

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANTIGUA AND BARBUDA

Claim No. ANUHCv2018/0146

BETWEEN

ANTIGUA HANGARS INC

Claimant

and

SFS ANTIGUA OPERATIONS LTD.

Defendant

Appearances:

Ms. Sherrie-Ann S. Bradshaw for the claimant

Ms. C. Kamilah Roberts for the defendant

2021: June 28th

June 29th

2023: May 4th

JUDGMENT

[1] **Drysdale J:** This matter concerns a Claim Form and a Counterclaim, both of which assert breaches of a Lease Agreement made between the parties on 14th August 2014.

[2] Particularly, Antigua Hangars Inc “the claimant”, filed a Claim Form and Statement of Claim on 3rd March 2018 with its amendments on 9th November 2018 against the defendant for the possession of two (2) Hangars and associated spaces, and damages for breaches of covenants. The claim is predicated on an alleged breach of the Lease Agreement between the parties by the defendant and its termination at the option of the claimant. The claimant claims, inter alia:

- (1) Possession of 14,800 square feet of Hangar and associated space in two hangars on lands situate at V.C. Bird International Airport, St. George's in Antigua and Barbuda and registered and recorded in the Land Registry as Registration Section: Barnes Hill & Coolidge; Block 41-2294A Parcel: 118 registered in the name of the claimant and contiguous with Runway 10, of which hangar 1 consists of approximately 6,800 square feet of hangar and office space and hangar 2 consists of approximately 8,000 square feet of hangar, office and shop space.

- (2) An order that the defendant's lease dated 14th August 2014 has been terminated at the option of the claimant as a result of default by the defendant.
- (3) Damages for breach of covenants contained in the lease agreement made on 14th August 2014 between the claimant and the defendant.
- [3] The claimant asserts that the defendant sublet the premises without prior written consent in breach of its agreement and has failed to carry out necessary repairs contrary to the tenant's covenant to repair under the lease which had caused the claimant to incur a loss. Owing to the said breaches, the claimant sought to terminate the lease agreement between the parties.
- [4] On 25th May 2018, the defendant filed a Defence and Counterclaim with subsequent amendments the last being filed on 6th January 2019, wherein the defendant denies the claim against it and alleges a breach of contract on the part of the claimant respectively. Essentially, the defendant avers that the claimant has breached the Lease Agreement by unreasonably withholding its consent to sublet to third parties; has thwarted its attempts to repair the premises by withholding its approval contrary to an established protocol between the parties; and has interfered with tenants' right to quiet enjoyment. On this premise, the defendant seeks several remedies in the counterclaim to include declarations, injunctions, damages, interest and further or other reliefs which may be summarized as follows:
- (1) Declarations that the claimant has unreasonably withheld its consent to the subletting of hangar space to Samaritan's Purse; James Fuller; and third parties.
 - (2) Declarations that the defendant is free lawfully to sublet a portion of the premises to Samaritan's Purse; James Fuller; and third parties without the consent of the claimant.
 - (3) Injunctions to restrain the claimant whether personally or by any agent, employee or other person whomsoever from committing any further breach of Clause 11 of the lease agreement by unreasonably withholding consent to the subletting of premises to third parties, and any breach of the covenant for quiet enjoyment.
 - (4) Damages for breach of contract; and for unlawful interference with the defendant's business.
 - (5) In the alternative, relief against forfeiture of the lease on such terms as the court thinks fit, or compensation for improvements to the property.

BACKGROUND

- [5] The claimant is a company duly incorporated under the laws of Antigua and Barbuda and is the owner of two (2) hangars and associated spaces at the V.C. Bird International Airport. The hangars and associated space

comprise 14800 square feet and registered and recorded in the Land Registry as Registration Section: Barnes Hill & Coolidge, Block: 41-2294A, Parcel:118 registered in the name of the claimant and contiguous with Runway 10 of which hangar 1 consists of approximately 6,800 square feet of hangar and office space and hangar 2 consists of approximately 8,000 square feet of hangar office and shop space.

- [6] The defendant is a company duly incorporated under the laws of Antigua and Barbuda which is a subsidiary of Signature Flight Support Corporation and carries on business as a flight based operation in Antigua for general and private aviation services.
- [7] The parties entered into a Lease Agreement dated 14th August 2014 for a term of ten (10) years at the rent of \$1,000.00 payable on the first day of each month including fees and taxes imposed on the rental property and rent thereafter adjusted upon the first anniversary to \$2,500.00 per month and on the second anniversary and every anniversary thereafter by an annual increase of three per cent (3%). As is customary, the lease agreement contains covenants for both the lessor and lessee to observe. The relevant covenants which forms the bases of the dispute between the parties is as follows:

Clause 3.1 Permitted Use. The premises shall be used as a hangar and for aviation-related purposes, including but not limited to those uses related to the fixed base operation of the Tenant at the airport.

Clause 4 Repairs and maintenance.

4.1 Original Condition. Tenant accepts the Premises “as is” at the inception of this Lease.

4.2 Landlord’s Obligation. Landlord shall be under no obligation to make or perform any repairs, maintenance, replacements, alterations, or improvements on the Premises during the term of this Lease including any exercise of the option to renew.

4.3 Tenant’s obligation. Tenant, at its expense, shall promptly make any and all maintenance and repairs to the Premises in order to maintain the Premises in the condition existing as to the Effective Date, reasonable wear and tear excepted. Tenant shall insure the Premises in accordance with section 6.

Clause 4.4. Landlord’s obligation. Following prior written notice, Landlord shall have the right to inspect the premises at any time during normal working hours to determine compliance with this section 4 or any other terms of this Lease, provided that such inspection shall not unreasonably interfere with the Tenant’s business. Landlord shall also be provided with the ability to gain access in the event of an emergency.

Clause 5.1 Alteration Approval. Tenant shall make no improvements or alterations on the Premises without first obtaining Landlord’s written consent which consent will be given at Landlord’s reasonable

discretion; provided that Tenant shall be free to make non-structural alterations to the interior of the Premises without such prior approval of Landlord. All alterations and improvements shall be made in a good and workmanlike manner and in compliance with applicable laws and building codes.

Clause 11. Assignment and Subletting. No part of the Premises may be assigned, mortgaged, or subleased, or any right of any portion of the property be conferred on any third party by any other means, without the prior written consent of the Landlord in the Landlord's reasonable discretion.

Clause 12.2 Default in Other Covenants. Failure of the tenant to comply with any term or condition or fulfil any obligation of the Lease (other than the payment of rent or other charges) within thirty (30) days after written notice by the Landlord specifying the nature of the default with reasonable particularity. If the default is of such a nature that it cannot be completely remedied within the thirty (30) day period, this provision shall be complied with if the tenant begins correction of the default within the thirty (30) day period and thereafter proceeds with reasonable diligence and in good faith to effect the remedy as soon as possible.

Clause 13. 1 Termination. In the event of a default, the Lease may be terminated at the option of the Landlord by written notice to the Tenant. Whether or not the Lease is terminated by the election of the Landlord or otherwise, Landlord shall be entitled to recover damages from Tenant for the default, and Landlord may reenter, take possession of the Premises, and remove any persons or property by legal action or by self-help with the use of reasonable force and without liability for damages and without having accepted a surrender.

[8] The claimant alleges that the defendant is in breach of several clauses of the lease agreement, allegations which are vehemently denied by the defendant. The defendant has counterclaimed for breach of covenant on the part of the claimant. The basis of contention between the parties is found in the evidence before the court.

THE EVIDENCE

[9] The parties filed seven (7) witnesses statements/summaries in the persons of Ms. Makeda Mikael, Mr. Cedric Henry and B.T. Lewis for the claimant and Ms. Bridget Cox, Mr. Cameron Singh, Ms. Natasha Burton, and Mr. James Fuller for and on behalf of the defendant. At the date of trial however only six witnesses were examined as B.T. Lewis had died.

The Claimant's Evidence

Ms. Makeda Mikael

[10] In summary, Ms Makeda Mikael testified that she is the Managing Director of the claimant. The witness stated that at the date of the Lease Agreement in 2014, the defendant inspected all buildings by their team of property experts and found "no inherent defects in the construction of the office", nor did the team mention any concerns. Accordingly, the defendant took the premises "as is". Per the Lease Agreement, the defendant through its agent is obligated to make prompt repairs and maintain the premises in the condition existing as to the effective date at its expense.

[11] The witness states that sometime in 2016 she met with Ms Bridget Cox (the then Managing Director of the defendant company) advising of repairs to be done on the hangars. The witness deponed further to corresponding with Ms Cox via a letter sent sometime in 2017 advising of the impending hurricane season and the urgent need to effect repairs. The witness states that there is a procedure established between the parties as it concerns repairs which mandates the defendant to produce a repair proposal to the claimant for approval.

[12] It is the witness' evidence that on 19th June 2017 Ms. Cox informed that she had requested quotes to start the repair process. The witness could not recall if the quotes were provided to the defendant nor when the material arrived for the re-commencement of works. On 17th November 2017, the witness inspected the premises and observed that there were major deteriorations of the roof sheeting and the frame structure; and there was a general lack of maintenance of the roof and steel frame, among other things. On this premise, the witness considered that all works were not completed by the defendant as was required to address the existing issues of repairs which resulted in both hangars being compromised.

[13] The witness avers in her witness statement that a letter was sent to the defendant on 6th December 2017 advising of repairs to be effected on the hangars.¹ The witness states further that yet again in January 2018, although some work was done to the large hangar, it was evident that the structural frame had not been cleaned and painted, and the windows which showed signs of deterioration had not been replaced and no works were done to the small hangar. The witness caused a letter to be sent on 17th January 2018 advising of its default of the lease agreement that includes a breach of clause 5.1 by removing the louvres

¹ The court notes that the letter exhibited with an even date was in fact a letter for notice to terminate the lease and the defendant should vacate on or before midday January 31, 2018.

of the large hangar; a breach of clause 4.3 by failing to promptly make repairs in accordance with the report on repairs from Lewis and Simon; a breach of clause 11 by subletting to Samaritan's Purse on 16th December 2017 without prior written consent from the claimant and which is being used in an unauthorized manner. The claimant in that letter advises that the defendant should vacate on January 31, 2018.

[14] The witness stated that on inspection in May 2018, a report was produced on 29th June 2018 wherein the report disclosed that: in relation to hangar 1, some of the floor tiles in the main office area were damaged and had not been replaced; evidence in multiple locations that rainwater enters the building during a downpour resulting in ceiling damage that had not been repaired; required waterproofing maintenance on the roofing sheets have not been done; remaining vinyl tiles in the storage area were soiled as a result of infrequent cleaning as there is oil and grease on vinyl marks on the tiles. In relation to the small hangar, there is evidence of solutions leaking on the floor of the hangar, particularly in the southwest corner of the hangar near the large sliding door. The fixed louvre windows on the east wall of the building were severely corroded and obviously had not been maintained.

[15] On 26th June 2019, the defendant wrote to the claimant advising of the replacement of the louvres, however, the witness states that more work needed to be done in order to bring the louvres to the condition it was upon entering the lease. The witness relies on the report of Lewis Simon made on 19th June 2019 and 26th June 2019. The defendant produced a repair proposal which was seriously deficient as it failed to address the full scope of the issues like a termite infestation, the deplorable and potentially hazardous condition of the storage area in the small hangar as well as the deteriorated state of the fuel office. The witness opined that it seems as if the defendant has been selectively repairing the premises due to convenience and by virtue of said negligence, the hangars are being kept in a poor state of maintenance and are now in a state where remedial works are required.

[16] There had been a continuous breach of the lease agreement owing to the defendant focusing on the wrong hangar. The defendant neglected the small hangar which had danger signs for asbestos exposure that were posted on the doors by the defendant and on entry. There is deterioration of the tiles, grime, termites and mould on the floor and walls. The total state of the hangars and the abandoned fuel office and the hazardous asbestos scare required an immediate ultimatum that the entire property be repaired on a full repair plan. The defendant's refusal to cooperate with the claimant continued to create breaches of the lease regarding entry and works without permission. The claimant states that the defendant establishes an uncooperative approach, especially in its refusal to consult the claimant after a serious current Engineer's report.

[17] The witness deponed that the defendant had stated the room with the asbestos had been fixed and the floor had been cemented. However, upon inspection by the Engineers, it was discovered to be untrue, and the state of the room raised such concerns that the Engineers demanded action.

[18] As it relates to the allegation of harassment, the witness stated that though the defendant had effected works on the large hangar, that plan was not preapproved by the claimant. There are specific materials which ought to be used in hangars for safety concerns. That the claimant demanding that the defendant follows the dictate of the lease and do annual repairs and maintenance is not harassment. The witness states that the Engineer recorded that if a category 1 hurricane arrives on the island, the large hangar will be blown down.

[19] Further, the fuel office was abandoned, and the roof had capsized, there was also a risk of a fire hazard owing to the passage of an electrical wire left exposed. To avoid the company being involved in any accident caused by a falling roof, a "NO ENTRY" sign and locks were placed on the doors. The defendant had removed the locks and signs without questioning their cause or reasons nor did they communicate to the claimant. Additionally, the furniture from the fuel room was removed and the claimant demanded them to be replaced, however, only some were tossed back inside the room and left in a condition which caused mould, decay, and rust. The witness states that the claimant intends to demand repayment for the fuel office furniture package.

[20] Regarding the subletting of the hangars and associated spaces by the defendant, the witness stated that the reasons given to the defendant are legitimate. The claimant rejected the proposal to sublet to Samaritan Purse owing to the fact that a Samaritan Purse employee attempted to disassemble an airport security gate to gain access to the field and on its face, that is enough to refuse approval. Against this background, the witness states that she would never authorise Samaritan Purse to operate from its premises as an independent Operator because Samaritan has presented problems in the past with respect to the breach of the perimeter fence. The repairs to the hangars were incomplete and further, Samaritan Purse refuses to comply with airport regulations. Additionally, Samaritan Purse is a N'registered aircraft. N'registered aircraft are American aircraft which outside of the USA, operate unregulated by Federal Aviation Administration and as such would pose a liability threat to the claimant and its policy of insurance. The hangars are in VC Bird Airport which is governed by ICAO rules and regulations. That the claimant only leases to ECCA registered aircraft to curtail drugs and contraband movements.

[21] Further that the subtenant Samaritan's Purse committed certain breaches by utilizing the space for an improper use as a ground handling facility and storage which breached clause 3.1 of the lease. Further Samaritan Purse's relaxation of the rule and disobedience caused runway 10 to be penetrated by two (2) drug operations slated for aircraft handled by the defendant.

[22] Regarding subletting to James Fuller, the witness states that she has never rented to Mr. Fuller in the past but had engaged Jeff Gillquist to give Mr. Fuller a special rate to perform work on his aircraft. The defendant through Mr. Gillquist offered Mr. Fuller US\$1600 for the 3 weeks, however, the claimant declined and allowed Mr. Fuller to occupy a small space in a corner of another hangar owned by the claimant to save Mr. Fuller some costs.

[23] Regarding subletting to Mr Fuller and Tropical Service Airways "TSA", the witness took issue with them operation as they are all N' registered aircraft.² The witness denies that the claimant's agent ever requested that the hangar space be sublet to James Fuller. The witness states that the claimant also has no profile information on the potential subtenants namely TSA and OECS Aircraft Maintenance Ltd. The witness stated that the claimant not being aware of the businesses which will be conducted by 3rd parties that this could possibly be a breach of its insurance policy in an instant of default.

[24] Finally of importance, the witness denies that any of the claimant's agents or representatives had entered the leased premises without prior written and adequate notice or consent. The witness stated that she has the authority to approach and correct anyone on the ramp that is in breach of security. Further, the witness states that the claimant does not recognise any subtenant of the defendant because permission was not given. The witness stated that she called and communicated with Ms Bridget Cox in relation to this issue. The witness states further that she has spoken several times to Samaritan Purse when its agents were caught breaching security rules by moving people and baggage through the security gates and into the claimant's hangar. The claimant has firmly requested that Samaritan Purse stop bringing passengers and bags through Gate 7 and unto its property. The claimant's ownership and position require regular reporting to ABAA, ECCAA, ONDCP, Customs and Immigration on incidents, irregularities, and the downgrading of the security systems on R10.

² see communication in the letters December 19, 2018, and February 21, 2020

Cedric Henry

[25] The witness deposed that he is a qualified Civil Engineer, and that he was the author of a report produced in 2019. He stated that he first inspected the hangars in 2019 and thus could not speak to their condition in 2014. He also admitted that he was unable to speak on any repairs which may have been undertaken during the period 2014 to 2019. He stated however that although he didn't see any maintenance works at that time, from his own inspection it was evident that some repairs had in fact been undertaken. He admitted that parts of his report dealing with the terms of the lease and claims of the defendant failing to deal with the asbestos issue were upon the instructions of the claimant and that he had no discussion with the defendant about those issues. He stated that he did not have much experience preparing reports such as these and that being engaged by the claimant he simply accepted the information and instructions given by the claimant.

THE DEFENDANT'S EVIDENCE

Mr Cameron Singh

[26] The witness deposes that he is the present Area General Manager of the defendant and has been employed with the defendant since July 2018. At the time of his employment, there was an anticorrosive paint project which he took over from August 2018 to October 2018, which includes the removal of the storage area and its rotten flooring. The defendant also levelled the floor and constructed a cement board to seal off the old doorway.

[27] The witness states further that he had considered repairing the fuel office however having subsequently obtained a report from a structural engineer that confirmed the repairs to be done were not wear and tear but instead a structural defect in the construction of the office which was pre-existing and outside the tenant's obligation to repair. Additionally, in light of the pending lawsuit against them by the claimant, the witness was of the considered opinion that it would not have been economical to spend money on repairs outside their obligation. The witness had caused the defendant's attorney to send a letter to the claimant on 17th November 2018 indicating the same.

[28] The witness sent a letter on 10th April 2019 requesting consent to do anti-corrosive painting on the small hangar; replacement of the louvres previously removed in the large hangar and replacement of corroding louvres in the large hangar, in that letter Mr Singh requested a response by 19th April 2019. Thereafter several communications were had between the parties and ultimately the claimant's representative stated that Mr Singh should follow procedure by indicating the scope of work, a list of materials and dates planned

for the said works. Additionally, the claimant requested a walkthrough of the facility on June 6, 2019, to review the scope of work, which was done, and a follow-up visit on June 14, 2019.

[29] On 6th June 2019, the claimant sent a letter indicating that the storage area was in a state of disrepair and that a possible asbestos issue has arisen. The claimant requested that in order for their approval the defendant should furnish additional scope of work and material to rectify the issue. However, on 17th June 2018, the defendant indicated to the claimant that the previously proposed works were urgent factoring in the pending hurricane season.

[30] On June 12, 2019, the claimant responded indicating it is awaiting an engineer's report in relation to additional repairs and the possible presence of asbestos among other things. The defendant responded indicating that the small office repairs are not related to the proposed works and requested urgent consent to proceed, again referencing the above hurricane season. Mr. Kevin Walsh (an agent of the claimant) responded by indicating that the repair proposal was deficient and again referred to the alleged issues in the storage area and fuel office. Eventually, after a few more communications, the defendant responded to the claimant indicating that the proposed work itself was a basis in the Claim Form in the High Court and the withholding of consent was unreasonable. Further without prejudice to their legal position, they will proceed with the replacement as proposed initially, as consent was not required by their lease agreement. The defendant, therefore, gave notice to the claimant that it will be proceeding with the repairs by way of a letter on June 26, 2019.

[31] The claimant wrote to the defendant advising that whilst the proposed work is necessary, there was still a requirement for more repairs to be done to what is present is only a portion of the required work. The letter also stated that the defendant should still provide a scope of work that would address all the deficiencies. The claimant advises that if the defendant proceeds in the absence of the required information there will be an injunction against them.

[32] The defendant without the consent of the claimant commenced works on the small hangar on 2nd July 2019 and ended on 18th July 2019. The materials were ordered for the large hangar and that project started on 29th July 2019 and ended in late October 2019. The claimant did file an application for an interim injunction against the defendant which was denied on 12th February 2020. The witness states that this is indicative of the claimant's attempt to frustrate the commercial dealings of the defendant.

[33] Regarding the presence of asbestos, the witness stated that there has not been a confirmation of asbestos presence, however, he contracted Chris Bento Projects to sub-floor the room with suspected asbestos. The

witness states further that he met with the Chief Health Inspector to inspect the property and later participated in a meeting where he answered all questions and thereafter there have been no further enquires. The defendant had sent several letters to the claimant dating from 10th October 2019 to 18th November 2019 wherein the witness requested for work to be done to the restroom of the small hangar. On 21st February 2020, the claimant responded requesting an inspection in order for a detailed evaluation to be provided on the hangars prior to giving consent. The defendant objected on the basis that it is unreasonable as a prerequisite for consent, especially in light of the rejection at the High Court of the mandatory injunction compelling the defendant to complete all of the works that the claimant deemed to be required for the premises. Be that as it may, there was a contemporaneous report was done in November 2019 so there was no need for a further report. The witness stated that he recognises that the claimant has a right to inspection and communicated that he will agree to a date and time but not as a precondition for approval.

[34] As of September 11, 2020, the works haven't been completed due to a lack of consent. On June 18, 2020, the claimant wrote to the defendant requesting payment as they wished to do work on the fuel room. The defendant did not agree to this. That the work on the louvres was of satisfactory quality.

[35] The witness deposed that the defendant operates a Fixed Base Operations "FBO" to support general aviation customers and does not own or operate any aircraft itself. That the only reason for leasing the hangars was to sublet hangar space to third party aircraft owners/operators. This is part of the services typically provided by FBO's.

[36] That several complaints were received from Samaritan Purse about harassment from Ms Mikael. In January 2019 Samaritan Purse gave notice that it would vacate the premises and did so by 31st January 2019. The claimant was notified of this by a letter in writing dated 4th January 2019.

[37] In relation to Mr. Fuller, the witness stated that on September 6, 2018, the claimant requested a copy of the permission to sublet to Mr. Fuller. The defendant stated that Mr. Fuller occupied the space at the request of the claimant in 2015 and has been occupying it with no complaint since 2014 to the date of the letter. The defendant also denies that the claimant had raised any previous objection. The claimant objected to Mr. Fuller by way of a letter on 4th July 2019, 21st February 2020 and 10th March 2020. The claimant rejected the defendant's request to sublet Cessna Caravan on the vague basis of continuous breach of the lease agreement which is not accurate. With respect to Caravan Tropic Ocean, the claimant refused on the premise that it had entered into a sales agreement of its airport building including the defendant's space

and “it would be inappropriate for us to make any commitments regarding your hangar lease request”. The defendant responded by stating that the owner would acquire the property subject to SFS Operation’s right under the tenancy agreement and reiterate the request for approval of the sublease.

[38] The claimant refused hangar space subletting for N381TA on the basis that the defendant failed to provide the claimant with written permission for the present occupants' John Fuller and aircraft #V2-LGS which is owned by the Antigua Government. On 8th December 2019, the claimant wrote to the defendant saying that the defendant has failed to produce written permission from the claimant for James Fuller aircraft N459PA and aircraft V2-LGS the government aircraft. The letter asserted that it was a breach and that the occupants be removed immediately and no later than 30 days.

[39] The witness stated that on 12th December 2019, they had previously asked for a request that the claimant ignored. There was another request on 25th January 2020 to sublease to Tropic Ocean and OECS Aircraft Maintenance. The claimant requested information on the aircraft and later rejected permission on the basis that it cannot consent to requests to sublet to Tropic Service Airways which is N registered aircraft and which the claimant had not been provided with profile information. The witness states there is no provision in law or lease agreement, nor did they agree to the restrictions on N-registered aircraft. Additionally, N-registered aircraft are regulated by ECCA contrary to the claimant’s averments. They are regulations which are applicable to foreign registered aircraft operating or maintained in Antigua. The claimant’s position is arbitrary and without reasonable justification. The defendant had provided profile information to the claimant on Tropical Airways, however, the claimant ignored its letter.

[40] The witness states that the defendant had lost business opportunities due to the claimant’s unreasonable objections. In particular the defendant lost the ability to sublet the premises to Tropic Airways effective October 24, 2019, for a year monthly US\$3,675.00, Fly Tropic Ocean Airways for a period of one year starting from 1st October 2019 and OECS Aircraft Maintenance from February 1, 2020, for a year monthly US\$3,675.00 and the possibility that they would have renewed their leases³.

[41] Regarding the persisting harassment and interference with quiet enjoyment, the claimant’s agent Makeda Mikael entered the lease premises without prior written consent. Ms. Mikael yelled at or otherwise harassed the defendant’s employees and employees of Samaritan Purse and Tropic Airways⁴. The witness asserts that the claimant has also reported false allegations to ECCAA and ONDCP. Also, in the latter part of 2019,

³ See paragraph 76 of the witness statement.

⁴ See paragraph 79 of the witness statement.

the claimant entered the premises on at least four (4) occasions without prior consent and notification and placed no entry signs on the door of the fuel office. That Ms. Mikael also disconnected an electrical wire from the A/C unit in the small hangar office causing a significant fire hazard⁵. That Ms. Mikael also blocked the entrance of gate 7 on the morning of Sept 30, 2019. At this time there was an aircraft departing with passengers on a diplomatic flight. Gate 7 is the primary gate access to runway 10 and the defendant's FBO operations. This behaviour was repeated on 20th June 2020 and 28th July 2020.

[42] On 16th October 2019, the claimant wrote a letter to the defendant that it had participated in a breach of security by removing a helicopter owned by Calvin Ayre from its hangar to a hangar owned by Ayre. This letter also alleged that the defendant failed to provide a report to its engineer. The claimant claimed that the defendant abandoned the fuel office which had caused the building to be condemned until repaired. The letter purported to invoke clause 13.1 and gave the defendant thirty (30) days to vacate the hangar. The defendant responded by 21st October 2019, denying these assertions.

[43] On 20th May 2020, the claimant wrote to the defendant alleging that it abandoned the annex to the small hangar "including the unsupervised removal, transportation and illegal dumping of asbestos" and that the claimant had decided to take over the building and make its own repairs. This letter indicates that the claimant would be changing the locks and beginning repairs as of that day May 20, 2020, and requested that all contents be removed from the annex. The claimant changed the locks on May 22, 2020, and has restricted the defendant's access to the fuel office since that date. Ms Mikael has entered the leased premises on numerous occasions without notice to the defendant in the period since late May 2020.

[44] The defendant wrote to the claimant on June 18, 2020, denying its allegations and reiterating the defendant's position on the fuel room and restriction to the fuel room is a breach of the lease agreement. The claimant wrote to the defendant on 11th August 2020 and 18th August 2020 which was sent by Sowerby Gomes indicating that the claimant is engaging in repairs and construction of the annex roof and required any equipment or supplies located in the small office occupied by our sub-tenant, James Fuller to be removed. The claimant also demanded that the defendant remove Mr Fuller from the small office space so that it could finalize the construction of the roof. If the defendant doesn't clear the room within 24 hours the claimant would do it by itself. The small office did not need to be vacated to accommodate the repairs to the roof of the fuel office.

⁵ See paragraph 89 of the witness statement.

[45] Through video surveillance observed on 19th August 2020 and 20th August 2020, the entire roof of the annexed section had been completed and then later the portion of the roof above Mr Fuller's office only was removed. The defendant objected to this unlawful conduct through its attorney and for the claimant to cease and desist for interfering with their rights as a tenant and quiet enjoyment. On 21st August 2020, the claimant took immediate steps to replace the roof. The claimant raised an issue about a boat temporarily placed in the Hangar from August 21 to 23, 2020 due to an imminent tropical storm. The boat had come through gate 7 where all protocols were followed, and Antigua and Barbuda Airport Authority had not complained about it. The claimant had written to the defendant on August 24, 2020, raising an issue with this storage. The claimant objected on the basis that the usage is not appropriate as it is not for aviation purposes and the boat was not checked.

[46] On 27th August 2020, the claimant wrote a letter to the defendant through its attorney that it was going to determine the lease and re-enter and retake possession on the premise that the defendant breached the Lease Agreement in bringing a boat into the hangar and subleasing to N-Registered aircraft. The claimant advised that the defendant should remove all property by midday 15th Sept 2020, and if fail to comply the claimant will exert reasonable force by self-help. The witness contends that it was not a breach and even if so, it was remedied before the letter was sent. Additionally, subleasing to N-registered aircraft is not a breach and is before the High Court. The claimant also falsely accused the defendant of clandestine, unlawful, and unauthorized movements and copied it to ONDCP Antigua and Barbuda Airport Authority and Comptroller of Customs. The claimant has exposed the defendant to reputational risk due to harassment, and unreasonable behaviour of relaying false reports to various authorities. The claimant's behaviour has escalated during his time as General Manager and threatens to unless restrained by the court.

Bridget Cox

[47] The witness deponed that she was previously employed as the General Manager of the defendant with responsibility for both Antigua and St. Kitts and Nevis during the period September 2015 to August 2018, and was involved during the transition period to the new General Manager.

[48] Sometime in the spring of 2017, the claimant started to complain about property repairs. On 16th June 2017, Mr Kevin Walsh sent an email to the defendant complaining about the state of the hangars, which he stated needs to be remedied within thirty (30) days, in default of which the defendant would receive a notice to terminate the lease. The witness stated that she informed Mr Walsh of being in the process of getting quotations for certain repairs to be done on the premises.

[49] The witness encountered difficulties as there were limited companies in the jurisdiction that had the capacity and expertise to do the required work on the hangars and she also found that some of the companies were busy and unresponsive. On 19th June 2017, Harrington Building and Construction and Linton Mark Contractors came to do walks around the hangars and a request was made for a quotation from both companies. Harrington did not provide one and Linton indicated that their engineer was on vacation which would delay a quote being provided. In the interim, the witness stated that she has tried contacting a few US companies and other local engineers.

[50] Linton sent a quote on 6th August 2017. The witness stated at paragraph 22 that after obtaining the quote she had to seek approval per their corporate approval process. A draft was submitted for approval on 9th August 2017, which then had to go through the company's internal project approval process. The witness stated that she received approval for the project on 18th August 2017, and proceeded to order the materials. During the month of September, three hurricanes hit the Caribbean region which caused a delay in shipment of the supplies. Mr. Walsh sent a letter of termination on 28th September 2017, effective 30th September 2017. Upon advice from the defendant's attorney Mr. Rinka, the witness was informed that in the circumstances there was no legal premise to terminate the lease.

[51] On 16th October 2017, work commenced on the hangars with further quotations and approval in November of that year. Work was re-commenced on 21st November 2017, with a projected date of 3 weeks to complete. On 6th December 2017, the claimant served another notice to terminate on basis of breach of clause 4.3 and failure to complete obligation per notice dated 26th July 2017. That letter indicated that the defendant should vacate on or before midday 31st January 2018.

[52] The General Counsel responded on 15th December 2017 stating that the email sent in July was not proper notice as it was not addressed to specified recipients or delivered via one of the approved methods in the lease. The work on the large hangar was completed on 15th December 2017, and more work was being done thus no default had existed at the time of the letter to terminate. On 12th January 2018, the claimant's attorney sent a letter to the defendant that they failed to promptly conduct maintenance and had breached the lease agreement by removing the louvres without prior consent and the defendant should vacate by 31st January 2018. On 18th January 2018, the witness stated that she sent an email to Ms. Mikael for approval to do repairs on the fuel office and restroom facilities of the small hangar. The claimant responded by saying that it expects the defendant to vacate on 31st January 2018. The witness responded by denying there is a basis for termination. Without the claimant's work approval, the defendant conducted repairs in

February 2018 to the bathrooms in the fuel office including the replacement of the toilet, building a new vanity, installation of new facets and changing toilet seats. This work was completed by Darren Graham.

[53] On 23rd March 2018, the witness sent an email requesting approval having sourced a contractor to address certain concerns in the fuel office attached to the small hangar. On 29th March 2018, the defendant was served with a claim seeking possession of the leased premises and an order that the lease be terminated.

[54] The witness states further that during the period of October 2017 to December 2017 extensive work was done on the hangars which include a replacement of sheet side rails on the eastern side of the large hangar, replacement of the bottom rail of the large hangar, repairs to the roof of the large hangar, and structural repairs to the large hangar. Between January 2018 to March 2018, there have been repairs to the fuel restroom. The report from Lewis, Simon and Partners of July 5 Nov 27 and January 2018 was not an accurate representation of the maintenance and repairs which the defendant was obligated to perform pursuant to clause 4.3 of the lease agreement. Further, at the time of filing the claim, many of the observations were rectified and or scheduled to be rectified.

[55] Additionally, some of the observations from Lewis's report existed before August 2014. These pre-existing defects include leaks in the roof of the small hangar office, cracks in the tiles and defects in the condition of the fuel office. The witness states that upon reviewing the company's record she discovered a letter dated 20th August 2015 from the Fueling Department to the claimant complaining of a build-up of mould in the office and lunchroom, flooding in both rooms and broken tiles at the front door. This letter is indicative that the complaint was already brought to the claimant's attention some six (6) months prior to the sending date.

[56] In relation to the louvre of the large hangar, it was done to facilitate repairs and the defendant was advised by the engineer not to replace it as it allowed excessive moisture that causes an increase in corrosion. The defendant requested permission for the non-replacement of the hangar or a substitute from the claimant. This was not approved, and the louvres were eventually replaced.

[57] The defendant had requested permission to sublet to Samaritan Purse, however, the claimant had refused permission on the same basis as expressed earlier in Mr Cox's witness statement. On 15th December 2017, the defendant notified the claimant that their refusal was unreasonable and that it will be entering into an FBO space permit with Samaritan Purse effective 16th December 2017 for a 12-month period. The claimant sent their objections to this arrangement on 19th December 2017 and alleged an additional breach

of using the premise as a cargo storage handling facility. The defendant responded through Mr. Rinka stating that there is no reasonable basis for refusal and denies the alleged usage. On 29th June 2018, the claimant's attorney responded stating Samaritan expanded its operations and established a Part 145 Operation for a N'registered aircraft which was causing security irregularities. The defendant responded through Mr Rinka on 20th August 2018 denying that Samaritan Purse has expanded their operations or operating a Part 145 aircraft repair centre. At that time Samaritan Purse was conducting light maintenance on its own aircraft.

[58] The witness stated that to the best of her knowledge, Samaritan Purse had acquired all necessary authorization from ABAA and the Government. Attached is a copy of letters dated 20th July 2018, from ABAA to Samaritan Purse granting permission for self-handling. A letter dated 16th October 2017, from the Ministry of Civil Aviation to Samaritan granting a waiver of Navcon and Landing fees. A letter dated 8th January 2018 from the Government of Antigua and Barbuda to Samaritan Purse documented waivers and exemptions.

[59] The witness stated that the security concerns of the claimant were misplaced as the defendant has never received any complaints about Samaritan Purse from ABAA which is the regulatory body responsible for the security at the airport in relation to the operations of Samaritan Purse and the conduct of its employees. See [74]. The isolated incident before the defendant had sublet to Samaritan Purse was resolved and that employee was sent back to the United States.

[60] The witness states further that N'registered means an aircraft registered in the United States. There is no prohibition in the Lease Agreement against subletting to N-registered aircraft. These aircraft are also subjected to Eastern Caribbean Civil Aviation regulations and in particular, there are regulations which are applicable to foreign registered aircraft operating or maintained in Antigua. Further "N" registered aircraft must comply with the security protocols and laws as enforced by ABAA.

Natasha Burton-Jacobs

[61] The witness states that she is currently a duty manager of the defendant and assumed this role in August 2014. Prior to employment at the defendant, she was employed with FBO 200 Antigua Limited from 2001 to August 2014 and her last position was as an operations supervisor. FBO 2000 Antigua Limited previously occupied the hangar space and used it as part of its FBO Operations. She is therefore familiar with the conditions of the premises before the lease agreement between the parties.

[62] In relation to the fuel office, as annexed to the small hangar, this office space had several issues prior to the defendant's occupation which includes leaks from the ceiling on the wall and also leaks in the mess room area. The witness states that she also recalls that there were cracked tiles on the floor at the entrance throughout the office which were covered by "FBO 2000" mats to prevent tripping. The floor of the fuel office was uneven which may have caused the tiles to crack. The witness states that she recalls that the employees had complained about the condition of the fuel office to the claimant at the time. At various points, Ms Mikael would do ad hoc work on the fuel office, but this work was not extensive and never fully or adequately addressed the various problems. The defects in the fuel office were therefore still present when the defendant had entered into the lease agreement.

James Fuller

[63] The witness states that he previously enjoyed a good relationship with Ms Mikael to the point he would consider them friends. In 2015 he made arrangements with her to help him obtain hangar space with the defendant. She introduced him to the representative of the defendant, and she asked the defendant to sublease hangar space to him. From about September 2015, he has sublet hangar space in the small hangar from the defendant. The witness states further that he has been occupying the space for several years before an objection was raised in 2019. Mr Fuller avers that the claimant described it as "friendly fire" as she wanted the defendant out. The witness states that as time went by her conduct towards the defendant escalated and the harassment towards him intensified and that Ms Mikael kept telling him to come out of her hangars and said she was going to get him and Signature out of her property. She has never raised any issue with him at the time of her intervention for subletting that his hangar was N - registered or any other issues with his presence. The witness states further that he is aware from his observation that Ms Mikael has allowed other N-registered aircraft in her other hangars.

[64] On August 18, 2020, he was present and saw that the contractor employed by the claimant replaced the roof of the annex of the small hangar which includes the office space occupied by himself. The roof was completely replaced and on August 19 and the contractor removed a small section of the roof just above his office. This was done just before the passage of a storm on August 21, 2020, to August 22, 2020, and therefore left his equipment and items exposed to the elements. The witness states that he believes that this was a deliberate attempt to force him out of the office. On September 1 the roof was replaced but he remained concerned about future harassment and other unlawful conduct from the claimant's representative.

ISSUES

[65] The issues which fall to be determined are:

- (1) Whether the claimant had a legal basis to terminate the lease agreement? This issue subsumes the narrower issues as to whether the defendant failed to effect necessary and prompt repairs in contravention of its covenant to repair under the lease agreement; and whether in the circumstances, the claimant unreasonably withheld its consent from the defendant to sublet the hangar spaces to third parties; and to effect alteration on the two hangars.
- (2) Whether the defendant is entitled to injunctive relief in the manner pleaded in his counterclaim, on the bases of a breach of quiet enjoyment and any findings of the claimant unreasonably withholding consent to subletting to third parties?
- (3) Whether in the circumstances, the claimant is entitled to an award for damages? If negative, whether the defendant is entitled to an award for damages for breach of contract and/or unlawful interference with its business?
- (4) Taking the circumstances in the round, whether the court ought to exercise its discretion to grant the defendant relief from forfeiture of the lease? In the alternative, whether the defendant is entitled to compensation for improvements on the leased premises?

[66] The resolution of issues number 3 and 4 which are alternative remedies sought by the defendant in its counterclaim, is dependent upon the conclusion of the preceding issues to be discussed in the following.

Issue no.1

Breach of clause 12.2

[67] In its stated case, the claimant pleads that the defendant has committed violations of the lease agreement, including a failure to maintain and repair which, among the other breaches, warrants the termination of the lease at the election of the claimant. Particularly, the claimant avers that the defendant's ongoing breach to repair per the Notice to Repair dated 6th December 2017, not only contravenes clause 4.3 but also contravenes clause 12.2 of the lease agreement by failing to conduct repairs in a timely manner. The claimant argues that the demised property is in a state of disrepair which is consequent attendant on the defendant's failure to fulfil its obligation under the lease.

[68] The defendant vehemently contests the claimant's averment by contending that the referenced notice to repair does not constitute proper notice under the lease agreement, thus the defendant is not in breach of clause 12.2. Further, the defendant has satisfied its duty to repair per clause 4.3 of the lease, and the

present defects in the premises fall outside the defendant's scope of duty. Therefore, the claimant has no legal basis to terminate the agreement.

[69] Essentially, the parties' complaints concern the validity of a notice to repair and the consequences flowing therefrom, the scope of the tenant's duty to repair, and the question of whether there was compliance with the defendant's repair duties.

[70] It is trite law that a lease agreement is a contractually binding agreement, not referable to any other relationship between the parties. Accordingly, the clauses in the agreement are construed in accordance with ordinary contractual principles of interpretation. To give effect to the true intentions of the parties, any clause in question must be viewed in the context of the document as a whole.

[71] Clause 12.2 stipulates instances of defaults to the lease agreement, wherein there is a requirement that written notice is provided to the tenant to remedy the default. By the language of the clause, it places the onus on the landlord to provide written notice that accords with clause 15.3 (method of service). Both provisions are to be read conjointly to give effect to the true intentions of the parties. The provisions are interpreted to mean that a default of the lease agreement on the part of the tenant only arises when there is a breach of clause 12.2. Clause 12.2 is triggered when a notice is issued in accordance with clause 15.3. Otherwise, the landlord will be entitled to some other remedy⁶. On this premises, therefore, it also follows that a notice to remedy a breach of covenant ought to precede a notice to terminate the lease agreement at the option of the landlord.

[72] Regarding the questioned notice, the court observes and concurs with counsel for the defendant that the notice sent on 6th December 2017 was a Notice to Terminate the lease and not a Notice to Repair as alleged by the claimant. The implication being that the Notice to Terminate for a breach of covenant without prior written notice to remedy the said breach was an improper notice. Interestingly, however, counsel for the defendant addressed the content of that termination notice. The notice in December advises the tenant to vacate the premises before 31st January 2018 and alleged that the tenant failed to promptly conduct repairs per the notice to repair dated 26th July 2017 in contravention of clause 12.2.

[73] The court notes that the claimant did not advance the July notice on its case. Nevertheless, counsel for the defendant argues that the referenced notice was in fact not an effective notice per the lease agreement.

⁶ There are instances where the landlord may be entitled to some other remedy. See Sampson Owusu "Commonwealth Caribbean Land Law", p. 641, where it is stated that where there is a breach of a covenant other than a covenant for payment of rent, the landlord is entitled to an award of damages.

The notice did not comply with clause 15.3 as it was not sent by a specified method of service, it did not disclose the repairs to be conducted with reasonable particularity and it was not addressed to the specified recipients. Learned counsel, Kamilah Roberts, argues that the construction of clause 15.3 mandates strict adherence to the particulars, and the absence of the specified requirements of clause 15.3 translates to mean that the notice could not have been effective. The claimant's witness, Ms Mikael, acceded to this point under cross-examination. Accordingly, the court finds that the notice dated 26th July 2017 could not constitute an effective notice as contemplated by the parties under the lease agreement.

[74] Based on the foregoing, the court does not find that the defendant breached clause 12. 2 of the lease agreement, thus there is no legal basis for the claimant to terminate the lease per the notice dated 6th December 2017. Further, it is worthy of note to mention that on the evidence and pleadings before this court, whilst there have been several communications between the parties for a need to conduct repairs, there appears to be no instance in which clause 12.2 was triggered.

Breach of covenant to repair

[75] The claimant argues that there is a continuous breach of the defendant's obligation to repair the premises in a timely manner. On this basis and subsequent to the notice sent in December 2017, the claimant again sought to determine the lease by way of a notice sent on 17th January 2018. Additionally, the claimant alleges further breaches of covenant to include the breach of the alternation clause for the non-replacement of two louvres; and the covenant not to assign or sublet without the claimant's prior written consent, both of which will be discussed further below.

[76] The defendant's obligation to repair is founded in clause 4.3 of the lease agreement. The specific covenant requires the tenant to keep the property in a state of repair giving due allowance to the age, character, and locality of the demised. The covenant obliges the tenant at his own expense to keep the premises in a state a reasonable-minded owner would keep them to maintain the condition of the property at the commencement of the lease. The object of the covenant is to protect the reversionary interest of the claimant from the voluntary and permissive waste of the tenant for the duration of the lease. The stipulation to conduct repairs promptly is to protect against resulting damage flowing from a state of disrepair of the premises. The duty to repair is occasioned by the property falling into a state of disrepair. Sampson Owusu at page 592 citing the authority of **Holding Management Investment Ltd v Property Holding and**

Investment Trust Plc⁷ informs that “[A] duty to repair arises where the condition of the demised property has deteriorated. The existence of the duty is determined by considering the particular covenant, the terms of the lease, the condition of the property at the time of the demise – age and locality, the nature of the defect, and the costs of repair as well as the lifespan of the property”.

[77] In addition, the duty to repair is a continuous burden being imposed on the defendant on each occasion of disrepair. In the circumstances of this case, a breach of clause 4.3 will entitle the claimant to an award in damages where it is claimed, after having determined that there are some other bases to terminate the lease agreement as the court did not find any instance of default to repair the premises per clause 12.2. Clause 14.1, so far as is relevant, expressly provides that “upon ... termination on account of default, [sic] tenant shall ... surrender the premise in broom clean condition, reasonable wear and tear excepted.” The claimant is entitled to terminate in instances of default. A breach to repair, unless clause 12.2 is triggered, is mutually exclusive. The landlord will be entitled to recover the cost of repairs as best evidence of the diminution in the value of the property towards the end of the term of the lease or sooner determined unless evidence is led to establish that the diminution is much less than the cost of repairs⁸. The question to be answered is whether there is a diminution in the value of the property.

[78] Regarding the state of repair of the questioned property, evidence was led by both the claimant and the defendant. The claimant led evidence from the reports conducted by Lewis Simon & Peters to bolster its position that the defendant failed to conduct the repairs within a timely manner. I pause here to note that this is documentary hearsay and for that reason appropriate weight will be given to it.

[79] It can be gleaned from the evidence before this court that the tenant’s duty to repair arises as far back as June 2017. Based on the evidence adduced, the claimant communicated a need to repair to the defendant sometime in June via email. This court notes also that there were two reports conducted by Lewis Simon & Peters on 5th July 2017 and 27th November 2017 prior to the notice to terminate the lease agreement in December of that year.

[80] The July report discloses that in the large hangar, there is a need for anti-corrosive paint work on the steel structure element, the side panels and roof had signs of holes some of which are to be replaced. On the interior wall, there were water stains due to the ingress of rainwater. Regarding the side panels, several

⁷[1990] 1 All E.R. 938, 945 .

⁸ See Sampson Owusu p. 642

metal screws have rotted and are incapable of holding the panels to the siding which evidences advanced corrosion on the metal windows some of which need to be replaced. Rotted screws also exist on the roof.

[81] The small hangar shows that the structural steel frame section is in a similar condition to the large hangar frame. In the attached section the timber floor in the northern room has failed and the concrete floor in another section has heaved due to the infiltration of water runoff. All of which need immediate attention due to the impending hurricane season. The report in November evidenced a sustained condition of the two hangars wherein the reporter stated that the condition of the roof sheeting and the steel frame is indicative of a lack of maintenance for at least two (2) years. The reporter observed however that at the time of the visit on 15th November 2017, work was being done to the southern side of the large hangar.

[82] These reports were brought to the defendant's attention. The reports establish that the defendant was under a duty to repair per clause 4.3 of the lease agreement, at the very least, as of the date of 5th July 2017. Clause 4.3 prompts the defendant to make the necessary maintenance and repair within a reasonable time. Where time is not stipulated in the agreement, clause 15.6 states that time is of the essence of the performance of the tenant's obligation. In clear language, the defendant was under a duty to perform per clause 4.3 of the lease within a reasonable time and not within the thirty (30) days stipulation under clause 12.2 of the agreement.

[83] In this regard, counsel for the defendant argued that the evidence adduced by Ms. Cox on behalf of the defendant evinces that it requested quotes for repairs in June, which is before the email was sent by the claimant company. The court observes that this was also affirmed in the witness statement of Ms Mikael, witness for the claimant. Counsel argues further that the defendant obtained internal company approval and ordered material in August which was delayed due to an active hurricane season. The material arrived sometime in October, and work began in the period of October 2017 to December 2017.

[84] The following works were conducted, replacement of sheet side rails on the eastern side of the large hangar; side sheets of the large hangar; and bottom rail of the large hangar. Repairs were done to the roof of the large hangar and structural repairs to the large hangar. The court notes that it is not clear from the evidence what constitutes structural repairs. Be that as it may, owing to the countervailing circumstances of delay, the court is of the opinion that the defendant acted promptly to conduct repairs in accordance with clause 4.3 as of the date of the December notice, albeit incomplete, as there were more works to be done on the large hangar and works to be done on the small hangar.

[85] There was a further report done by Lewis, Simon & Partners dated 5th January 2018 which disclosed that the inspectors visited the site on 19th December 2017, where works were still being done on the premises however, there was no anti-corrosive paint work done, the windows had not been replaced and no work had been carried out on the small hangar. It is not clear from the evidence what further work was done between 19th December 2017 to 17th January 2018 when the claimant sent a letter of notice to terminate the lease as of 31st January 2018.

[86] From the evidence, there had been subsequent communications between the parties regarding repair works to be conducted on the hangars. From the period February 2018 to March 2018 before the initiation of the claim by the claimant, the defendant had requested preapproval for work to be conducted on the fuel office which was denied. There is evidence that the defendant without the claimant's approval conducted repairs to the bathroom as indicated in Ms Cox's witness statement above which will not be reproduced.

[87] There is cogent evidence before this court, one of which counsel for the defendant has argued lends support to the assertion that the defendant company does continuous repair work on the property. This court agrees with counsel. The report of Lewis on 8th June 2018, a report commissioned by the claimant company, and was made after the filing of the Claim Form in this matter for a breach of repair, evidence that good maintenance generally has been performed on the building given its locale near a harsh salt spray environment. The windows, roof and side sheets have also been replaced. However, that report calls for the replacement of tiles in the office, repairing the damaged ceiling, sealing the roof, repairing the sprouting, replacing vinyl tiles, replacing two (2) windows, power washing and sanitizing hangars.

Asbestos presence in the storage area

[88] The claimant argued that there was an issue of asbestos in the fuel office which needed immediate attention that the defendant conveniently ignored. The defendant asserts in the witness statement of Mr Singh that the presence of asbestos has never been confirmed, and even in the absence of confirmation the defendant had taken positive steps to remove the suspected asbestos. The claimant took issue with the removal of the tiles on the basis that the works done were not preapproved by it and there has been no evidence of the safe removal of the asbestos tiles.

[89] Lewis, Simon & Partners prepared a report dated 26th June 2019. Essentially, the report outlined the following:

There are signs of rusting in the large hangar of the structural members and girts under the two windows which are so severe there are holes in the girts. A room that appears to be kept closed

with badly cracked and deformed vinyl asbestos tiles on the floor, with termite traces present. In the smaller hangar, there are termite trails, and water-damaged ceilings indicative of roof leaks damaged badly, damaged ceramic floor tiles and damaged rainwater gutters. The interior is generally unkept. Of immediate concern was the severe rusting with the loss of material girts below the windows on the eastern side of the larger hangar. With the recommendation that the deteriorated first be removed immediately.

[90] The report went on to state further that “in June 2018, Mr. Simon (now deceased) noted that there are outstanding repairs which should be addressed and mentioned in particular the steel frame and windows on the larger of the hangars”. He stated then that ‘the deterioration of the structural elements on the hangars will reach a state where major remedial work will be necessary.’

[91] Counsel for the defendant challenged the veracity of the report and the weight to be placed on the evidence. Counsel avers that the concluded statements of the report are an inaccurate representation of what was previously stated. The court finds that the concluding statement was inconsistent with the June 2018 report adduced in evidence. The court also observes that there is an established protocol between the parties for works to be preapproved by the claimant before the defendant can commence work on the premises.

[92] As indicated by Mr. Singh, at the time at which the report was made, there were requests made by the defendant to the claimant for repairs to be conducted, which was rejected by the claimant on the premise that the scope of work requested by the defendant was inadequate. There are in evidence works which were done subsequent to the report without the claimant’s approval as the defendant opined that there is no basis for approval to conduct the anti-corrosive paint work on the small hangar. In relation to the rusting and replacement of the girts below the windows on the eastern side of the large hangar, this was resolved by the work conducted by the defendant sometime between July 2019 and October 2019. The court accepts that these works were done.

[93] There is also in evidence a report of Cedric Henry dated November 14, 2019, on behalf of the claimant to establish that the premises are in a state of disrepair. Counsel for the defendant argues that the report of Cedric Henry dated November 14, 2019, was heavily influenced by Ms. Mikael which was disclosed under cross-examination where Mr Henry has admitted that there were certain highlighted paragraphs in the report which were based solely on his discussion with the claimant without any input from the defendant.

- [94] Against this background, counsel enjoined this court to review the evidence with caution. Additionally, counsel avers that the report generally is not relevant to the critical matters which must be established by the claimant to discharge the burden of proof and therefore does not assist the court as the report is unable to speak to the state of the hangars in 2014, and the works which were done by the defendant at the time of the purported notice to vacate and at the initiation of the claim.
- [95] Mr. Singh indicated that between the period of 10th October 2019 to 18th November 2019 requests were made to conduct work on the restroom of the small hangar, requests to which the claimant only responded on 21st February 2020 requesting an inspection. The witness advances that as of September 11, 2020, the works haven't been completed due to a lack of consent from the claimant.
- [96] In taking the evidence in the round, the court has observed the conduct of the witnesses generally in the proceedings, the court also considers the contemporaneous reports of the inspectors occasioned by the claimant which evidences the deteriorative state of the property, and the court finds that the report of November 14, 2019, was engineered by the influence of the claimant's general manager Ms Mikael which affects the weight of that evidence. Ms Mikael has not endeavoured herself before this court to be a witness of credit, and where there is an absence of cogent evidence before this court, the court finds that witnesses for the defendant generally are to be believed. The court finds that the property, at the very least as of November 14, 2019, was in a state of disrepair.
- [97] However, it is observed that the general disposition of the defendant is to put the premises in a state of repair. The court is cognizant of the fact and does find that there is a pattern, modus operandi if you may, of the claimant's general manager withholding consent to repair, allowing the premises to fall to a state of disrepair, then conveniently conducting an inspection of the property. Thus, the court views the evidence with a measure of caution. Whilst the defendant does not escape its obligations to repair, the court is of the opinion that in circumstances where the claimant's general manager has frustrated the repair process in withholding consent thereby causing resulting damage in the reversion, the claimant cannot be rewarded in light of such conduct as the court will not countenance the behaviour of the claimant. Additionally, the defendant was in the process of doing repairs on the hangars, the court does not find that the reports lend themselves to establish that the defendant was in breach of its duty to repair, instead, the report made alive the issues of repairs at that each given date.

STRUCTURAL DEFECTS

[98] There is a dispute between the parties which surrounds the repairs of the fuel office room. The crux of the argument from counsel for the defendant is that the repairs needed for the fuel office fell outside the scope of duties for the defendant, as there were structural defects which existed before the commencement of the Lease Agreement. The claimant rebuts the defendant's assertion and states that the defendant company took the premises "as is" per Ms Mikael's witness statement, and is obligated to conduct said repairs, failure of which is a continuous breach of the Lease.

[99] The first question to be addressed is who bears the burden of repair. At common law, there is no implied obligation on the landlord to do repairs⁹. The landlord's obligation usually arises by a statutory imposition or an expressed lease agreement clause. Per the repair covenant of the instrument, the obligation to repair rests on the defendant as a tenant. It follows that it is necessary to assess whether the repair works fall within the repair covenant.

[100] In taking the property "as is" the defendant is under no duty to make new what was not given. Where there is an express covenant to repair, it does not require the covenantor to make improvements to the premises. In discussing the scope of a covenantor's duty in the face of an express covenant to repair, Sampson Owusu¹⁰ writes that:

"A covenant to repair does not impose an obligation on the covenantor to improve the property, nor "to make a new and different thing". *Lister v. Lane* [1983] 2 QB 212,217. As observed in *Quick v Taff Ely BC*, keeping in repair means remedying disrepair. The [covenantor] is obliged only to restore the house to its previous good condition. He does not have to make it a better house than it originally was, *Southwark London Borough Council v. Mills & Ors* [1994] 4 All E.R. 449,453, per Hoffman L.J. The covenant merely requires the renewal or replacement of subsidiary parts and not a substantial reconstruction of the whole property."

[101] The expanse of the defendant's obligation depends on the wording of the covenant. The covenant to promptly make any and all 'maintenance and repairs', merely requires the defendant to keep the property in a state in which a reasonable user would put it.

⁹ Gilbert Kodilyne in "Commonwealth Caribbean Property Law" p.26

¹⁰ [Op cit, p.592

[102] The interpretation of the word ‘maintain’ is derivative from the context in which it was used. In the narrower sense here, ‘maintain’ does not impose a greater obligation on the defendant to repair the premises, it refers to something less than repair. This is illustrative by the use of the qualifying words ‘in order to maintain the premises in the condition existing at the effective date of the lease’. Consequently, to ‘maintain and repair’ does not raise the defendant’s obligation to the standard of repair as one who covenants to ‘keep the property in repair’¹¹. He is not bound to put the property in its required condition even if it was in disrepair at the commencement of the lease. In clear language, the defendant’s obligation is less onerous, he is to keep the premises in no worse a state of repair than it was at the beginning of the lease. The scope of the defendant’s obligation is to use the property as a reasonable user and will be liable for any waste committed, i.e., the positive failure to repair the property that occasioned any disrepair, or for any acts done which cause injury to the property¹². The defendant however can avail himself from liability where any existing defects are owing to fair wear and tear. It was held in **Haskell v Marlow**¹³ that the gradual wearing away of a stone floor or staircase by ordinary use, may in time produce considerable wear and tear and the tenant is not liable in respect of it.

[103] What is clear from the evidence is that the claimant withheld its consent for proposed works to be done to the fuel office by the defendant company sometime between the period of January 2018 to March 2018, before the initiation of the proceedings herein. The defendant had replaced the toilet in the fuel office, built a new vanity, installed new facets, and changed toilet seats.

[104] Witness for the defendant, Mr. Singh, stated that he declined to do further work on the fuel office having obtained a structural report which suggests that the defects of the fuel office were structural defects. Counsel for the defendant argues that the claimant denies there being any pre-existing issues with the fuel office.

[105] Both parties obtained reports from Mr. Wayne Martin on different dates. The claimant adduced two reports dated 9th August 2012, and 8th December 2016. The defendant contests the veracity of these reports and their relevance to the live issue of the structural condition of the fuel office. The court notes that the reports of 9th August 2012, and 8th December 2016, were valuation reports and not reports that address the issues

¹¹ See p. 592 in Owusu in citing the authorities of *Payne v. Haine* (1847) 16 M.&W; *Proudfoot v. Hart* (1890) 25 Q.B.D. 42; *Credit Suisse Investment Ltd. v Eclipse Radio and Television Services Ltd.* [1994] 4 All E.R. where he states “a covenant to “keep” the property in repair will oblige the covenantor at his own expense to put the property in the required condition even if it was in disrepair at the commencement of the lease.

¹² Founded on the principle of waste.

¹³ Gilbert Kodilyne in “Commonwealth Caribbean Property Law” p. 31

of the structure of the fuel office. The report obtained on behalf of the defendant company on 2nd November 2018 discloses the following:

“... there is evidence of cracks and unevenness in the floor slab, (2) There are signs of tiles that have cracks and upheave. In general, there appear to be some inadequacies in regard to the floor slab with regard to the age versus expected design performance. The building use is advanced into the design performance.¹⁴” There are masonry cracks in the wall base and masonry wall exterior.

Walls above foundation floor slab¹⁵ “... ... the defects which persist are not curable defects and the value gain is less than the cost to correct for the work to be satisfactory by removing the entire length of walls to be constructed adequately from new and make good ... the evidence of the cracks in the masonry walls in certain location of the building structure suggest there are inefficiencies, inadequacies or defects during the construction and implementation process.¹⁶”

[106] With respect to the roof, the report states¹⁷:

“There is evidence of moisture leaks, there are some signs of deferred maintenance issues, defects to roof ceiling, assume defects to roof framing, and defects and aged roof covering. There is enough evidence to suggest that the roof construction has aged and defected significantly to warrant replacement.” Per the report, the roof was adequately designed and constructed. The age and defect warrant replacement to adequately provide satisfactory functionality and use.

The report went further to state that the general amenities:

“Maintenance appears to be fair and only will appear better if replacement of component parts is done to alleviate the incurable long-lived building components. ...general observations indicate that the wear and tear of the age and useful economic life of the subject building components are advanced...other items including windows, doors, electrical and plumbing fixtures, cupboards and closets, hardware/ironmongery, painting and tiling, general timber construction materials, floor and wall finish are fair in appearance and most require replacement or redo ... the general building components outlined are useable but are aged and have used beyond their useful life.”

[107] The report reveals that there are some defects which are incurable, owing to inherent defects of the property, particularly in relation to the foundation walls and floor slabs, and the foundation above the floor

¹⁴ See bundle 4 p.141.

¹⁵ See bundle 4 p.143.

¹⁶ Ibid.

¹⁷ See bundle 4 p.145.

slab. There is evidence of a need to repair particularly the roof of the infrastructure, there is also evidence of wear and tear.

- [108] Gilbert Kodilyne in “**Commonwealth Caribbean Property Law**” on page 30, states that, “[T]he obligation to repair does not normally require the rebuilding of premises that ‘through inherent defects, have passed beyond repair, or doing work which cannot fairly be called repairing the premises as they stood when demised’”. There are instances, however, where the obligation may fall on the tenant to repair inherent defects. In the seminal authority of **Ravenseft Properties Ltd v Davstone (Holdings) Ltd**,¹⁸ Forbes J held the following:

There was no doctrine that want of repair due to an inherent defect in the demised premises could not fall within the ambit of a covenant to repair. It is a question of degree whether that which the tenant was asked to do, or pay for, could properly be described as repair so as to fall within a covenant to repair, or whether it involved giving back to the landlord a wholly different thing from that demised in which case the work would not fall within a covenant to repair or pay for repairs.

- [109] Generally, it is a question of fact and degree as to whether the necessary works constitute 'repair', and the standard and extent of repairs required are case-specific. The matter of the standard of repair is treated extensively by Gilbert Kodilyne, the following extracts are to the point:

The standard of repair required is that which, after making due allowance for the locality, character and age of the premises at the date of the lease, a reasonably minded owner would keep them¹⁹. Regarding the age of the property, the covenantor is obliged to keep it in a reasonably good condition for a building of that age. If, in order to keep the property in such a condition, it becomes necessary to renew or replace parts of the building, such as a defective wall or roof, the covenantor must do the renewal or replacement. However, the covenantor is not bound to reconstruct the building²⁰.

- [110] The wording of the covenant, taken as a whole, has primacy. The duty of the defendant will be interpreted in light of the circumstances surrounding the individual property in question. The court must consider whether, on a fair interpretation of the terms of the covenant in relation to that state of the property, the requisite works can fairly be termed repair. As intimated earlier, the court considers that it would be a strain

¹⁸ [1979] 1 All ER 929

¹⁹ [Op cit, p.29

²⁰ [OP cit, p. 30

on an interpretation of the words in the clause to extend the defendant's obligation to rectify structural defects in the property.

- [111] In the circumstances, having considered the incurable parts as outlined in the report, and the observation of Mr Martin in his report that the 'value gain is less than the cost to correct for the work to be satisfactory, the court is of the opinion that in the circumstances, the works required to be done on the foundation walls and floor slabs, and the foundation above the floor slab, in the circumstances of this case, is not reasonable to be carried out by the defendant, and cannot properly be constituted as repair.
- [112] As it relates to the roof, at the time of the report, the roof was evidently in a state of disrepair owing to deferred maintenance issues, and within the scope of duty for the defendant to repair. With respect to the general amenities, some of the defects are owing to fair wear and tear.
- [113] Though a tenant will avail himself from liability for disrepair which can be properly categorized as "fair wear and tear" a tenant, however, will not avail himself from liability where he fails to respond to defects as a reasonable user of the premise. Fair wear and tear proviso exempts from liability for the immediate or direct consequence of such a condition produced by reasonable use and ordinary operation of natural forces²¹. On page 598, learned author Owusu having considered the principles exposed in **Haskell v Marlow**, and **Taylor v Webb** which was considered in **Regis Property** proffered a guide on the tenant's obligation in this regard²²:

"... Where there is disrepair falling within the "fair wear and tear" exception, a tenant is completely absolved from any liability, if he reacts to the disrepair in a tenant-like manner, that is, behaving like a reasonably minded tenant. Under such a circumstance a reasonable effort should be made by the tenant to apprise the landlord, i.e., the party on whom the duty falls to remedy the defect. That is the limit of the tenant's responsibility in an event which can be subsumed under the "fair wear and tear" exception, it is submitted."

²¹ [Op cit, p.593

²² As was previously expressed in *Haskell v Marlow* [1928] 2 K.B. 45,59. Which was rejected by the court of appeal in *Taylor v Webb* [1937] 2 K.B. 283. However, the House of Lords in *Regis Property Co. Ltd. v. Dudley* [1958] 3 ALL E.R. 491 rejected the principle as laid down in *Taylor v Webb* and restored the law as stated by *Talbot J.* in *Haskell v Marlow*, however the courts did not embark on a refinement of the principle. If anything, the position is left inconclusive by the House of Lords.

[114] Given the long term of the lease, the defendant is under a duty to rectify any leaks and prevent any water flow that may seep in and damage the property, or any resulting damage occasioned by the seepage of water.

[115] It is also incumbent on the defendant to apprise the landlord of the wear and tear, on whom the obligation lies, and do the little things about the fuel office to prevent the premises from going into further disrepair. It is within the defendant's scope of duty to address and correct the general amenities inside the building as outlined in the section of the report titled 'general amenities' save wear and tear.

[116] The evidence disclosed that there was a "Refuelers Complaint" lodge on 20th August 2015 wherein the refuelers complained of water seepage which causes flooding, broken tiles, replacement of lunchroom A/C and buildup of mold in the office and lunchroom²³. This complaint also discloses that there was a previous complaint "some 6 months ago". This suggests the issue existed at the initial commencement of the lease agreement. There is also the evidence of Ms. Burton which will not be reproduced, which suggest that the issue pre-dates the lease. This court is satisfied that the claimant was aware of the defects and the court finds favour with the defendant's averment that the issue pre-dated the lease. Thus, the court does not find that the defendant was in breach of the covenant to repair the fuel office. Further based on the cogent evidence before this court, it finds that the defects in the fuel office are structural defects which fall outside the scope of duty for the defendant company to repair.

Unreasonably withhold consent

[117] The standard of reasonableness is to be applied in cases where a lease provides that a tenant may sublet or assign with the consent of the landlord, such consent not to be unreasonably withheld. The court must determine whether the withholding of consent is reasonable in the circumstances. In **Barclays Bank Plc v Unicredit Bank AG and another**²⁴, the court approved the principle laid down by Balcombe LJ in **International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd**²⁵. In that case, Balcombe LJ, after having considered authorities relating to like clauses, stated the following:

(1) "The purpose ... is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee ...

²³ See exhibit BC15 of Bridget Cox's witness statement.

²⁴ [2014] 1 BCLC 342

²⁵ [1986] 1 All ER 312-326, [1986] 1 Ch 513-521

- (2) As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease ...
- (3) 4. It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified if they were conclusions which might be reached by a reasonable man in the circumstances ...
- (4) 6. There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld ... in my judgment, a proper reconciliation of those two streams of authority can be achieved by saying that while a landlord need usually only consider his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent.
- (5) 7. Subject to the propositions set out above, it is in each case a question of fact, depending on all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld ...”

[118] It is pellucid from the aforementioned authorities that the question of reasonableness is an objective criterion that rests on the facts of each case. The courts have however cautioned that “care must be taken not to elevate a decision taken on the facts of a particular case into a principle of law ²⁶”. In circumstances where the landlord’s refusal is one that would have been reached by a reasonable man in the same circumstances, then it is not necessary for the landlord to provide a justification for his conclusion. Reasonableness should be read in the general sense and be given a “broad, commonsense meaning” in the context of each case²⁷.

[119] In **Barclays Bank Plc** at paragraph 60 of the judgment the court states that “*where there is an objective requirement of reasonableness, the question is not whether the decision is justified, but whether the decision is one which might be reached by a reasonable man in the circumstances*”.

²⁶ See paragraph [59] of *Barclays Bank Plc v Unicredit Bank AG* where the court cited Lord Bingham in *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59, [2002] 1 All ER 377–[5], [2001] 1 WLR 2180.

²⁷ See paragraph [59] *Barclays Bank Plc v Unicredit Bank AG* where the court cited Lord Bingham pronouncement that the approach was clearly laid down by Lord Denning MR in *MR in Bickel v Duke of Westminster* [1976] 3 All ER 801–805, [1977] QB 517 at paragraph [5] of that judgment.

[120] Thus, the question of justification for the landlord's action does not arise. The court went on further to state that the *"decision-maker is entitled to take into account his own commercial interests. These will take precedence over the commercial interests of the other party."* This position, however, has been qualified, as a landlord in such a circumstance is not given carte blanche in the exercise of his discretion; though the lessor usually can consider his own relevant interest to the exclusion of the interests of the lessee, Balcombe LJ's proffered the proposition that *"the tenants' interest will come into play where to ignore them would be so disproportionate as to be unreasonable"*.

[121] 'Reasonableness' as used in the context of a commercial agreement has not ascribed the meaning in the sense used in the *Wednesbury* construction of 'not irrational', instead, the word carries an analogous interpretation and 'rationality' has far less bearing on its construction. In paragraphs [63] and [64] the court states:

[63] Although public lawyers are familiar with the concept of reasonableness in its *Wednesbury* sense of not irrational, that is not the sense in which the word would commonly be used or understood by businessmen in a commercial agreement.

[64] It is true that it is difficult to define objective criteria applicable in all cases in which the determination of consent ... falls to be considered, other than at a high level of generality. But the same is true of a provision that consent is not to be unreasonably withheld in landlord and tenant cases... The difficulty is mitigated by the two aspects of the objective test which I have highlighted, namely that the question is not whether the decision is justified but whether the decision is one which might be reached by a reasonable man in the circumstances; and the decision-maker is entitled to take into account his own commercial interests, in preference to those of the other party, and normally to their exclusion."

[122] A more recent consideration of this principle was applied in **Sequent Nominees Ltd (formerly Rotrust) v Hautford Ltd**²⁸. In this case, the court by a majority accepted the submissions made by Mr Rainey QC, based on Lord Denning MR's judgment in *Bickel and others v Duke of Westminster and others* [1977] QB 517, 524 that "the court must not determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent, nor be limited by the contract to any particular grounds not even under the guise of construing the words". Lord Briggs JSC, who gave the judgment of the majority, in paragraph [30] characterized Lord Denning's observations as:

²⁸ [2019] UKSC 47

“... a warning against addressing the reasonableness of a refusal by reference to an over-refined construction of the lease as at the time of its grant, something which Lord Denning MR called “the guise of construing the words”.”

He added at [32] that:

“It is over-simplistic, and contrary to the principles as laid down in the *Ashworth Frazer* case [2001] 1 WLR 2180, to approach this question in any rigid or doctrinaire way, still less solely by reference to original purposes of the covenant in clause 3(19) which may have been within the contemplation of the parties when the lease was granted. It will in every case be a question of fact and degree measured as at the date upon which the relevant consent is sought by the tenant.”

[123] In its submission, counsel for the claimant referred the cases of **Porton Capital Technology Funds v 3M UK Holding Limited**²⁹, **Crowther v Arbuthnot Latham & Co Ltd**³⁰, **Sequent Nominees Ltd (formerly Rotrust) v Hautford Ltd**³¹ and **Apache North Sea Limited v INEOS FPS Limited**³² for consideration on a proper construction of the word “reasonable” in the context. The defendant, on this point, proffered the authority of **International (Uxbridge) Ltd**³³. The principles extrapolated from the above cases are all similar and apposite in the circumstances. Accordingly, there is no need for a recital of the same.

[124] In **Invergarry Court Ltd v Connolly and Others**,³⁴ the court stated that “the standard proviso that consent would not be unreasonably withheld did not impose an obligation on the landlord not to refuse its consent unreasonably. The proviso operated as a condition rather than as an obligation and if the conditions were not satisfied, because a refusal was unreasonable, the tenant was free to assign without consent, but it did not have a claim based on a breach of obligation. To the extent, the respondents’ case was based on an alleged breach of obligation ... it was bound to fail.” This case considered and applied the principle laid down in **Treloar v Bigge**³⁵.

[125] The defendant requested permission to sublet hangar space to Samaritan Purse, which the claimant refused. Nonetheless, the defendant informed the claimant that it will enter an FBO space permit with Samaritan Purse effective 16th December 2017 to January 2019. The claimant asserts that the defendant is in breach of its covenant not to assign or sublet without the claimant’s permission. The defendant laboured under

²⁹ [2011] EWHC 2895 (Comm).

³⁰ [2018] EWHC 504 (comm).

³¹ [2019] UKSC 47

³² [2020] EWHC 2081 (Comm),

³³ [1986] 1 All ER 321

³⁴ [2022] All ER (D) 41 (Aug) [2022] UKUT 2009 (LC)

³⁵ (1874) LR.9 Exch. 151

the opinion that the claimant has unreasonably withheld consent for the defendant to sublet hangar spaces to Samaritan Purse, John Fuller, and third parties. The reasons proffered for refusal are as follows:

- (1) Samaritan Purse is an international relief and aid organization which had obtained its necessary authorization to operate business in Antigua and Barbuda as evidenced in Ms. Cox's witness statement. The claimant refused on the premise that it was not satisfied that the condition of the hangars is safe and secure until all repairs and rehabilitation has been completed. From the own witness statement of Ms Mikael, the claimant objected further for further the following reasons:
 - a. The defendant failed to provide written consent for subletting to Samaritan Purse.
 - b. Samaritan is a N'registered aircraft not regulated by Aviation Regulators and ECCAA, which poses security concerns. N'registered aircraft will pose a liability threat to the claimant and its insurance policy.
 - c. A Samaritan Purse employee attempted to disassemble an airport security gate to gain access to the field and on its face, that is enough to refuse approval. The claimant stated that it would not have authorised Samaritan Purse to operate from its premises as an independent operator because it had presented problems in the past.
 - d. The claimant only leases to ECCA-registered aircraft to curtail drugs and contraband movements which were settled in or around April 2015 when the defendant approached the claimant for the subletting to N'registered aircraft.
 - e. Whilst occupying the premises the subtenant used the space for improper use as a ground handling facility and storage contrary to clause 3.1. Samaritan's relaxation of the rule and disobedience caused runway 10 to be penetrated by two (2) drug operations slated for aircraft handled by the defendant.
- (2) Regarding James Fuller's aircraft A/C N458PA, the claimant refused consent for the reasons that Mr Fuller operates a N'registerd aircraft, and consent was not obtained prior to its subletting.
- (3) Regarding Tropical Service Airways and OECS Aircraft Maintenance Ltd. The claimant refused for the reasons that they both operate N'registered aircraft; consent was not obtained prior to subletting of the hangar spaces; the claimant has no profile information on TSA and OECS Aircraft Maintenance Ltd. Owing to this, the claimant isn't aware of businesses that will be conducted by third parties and the possible breach of its insurance policy in an instant of default. (The claimant was provided with profile information which it ignored).
- (4) Regarding Cessna Caravan/Caravan Tropic Ocean Airways, the claimant rejected on the basis that there is a continuous breach of the lease agreement by the defendant. The claimant stated further on a separate occasion that it had entered into a sales agreement for its airport building including the

defendant's space and it would be inappropriate to commit to any hangar lease request. Regarding A/C N381TA owned by Tropic Oceans Airways, the claimant refused on the basis that the defendant failed to provide written consent letters for the present occupants James Fuller and aircraft #V2-LGS which is owned by the Antigua Government.

[126] Counsel for the claimant proffered that the tenant has the burden to furnish sufficient information for the landlord to make a decision on whether to grant or withhold consent; thus, the refusal of a landlord to consent to an assignment and sublease if the tenant does not furnish sufficient evidence for the landlord to make a determination regarding the new party (consisting of things such as the assignee's financial condition, the assignee's experience in operating its business, and how the premises are to be used) is reasonable. The landlord requires not only financial information but also knowledge regarding projected sales, gross income, income per square foot, and, in the case of a partial lease, the size of the sublease space. In face of this, the landlord must be given a reasonable time by the tenant to issue a decision. Counsel for the claimant argued that there are instances when the court factors the assignee's need for alterations in its determination of unreasonable withholding consent.

[127] Counsel argues further that the landlord is reasonable if it rejects an assignee or subtenant on the basis that the proposed tenant is 'insolvent, or of dubious financial responsibility, or has a poor payment record'. Counsel avers that the courts consider not only the types of reasons advanced for the refusal of consent but also the reasonableness of the specific factual underpinnings offered in support of those reasons. Counsel opined that in the circumstances of this case, the landlord's reason for withholding consent was reasonable.

[128] The defendant argued that at the onset of the lease, it was understood and agreed between the parties that the defendant would be sub-leasing hangar space to third parties as the defendant does not own or operate any aircraft. Counsel states that withholding consent to sublease to Samaritan Purse was unreasonable. Samaritan is a reputable international relief and aid organization, and the sub-letting of the space is within the permitted uses of the premises as stipulated in clause 3.1 of the lease agreement. Further, the defendant had done a considerable amount of work before its subletting to Samaritan. It was also admitted by the witness for the claimant under cross-examination "If permissible, the repairs condition would have been resolved." Samaritan usage of the space for aircraft storage and related uses fell squarely within clause 3.1 of the lease agreement.

- [129] The defendant states that there was no reasonable basis for the claimant's allegation of security concerns as the claimant has only highlighted an isolated incident involving a former employee of Samaritan's Purse, which incident was addressed by Samaritan. Samaritan had received proper authorization from the appropriate authorization body as evidenced by the documents exhibited in Ms Cox's witness statement. Further, the defendant has never received any complaints from ABAA which is the regulatory body responsible for security. Additionally, there is no prohibition in the lease agreement against subletting to N-registered aircraft. There is also no prohibition in law from N-registered aircraft hangaring in Antigua.
- [130] Ms Mikael, a witness for the claimant, has admitted in cross-examination that there is a regime for ECCAA to regulate foreign-registered aircraft and also that ABAA controls the security at the airport regardless of where the aircraft is N-registered. N-registered aircraft are subject to ECCAA regulations and in particular regulations which are applicable to foreign-registered aircraft operating or maintained in Antigua. Further, N-registered aircraft must comply with security protocols and laws as enforced by ABAA. Additionally, the claimant has previously sublet to N-registered aircraft including Samaritan Purse, and there is no damage to the claimant's reversionary interest arising out of the defendant subletting to N-registered aircraft. Thus, the claimant's refusal was arbitrary and unreasonable.
- [131] As it relates to Mr Fuller, the defendant's case which was also presented through Mr Fuller's own witness statement is that the claimant had granted him permission to occupy the hangar space as a subtenant. He was occupying the space at the request of the claimant until 2018. The court also observes the version of events as outlined in Mr Fuller's witness statement and accepts his version to be true. The defendant argued that in the circumstances Mr Fuller had occupied the space with the claimant's consent, whether express or implied. Importantly, the claimant in its amended counterclaim did not raise an objection to Mr Fuller. The defendant has asked this court, however, to rule on whether or not consent was unreasonably withheld.
- [132] Counsel argued further that the refusal to Tropic Airways Aircraft N31TA was vague and thus unreasonable. The further rejection of Tropic Ocean Airways on the purported basis of a sales agreement between the claimant and a third party was unreasonable as the sale would be subject to the defendant's right under the lease agreement, thus the claimant continues to be subject to its obligation under the lease to consider the request of the defendant. Additionally, the further rejection to sublet to Tropic Ocean Airways on the purported basis that the defendant had failed to provide written permission for subtenants presently occupying the space was unreasonable as the rejections prior were also on unreasonable bases. It is counsel's argument that the defendant is entitled to and claims a declaration that the defendant is free lawfully to sublet the premises to third parties without the claimant's consent.

[133] In being guided by the principles extrapolated in the above-mentioned authorities, the court makes the following observations and findings. Though the claimant need only consider its interest, oftentimes to the exclusion of the defendant, in the circumstances of this case the court does not find an apparent economical interest in which the landlord is to benefit. The detriment of refusing to sublet is far greater to the defendant, given that the defendant conducts an FBO operation where it owns no aircraft of its own but instead seeks to conduct business by renting to aircraft owners. The court finds that the claimant's refusal was a disproportionate response in circumstances where the defendant relies on prospective ventures of this kind to meet its commitment of paying rent to the claimant, and its services are being hindered on a basis which is neither accurate in law, nor was it prior agreed to between the parties that there was a restriction on N-registered aircraft.

[134] The claimant seemed to have haphazardly manufactured rules whilst unilaterally deciding that they are binding between the parties unbeknownst to the defendant. The court finds that N-registered aircraft are regulated by the relevant authorities and there is no basis for concluding that N-registered aircraft generally pose a liability threat. The claimant also made manifest its own feelings regarding Samaritan Purse which cannot be said to be on grounds which have anything whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease. The court does not find that there has been an improper use of the premises contrary to clause 3.1 of the lease. Be that as it may, the claimant cannot employ the subsequent conduct of the defendant or any subtenant and retroactively apply as a reason for withholding consent. At the time of the alleged breach, which the court does not find, there was no application to the claimant for subletting to Samaritan Purse as the defendant had already sublet the hangar.

[135] The court finds that in the circumstances of the case, as it relates to Mr Fuller counsel for the defendant on this point is clearly correct. The claimant has given consent to the subletting of the hangar to Mr Fuller. The claimant has made further objections to the subletting of the hangar space on the premise that there is a risk of a breach of its insurance policy, however, has failed to indicate the potential risk of a breach. Additionally, per the lease agreement, the defendant is under a duty to insure the property, and upon observation of the policy, the court does not find a potential breach as it relates to N-registered aircraft or any other basis proffered by the claimant for refusal. Further, it cannot be said to be reasonable in withholding consent on the basis that past approval letters from the claimant were not furnished by the defendant in respect of the previous subtenants when it is clear that the claimant had not given any letters to the defendant.

[136] In the circumstances of this case, the court finds that the claimant has unreasonably withheld consent to the subletting of hangar spaces to Samaritan Purse, Mr James Fuller, Tropical Service Airways, OECS Aircraft Maintenance Ltd and Cessna Caravan/ Caravan Tropic Ocean Airways. Accordingly, the defendant was free lawfully to sublet to the above-named third parties. *Invergarry Court Ltd* applied. Thus the defendant is not in breach of its covenant not to assign or sublet without the claimant's permission. The court adds, however, that the remedy sought by the defendant is prospective in nature, it is impossible for the court to conclude a prospective indication of the grounds on which a landlord intended to refuse to assent to a request would itself be an unreasonable refusal. Accordingly, the court does not grant the relief sought by the defendant that it is free lawfully to sublet to third parties.

[137] Regarding the replacement of the two louvres. Counsel for the defendant argued that the louvres were removed during the repair process and upon advice from an engineer to the defendant, the defendant sought permission from the claimant for the non-replacement of the louvres due to the increase in moisture, or for a possible substitute. The defendant asserts that the claimant did not respond to the same request and has further alleged a breach of covenant for its removal. The defendant restored the louvres in October 2019.

[138] In light of the circumstances where the claimant has not responded to the request for the replacement of the louvres, it precludes the court from making a finding that the refusal was unreasonable where the circumstances of this case have disclosed none. On the other hand, however, the court does not find that the defendant company is in breach of the non-replacement of the louvres as they have been replaced.

Issue no. 2

INJUNCTIVE RELIEFS

[139] The defendant enjoins this court to grant an injunction against the claimant from unreasonably withholding consent to sublet to third parties, and to restrain the claimant from committing any further breach of the covenant for quiet enjoyment.

An injunction from unreasonably withholding consent

[140] The court considers this ground of the counterclaim and determines that there is no basis to grant the order. The standard proviso "consent will not be unreasonably withheld" has been construed by the courts as a

condition imposed upon the landlord and not an obligation to not withhold consent unreasonably. The lessor is not bound by the words of the covenant to not refuse consent unreasonably. **Treloar v Bigge**³⁶ applied.

[141] In the recent authority of **Invergarry Court Ltd v Connolly and Others**,³⁷ the court, considered and applied **Treloar v Bigge** states that “the standard proviso that consent would not be unreasonably withheld did not impose an obligation on the landlord not to refuse its consent unreasonably. The proviso operated as a condition rather than as an obligation and if the conditions were not satisfied, because a refusal was unreasonable, the tenant was free to assign without consent, but it did not have a claim based on a breach of obligation. To the extent, the respondents’ case was based on an alleged breach of obligation ... it was bound to fail.” In this case, the court underscores that both at common law and statute, a landlord is under no obligation to give consent to a tenant’s request and it is for that reason parliament introduced statutory duties which give a tenant a new statutory right to sue for damages or an injunction to an unreasonable refusal of a written request for consent.

[142] In light of the aforementioned authorities, the injunction against the claimant from unreasonably withholding consent to sublet to third parties is refused.

Peaceful and quiet enjoyment

[143] The defendant counterclaimed that the claimant has breached its covenant for quiet enjoyment. Counsel for the defendant avers that contrary to the provisions of clause 4.4 of the lease agreement, the claimant, during the period of 2016 to present, has repeatedly entered the premises without prior or any written notice to the defendant. The claimant has on several occasions harassed the employees of the defendant and its subtenant Samaritan’s Purse or otherwise interfered with the defendant’s right to peaceably and quietly hold, use and occupy the said premises. The claimant’s General Manager has yelled or otherwise harassed the employees of Samaritan’s Purse. Has changed the locks on the doors to the fuel office room which forms part of the leased premises, repeatedly attached signs to the doors of the fuel office seeking to restrict entry, vandalized the door to the fuel office by writing the words “do not enter-authorized owner – Antigua Hangars Inc”, disconnected an electrical wire from the defendant’s a/c unit in the small hangar office; repeatedly making false allegations to various authorities including ABAA, ECCAA and ONDCP accusing the defendant of breaches of airport security regulations.

³⁶ (1874) L.R. 9 Ex. 151.

³⁷ [2022] UKUT 209 (LC) [2022] All ER (D) 41 (Aug)

- [144] Counsel went on to state further that the claimant has obstructed the access of the defendant, its employees and its clients and customers to the leased premises through gate 7 which is the primary access to runway 10 and the defendant's FBO operations. Counsel states that by no means is this an exhaustive list, and it is clear from the evidence that the claimant has pursued a course of conduct calculated to interfere with the defendant's quiet enjoyment of the leased premises.
- [145] Counsel for the claimant argued that the defendant has provided no evidence to the court for the court to agree that it has breached quiet enjoyment. Not every action or inaction of the claimant is tantamount to a breach of peaceful quiet enjoyment and all matters are to be considered in light of the circumstances of this case.
- [146] In any landlord and tenant relationship, there is an implied covenant for quiet enjoyment. Sampson Owusu has defined it as an "ordinary incident"³⁸ of the lease. The landlord and his successors in title are bound to preserve the tenant's quiet and peaceful enjoyment, and he must not do or suffer to be done anything that will substantially interfere with the tenant's "ordinary and lawful enjoyment" of the demised³⁹. It has long been established that any substantial or physical interference would constitute a breach of the landlord's covenant for quiet enjoyment. This principle was laid down in the seminal case of **Kenny v Preen**⁴⁰ which was later applied in **Ram v Ramkissoon**⁴¹, **Tapper v Myrie**⁴², **Saul and Saul v Small**⁴³ and others.
- [147] In **Kenny v Preen**, the landlord served the tenant with a notice to quit. Thereafter the landlord threatened the tenant by way of a letter and proceeded by shouting at the tenant and banging on her door, threatening to take physical action to evict the tenant and remove her belongings from the demised premises. On appeal, the Court of Appeal affirmed the decision of the County Court in part that, there was an element of direct physical interference that was not trivial but substantial.
- [148] In **Ram v Ramkissoon** the landlord removed the galvanised iron sheets from the roof of the demised premises which caused water to seep through to the floor of the rooms causing annoyance and discomfort as well as loss and physical damage. In **Tapper v Myrie** the landlord disconnected the supply of electricity to the tenant's household in an attempt to evict the tenant which constituted a breach of quiet enjoyment.

³⁸ See page 573 Sampson Owusu

³⁹ Aldin v. Latimer Clark Muirhead & Co [1984] 2 Ch. 437, 442

⁴⁰ [1963] 1 Q.B. 499

⁴¹ (1968) 13 W.L.R. 332.

⁴² (1968) 11 J.L.R. 102.

⁴³ [1963] L.R.B.G. 200.

In **Saul and Saul v Small** *the* blocking up of the passageway of the plaintiff and barring of the kitchen door was considered to be more than mere interference which amounted to a breach of the covenant for quiet enjoyment.

[149] The court finds that the eviction letters sent with the warning of possible recourse to self-help in removing the defendant from the premises are tantamount to letters of intimidation. The court does not accept the reason proffered by the claimant for the removal of the electrical wires in circumstances where the claimant had not given notice to the defendant per the lease of its inspection, nor does it find it excusable for the removal of the galvanising sheet of the office to which Mr Fuller occupied for an extended period beyond the repair process. This action is not consistent with a duty or undertaking to repair premises. The obstruction of access, and the encounters with the subtenant to which the claimant's managing director has admitted to this court "does not recognise" by her as she had not given them permission to enter the premises, wantonly placing signs to assert ownership, the allegations to the authorities are all actions which can sufficiently be concluded as an attempt tended to deprive the defendant of the full benefit of use of the premises.

[150] The court finds that the posture of the claimant has been to adopt a persistent, and calculative course of intimidation with added features of physical interference which is substantial to constitute a flagrant breach of the defendant's right to lawfully use the premises peacefully and quietly from substantial interference by its landlord, for which the defendant preys an injunction.

[151] In granting a permanent injunction, the court will consider whether damages is an adequate remedy and whether granting an injunction is appropriate in order to do justice between the parties in the circumstance of the case. The right of the defendant exists as a matter of law and there has been a flagrant breach of its right. Having regard to Ms. Mikael's conduct and in light of the surrounding circumstances, it is likely, unless restrained, that the claimant's general manager will continue to infringe the defendant's right. Damages will not be an adequate remedy. This is an appropriate case in which to grant a permanent injunction restraining the claimant whether by its servant and/or agent, from interfering with the defendant's right to a quiet enjoyment.

Damages

[152] Where there is a breach of a covenant other than a covenant for payment of rent, the landlord is entitled to an award of damages. The claimant asserts that his reversionary interest has diminished in value consequent of the defendant's continuous breach of covenant and is thus entitled to an award in damages.

However, for the reasons stated above, the court does not find that there is a breach of covenant on the part of the defendant in the circumstances of this case. The claimant has also failed to plead the facts in its case. Accordingly, the court does not find that the claimant is entitled to an award for damages.

[153] The defendant is seeking an award for damages for loss of reputation and the unlawful interference with the defendant's economic interest. In relation to the former, the defendant must prove that there is a causal link between its financial loss and the breach of contract. Regarding the tort of unlawful interference, this arises where there is an interference with the economic interests of an innocent party by another by unlawful means, the object and intention of which is to cause loss to that party⁴⁴. An allegation that the actions of a wronged party would likely cause damage, that is damages were foreseeable is insufficient to give rise to the requisite elements necessary to establish this tort.

[154] Having examined the evidence, the court's previous findings as it relates to the claimant's pattern of behaviour in particular but not limited to the intimidation and constant harassment by the claimant of the defendant and its tenants, I am of the considered belief that the evidence clearly supports that the claimant deliberately breached the lease agreement with the intention of causing financial loss to the defendant. The claimant employed several tactics to disrupt the business of the defendant resulting in subtenants terminating the tenancy. Furthermore, the claimant persisted in a manner of deliberate baseless refusal of consent to sublet the premises knowing fully that this was an essential element of the defendant's business and that this would have the resultant effect of loss of business or business opportunity thereby further demonstrating that the claimant's conduct is sufficient to establish the causal link for loss of reputation. The defendant is therefore entitled to damages. In this instance damages are calculable having regard to lost business profits and as such will be discussed below.

[155] Similarly, the claimant's behaviour when examined also sufficiently establishes an intention to unlawfully interfere with the defendant's business. The claimant boldly warned the defendant that it could resort to self-help which is not permissible in law. Further the claimant repeatedly trespassed onto the premises and put-up signs seeking to prohibit the defendant's lawful use of the premises and eventually locked the fuel office denying the defendant access thereto. By so doing the claimant deliberately and wrongfully prevented the defendant from having access to that area as well as the items inside. Further the harassment of the defendant's subtenants which the court accepts was designed to frustrate their continued occupation of the premises as well as the claimant's unreasonable and baseless refusal to consent to the sublease of

⁴⁴ OBG v Allan, Future Investments v Federation Internationale [2007] UKHL 21

premises that N' registered aircrafts are not regulated which the claimant admitted was untrue signifies a pattern of behaviour designed to intentionally and unlawfully disrupt and interfere with the defendant's business.

[156] From the evidence before this court, the defendant lost a tenant in the person of Samaritan's Purse which ended their relationship on 31st January 2019 a direct result of the claimant's continued harassment. This entity had been in occupation for more than 3 years and it is likely would have continued its occupation but for the conduct of the claimant. The defendant tried reasonably to mitigate its loss by seeking consent to sublet the premises. However, the already established unreasonable denials of consent and action of the claimant thwarted any attempt to do so. I accept the evidence of the defendant that it had firm offers from at least two entities for leases for a period of one year and for a rental of US\$3,650.00 since the loss of business from Samaritan's Purse. Whilst there is no guarantee that these potential tenants would have remained for a protracted period, given the nature of the service offered, the fact that these are unique commercial premises for which there isn't a large market thereby making the opportunity to find suitable alternative rental limited, I believe that it is likely that the defendant would have had that rental income for a period of no less than 6 months for each tenant. Given the nature of this sort of tenancy, being the occupation of hangar space, it is unlikely that there would be an associated costs to deplete the rental income generated monthly. Therefore, the expected monthly rental would be akin to the expected loss of profits. Thus, having regard to all the circumstances and the sum for rental I am of the considered opinion that the damages suffered for economic loss and loss of reputation would be the sum of EC\$119,000.00 or US\$43,800.00 (US\$ 3,650 *12) representing loss of two tenants for a period of 6 months each.

ORDER

[157] In light of the foregoing, it is hereby ordered as follows:

- a) The claimant's claim is denied, and judgment is entered for the defendant.
- b) It is declared that the claimant has unreasonably refused consent for the defendant to sublet the premises to third parties.
- c) The lease agreement between the parties continues to subsist, it not being lawfully terminated.
- d) The defendant has not breached its duty of repair pursuant to the lease agreement.
- e) The defendant is awarded damages for loss of reputation and economic loss in the sum of \$119,000.00.

- f) The claimant, by itself or agents, is prohibited from interfering with the quiet enjoyment of the defendant during the currency of the lease.
- g) The claimant shall pay the defendant prescribed costs in accordance with CPR65
- h) Interest.

Jan Drysdale

High Court Judge

By The Court

Registrar