

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Civil Appeal No. 18 of 2008  
HCA 2495 of 2002 and  
HCA 392 of 2003**

**BETWEEN:**

**MARK LYNCH**

**First Appellant**

**HERMAN MALONEY  
(Trading as “Reggae Lounge”)**

**Second Appellant**

**AND**

**BRIGITTE BARBARA TAYLOR**

**Respondent**

**Before the Honourable Mr. Justice Marston C. D. Gibson, Chief Justice**

**2012: February 6, 24**

**2014: March 3**

**Mr. Leslie Haynes Q.C. for the Appellants  
Mr. Tariq Khan for the Respondents**

**DECISION**

**Background**

[1] This application originates from the Order of *Goodridge J*, as she then was, made on 9 September 2008 in which she ordered, *inter alia*:

That the Defendants do pay the Plaintiff in the sum of \$300,000.00 being mesne profits accrued at the rate of \$5000.000 per month for the period from the month of February 2003 to November 2008 together with interest

thereon at the rate of 8% per annum from the 9<sup>th</sup> day of September 2008 until payment.

[2] On 16 October 2008 the Applicants, Mr. Mark Lynch and Mr. Herman

Maloney, sought leave to vary the above Order on the following grounds:

- (a) that the evidence before the court did not support the finding of the amount awarded;
- (b) that the learned trial judge wrongly applied the law on landlord and tenant and the implied covenant to repair by the landlord which said repairs were *de facto* carried out by the tenants and ought to be deducted from any rent found to be due;
- (c) that the learned Judge failed to take into consideration that the improvements made to the premises was at the expense of the Defendant and the Plaintiff is not entitled to benefit any increase in value of the property and more any increase in rental value of the property and more increase in rental value to the detriment of the Defendants.

[3] On 7 August 2009 the Respondent filed a Notice of Intention, with supporting affidavit, in which she also sought to amend the decision of the learned Trial Judge on the ground that:

The Learned Trial Judge erred in law in failing to hold that the Respondent was fully entitled to mesne profits at the rate of \$12,000.00 per month.

[4] The substantive appeal came before this Court on 24 October 2011. On that date, the Appellants sought leave to withdraw the appeal and leave was so granted. Also on that date, I invited the parties to file written submissions in support of and in opposition to the relief claimed in Respondent's Notice of

Intention. Both parties complied with this Order. The substantive appeal was withdrawn on 20 January 2012.

**The Issue**

[5] The sole issue for determination is whether mesne profits should have been awarded in the sum of \$5,000.00 as sought in the *ad damnum* clause in the Statement of Claim or the sum of \$12,000.00 which was the sum testified to by the Respondent's expert at the hearing before the learned Trial Judge.

**The Appellants' Submissions**

[6] Mr. Haynes QC, for the Appellants, submitted that in accordance with **Order 18 Rule 15(1) of the Rules of the Supreme Court 1982** ("the RSC"), the Respondents were required to "state specifically", in the Statement of Claim, the relief or remedy claimed and that they did so by claiming mesne profits of \$5000.00 per month. He argued that the High Court claim was defended on the basis of the mesne profits as sought in the pleadings and, as there was no application to amend this amount, the Trial Judge had no choice but to award the amount as claimed.

[7] Mr. Haynes QC contended that a plaintiff is only entitled to recover such relief as is pleaded and proved at trial. In support, he cited the decision in *Re Wrightson* [1908] 1 Ch 789 and that in *Pelter v The University of the West Indies* [1994] 30 Barb LR 169 ("*Pelter*") where *Moe JA* cited with

approval the well known article of Sir Jack Jacobs in *Current Legal Problems* (1960) at pp. 176-177 on the importance of pleadings. The views in that article were re-iterated in **Bullen & Leake and Jacobs Precedents and Pleadings, 12<sup>th</sup> Ed. (1975)** at pages 17 and 18) as follows:

The very nature and character of pleadings demonstrate their significance and overwhelming importance, for the attention of the parties as well as the court is naturally focused on and riveted to the pleadings as being the nucleus around which the whole case revolves throughout all its stages. The respective cases of the parties can only be considered in the light of and on the basis of the pleadings, which act as fetters upon them, binding and circumscribing them closely and strictly to their own cases as pleaded, subject only to the power of amendment to free them from such fetters so as to put forward the real questions in controversy between the parties. Each party may be thus be assumed to have put forward the best case he has in the best way he can in his pleading, and in this sense the pleadings manifest the true substantive merits of the case.

### **The Respondent's Submissions**

[8] Mr. Khan, for the Respondent, submitted that the award of mesne profits ought to have been predicated on the evidence led in the High Court during trial. He submitted that, despite the writ being filed in 2003, judgment was not delivered or made until 9 September 2008. *Goodridge J*, he said, ought to have been cognisant of this effluxion of time and should have awarded damages on the basis of evidence available to the court at the date of judgment.

[9] Mr. Khan referred to the evidence of Mr. Franklin, valuer at Franklin Group Inc., who by way of letter dated 3 March 2004 confirmed that he inspected the property known as “The Reggae Longue” situate at St. Lawrence Gap, Christ Church in this Island, and concluded that the fair market rental for the property was \$12,000.00 per month. His conclusions were based on an analysis of the surrounding properties and their rental values.

[10] Mr. Khan argued, further, that that evidence was not challenged by the Appellants during trial. He urged, additionally, that the Trial Judge referred to the unchallenged evidence in the penultimate paragraph of her decision. However, in the final paragraph, she ordered mesne profits in the sum of \$5,000.00. He further argued that based on that anomaly, which he deemed an obvious mistake of fact, and the evidence of Mr. Franklin, this Court should grant a variation of the order of 9 September 2008 and award the Respondent mesne profits of \$12,000.00 per month from the period 1 February 2003 to the date of vacant possession.

### **Discussion**

[11] Mesne profits are damages in trespass which are payable to a landlord for losses incurred due to a tenant’s remaining in possession after the termination or expiry of a tenancy. A landlord may make a claim for and recover mesne profits which reflect the open market value of the premises

for the period of the wrongful occupation. The method of quantification of mesne profits is stated in **Vol. 27 Halsbury's Laws of England 4th ed.**, at paragraph 255 thus:

In most cases, the rent paid under any expired tenancy will be strong evidence as to the open market value. In the vast majority of cases in which mesne profits are claimed they are awarded if at all, at the rate of the previous rent, and as a rule of practice, if not at law, it can be taken as being the case that the burden lies upon a party who argues for a different rate of mesne profits (whether higher or lower) to adduce evidence to rebut the inference arising from any reasonably recent rental transaction.

[12] This position also finds favour with the authors of **Woodfall on Landlord and Tenant** at paragraph 19.013 as follows:

The amount of the mesne profits for which the trespasser is liable is an amount equivalent to the ordinary letting value of the property in question. This is so even if the landlord would not have let the property in question during the period of trespass. Where the rent payable under the former lease is the fair letting value of the property, mesne profits are awarded at the rate of the rent; but if the rent is less than the true letting value of the premises, then mesne profits may be awarded at a rate exceeding the rent. The precise basis of valuation for the purpose of calculating mesne profits is not the subject of authority. It is considered, however, that the valuation should be on the basis of a short term letting at a rack rent on the terms which would in practice form the terms on which the landlord would let.

See also **Hill and Redman Law of Landlord and Tenant, 18<sup>th</sup> Ed.** at A[5167].

[13] In *Swordheath Properties Ltd. v Tabet and Others* [1979] 1 W.L.R. 285, 288E ("*Swordheath*"), *Megaw LJ* stated:

[T]he plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the

trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages.

- [14] It is also a well settled principle that, in circumstances where the market value of the property has risen, mesne profits are assessed at the higher figure (see, for example, *Clifton Securities Limited v Hurley* [1948] 2 All ER 283).
- [15] There can, therefore, be no quarrel with the finding of *Goodridge J* that the claimants were entitled to recover mesne profits on the basis that defendants remained in possession of the property in excess of six years without payment of rent. The question is, however, whether the Learned Judge erred in awarding the sum of \$5,000.00, the figure pleaded and sought in the Statement of Claim.

### **The Effect and Importance of Pleadings**

- [16] As Counsel for the Appellant quite correctly argued, the Appellants were under a duty, pursuant to **Order 18, Rule 15(1)** of the RSC, to “state specifically the relief and remedy” they claimed. It is axiomatic that parties are bound by their pleadings, but while there is a plethora of authorities on this point, I am content in this case to refer to the House of Lords decision in *London Passenger Transport Board v Moscrop* [1942] A.C. 332, [1942] 1 All ER 97, a case concerning the right of an employee to be represented in a

disciplinary proceeding. Quite pivotal to the decision are their Lordships' observations on the importance of pleadings. *Viscount Maugham* stated ([1942] 1 All ER, at 99 H):

I do not usually like to criticise a pleading in a difficult case, but lack of precision sometimes adds, as in this case, to the difficulty of the judge and of a court of appeal. After a prolonged hearing and the able assistance of counsel, I am still in doubt as to the cause of action intended to be pleaded.<sup>1</sup>

His Lordship went on to “express . . . regret that the statement of claim was not amended when the liberal amendment of the declaration was permitted by the Court of Appeal” ([1942] A. C. at 340, [1942] 1 All E. R. at 101 F).

[17] In his speech, *Lord Russell of Killowen* observed ([1942] A. C. at 347, [1942] 1 All E. R. at 105 C-D):

This appears to me to have been a complete recasting of the respondent's alleged cause of action, and the matter was unfortunately carried through without any amendment of the statement of claim. This should not be so. *Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and the relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended'. They should be amended in fact.* (Emphasis added)

[18] *Lord Macmillan* noted that “the plaintiff's statement of claim as it stands on record unamended asks for something very different from what he has been given in the Court of Appeal. What he finally decided to ask for from this House differs from both of these formulas.” (see, [1942] A.C. at 348, [1942]

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<sup>1</sup>. This passage in the speech of Viscount Maugham in the All E. R. does not appear to have been reproduced in the official Appeal Cases reports.

1 All E. R. at 105 H). *Lord Wright* stated that “I must, however, associate myself with what has fallen from Lord Maugham and Lord Russell of Killowen by way of condemning the looseness of practice which allows substantial changes to be made in the relief claimed or cause of action without precise and formal amendment of the pleading.” (see, [1942] A. C. at 351, [1942] 1 All E. R. at 107 F).

[19] As Mr. Haynes QC quite properly notes, the importance and effect of pleadings has been emphasised by this Court in *Pelter*, a principle repeated, again by this Court, in *Cecil Ward v New India Assurance Co. (Trinidad and Tobago) Ltd.*, Civil Appeal No. 15 of 1998 (date of decision 9 December 2005) where, at [7], *Connell JA*, citing with approval the above reproduced passage of Sir Jack Jacobs, stated that pleadings “govern a civil action from the trial to appeal.”

[20] On the basis of these authorities, it seems to me clear that if the Appellants wished to recover mesne profits in the sum of \$12,000.00, they should have made the relevant application to amend their Writ of Summons under **Order 20 Rule 15(1)** of the RSC. Such action was taken by the claimants in *New Falmouth Resorts Limited v International Hotels Jamaica Limited*, Civil Appeal No. 32 of 2009 (date of decision 15 April 2011) (Jamaica) and

***Mahitani v Castillo; Castillo v Mahitani*, Civil Appeal Nos. 36 of 2008 and No. 2 of 2009 (date of decision 19 March 2010) (Belize).**

[21] My attention has been drawn to the decision ***Bain v Econo Car Rentals Ltd*, Civil Suit No. 1430 of 2005 (date of decision 22 July 2010) (“*Bain*”)**, a decision of the Trinidadian High Court in which the applicant claimed mesne profits in the sum of US \$8,000.00 (approximately TT \$48,000.00). In that case, the rent due under the tenancy agreement was TT \$8,000.00 but the applicant subsequently demanded a rent of US \$8,000.00. The parties entered into negotiations and the applicant proposed a reduced rent of TT \$30,000.00 after consulting the services of a property valuer who gave affidavit evidence that that figure was the fair rental value of the demised property. The statement of claim was never amended to reflect this proposed rent.

[22] ***Rampersad J*** acknowledged the applicant’s failure to amend the statement of claim. However, after reference to Halsbury’s and ***Swordheath*, supra**, he awarded mesne profits in the amount of TT \$30,000.00 on the basis that he had no choice but to accept the evidence of the plaintiff’s expert valuer, since the defendant failed to adduce any comparable market rates.

[23] I feel compelled to express my disagreement with both the reasoning and the conclusion arrived at by ***Rampersad J*** which contravene the principles

adumbrated above which clearly express the view that litigants are, and should be, bound by their pleadings and that where they do not wish to be so bound, they are obligated to seek an amendment to those pleadings (*London Passenger Transport Board v Moscrop, supra, per Viscount Maugham and Lords Russell of Killowen, MacMillan and Wright*). Moreover, the *Bain* case is also distinguishable since it was decided under the Trinidad and Tobago Civil Procedure Rules 1988 which afford a court greater flexibility in the pursuit of justice through the application of the overriding objective. That flexibility does not exist under the old RSC 1982, and it may well be that, in some circumstances which do not need to be detailed here, neither the overriding objective nor the flexibility of the **Supreme Court of Barbados (Civil Procedure) Rules 2008** will justify judicial alteration of the relief sought in unamended pleadings. For these reasons, I decline to adopt the conclusion in the *Bain* case.

**Disposal**

[24] In light of the foregoing, the Appellant's application for a variation of the Order of *Goodridge J* is dismissed, with costs to be agreed or taxed under the RSC 1982.

A handwritten signature in blue ink, reading "R. Austin D. Gibson". The signature is written in a cursive style with a large initial "R" and "G".

**Chief Justice**