
>
> (2) A notice to prove a document must be served not less than 42 days before the trial.

It is clear that such a notice must be in a written form and should contain particulars to the effect that the document must be proved at trial. Therefore I do not find favour with the submissions of the Defendant that the notice was contained in the Defence. The section clearly contemplates a different document from a statement of case.

[53] The next question that I have to resolve is whether summary judgment is a trial on the merits and whether or not the provisions under CPR 28.19 apply to summary judgment applications. Summary judgment applications have been likened to a trial on the pleadings but to say that it is a trial on the merits may be taking it a step too far. A trial on the merits is a forum where witnesses have

an opportunity to give evidence and be cross-examined. The case **Three Rivers District Council v Bank of England** (No.3) [2003] 2 AC 1, 259- 261, [2000] 3 All ER 1 paragraphs. 90-97 at paragraph 95 points out that the method by which issues of fact are tried in our courts is well settled and indicates the following:

> "After the normal process of discovery and interrogatories have been completed the parties are allowed to lead their evidence so that the trial judge can determine where truth lies in the light of that evidence. In summary judgment applications these circumstances are absent".

[54] The cases have been clear and have even gone as far as to caution that a summary judgment hearing is not a mini-trial. In particular in **Swain v Hillman** Lord Wolfe MR advanced that summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Lord Wolfe even cautioned that the judge should not be conducting a mini-trial and that that is not the object of the provisions but rather it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

[55] In the circumstances I find that CPR 28:19 applies strictly to trials and not to summary judgment applications and therefore the Defendant's failure to give notice does not mean that it is deemed to admit the authenticity of the lease.

Whether estoppel arises

[56] The Defendant has also raised the defence of estoppel. In support to these submissions reliance was placed on the case **Artworld Financial Corporation v Safaryan & Ors** [2009] EWCA Civ. 303. The facts as gleaned from the case are that Artworld Financial Corporation (AFC) owned a house as a vehicle of trust for a wealthy family known as the Tatanakis. This house was leased to the Safaryan family for a term of three years. Due to technical troubles with the property the Safaryans left the property with 15 months left of the three year term. All keys

were returned to the landlord. The landlord brought an action claiming rent for the remainder of the term. The Safaryans resisted, contending that the tenancy had come to an end by surrender by operation of law and relied upon several facts. Among them were the landlord's acceptance of the keys to the property; the landlord's instructing and obtaining the 'checkout' report and inventory by their agent; the carrying out of works of redecoration to the property to the taste of the Tatanakis; and Mr. Tatanaki's moving into, staying and sleeping at the property.

[57] Despite those actions, AFC made it clear through a series of letters issued by their solicitor that they regarded the lease as continuing and had no intention of accepting a surrender. They argued that the above actions were legitimate as they were entitled to carry them out under the terms of the tenancy and/or were protecting/preserving the property. The Court of Appeal did not agree with AFC and found inter alia that going in and living in the property is in effect taking it over and treating it as its own. The Court of Appeal formed the view that whilst many of their actions may be looked at individually the court must look at the cumulative effect of the acts relied on and taken together they amounted to a resumption of possession.

[58] Lord Justice Dyson at paragraph 28 said:

> *"The meaning of the doctrine of surrender by operation of law is not in doubt. It was well summarized by Peter Gibson LJ in **Bellcourt Estates v Adesina** [2005] EWCA Civ 208, 2 EGLR 33, in these terms: The doctrine of surrender by operation of law is founded on the principle of estoppel in that the parties must have acted towards each other in a way which is inconsistent with the continuation of the tenancy. That imposes a high threshold which must be crossed if the tenant is to be held to have surrendered and the landlord is to be held to have accepted the surrender."*

[59] From this case two main principles can be distilled. Firstly, that a lease can be determined before its expiration by operation of law and secondly that in certain circumstances a surrender can occur due to the conduct of the parties despite their intentions to the contrary. In the instant case the Defendant is saying that

the Claimant had full notice of the change of occupancy prior to and during the Defendant's relocation from the premises and that for three years there was no demand of rent from the Defendant and so the Claimant is estopped from resiling from its acceptance of DYC Fishing LTD as its tenant or from claiming a breach of its expired lease agreement with the Defendant. Indeed there is a high threshold which must be crossed if the tenant is to be held to have surrendered and the landlord is to be held to have accepted the surrender. In order for me to determine this issue on this summary judgment application I would have to conduct what is tantamount to a mini-trial. However I find that these are issue which should be determined at a full blown trial. It is my view that this Defence of estoppel raises issues that should be subject to investigation and determined after evidence is heard.

Whether the Defence has a real prospect of success

[60] The burden of proof in applications for summary judgment rests on the Applicant. In **ASE Metals v Exclusive Holidays of Elegance Limited** [2013] JMCA Civ. 37 Brooks JA sets out what he found to be the requisite burden of proof in this fashion:

> *"The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that that the respondent's case has no real prospect of success. In **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ. 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment: "...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success..." [15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of ED & F Man). The defendant must show that he has "a 'realistic' as opposed to a 'fanciful' prospect of success".*

[61] The granting of summary judgment is an exercise of a discretionary power conferred on a Judge by way of CPR 15. In exercise of this power I must concern

myself with whether or not the Defendant has a real prospect of successfully defending the claim. Among the material presented by the Claimant in support of its application is the signed lease agreement which is being challenged by the Defendant. In the face of this challenge it was open to the Claimant in the application for summary judgment to provide further evidence as to the circumstances under which the Defendant entered into this lease. In a summary judgment application based on the wording of CPR 15 it is incumbent on the court to consider not only the pleadings but also the supporting affidavits. Ms. Donna Roberts is now deceased and so no affidavit from her was expected but there are affidavits from Mr. Solomon Wentworth a director of the Defendant and Mr. Roger Chuck another director albeit only a "casual" one. Mr. Wentworth indicates that the Claimant has not provided them with the original lease with the original signatures and seal so that comparisons may be made and the document forensically examined. He also indicated that he would like an opportunity to do so and at trial call evidence to challenge the execution of this document and to cross-examine the Claimant's witnesses who allege that the document is genuine. The Defendant in denying the lease has raised an issue of fact which requires further investigations.

[62] The scope of the power of a court to grant summary judgment was considered by the House of Lords in **Three Rivers District Council v Bank of England (No. 3)** [2001] 2 All ER 513 in which it was held that a claim may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based. Specifically Lord Steyn in discussing the criteria for granting summary judgment has this to say at paragraph 95:

> *"For example it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of the court as soon as possible"*

[63] On a proper consideration of all the information before the court in the instant case I find that the Defence is more than just fanciful, bearing in mind the contention that the Defendant did not enter into a second lease agreement and that it vacated the property and, that a third party took up possession and in furtherance of that this party, they alleged, paid rent to the Claimant which was accepted by the Claimant. Based on that there appears to be some merit in this Defence. What is also clear is that there is a significant dispute as to fact as it relates to the lease agreement. The issue of estoppel is another question that the court would have to resolve based on the facts and the law. Summary judgment is usually only granted in clear cut cases where the law is clear.

[64] In the 2016 decision of the Court of Appeal in **Marvalyn Taylor Wright v Sagicor Bank Jamaica Limited** the Court of Appeal considered whether or not summary judgment was properly granted in the circumstances outlined below:

> *"The appellant is an attorney-at-law and customer of the respondent. The respondent is a company duly incorporated in Jamaica and operates as a bank. It was formerly known as "RBC Royal Bank (Jamaica) Limited", prior to that as "RBTT Bank Jamaica Limited", before its name was changed on 26 June 2014 to "Sagicor Bank Jamaica Limited". [4] On 27 July 2007, the appellant borrowed the sum of $21,760,000.00 from the respondent with interest. In pursuance of this arrangement, it was the respondent's contention that the appellant signed a promissory note dated 27 July 2007 (the 27 July promissory note). The appellant denied this, but admitted that she signed a promissory note on 20 July 2007 (the 20 July promissory note); she signed an offer letter;"*

[65] The Court of Appeal in that case considered issues such as whether or not the validity of the promissory note required investigation at trial and also whether or not the judge erred in his assessment of the prospects of success. The Court of Appeal found that the issues surrounding whether the appellant signed the 27 July promissory note and whether it was forged or was ratified required investigation and could not be a basis for summary judgment. In those circumstances they were of the view that the learned judge was wrong in the

exercise of his discretion to grant summary judgment as the issues which arose on the disputed facts in the case must be subject to trial.

[66] Similarly in this case I find that there are real issues to be tried. Among the issues are whether the Defendant entered into this lease agreement dated August 1, 2009 and whether or not another entity took up possession and paid rent to the Claimant. Those issues should be subject to trial. In light of that I am of the view that the Defendant has a real prospect of successfully defending the claim. I find therefore that this is not an appropriate case for the grant of summary judgment. The application for summary judgment is dismissed.

Whether or not mediation should be dispensed with

[67] CPR 74.1 states:

> *"This part establishes automatic referral to mediation in the civil jurisdiction of the court for the following purposes: a) improving the pace of litigation; b) promoting early and fair resolution of disputes; c) reducing the cost of litigation to the parties and the court system; d) improving access to justice; e) improving user satisfaction with dispute resolution in the justice system; and f) maintaining the quality of litigation outcomes through a mediation referral agency appointed to carry out the objects of this part."*

CPR 74.4 empowers the court to postpone or dispense with mediation if it is satisfied that certain stated circumstances exist. CPR 74.4 (1) provides as follows:

> "The court may postpone or dispense with a reference to mediation if it is satisfied that:
>
> a) good faith efforts to settle have been made and were not successful;
>
> b) the costs of mediation would be disproportionate to the value of the claim or the benefits that might be achieved by mediation;
>
> c) the case involves a matter of public policy and mediation may not be appropriate; or

d) for some other good or sufficient reason, mediation would not be appropriate.

[68] The basis on which the Claimant seeks an order to dispense with mediation is twofold: Firstly that good faith efforts to settle have been made and were not successful and secondly that the Defendant has failed to co-operate in having mediation convened. In support of their application the Claimant relies on the affidavit of Ms. Sheryl Thompson and the correspondence exhibited thereto. There is one letter from the Claimant's previous attorneys-at-law to the Defendant's previous attorneys-at-law dated May 15. 2015 with the mediation referral form enclosed. There is equally one response, which included the mediation referral forms, addressed to another firm of attorneys-at-law Livingston Alexander & Levy to the effect that these attorneys-at-law no longer had conduct of the matter. Mr. Wentworth has indicated that Livingston Alexander & Levy has never been retained by them in this matter.

[69] It is not being contested that the signatory of the Defence is now deceased, having died November 5, 2015 less than a year ago. Affidavits filed by the current directors indicate a lack of awareness of the efforts to convene mediation. In fact Roger Chuck is asking for the matter to be referred to mediation. There is now new counsel in the matter. Counsel is opposed to this application to dispense with mediation which suggests a willingness on their part to proceed to mediation.

[70] The Claimant's attempts at mediation have not been directed at any of these two directors or to their current legal representative. I am unable to say that any efforts much less good faith efforts have been made with the representatives of the Defendant or the previous attorneys-at-law or that they or anyone has failed to co-operate. The application to dispense with mediation is dismissed.

Decision

The application for summary judgment is dismissed. The application to dispense with mediation is also dismissed.

Costs

[71] The Defendant/Respondent being the successful party is entitled to recover cost from the Claimant/Applicant. My order is that costs be to the Defendant/Respondent to be agreed or taxed.