

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2019/0394

BETWEEN:

LUXURY HANGAR HOLDINGS LIMITED

Claimant/Respondent

and

CARIBBEAN HELICOPTERS LTD.

Defendant/Applicant

Appearances:

Mr. Dane Hamilton Q.C. and with him Dr. L. Errol Cort and Mrs. Sharon Cort-Thibou for the Claimant/Respondent.

Mr. Loy Weste and with him Mrs. Lisa John-Weste for the Defendant/Applicant

2019: October 3rd; 10th

ORAL JUDGMENT

- [1] **WILKINSON, J.:** On 19th July 2019, the Claimant filed a fixed date claim form seeking the following orders: (i) possession of the Demised Premises and which is a part of a parcel of land described and registered as Registration Section: Barnes Hill & Coolidge, Block 41:2294A Parcel 100 (Parcel 100), (ii) mesne profits at the rate of \$32,000.00 per month or such other sum as deemed just by the Court from 24th December 2018, until possession was given up to the Claimant, (iii) damages, (iv) interest, (v) costs, and (vi) such other relief as the Court deemed just. There was filed in support of the fixed date claim form a statement of claim.
- [2] On 20th September 2019, the Defendant filed its defence, counterclaim and an application supported by the affidavit of Mr. Tanner Jones, the managing director of the Defendant.

- [3] By its counterclaim the Defendant sought the following relief: (i) exemplary damages for the unlawful conduct of the Claimant; (ii) injunctions identical to that sought in its application, (iii) damages, (iv) interest and (v) further or other relief.
- [4] The Defendant's application sought the following relief:
- i. An injunction restraining the Claimant and all persons connected with it from trespassing upon the Demised Premises.
 - ii. An injunction ordering the Claimant and all persons connected with it from interfering with or obstructing the Defendant's occupation, use and quiet enjoyment of the Demised Premises.
 - iii. An injunction that the Claimant immediately permit and not restrict in any way the Defendant's access to the Demised Premises.
 - iv. That the order remain in force until the determination of the substantive matter between the Parties or further order.
 - v. Costs to the Defendant.
 - vi. Further or other relief as the Court deemed fit.
- [5] On 23rd September 2019, Mr. Dominic Noon the aviation manager and Mr. Mark Flemming the director of aviation of the Claimant filed affidavits in response to the application.
- [6] The matter came on for hearing on 23rd September 2019, and at that time the Court made the following order:
- "i. The hearing of the Defendant's application filed 20th September 2019, is adjourned to 2.00p.m on 3rd October 2019.
 - ii. The Claimant is to deliver to the Registrar of the High Court the keys for the Demised Premises the subject issue of the suit forthwith. The Registrar is to issue a receipt for same and is only to release same on the Court's decision on the Defendant's application filed 20th September 2019.
 - iii. The Defendant is granted 3 days within which to file any affidavit in response to those of the Claimant filed 23rd September 2019.
 - iv. The Defendant is to draw, file and serve this order."

Summary of the Facts

- [7] The Claimant is the current owner of 10 acres of land including buildings of which one (1) is a hangar, within the perimeter of VC Bird International Airport. It purchased the land during December 2018, from Stanford Development Company Limited (In Liquidation). The said land is

registered as Registration Section: Barnes Hill and Coolidge; Block: 41 2294A; Parcel 100 ("Parcel 100").

[8] The Defendant has been in occupation of a part of Parcel 100 (the Demised Premises) since August 2011, having entered into a 2 year Lease with the Stanford Development Company Limited. The Lease expired during 2013. Stanford Development Company Limited was put into liquidation and Joint Liquidators appointed on 15th October 2013. After the Joint Liquidators were appointed, they continued to rent the property to the Defendant on apparently the same terms of the expired written lease albeit there was no written lease. It appears that at some point the Defendant fell into arrears of rent and the Joint Liquidators issued a Notice to Quit – see the notice to quit dated 8th November 2017 from Counsel for the Joint Liquidators. The Joint Liquidators thereafter nevertheless allowed the Defendant to remain in possession and on what the Defendant says was a periodic month to month tenancy. At all material times the Defendant was due to pay the same rent as due to Stanford Development Company Limited i.e. \$10,000.00.

[9] At 17th December 2018, the Joint Liquidators wrote to the Defendant giving notice of the sale of Parcel 100. They further stated:

Property exercised <u>Property</u> <u>save and except any</u> payment of mesne of which, the Joint	“With effect from the date of this Notice the Purchaser as registered proprietor of the shall be entitled to exercise all rights in relation to the Property as were previously by SDC <u>and all and any dealings in connection with your occupation of the Property shall be between you and the Purchaser as registered proprietor,</u> claim that the Joint Liquidators are entitled to make against you for the payment of mesne profits for the period up to the date of this Notice, and in respect of which, the Joint Liquidators hereby specifically reserve all rights.” (My emphasis)
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[10] It is evident from the Joint Liquidators notice to the Defendant that on transfer from the Joint Liquidators to the Claimant that the Claimant was not subject to any tenancy arrangement by way of assignment or otherwise.

[11] There was an attempt to negotiate a new lease between the Claimant and Defendant at a new rent. Proposed rent was EC\$34,200.00 (US\$12,000.00). The negotiations failed.

[12] The Claimant by its Counsel issued a Notice to Quit dated 25th March 2019, giving the Defendant 3 months notice to deliver up possession and same was to expire on 30th June 2019. The Defendant failed to deliver up possession and so the Claimant filed this suit for possession together with the relief previously cited.

[13] 5 days before the Notice to Quit was due to take effect and the Defendant had to deliver up possession, Counsel for the Defendant wrote to Counsel for the Claimant and therein stated:

“We are the Attorneys-at-Law acting for the and on behalf of Caribbean Helicopters Limited.... Our client has forwarded to our Chambers your Notice to Quit dated March 25th 2019 on behalf of Luxury Hangar Holdings Ltd., with instructions to respond.

Please note that, due to the nature of our client’s business, our client is not in a position to provide vacant possession of Runway 10 on June 30 2019, or in the upcoming months.

After this a long process of searching, our client has identified a new location for its business, but will require approximately 18 to 24 months for a move from its present location, for the reasons expounded in this letter....”

- [14] The Defendant states that the Claimant as of 17th September 2019, took possession of the Demised Premises saying that this was necessary in order to perform repairs of the roof and upgrades to the structure on the Demised Premises and demanded that the Defendant remove all of its possessions. A change of locks occurred. The Defendant states that by the Claimant denying it entry and access to the Demised Premises it is prevented from operating its business and should the Defendant be evicted it would suffer a loss of approximately EC\$2,000,000.00 per year in profits from its business, as it would be forced out of business through bankruptcy.
- [15] It appears to the Court that the statement on loss of profits is contradicted by the Company's financial statement dated 31st August 2018 and which shows that the Defendant has suffered an increase in financial loss year over year - 2018 was (US\$669,441.00) compared with 2017 which loss was (US\$293,908.00)
- [16] The Defendant states that the Claimant's actions are deliberately perpetrated to cause financial loss to the Defendant, and that the Claimant's intention is to directly compete with the Defendant.
- [17] The Defendant also states that it employs 30 employees who could potentially suffer a loss of their jobs. The evidence is that these employees have not been paid for several months and they have consulted Counsel who has written to the Defendant on their behalf.
- [18] The Defendant states that if it not able to repay a loan of approximately US\$700,000.00 then one of its principals who provided security for the loan by way of his home is likely to suffer the loss of his home.
- [19] The Defendant further states that there are issues arising with the Eastern Caribbean Civil Aviation Authority – up to date of hearing it does not have an Aircraft Operation Certificate due to non-payment of the required fee although it has an Aviation Maintenance Organization Certificate which allows it to conduct maintenance operations as part of its business.
- [20] Since the Claimant's purchase of Parcel 100, it has not accepted the payment of any rent or payment of any other description from the Defendant.

Defendant's Submissions

- [21] At the hearing, Counsel for the Defendant argued that there is a serious issue to be tried as the Claimant took possession of the Demised Premises and did so knowing that the Defendant was occupying the Demised Premises and according to Counsel, sections 23 and 28 **Registered Land Act Cap.374** makes this unlawful. Counsel further argued the above in justification of the granting of an interim injunction. The Defendant's position is that the Claimant changed the locks and essentially denied it access to the Demised Premises, and as such there would be destruction and

severe hardship to the Defendant's business and especially a potential threat to its helicopters and aircraft.

- [22] Further, according to the Defendant, as it had an overriding interest, it had a right to remain in possession for a reasonable time and meeting the Eastern Caribbean Civil Aviation Authority requirements for relocation was not something that could be done within a short period of time. In addition to this the Defendant's position was that the Defendant was holding over with the same rights as under the previous lease agreement with Stanford Development Company Limited. Counsel again referred the Court to the **Registered Land Act** and in particular sections 51, 55, 56 and 57 which address holding over and forfeiture.

- [23] Counsel also argued that the increase in rent sought during negotiations was 300 times in excess of that allowed under the **Rent Restriction Act Cap. 328**

- [24] On the issue of whether damages would not be an adequate remedy, Defendant's Counsel stated that there was a real likelihood that the Defendant's "business will be shut down, and its business destroyed." According to the Defendant, this could affect its 30 employees who are likely to return. The Defendant argued loss of assets, as well as business contracts with various companies and as a result of being ousted from the Demised Premises it would not be able to fulfill its obligations, and this could not be quantified in damages.

- [25] The Defendant's position is that the balance of convenience would lie in favour of granting the injunction as there would be more risk of injustice and irreparable harm that would be caused to the Defendant due to the loss and destruction of its business should the Claimant be allowed to exclude the Defendant from the Demised Premises.

Claimant's Submissions

- [26] The Claimant's position is that the Defendant has no cause of action in relation to a right or interest that is to be protected or is enforceable and so could give rise to the need of an interim injunction. The Claimant's Counsel argued that the Demised Premises was not sold subject to the lease/tenancy of the Defendant and therefore there being no agreement for lease, the Defendant held over and the legal position after the sale would make the Defendant a tenant at will or at sufferance of the Claimant. Such being the position, then the Claimant was well within its rights to issue a notice to quit and claim possession of the Demised Premises.

- [27] In relation to whether the Defendant had an overriding interest under section 28 of the **Registered Land Act**, Counsel's view was that section 28 applies when person/individual claiming has an interest in the property giving rise to a right to be there and that as the Defendant was not a tenant of the Claimant it could not establish this right or interest to remain on the Demised Premises. Therefore, the Defendant could not dispute the Claimant's title as once it was given notice and the notice expires, the tenancy at will ends.

The Law

[28] It is settled law following **American Cyanamid Co. v. Ethicon** [1975] AC 396, [1975] 1 AER 504 that before this Court can grant an interim injunction the Court must be satisfied that:

- i. The Defendant has established a serious issue to be tried.
- ii. Damages are not an adequate remedy.
- iii. The balance of convenience lies in favour of granting such relief (that is, the grant of an injunction will do more good than harm); and
- iv. The Defendant is able to compensate the Claimant for any loss which such interim injunction may cause him in the event that it is later adjudged that the injunction ought not to have been granted.

[29] Counsel for the Claimant referred the Court to **Saint Lucia HCVAP2008/006 Margaret Sargusingh v. Caius Sargusingh** where Edwards JA said:

“[26]To obtain an interim injunction, like any equitable remedy, the applicant must show some property, right or interest in the subject matter of the claim since such an **injunction is a remedy which is usually obtained in protection or assertion of some right for which the applicant has a cause of action enforceable by final judgment.**” (My emphasis)

[30] Counsel for the Defendant referred the Court to **SKBHCV2013/0290 Terrance Thompson v. Larkland Richards**. As the Court understands the facts of this case, the triable issue established was whether there was to be a setoff of value for improvements against arrears of rent.

[31] On the nature and effect of a notice to quit, Counsel for the Claimant referred the Court to **Davies v. Bristow** [1920] p.509 at p. 513 where Lush J said:

terms
quit
must

“**When once the notice is given and received the term automatically comes to an end upon the expiration of the notice, and the position is then precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice to quit.** There is no room for any election by the landlord. The landlord and the tenant may agree that a new tenancy shall be created on the old as to rent & c., and that is what, in effect, they do when they agree to treat the notice to as inoperative, or to use the expression which is used so often – that they agree to waive the service of the notice to quit. The agreement for the new tenancy must be proved. It be shown that the parties were ad idem as to the terms.” (My emphasis)

[32] The Claimant submitted that what the Defendant had was at most a tenant at will and or at sufferance. **The Law of Real Property 5th Ed¹.** at p.1039 states:

that

“**5. Tenants at will and at sufferance.** A tenant at will was formerly in a better position a tenant under a lease for a fixed term of years, for time began to run against the landlord

¹ Sir Robert Megarry and HWR Wade

from the expiration of one year after the commencement of the tenancy, or after its determination, whichever was the earlier. Thus a tenant at will who paid no rent could bar his landlord's title in 13 years. But this made an anomalous distinction between a tenant at will and a licensee, and tempted courts to escape from holding that a rent-free "tenant" had barred the landlord's title by holding that there was only a licence to occupy and not a true tenancy. Consequently, the rule was repealed in 1980, so that time now runs in favour of a tenant at will at only from the determination of his tenancy.

In the case of a tenancy at sufferance, time runs from the commencement of the tenancy. This is because a tenancy at sufferance is really not a tenancy at all, but is adverse possession."

[33] On the issue of tenancy at will, the Claimant's Counsel referred the Court to **Stanford International Bank Ltd. v. Austin Lapps [2006] UKPC 50**. The case is instructive. There the Lordships stated:

"34. According to Halsbury's Laws of England, 4th Ed. Reissue, Vol.27 at para. 169:

Such of a tenancy is implied accordingly in cases of mere permissive occupation without payment rent...'

But it was held in *Doe d Hull v. Wood* 14 M & W 682 at 687 that an affirmative consent was necessary and not simply a mere negative or silent consent.

.... Paragraph 170 of the same volume of Halsbury's Laws says that:

'Entry into occupation of land pending negotiation for the grant of a lease ... gives rise to a tenancy at will...'

The It is common ground that until the advent of the bank in October 1995 Mr. Lapps enjoyed a quality of possession of the 0.6 of an acre, sufficient to sustain a trespass action if his possession were disturbed by someone with no better right to possession than he had. important issue is when did Mr. Lapps' assumed tenancy at will came to an end.

35. ... Their Lordships would refer again to Halsbury's Laws Vol. 27(1). Paragraph 1213 deals with the determination of a tenancy at will by the landlord and says, inter alia, that:

The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with the continuance of the tenancy... and also when he does an act off the premises which is inconsistent with the tenancy, as, for example, when he grants a lease of the tenancy to commence forthwith. An act done off the premises does not, however, determine the tenancy until the tenant has notice of it.'

Among other cases, *Doe d Davies v. Thomas* (1851) 6 Ex. 854 is cited in the notes to paragraph 153 as authority. Parke B stated the law in clear terms:

notice	'The law upon the subject is, that if an assignment or conveyance on the reversion takes place behind the back of the tenant, it does not affect him until he has of it; but if he has knowledge from the assignee or the reversion, or has himself achieved the same information, it is a determination of the will ... <u>Every conveyance of the reversion is inconsistent with the will to occupy under him, but the tenant is not to be treated as a trespasser until he has had notice of the determination of the will – not formal notice, but knowledge of it: - as soon as he had that, he must know that he is not to occupy.</u>'
the	36. The grant by the Crown of the 99 year lease to the bank was an act inconsistent with continuance of any tenancy at will of the 0.6 of an acre that Mr. Lapps may have enjoyed. ...
him there.	37. It follows that Mr. Lapps' tenancy at will, if he had one, was terminated on receipt by of the letter of 25th July 1996. He chose to ignore the letter but that is neither here nor there. He was given two weeks grace, until 9 August 1996, to vacate the land and take away his construction materials." (My emphasis)
[34] not exceeds Rent	The Defendant referred to the Rent Restriction Act and which at section 5 (b) provides that it is lawful for a landlord to increase the rent of any building land or dwelling house or public or commercial building to which the Act applies, other than a new building, to an amount which exceeds the standard rent by more than fifteen per centum unless the increase is sanctioned by the Rent Commissioners in accordance with the provisions of section 6.
[35]	The Defendant placed much reliance on the Registered Land Act Cap. 374. The Act provides:
	"Overriding interests
subsist	28. Overriding Interest—Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being and affect the same, without their being noted on the register-
	(a) ...;
periodic	(d) leases or agreements for leases for a term not exceeding two years, and tenancies within the meaning of section 2;
	...;
	(g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed;
	
	Leases
lease	44. Subject to the provisions of this Act and of any other law, the proprietor of land may the land or part of it to any person for a definite period or for the life of the lessor or of the

lessee

lessee or for a period which though indefinite may be terminated by the lessor or the
for a period which though indefinite may be terminated by the lessor or the lessee, and
subject to such condition as he may think fit:

Provided that, if only part is leased, the lease shall be accompanied by a plan or other
description which the Registrar, in his absolute discretion, deems adequate to identify the
part leased.

Periodic tenancies

45. (1) Where in any lease the term is not specified and no provision is made for the giving
of notice to terminate the tenancy, the lease shall be deemed to have created a periodic
tenancy.

(2) Where the proprietor of land permits the exclusive occupation of the land or any part
thereof by any other person at rent but without any agreement in writing, that occupation
shall be deemed to constitute a periodic tenancy.

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(3) The period of a periodic tenancy created by this subsection shall be the period
reference to which the rent is payable, and the tenancy may be terminated by either
party giving to the other notice, the length of which shall, subject to any other law,
not less than the period of the tenancy and shall expire on one of the days on which
rent is payable.

Holding over.

lessee,

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51. (1) Where a person, having lawfully entered into occupation of any land as
continues to occupy that land with the consent of the lessor after the termination of
the lease he shall, in the absence of any evidence to the contrary, be deemed to be a
tenant holding the land on a periodic tenancy on the same conditions as those of
lease so far as those conditions are appropriate to a periodic tenancy.

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(2) For the purposes of this section, the acceptance of rent in respect of any period after
termination of the lease shall, if the former tenant is still in occupation and subject to any
agreement to the contrary, be taken as evidence of consent to the continued occupation of
the land.

Lessor's right of forfeiture and effect of forfeiture of sub-leases,

55. (1) Subject to the provisions of section 57 and to any provision to the contrary in the
lease, the lessor shall have the right to forfeit the lease if the lessee-

(a) commits any breach of, or omits to perform, any agreement or condition on his
part expressed or implied in the lease; or

(b) is adjudicated bankrupt; or

(c) being a company, goes into liquidation.

(2) The right of forfeiture may be-

(a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or

(b) enforced by action in the Court.

(3) The right of forfeiture shall be taken to have been waived if-

positive (a) the lessor accepts rent which has become due since the breach of agreement or condition which entitled the lessor to forfeit the lease or has by any other act shown an intention to treat the lease as subsisting; and

(b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach:

Court Provided that the acceptance of rent after the lessor has commenced an action in the Court under subsection (2) shall not operate as a waiver.

(4) The forfeiture of a lease shall terminate every sublease and every other interest appearing in the register relating to that lease, but-

procured (a) where the forfeiture is set aside by the Court on the grounds that it was by the lessor in fraud of the sublessee; or

emphasis) (b) where the Court grants relief against the forfeiture under section 57, every such sublease and other interest shall be deemed not to have terminated.” (My

Findings and Analysis

[36] The Court starts with its first consideration and which is whether the Defendant has demonstrated to the Court or met the threshold of showing the Court that it has a serious issue to be tried or a cause of action.

[37] It is not to be disputed that Stanford Development Company Limited was the Defendant's former landlord pursuant to a lease made 27th July 2011, for 23 months and so the lease expired in 2013. It appears that the Liquidators on being appointed at October 2013, continued to allow the Defendant to occupy the Demised Premises without reducing the continued occupation to writing but then when the Defendant failed to pay in a timely manner a notice to quit was issued by Counsel for the Liquidators dated 8th November 2017. The Defendant continued in occupation of the Demised Premises it appears following the notice to quit and according to the Defendant this was on month to month arrangement.

[38] By letter dated 17th December 2018, the Liquidators notified the Defendant that Parcel 100 had been sold and that the Claimant was in charge of any arrangements between the Parties going forward as regards the Demised Premises.

- [39] The question for the Court then is, what was the Defendant's status once the Claimant purchased Parcel 100? The answer to this question will assist the Court in determining whether the Defendant has crossed the first hurdle for the grant of an interim injunction.
- [40] The Defendant argues that following the expiration of the lease and when Stanford Development Company Limited entered into liquidation that it then held a periodic tenancy of month to month with the Joint Liquidators. The Defendant insist that this arrangement continued and was transferred to the Claimant once there was no formal arrangement arrived at between the Defendant and the Claimant.
- [41] The Claimant on the other hand insist that at most the Defendant was a tenant at will on purchase of Parcel 100.
- [42] If the Defendant is correct that it held over on the periodic tenancy of month to month then pursuant to section 45 (3) of the **Registered Land Act**, notice of termination was to be a period of not less than the tenancy, in this instance one (1) month.
- [43] If the Claimant was correct that the Defendant was merely a tenant at will then pursuant to **Stanford International Bank Ltd v. Austin Lapps** the tenancy was terminated by any act of the Claimant which was inconsistent with the continuance of the tenancy and the Defendant had notice of it.
- [44] This brings the Court to the notice to quit. It is without doubt that a notice to quit is intended to disrupt a tenancy of whatever length. And the effect of which according to **Davies v. Bristow** once received is to automatically terminate the tenancy on expiration of the notice. There is no room for any election by a landlord. Any dealings after the expiration of a notice to quit would be lead to a fresh contract.
- [45] The notice to quit was issued on 25th March 2019, some 3 months after the Claimant purchased Parcel 100. As observed earlier, 5 days before the notice to quit was to take effect, at 25th June 2019, the Defendant's Counsel by letter stated that the Defendant had forwarded to them the Notice to Quit so therefore there was an acknowledgment of the notice to quit.
- [46] It appears to the Court that whether the Defendant had a periodic tenancy of month to month, or was a tenant at will, that either way the notice to quit brought the tenancy to an end. It could be viewed as having brought the tenancy to an end per the dicta in **Davies v. Bristow**, or by being an act which was inconsistent with the continuance of a tenancy at will and of which the Defendant had notice – **Stanford International Bank v. Austin Lapps**.
- [47] The Court is therefore of the view that the tenancy was at an end following the expiration of the time fixed in the Notice to Quit – 30th June 2019. This being the Court's view, the Defendant is not able to cross the first threshold of the **American Cyanamid** tests for the grant of an interim injunction. With the Defendant failing to cross the first threshold, the Court ought not to proceed to look at the further considerations laid out in **American Cyanamid**. The Court recalls Edwards JA salutary warning in **Sargusingh** about an interim injunction being a remedy to protect a right enforceable by a final judgment.

[48] The Court will deny the application for interim injunction relief, however, since it is common knowledge that the Defendant still has property including helicopters and aircraft on the Demised Premises, the Court will grant the Defendant 14 days within which to make arrangements to remove all of its property from the Demised Premises.

[49] Court's order:

1. The application for interim injunctions is denied.
2. The Defendant is granted 14 days within which to enter the Demised Premises and remove all of its property. The 14 days will commence on 11th October 2019 and end on the 25th October 2019.
3. The Registrar is to deliver to the Defendant the keys delivered to her on 23rd September 2019, by 10:00 a.m. on 11th October 2019.
4. The Claimant is not to during the 14 days given to the Defendant to remove all of its property from the Demised Premises visit or enter the Demised Premises.
5. By 10:00 a.m. on the morning of 26th October 2019, the Defendant shall deliver to the Claimant the keys for the Demised Premises.
6. Costs is awarded to the Claimant in the sum of \$2,500.00.

Rosalyn E. Wilkinson
High Court Judge