

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL JURISDICTION**

**NO. 635 of 1991**

**BETWEEN:**

**NYLOTEX LIMITED**

*Plaintiff*

**AND**

**BARBADOS INVESTMENTS  
DEVELOPMENT CORPORATION**

*Defendant*

*Before The Honourable Mr. Justice William J. Chandler, Judge of the High Court.*

*Date of hearing: 2007 February 1*

**Ms. Faith A. Seale, Q.C., for the Plaintiff**

**Mr. Theodore Walcott with Ms. Anita Rampaul for the Defendant.**

**DECISION**

**Introduction**

[1] This is an Application by Summons filed 1<sup>st</sup> July 2004 to further amend the amended Defence filed 22<sup>nd</sup> June 2001 on behalf of the

Defendant by inserting paragraph 8 into the Amended Defence and renumbering the former paragraph 8 as paragraph 9.

[2] The proposed paragraph 8 is as follows:

*“8. The defendant claims against the plaintiff for use and occupation by the plaintiff of the defendant’s premises at Units 3C and 1B, Building #2, Newton Industrial Estate in the parish of Christ Church for the period 1<sup>st</sup> September, 1990 to 31<sup>st</sup> October, 1995 at \$1,568.05 per month from the 1<sup>st</sup> day of September 1990 to the 31<sup>st</sup> day of December 1991, at \$1,960.06 per month from the 1<sup>st</sup> day of January 1992 to the 30<sup>th</sup> day of September 1995 and the sum of \$2,111.25 for the month of October 1995, being the total sum of \$147,725.81.”*

[3] The full text of the proposed further amended Defence is as follows:

**BARBADOS**

**No. 635 of 1991**

**IN THE HIGH COURT OF JUSTICE**

**CIVIL DIVISION**

**BETWEEN:**

**NYLOTEX INDUSTRIES LTD**

**Plaintiff**

**AND**

**BARBADOS INDUSTRIAL DEVELOPMENT**

**CORPORATION**

**Defendant**

**AND**

**~~ADeB CONSULTANTS LTD~~**

**Third Party**

**Further Amended Defence**

1. The Defendant admits paragraph 1 to 3 of the statement of Claim that the Plaintiff is a limited liability company as alleged in paragraph 1 of the amended Statement of claim but denies that the registered office of the Plaintiff is situated at No. 2 Newton Industrial Park, Christ Church.

2. ~~No admission is made as to paragraph 4 of the Statement of Claim.~~  
Paragraph 2 of the amended Statement of Claim is admitted.

3. ~~The Defendant denies paragraph 5 of the Statement of Claim does not admit that on the 2<sup>nd</sup> day of May, 1990 it offered to rent to the Plaintiff factory premises at Newton Industrial Park, Christ Church or that the Plaintiff accepted the offer as alleged in paragraph 3 of the Plaintiff's amended Statement of Claim.~~

4. The Defendant denies that there was a tenancy agreement between the Plaintiff and the Defendant and that there was an implied term and a breach thereof as alleged in paragraphs 4 and 5 of the Plaintiff's amended Statement of Claim.

4.5. The Defendant further states that if a tenancy came into being and the said premises could not be connected to the public electricity supply, (which is denied) such inability to be connected to the public supply was caused by or contributed to by the Plaintiff. ~~And/or independent contractors employed by the Defendant.~~

5.6. No admission is made as to any loss or damage as mentioned in paragraph 6 of the amended Statement of Claim or at all.

7. The Defendant further states that if the Plaintiff suffered any loss (which is denied) it failed to mitigate its loss.

6.8. The defendant claims against the plaintiff for use and occupation by the plaintiff of the defendant's premises at Units 3C and 1B, Building #2, Newton Industrial Estate in the parish of Christ Church for the period 1<sup>st</sup> September, 1990 to 31<sup>st</sup> October, 1995 at \$1,568.05 per month from the 1<sup>st</sup> day of September, 1990 to the 31<sup>st</sup> December, 1991 at \$1,960.06 per month from the 1<sup>st</sup> day of January 1992 to the 30<sup>th</sup> September, 1995 and the sum of \$2,111.25 for the month of October, 1995 being the total sum of \$147,725.81.

*6.8.9. Save as is expressly admitted herein the Defendant denies each and every allegation contained in the amended Statement of Claim as ~~though~~ if the same were set out and traversed seriatim.*

- [4] The areas of the further amended defence which have been struck through and underlined represent previous amendments to the defence. The underlined areas are delineated in red in the original further amended defence.

### **Grounds of the application**

- [5] Mr. Walcott submits that:
- (1) The proposed amendment raises no factual matters for which plaintiff does not have adequate notice;
  - (2) The defendant's new claim arises out of the same or substantially the same facts already pleaded;
  - (3) Relevant documents are now available or are accessible;
  - (4) The delay in applying was particularly caused by "without prejudice" negotiations between plaintiff and defendant;
  - (5) the delay in filing the new claim was further and particularly caused by the policy of the defendant and the provisions of the legislation governing the defendant to facilitate and encourage business activity including the

business activity which the plaintiff stated that it intended to carry on;

- (6) It is not the policy of the defendant to be involved in unnecessary litigation with occupants of its business estates;
  - (7) The delay in filing the new claim is partially caused by the reluctance of the plaintiff to make full discovery of relevant documents;
  - (8) The new action will not cause prejudice or injustice to the plaintiff;
  - (9) It would be unjust to deprive the defendant of its many claims when the plaintiff has a substantial claim in damages against the defendant;
  - (10) The court in the exercise of its wider discretion ought to grant the relief.
- [6] The Summons for leave to amend was supported by an Affidavit sworn to by Miss Carol-Ann Smith Attorney-at-Law and Legal Officer of the Defendant Corporation and filed on the 1<sup>st</sup> July 2004. She deposed:
- “That the Defendant Corporation was a facilitator of business activity which provided factory space for business purposes having a number of business estates in Barbados.

1. That having access to the corporation's legal documents as part of her duty she was familiar with the occupation by the Plaintiff of the Defendant's premises.
2. [...]
3. That by letter dated the 2<sup>nd</sup> May 1990 the Defendant offered factory space at Unit 3C, Building 2, Newton Industrial Park to the Plaintiff and that it was the responsibility of occupiers to arrange their floor space as they saw fit.
4. That the Defendant is responsible for supplying electricity to the building but the occupier (Plaintiff) is solely responsible for all internal works.
5. [...]
6. [...]
7. [...]
8. [...]"

[7] In paragraph 10 the deponent swore to the chronology of the filing of the proceedings in the matter, namely:

- a. The filing of the writ with an endorsement of claim on the 17<sup>th</sup> May 1991.
- b. No further action was taken by the plaintiff until 1<sup>st</sup> June 1992 when it filed a Notice of Intention to Proceed.
- c. On the 25<sup>th</sup> February 1993 it filed a further Notice of Intention to Proceed
- d. On the 11<sup>th</sup> January 1995 a Notice of Change of Attorney at Law was filed on behalf of the Plaintiff.

- e. A further Notice of Intention to Proceed was filed by the Plaintiff on the 11<sup>th</sup> January 1995
- f. On the 27<sup>th</sup> February 1995 a Statement of Claim was filed on behalf of the Plaintiff, almost four (4) years after the filing of the Writ of Summons.

[8] She further deposed at paragraph 11 that on the 1<sup>st</sup> August 1995 a Defence was filed by the Defendant's then Attorney-at-Law.

[9] In paragraph 12 she deposed that a Summons for Directions was filed on behalf of the Plaintiff on the 8<sup>th</sup> September 1995 and one of the directions applied for by the Plaintiff was for discovery of documents to be made within 14 days.

[10] In paragraph 13 Miss Smith deposed that the Defendant, by order of the 9<sup>th</sup> June 1998, was granted liberty to issue a third party notice and on the 8<sup>th</sup> June 2001 a Statement of Claim was filed on behalf of the Defendant against the Third Party pursuant to a further order of the Court. The Third party filed its Defence on the 9<sup>th</sup> July 2001.

[11] At paragraph 14 of the Affidavit she deposed that, on the 18<sup>th</sup> June 2001, the Plaintiff filed an amended Statement of Claim pursuant to an Order of Court on the 5<sup>th</sup> October 1991 and the Defendant filed a statement of Claim on the 19<sup>th</sup> June 2001. An amended Statement of Claim and amended Defence were filed on behalf of the Defendant on the 22<sup>nd</sup> June 2001.

[12] At paragraph 15 of the Affidavit she deposed that the Plaintiff failed to make full discovery of documents and by Summons filed on the 6<sup>th</sup> July 2001 the Defendant “sought an application for the Plaintiff to produce all relevant documents”. The Application was supported by an Affidavit filed on even date. The Plaintiff replied by Affidavit filed on the 11<sup>th</sup> July 2001 in paragraph 5 of which it stated that up to that date it was impossible to locate a number of documents which the Plaintiff ought to have produced. The Defendant amended the Summons for Discovery having had sight of the discovery then made by the Plaintiff the hearing for specific discovery took place on the 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, and 22<sup>nd</sup> November 2001 but a decision was not delivered until 3<sup>rd</sup> December 2002.

[13] At paragraph 16 the deponent further deposed that at all material times it was the intention of the corporation to give the Plaintiff whatever assistance it could to enable the Plaintiff to carry on its business. The Plaintiff was always aware of all the facts set out in the draft further amended Defence attached to the Summons. The new claim by the Defendant, she further deposed, arose out of the same or substantially the same facts that appeared in the proceedings and all relevant

documents were available or could be obtained by the issue of subpoenas or summonses.

[14] Finally at paragraph 17 she deposed that there were “without prejudice” negotiations in order to avoid unnecessary litigation. Further, that the new action of the Defendant would cause no prejudice or injustice to the Plaintiff which had been primarily at fault for a substantial part of the delay. Miss Smith submitted, therefore, that, in the circumstances, it would be unjust to deprive the Defendant of its new action for a money claim for use and occupation by the Plaintiff of the Defendant’s premises. She also submitted that the Court ought to use its wide discretion to grant the relief sought.

[15] Mr. Walcott submitted inter alia, that the relationship of landlord and tenant never existed between the plaintiff and the defendant. He argues that Nylotex’s occupation could only be “as some type of licensee...” He says that the defendant was given 3 months’ rent free in the premises and that the document which he signed was without prejudice and could not create the relationship of landlord and tenant.

[16] Mr. Walcott further argues that the amendment sought is not a new claim; it arises out of the same set of facts as the plaintiff’s claim. There is some contradiction in counsel’s argument since he refers to

the claim as a new claim in paragraphs 2, 5, 7 and 8 of the said grounds. He also submitted in paragraph 2 that the "...defendant's new claim arises out of the same or substantially the same facts already pleaded."

**The Plaintiff's submissions**

- [17] Mrs. Seale, on the other hand, argues that the proposed amendment introduces a new claim and an original counterclaim. She argues that the defendant has sought to bring an original set off or counterclaim. Counsel also submitted that the plaintiff's claim is in respect of the years 1990 to 1991 only and that to pursue this claim the defendant would have to rely on facts other than those pleaded.
- [18] Counsel further submitted that the claim is barred under the provisions of the Limitation of Actions Act. Further, that to allow the amendment would further delay the trial of the action.
- [19] Mr. Walcott's simple submission on this issue, without more, is that the **Limitation of Actions Act Chapter 231 (The Act)** does not apply to use and occupation.

## Analysis

[20] An analysis of the amended Defence reveals a simple denial of the existence of a tenancy agreement. In paragraph 4 of the amended defence the Defendant pleads:

*“The Defendant denies that there was a tenancy agreement between the plaintiff and the Defendant and that there was an implied term and a breach thereof as alleged at paragraph 4 and 5 of the Plaintiff’s amended Statement of Claim.”*

[21] Paragraph 5 of the Defence states:

*“...even if a tenancy came into being and the said premises could not be connected to the public electricity supply (which is denied) such inability to be connected to the public supply was caused by or contributed to by the plaintiff”.*

[22] There is no allegation in the pleadings that the defendant failed to pay any sum requested of him for the use and occupation of the premises, or that any sum was requested of him, neither is there any reference in the proposed amendment as to the nature of the licence (contractual or otherwise) referred to by Mr. Walcott in his address to the Court.

[23] It seems to me that this proposed amendment may further serve to delay the hearing of this case since the Defendant never pleaded what it considered the nature of the relationship between itself and the plaintiff to be, neither did it plead the basis upon which it proposed to assess the quantum for use and occupation.

- [24] The Pleading is a bald defence and is not headed in the traditional language of defence and counterclaim or defence, set off and counterclaim.
- [25] Mr. Walcott in his address spoke of a new claim being introduced by the proposed further amendment but the proposed further amendment is concluded in language of a defence simpliciter.
- [26] There is no pleading as to the facts relied upon to establish this claim as is required by the **Rules of the Supreme Court** so that the defendant would be able to plead to it by way of defence to the counterclaim.
- [27] It must be remembered that the original pleadings of the plaintiff paragraphs 2 and 7 is that there was a tenancy arrangement.
- [28] What is the nature of the license for which Mr. Walcott argues and what were its terms, are all relevant factors to be pleaded in a counterclaim or set-off so that the plaintiff may be able to respond appropriately to the pleadings?
- [29] A counterclaim is itself a claim and must be substantiated by pleadings of facts. A plaintiff can only plead to a counterclaim if he knows of the facts on which the counterclaim is based. A similar argument relates to set-off

- [30] There is no proposed pleading as to when the relationship (license) ended so as to substantiate the time limit of the claim outlined in paragraph 8 of the proposed amendment. So that an enormous amount of guesswork would be involved if this amendment were allowed as proposed.
- [31] It could lead to further interlocutory proceedings to obtain the terms of the proposed license (which I remind you is not pleaded at all) and would delay an already old case.
- [32] Furthermore, the proposed amendment is in the nature of a general endorsement to which there can be no pleaded defence unless further particulars are pleaded. Counterclaim can be made by service of a pleading embodying the counterclaim.
- [33] A counterclaim is made when it is properly formulated and pleaded and when made it must be added to the defence. It is by its very nature a separate claim which must be supported by sufficient facts to establish the claim.
- [34] The service of a “Notice of Counterclaim” without any previous pleadings is not a proceeding recognised by the **Rules of the Supreme Court**.

[35] With reference to the **Limitations of Actions Act**, Mrs. Seale's point is well grounded that the claim may be barred under the provisions of the **Act**. There was not much argument from Mr. Walcott on this issue.

**Disposal**

[36] Given the length of time, this matter was before the court and the imprecision of the proposed amendment to the pleadings, I am of the opinion that to allow the amendment would further delay the trial of the action since further amendments will be required.

[37] In the circumstances, the application is disallowed.

[38] Costs to be costs in the cause.

**William J. Chandler**  
Judge of the High Court.