

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2009/0123

BETWEEN

[1] ~~EGBERT OWEN SMITH~~
[2] MARY ELIZABETH SMITH VANTERPOOL
[3] WILBERT OWEN SMITH
[4] ELEANOR MELVINA SMITH
[5] ELVIA EUGENIE MERRYMAN
[6] TEDDY LOUISE SMITH
[7] CREIGHTON ANTONIO SMITH
[8] DANIEL MARVIN SMITH
[9] DAVE BRUBECK SMITH
[10] SHANIA MARY ANN SMITH
[11] ORAAL DWAYNE SMITH
[12] DORAN MARTINEZ SMITH

CLAIMANTS

AND

[1] TURQUOISE WATERS LIMITED
[2] ATTORNEY GENERAL

DEFENDANTS

Appearances: Michael Faye for the Claimant
No appearance for the 1st Defendant
Shonice Warner for the Attorney General

2024: February 8th

ORAL DECISION

[1] **YOUNG J:** This decision concerns an application to enforce a suspended possession order made in 2010 in relation to property, the subject of a lease dated 18th April, 1997.

- [2] In 2009 the then Claimant, Egbert Owen Smith, filed a claim form seeking the following reliefs:
1. An Order requiring the Defendant to give up possession of the premises known as Parcel 120 Block 2033B West End Registration Section to the Claimant.
 2. An Order restraining the Defendant whether by itself its servants, agents or otherwise howsoever from entering or remaining on the said premises.
 3. Payment by the Defendant to the Claimant outstanding rent in the sum of \$209,950.00.
 4. Costs.
 5. Such further and other relief as to the Court seems just.
- [3] On 20th January, 2010 the matter came on for trial and upon hearing Counsel on both sides the following order was made by consent:
1. The Defendant shall quit possession of Parcel 120 Block 2033B West End Registration Section (the "Property") by 31st January 2010.
 2. The Order made at paragraph 1 above shall be suspended provided that the Defendant complies with the terms of the schedule hereto.
 3. There shall be liberty to apply.

SCHEDULE

1. The Defendant shall pay to the Claimant the sum of \$60,000 on or before 31st March 2010, such sum shall be for arrears of rent and legal costs.
2. The Defendant shall pay from 2011 an increased rent as determined by the Claimant after independent valuation of the Property.
3. The rent review periods for the Property shall be every 7 years commencing 2011.
4. The Defendant shall pay the adjusted rents strictly in accordance with the terms of the Lease by certified cheque to a person nominated by the Claimant.
5. The Defendant shall stop all construction on the Property and shall not commence any future construction until he receives the written approval of the Claimant or his Attorneys in fact.
6. The Defendant shall otherwise comply strictly with the terms of the Lease registered as Instrument No. 789 of 1997 and every approval required from the Lessor shall be in writing.

[4] The Claimants say that either the first and/or the second Defendant have failed to comply with the schedule, more specifically:

- a. Clauses 4 and/or 6 of the schedule as they
 - i. failed to pay the rent due on the first working day of January in 2021, 2022 and 2023 in breach of clause 3.1 of the lease.
 - ii. failed to pay the property taxes due in respect of Parcel 120 in 2021, 2022, 2023 [ANY OTHER YEARS] in breach of clause 3.1 of the Lease.
 - iii. failed to keep the buildings structures erections and all fences sewers drains or other appurtenances thereto on Parcel 120, together with any addition or improvements to Parcel 120, in good a substantial repair in breach of clause 3.6 of the Lease.
 - iv. failed to construct a marina and shopping centre and other marina related activities on Parcel 120 in breach of clause 4 of the Lease.
 - v. underlet, rented or otherwise parted with possession of parts of the demised premises, not comprising shop units, without the prior written consent of the Lessor in breach of clause in breach of clause 3.3 of the Lease.
- b. Clause 5 of the Schedule to the January 2010 Order, TWL and/or the Crown have proceeded with construction on Parcel 120 after 20th January 2010 without the written approval of the Lessor. In particular, a 2 floor restaurant that was erected on Parcel 120 (which building was damaged by Hurricane Irma) was removed and replaced by a 1 floor restaurant.

[5] The Claimants, therefore, applied for the following reliefs:

1. Declarations that:
 - a. the suspension of paragraph 1 of the Order dated 20 January 2010 imposed by paragraph 2 of such order is no longer operative.
 - b. the Lease dated 18 April 1997 made between Egbert Owen Smith and the first Defendant registered at HM Land Registry as Inst 789/1997 (the "Lease") has been forfeited
 - c. the Incumbrances section of the Land Register for Parcel 120, Block 2033B, West End Registration Section ("Parcel 120") should be amended to delete Entry No 4.
 - d. the leasehold title recorded in at HM Land Registry as Parcel 120/1, Block 2033B West End Registration Section ("Parcel 120/1") should be amended to record the forfeiture of the Lease.

- e. the 2nd to 12th Claimants are forthwith entitled to:
 - i. possession of Parcel 120
 - ii. issue a writ of possession against any persons in occupation of Parcel 120 save the second Defendant.

Orders that:

- a. the first Defendant and anybody else in possession of Parcel 120 save the second Defendant shall forthwith deliver up possession of Parcel 120 to the Claimants.
- b. the question as to what sum is due to the Claimants in respect of arrears of rent be adjourned with liberty to restore.
- c. provision be made for the costs of these proceedings.

[6] Towards the end of his oral submissions King's Counsel for the Applicants revised the order sought to include an additional recital reflecting that the Court had heard Ms. Warner on behalf of the second Defendant. He continued "We're asking you to declare the suspension of paragraph 1 of the order dated the 20th of January 2010, imposed by paragraph 2 of that order ceased to be operative on the 4th of January 2021. Declare that the lease made between Mr. Smith and the First Defendant was forfeited upon that date. 3. The encumbrance section of the Land Register for Parcel 120 should be amended to delete entry number 4, which is the reference to the lease and the land register in evidence before you. That the leasehold title which is Parcel 120/1 should be amended to record the forfeiture of the lease and thereafter it should be closed, and; We are entitled to possession of Parcel 120. In respect to paragraph 5(b), you should declare we are entitled to issue a writ of possession against, and it should, then cross out the words "the First Defendant and" leave the word "any" and then cross out the word "other" so that it will say, "the declaration will be that the 2nd to 12th Claimants are forthwith entitled to issue a writ of possession against any person in possession of any part of Parcel 120. So paragraph 5(b) will actually say that the "2nd to 12th Claimants are forthwith entitled to issue a writ of possession against any person other than the Crown."

[7] Since 2010 the landscape of this matter has changed significantly. The first Defendant, the Company lessee, has been struck off and dissolved (2019) and their Attorney was removed from the record by court order in 2023. The original Claimant has died and the new proprietors were substituted in

these proceedings in April, 2023. The Attorney General has also been added as a party by virtue of an application made by the Claimants who accept that by operation of law any property which belonged to the first Defendant prior to its dissolution would have fallen to the Crown bona vacantia.

[8] The Claimants wrote to the Financial Secretary, the Minister of Finance and the Attorney General on the 23rd February, 2023, enquiring whether the Minister of Finance intended to disclaim the lease. The Crown has not disclaimed to date nor have they made any filings in this matter. They briefly addressed the Court only to state that they had not disclaimed the property or filed any documents and preferred to await the ruling of the Court on the present application.

[9] Issue 1: Has leave been sought Pursuant to Rule 46.2:

King's Counsel in his submissions to this Court stated that if the Court did not grant his application he could alternatively take out a writ of possession. The Court draws attention to Rule 46.2 which directs that a writ of execution (which includes a writ of possession Rule 46.1) may not be issued without permission if;

- (a) any party against whom a judgment or order was liable to be enforced is no longer liable to have it enforced against it;
- (c) 6 years have elapsed since the judgment was entered; and
- (f) the judgment was made subject to conditions.

[10] In the Court's view the present case falls squarely within the conditions outlined above. It is also clear that the Claimants did not bring their application pursuant to Rule 46.2. It was never stated in their application or written submissions, the reliefs sought do not speak to leave in any way and the oral submission made dispelled any doubt whatsoever.

[11] Even if this Court were to consider the application now before it as an application seeking leave, which it is not, then in accordance with Rule 46.3 the Applicants must satisfy the Court of their general entitlement to proceed to enforce the judgment or order and particularly:

- (b) if rule 46.2 applies – as to the reasons for the delay;
- (c) if rule 46.2 (a) or (e) applies – as to the change that has taken place;

- (d) if rule 46.2 (d) or (f) applies – that a demand to satisfy the judgment or order has been made on the person holding the assets and that person has refused or failed to do so;
- (e) that the applicant is entitled to enforce the judgment; and
- (f) that the person against whom enforcement is sought is liable to satisfy the judgment.

Entitlement to Enforce:

- [12] The Claimants say that throughout the many years since the 2010 order there have been various applications before the Court for possession or the removal of the suspension. The Evidence provided by the Claimant in the affidavit of Shaina Mary Ann Smith filed on the 20th February, 2023 was that since the suspended order had been made the First Defendant had often breached its terms causing the matter to return to court on a number of occasions. On none of those occasions was permission given to issue a writ of possession.
- [13] A review of the court record reveals that in January 2014 the then Claimant applied for possession. On the hearing of the matter the parties consented to an order regulating the payment of rent arrears and repairs to be done by the Defendant among other things. In 2015, the court again considered an application to issue a writ of possession on the grounds of failure to pay rent much like it has been alleged now. The court heard the matter and considered written submissions (as there is an order to that effect). An order was made regulating payment of the arrears and setting a date by which the yearly rent was to be paid. Finally and most importantly, rather than issue the writ of possession, the Court invited the parties to take their remedies under the lease. In effect the Court refused to enforce the earlier suspended order thereby affirming that the lease had never been forfeited.
- [14] This Court is not aware of the reasons for the decision but that order remains in effect. It has never been set aside or appealed. This sole reason assures this Court that it can not and must not allow a relitigation of an already determined issue and so any application for permission to issue a writ of possession or otherwise enforce the 2010 judgment must be dismissed.

- [15] The Court states, only because it noticed, that there were no further applications for enforcement from 2015 although the Applicant alleges breaches commencing in 2019. The parties seemed to have accepted that the issue had been settled. It was not until 2023, with a change in Counsel, that this application, now being considered, was made.

The 2010 Order

- [16] If only for completeness the Court must indicate that the application now being made seems deceptively straightforward, it is not. The orders which the Claimants pray further complicate the issue. What the Claimants seek by this application goes far beyond the ambits of the Claim or even the suspended order itself. By way of example, the writ of possession is now to be made against any person in possession not just the first Defendant against whom the suspended possession order had been made.
- [17] It appears, although the Court remains uncertain, that the liberty to apply order forms the basis of the many reliefs which the Claimants now seek. King's Counsel contends that the enforcement would be unworkable unless these various declarations and orders were included. Their very nature indicates to this Court that this procedure could not be correct.
- [18] Lord Mackay of Clashfern in Halsbury's Laws of England 4th ed., Reissue, Vol. 37, 2001, paragraph 1230 explained in relation to the 'liberty to apply' provision:
- "The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it. It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur."

- [19] The problem which the Claimants may now encounter stems in part from the wording of the 2010 consent order. It has perhaps created an unworkable situation and may have been the reason the parties were invited to take their remedies under the lease by the 2015 order.
- [20] An order for possession is the enforcement of a forfeiture - section 55 of the Registered Land Ordinance (RLA). This is because the forfeiture is of the tenant's leasehold interest of the right to possession. Therefore, embedded in an order for possession for non payment of the rent is the fact that the lease has been forfeited. This allows the landlord to terminate the lease early and regain possession of the real estate.
- [21] Ordinarily, the suspension of an order of possession for arrears of rent or other breach is made on the condition that the arrears are paid up or the breach fixed by a given date. At that point the right to pay the rent arrears or address the breach is not an obligation under the lease but rather under the order. Once there is compliance, the order of possession would cease to have effect and the parties would operate under the lease as they did prior. The lessee would then continue to hold the property under the lease because the forfeiture is set aside. If there is no compliance, the order may then be enforced and the lessor could recover possession.
- [22] This order, however, seems to have suspended possession indefinitely and on the condition that the lease in its entirety is complied with. This seems a strange wording and has created an impossible situation. You could not have forfeited the lease, gained the right to possession but suspended it on the condition that the very lease which has already been terminated or forfeited is to be complied with and more so compliance is expected for an indefinite period. Suspension of possession is not the elimination of the right of forfeiture.
- [23] Relief from forfeiture sets aside the forfeiture of the lease on certain conditions, one of those conditions cannot be the general compliance with the lease. It is not a waiver either since the Claimant by seeking and securing the order of possession shows quite clearly that he has no intention of abandoning his right of forfeiture - section 55 (3) of the RLA. He has in fact claimed it and has done so in the most definitive manner - section 55 (2) (b) of the RLA.

- [24] What has been created is a no man's land for both the lessee and the lessor. It seems to be nothing more than a failed attempt to circumvent the 12 year limitation on the enforcement of a judgment as well as the need to bring fresh proceedings for any new breach.

The Now Existent Parties:

- [25] The Claimants have proven that the first Defendant company has been dissolved since 31st October, 2019. If there had been no forfeiture prior, then by the time this application was filed any property which the first Defendant may have owned would have already fallen bona vacantia to the Crown. No orders could be enforced against the first Defendant in relation to any property which is now bona vacantia. This Court has repeatedly refused to enforce possession in these proceedings and has already affirmed by the 2015 order that the lease had not been forfeited in 2010.

- [26] Although the Second Defendant was joined in these proceedings there was never a suspended order made against them and none can now be enforced against them either. This is because the Crown is not bound by any covenants of the tenant nor can it be bound by the 2010 order which was not made against it or stated to bind it.

Disposition:

- [27] For all these reasons the application is dismissed.

- [28] There will be no order as to costs.

**Sonya Young
High Court Judge**

By the Court

Registrar