



[2025] JMCC Comm 30

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE COMMERCIAL DIVISION
CLAIM NO. SU2020CD00176**

BETWEEN	LEVEL BOTTON FARMS LIMITED	CLAIMANT
AND	DIGICEL (JAMAICA) LIMITED	DEFENDANT
AND	DIGICEL (JAMAICA) LIMITED	DEFENDANT/ANCILLARY CLAIMANT
AND	LEVEL BOTTON FARMS LIMITED	CLAIMANT/ANCILLARY DEFENDANT

Mr Jerome Spencer instructed by John P Ross for the claimant/ancillary defendant

Mr Maurice Manning KC and Ms Dionne Samuels instructed by Nunes Scholefield Deleon & Co. for the defendant/ancillary claimant

Heard July 22, 2024, July 31, 2024, and September 26, 2025

Civil Procedure - Summary judgment- Whether defence has no real prospect of success - Landlord and tenant - Whether tenant can dispute the title of the landlord - Whether the tenant was subject to an adverse claim by title paramount

IN CHAMBERS

CORAM: JARRETT, J

1. I sincerely apologise for the delay in delivering this decision. Despite my best efforts, a very heavy docket and unforeseen responsibilities prevented its earlier completion. Nevertheless, I take full responsibility for the delay and apologise to the parties and to counsel.

Introduction

2. This is an application by Level Bottom Limited (Level Bottom), to strike out Digicel (Jamaica) Limited's (Digicel) defence and counterclaim, and for summary judgment on both the claim and the counterclaim. By its pleadings, Level Bottom claims arrears of rent, interest and costs pursuant to a lease, entered into between itself and Digicel. Digicel in its defence alleges that Level Bottom represented or warranted that it was the registered proprietor of land, the subject of the lease, and on that basis, it entered into the lease. It disputes Level Bottom's ownership of the land, and it's right to claim rent and says that Level Bottom was not entitled to enter into the lease.
3. Alternatively, Digicel says the parties entered into the lease under a mistake of fact that Level Bottom owned the land. Digicel pleads further that it received communication from the National Housing Trust (NHT), asserting ownership of the land, and querying Digicel's use of it. Digicel further alleges that the NHT is the true owner of the land and entitled to collect rent. Consequently, it entered into a lease with the NHT. In its ancillary claim, Digicel claims the recovery of all the rent it paid to Level Bottom under the lease, which it says it entered by mistake as to the true ownership of the land.
4. Level Bottom contends that Digicel's defence and counterclaim have no real prospect of success and are an abuse of the court's process because Digicel has been its tenant, paying rent between October 2000 and 2016, when it stopped doing so. The question I must decide is whether Level Bottom is right in this assertion.

Background facts

5. By way of a lease dated October 19, 2000, Level Bottom rented to Digicel, approximately 60 square feet of land, part of Holland Hill in the parish of Trelawny. The description of the land in the schedule to the lease does not refer to a volume and folio number for a certificate of title registered in the Register Book of Titles. The lease was for an initial period of 10 years, renewable for three separate periods of five years. As of May 6, 2020, (the date the claim was filed), the then current term of the lease would expire on October 22, 2020.

Digicel took possession of the land and erected a cellular tower on it. On May 21, 2012, the National Housing Trust (NHT), advised Digicel that they owned the land and questioned Digicel's use and occupation of it.

6. Correspondences subsequently passed among Digicel, Level Bottom and NHT. Level Bottom asserted that Digicel could not question Level Bottom's title to the land, assured Digicel that it would protect its right to undisturbed possession, and informed the NHT that it (Level Bottom), had been in possession of the land since 1990. On January 19, 2015, NHT advised Digicel that it was the beneficial owner of the land, and by letter dated May 19, 2015, Digicel confirmed to NHT that its landlord was Level Bottom and recommended that NHT raise with Level Bottom its concerns.
7. On September 23, 2016, lawyers for Braco Estate, issued to Digicel a "Notice for Removal of Cellular Tower", and gave it thirty days to vacate the land. By letter dated January 12, 2017, Digicel informed Level Bottom about the "Notice for Removal of Cellular Tower", and advised that its research revealed that its cellular tower is located on land registered in the name of Braco Estates Limited, that it would cease paying rent to Level Bottom and considered the lease "void, since Level Bottom is not the registered proprietor for the land . On June 9, 2017, NHT advised Digicel that the land was now transferred to the NHT effective May 3, 2017, and therefore Digicel was to pay all rent to the NHT effective May 3, 2017. The NHT also served on Digicel another "Notice for Removal of Cellular Tower", which gave Digicel 60 days to quit and deliver up possession of the land. Digicel was invited to "treat with" the NHT concerning payment for its use of the land from May 3, 2017, to the expiration of the notice period. On August 22, 2018, Digicel entered into a lease with the NHT in respect of the land.

Level Bottom's application

8. As earlier observed, Level Bottom by its application filed on January 25, 2021, seeks to strike out the defence and counterclaim and requests summary judgment in its favour, on both the claim and the counterclaim. Digicel has filed both a counterclaim and an ancillary claim, but the latter is unnecessary as it is

the exact same claim as the counterclaim, which, under CPR 18, is an ancillary claim.

9. The grounds relied on by Level Bottom, to support its application are that; a) Digicel was its tenant from October 2000, Digicel stopped paying rent in 2016 on the basis that Level Bottom was not the registered proprietor of the land; b) Digicel has no real prospect of successfully defending the claim or pursuing its counterclaim; and c) Digicel's defence and counterclaim are an abuse of the process of the court. Reliance is also placed on CPR 1, 15 and 26.
10. The affidavit of Vincent Chen (Mr Chen) filed on January 25, 2021, is in support of the application. Mr Chen is an attorney-at-law and a Director of Level Bottom. He says that it was Digicel who prepared the lease; Level Bottom is the registered proprietor of property south of the land; and that Level Bottom has been in open and lawful possession of the land from 1990. According to Mr Chen, Digicel paid rent for 16 years, from the start of the lease until April 22, 2016, and its position contained in letter dated January 12, 2017, that the lease is void because Level Bottom has no registered title is misconceived. According to him, at no time has Level Bottom claimed to be the registered proprietor of the land, as its position has always been that it has open and undisturbed possession, and was able to and did put Digicel in possession since October 2000. He says, Digicel owes rent amounting to USD\$14, 269.79, and has no real prospect of successfully defending the claim or pursuing its counterclaim.

Digicel's opposition to the application

11. Digicel's affidavit in response to the application is that of its Legal and Regulatory Director, Andrew Foreman (Mr Foreman). According to Mr Foreman, Level Bottom represented and/or warranted that it was the owner of the land and was the registered proprietor of adjoining lands. This led to both parties operating under a mistake of fact that the land belonged to Level Bottom. He says that at the time Digicel entered into the lease, it was unaware that a third party was claiming ownership to the land. Despite Level Bottom's promise to protect Digicel interest in the land, it took no action against NHT to assert its alleged possessory title. Mr Foreman says further that Digicel faced

threats of eviction from NHT due to Level Bottom's failure to prove it was entitled to lease the land to Digicel. To regularise its occupation of the land and based on NHT's directives, Digicel negotiated and entered a lease with NHT on August 22, 2018. Since May 1, 2017, Digicel has been paying rent to NHT amounting to approximately JD\$1,958,333.02.

12. In its counterclaim, Digicel claims the rescission of the lease, and the repayment of USD\$ 47,119.64, which it paid to Level Bottom, on the basis that it entered the lease with the mistaken belief that Level Bottom owned the land. It also claims it was induced by Level Bottom's misrepresentation and/or mistake to do so.

Summary of the submissions

The claimant/ancillary defendant

13. Level Bottom submits in its written submissions that there is no evidence that the parties entered the lease on the basis of a mistake, or that Level Bottom represented to Digicel that it was the registered owner of the land. It is submitted further, that the evidence is that there is no reference to a registered title in the lease, the land is only described by its size, and Digicel continued to pay rent to Level Bottom even after Level Bottom's title was challenged by NHT. It is submitted that it is trite law that a tenancy can exist even if the landlord does not have the legal estate in the tenanted property. This, the argument goes, is tenancy by way of estoppel. For this proposition, reliance is placed on the decision in **Bruton v London and Quadrant Housing Trust [2001] 1 AC 406**.
14. It is also argued that CPR 26.3(1)(b), allows the court to strike out a statement of case which is an abuse of the court's process, and that CPR 15.2 provides that the court may enter summary judgment where either the claimant has no real prospect of succeeding on a claim, or a defendant has no real prospect of defending a claim. The often-cited decisions in **Fiesta Jamaica Limited v National Water Commission [2010] JMCA Civ 4** and **Swain v Hillman [2001] All ER 91**, are prayed in aid in support of the submission that on an application

for summary judgment the question is whether the relevant party's prospect of success is realistic and not fanciful.

15. Counsel Mr Jerome Spencer, argued in his oral submissions that it is no answer to Level Bottom's claim, that Digicel "took it upon themselves" to pay NHT. It is still bound by the lease with Level Bottom, and unlike the subtenants in **National Westminster Bank v Hart [1983] 2 All ER 177**, Digicel continued paying rent to Level Bottom when it knew there was a challenge to Level Bottom's title to the land.

The defendant/ancillary claimant

16. Mr Maurice Manning KC argued that summary judgment should only be granted in clear cases where there are no factual disputes or where the law as applied to the facts can only go in one direction. This case, he argues, is not an appropriate one for such a judgment as there are triable issues to be resolved. According to Mr Manning, the evidence is that it was important to Digicel that Level Bottom owned the land, not by long possession, but by having purchased it. He submitted that tenancy by estoppel does not arise where there is a dispute as to title. Estoppel arises where the tenant, fixed with the knowledge that the landlord does not have title, continues to pay rent. In December 2012, there was no one with a paramount title to that of Level Bottom. Digicel only became aware of NHT's paramount title in January 2017, and it was on May 3, 2017, that NHT became the registered proprietor of the land. Mr Manning submitted that if Digicel continued paying rent to Level Bottom after May 3, 2017, then and only then, could Level Bottom have an argument that Digicel acceded to it as landlord by paying rent.

17. King's Counsel pointed to the fact that in 2016, threats of eviction from the NHT were faced by Digicel and that when NHT's title came to its attention it recognised NHT as having a superior title to Level Bottom. Asked by the court whether Digicel's actions amounted to it attorning to NHT, Mr Manning said it did. He said that as of May 2017, Digicel was entitled to refuse to pay any more rent to Level Bottom. In written submissions reliance was placed on the law as expressed by the English Court of Appeal in **National Westminster Bank v**

Hart, that a: “*lessee who paid rent to a lessor after the lessor’s title had been determined was subsequently estopped from disputing the lessor’s title **only if** it was shown that at the time at which the rent was paid the lessee knew or had notice of the true facts about the lessor’s title.*”

Analysis and discussion

18. I have carefully considered all the submissions and authorities relied on by counsel and am grateful for them.

19. It is common ground that on an application for summary judgment under CPR 15, the burden is on the applicant to show that the respondent’s statement of case has no real prospect of success, and that this is clear from an examination of the pleadings and the evidence. I endorse and adopt the following dicta of Palmer Hamilton J (Ag), as she then was, in **Lorraine Whittingham v Odette McNeil and Kenneth Maxwell [2018] JMSC Civ 5, para 18**, which was cited by Digicel in its written submissions:

“An application for Summary Judgment is decided by applying the test whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly (see text by Stuart Sime – **A Practical Approach to Civil Procedure, 5th edition**). The phrase “real prospect of success” does not mean “real and substantial” prospect of success. Nor does it mean that summary judgment will only be granted if the defence is “bound to be dismissed at trial”. Summary judgments are not meant to dispense with the need for trial where there are issues which should be considered at trial, and these hearings should not be mini trials. They are simply summary hearings to dispose of cases where there is no real prospect of success.”

20. After oral submissions ended, I invited counsel to review **Industrial Properties (Barton Hill) Ltd and Ors v Associated Electrical Industries Ltd (1977) 2 All ER 293** and prepare written arguments on whether its principles apply to the present claim. I thank them for the very helpful submissions which were filed.

21. Industrial Properties (Barton Hill) Ltd and Ors v Associated Electrical

Industries Ltd was a decision of the Court of Appeal of England and Wales in which the question whether a tenant was estopped from denying its landlord's title was raised. More particularly, whether the doctrine of tenancy by estoppel applies to a tenant out of possession in the absence of an adverse claim by a third party. In the process of deciding the appeal, some important principles of law concerning tenancy by estoppel were stated. It is helpful to summarise the pertinent facts of the case. I do so below.

22. A family decided to sell property, it owned, to a company, of which its members

were the shareholders and directors. The agreement for sale was completed, but to save on stamp duty, the property was not conveyed to the company. The legal title consequently remained in the name of the family. The company subsequently leased the property to lessees, and in error its solicitors advised that the property was owned by the company. The solicitors had overlooked the fact that the company only had an equitable title. There was a covenant in the lease which required the lessees to keep the property in good and tenantable repair. It came to pass that the lessees gave up possession on the termination of the term but left the property in disrepair. The company sued in damages on the covenant and the lessees believing they had no defence, only challenged quantum. After judgment was entered against it, the lessees learnt that the company was not the legal owner of the property and contended, therefore, that it was not liable under the covenant. The judgment was set aside, and the pleadings amended to join the family as plaintiffs.

23. At first instance, the trial judge found that the company could bring the claim.

On appeal, however, the Court of Appeal overruled its earlier decision in **Harrison v Wells** [1966] 3 All E.R 524, on the basis that that appeal was decided *per incuriam*. In **Harrison v Wells**, the court had decided that tenants who had gone out of possession could deny their landlord's title and avoid a repair covenant. Lord Denning, at page 301 para 9 of the judgment in **Industrial Properties (Barton Hill) Ltd and Ors v Associated Electrical Industries Ltd**, said that:

“[A lessee] having received the full consideration for the contract in which they entered, they should perform their part of it. It does not matter to them what title [the lessor] had; whether it was legal title or an equitable title it makes no difference to them **so long as they are not subject to any adverse claim by anyone else**”. [Emphasis mine]

The Court of Appeal held that a lessee who had possession for the term of a lease is estopped from denying his lessor's title in respect of the period he was in possession, unless, after possession has ended, a claim is made against him by someone with a paramount title in relation to some part of the term of the lease, thereby putting him in peril of an adverse claim. The court found, on the facts, that the lessees were estopped from denying the company's title, since they benefited from the lease without the risk of any adverse claim.

24. The following dicta of Lord Denning at page 301 para g, is instructive: -

“In the course of the discussion we were referred to many authorities, old and new. I have considered them all - and others too - but the result can be stated thus: If a landlord lets a tenant into possession under a lease, then, so long as the tenant remains in possession *undisturbed by any adverse claim* – then the tenant cannot dispute the landlord's title. Suppose the tenant (not having been disturbed) goes out of possession and the landlord sues the tenant on the covenant for rent or for breach of covenant to repair or to yield up in repair. The tenant cannot say to the landlord: ‘You are not the true owner of the property’. Likewise, if the landlord, on the tenant's holding over, sues him for possession or for the use and occupation or mesne profits, the tenant cannot defend himself by saying: ‘The property does not belong to you, but to another. But if the tenant is disturbed by being evicted by title paramount or the equivalent of it, then he can dispute the landlord's title. **Suppose the tenant is actually turned out by the third person – or if the tenant, without going out, acknowledges the title of the third person by attorning to him – or the tenant contests the landlord's claim on an indemnity from the third person - or there is anything else done**

which is equivalent to an eviction by title paramount- then the tenant is no longer estopped from denying the landlord's title (see **Wilson v Anderton**, per Littlewood J). The tenant being thus disturbed in his possession, can say to the landlord: '**You were not truly the owner at the time when you demanded and received the rent from me. I am liable to pay mesne profits to this other man. So you must repay me the rent which I overpaid you.** Nor am I liable to you on the covenants during the time you were not the owner' (see **Newsome v Graham; Mountney v Collier; Watson v Lane**). The tenant can also claim damages for the eviction if there is, as here, and express covenant for quiet enjoyment covering interruption by title paramount." [Emphasis mine]

25. Mr Spencer in his submissions on **Industrial Properties (Barton Hill) Ltd and Ors v Associated Electrical Industries Ltd**, highlighted the clear factual differences between that case and the present one, and underscored the point that Digicel in its defence did not plead that it had attorned to NHT. He argued that Level Bottom has been in undisturbed possession since 1990 and this is undisputed. It is not enough, he submitted, for Digicel to simply say that NHT has the registered title.

26. King's Counsel Mr Manning, for his part argued that the principles outlined in **Industrial Properties (Barton Hill) Ltd and Ors v Associated Electrical Industries Ltd**, are applicable and relevant. He contends that the evidence demonstrates that; a) Digicel was disturbed by an adverse claim from the NHT; b) the NHT has the superior title, and that; c) Level Bottom took no steps to assert its title vis-à-vis the NHT. King's Counsel further argued that the evidence also shows that after conducting its own investigation into the contentions of Level Bottom and the NHT, Digicel was satisfied that Level Bottom did not have title to enter into the lease and as such, it attorned to NHT.

27. In my judgment, the principles of law expressed in **Industrial Properties (Barton Hill) Ltd and Ors v Associated Electrical Industries Ltd** are certainly applicable to the present claim. This decision was relied on by Phillips

JA in **Implementation Limited v Social Development Commission [2019] JMCA Civ 46**. After referring to aspects of the above referenced judgment of Denning LJ, Phillips JA stated the law this way at paragraph 100 :-

“[100] So, if the tenant leaves the premises failing to comply with the covenant to repair, and is sued, he cannot say, "you are not the true owner of the property". Equally, Lord Denning MR posits, that if the landlord sues for possession, or use and occupation, or mesne profits, the tenant cannot say, "the property does not belong to you but to another". If, however, the tenant is evicted by title, paramount or equivalent, then he can dispute the landlord's title. So, if evicted by a third person, the tenant is no longer estopped from denying the landlord's title, as he can say "you were not the owner when you demanded rent from me", and as I am liable to pay someone else, you must refrain from making any claim. Then the tenant would not be estopped from denying the landlord's title.”

28. In my view this is not a clear and obvious case for summary judgment against Digicel. There are several triable issues that arise on both the defence and the counterclaim, and which are plain on the evidence. Consequently, it cannot be said that Digicel has no real prospect of success in defending the claim and in pursuing its counterclaim. In my view, the triable issues include: -

- a) Whether Digicel attorned to the NHT when it entered into a lease with them. It is true that Digicel in its defence does not use the word “attorn” but it is plain on those very pleadings, and the evidence of Andrew Foreman, that after having conducted its own investigations, Digicel entered into a lease with the NHT. There can be no doubt that this raises the question whether the actions of Digicel amounted to attorning to the NHT. That issue is certainly, in my view, foreshadowed in Digicel's defence.
- b) Whether NHT's Notice for Removal of Unlawful Cellular Tower amounted to an act of eviction by title paramount.

- c) Whether NHT has a paramount title to that of Level Bottom.
- d) Whether Level Bottom's alleged long possession of the land gives it a superior title to that of the NHT.
- e) If Digicel attorned to the NHT, whether it is entitled to claim for the recovery of rent paid during the lease, or it is entitled to claim the recovery of rent on the basis of misrepresentation. The above cited dicta of Denning LJ suggest that Digicel may well be able to recover all or some of the rent paid in the circumstances of this case. This is certainly a triable issue.

29. It follows, therefore, that I do not accept that Digicel's defence and counterclaim ought to be struck out on the basis alleged of an abuse of process of the court, or that it is likely to obstruct the just disposal of the proceedings under CPR 26.3(1)(b)

Conclusion

30. I find that there are several trial issues which cry out for resolution at a trial. This claim is not in my view a clear and obvious one for summary judgment against Digicel. I consequently also find that this is not a case in which Digicel's statements of case are an abuse of the process of the court or are likely to obstruct the just disposal of the proceedings.

Orders

31. In the result, I make the following orders:

- a) The Notice of Application for Summary Judgment filed on January 25, 2021, is dismissed.
- b) Costs to the defendant to be agreed or taxed.
- c) There shall be a case management conference in this matter on December 11, 2025, at 2pm for 1 hour.
- d) Leave to appeal is refused.

- e) The claimant's attorneys-at-law to prepare file and serve the formal order.

A Jarrett
Puisne Judge