

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANTIGUA AND BARBUDA**

**CLAIM NO: ANUHCV 2007/0648**

**BETWEEN:**

**THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA**

Claimant

and

**ORDINANCE LAND COMPANY LIMITED**

Defendant

**Appearances:**

Mrs. Carla Brookes-Harris for the Claimant  
Mr. Dexter Wason for the Defendant

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2009: November 16  
2010: May 25  
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**JUDGMENT**

[1] **MICHEL, J.:** By Fixed Date Claim Form, with attached Statement of Claim, filed on 8<sup>th</sup> November 2007, the Attorney General of Antigua and Barbuda (as Claimant) claimed against Ordinance Land Company Limited (as Defendant) the following relief:

1. Possession of land or premises known as the Ordinance Land, which is owned by the Crown, and particularly described as Registration Section English Harbour, Block 35 2480 D, Parcel 55, Acreage 7.056.

2. Damages for breach of several covenants under the lease.
3. Interest pursuant to Section 27 of the Eastern Caribbean Supreme Court Act, Cap. 143.
4. Costs.

[2] On 31<sup>st</sup> October 2008 the Defendant filed a Defence to the Claimant's claim joining issue with the Claimant on the allegations contained in the Statement of Claim, while on 17<sup>th</sup> November 2008 the Claimant filed a Reply to the Defendant's Defence joining issue with the Defendant on its Defence.

[3] Following the case management conference, the hearing of interlocutory applications, the conduct of mediation and a pre-trial review, and following too the filing of lists of documents, witness statements, listing questionnaires, pre-trial memoranda, a five-volume trial bundle and skeleton arguments on behalf of the parties, the trial of the matter took place on 16<sup>th</sup> November 2009, with one witness giving evidence for the Claimant and two witnesses giving evidence for the Defendant.

[4] The first witness to give evidence at the trial was Ms. Ann Marie Martin, who was the only witness for the Claimant.

[5] In her Witness Statement, Ms. Martin stated that she was the Commissioner of the National Parks Authority of Antigua and Barbuda. That by deed dated 12<sup>th</sup> December 1961 the then Administrator of the Colony of Antigua leased the parcel of land (the Ordinance Land) to Vernon E. B. Nicholson and Emma M. Nicholson for 99 years at a peppercorn rent of \$100 per annum. That by instrument dated 23<sup>rd</sup> January 1963 the title and interest of the lessees in the demised premises was assigned to the Defendant without the written consent of the Crown as prescribed in the lease. That the lessees under the lease had covenanted with the lessor as follows:

1. Under Clause 2 (3) –  
"At their own cost to renovate and adapt for use as a dwelling house the Powder Magazine, to build four other dwelling houses and to construct a slipway for yachts within five years from the date hereof ... all to a total cost of not less than \$144,000.00."

2. Under Clause 2 (7) –  
"To keep the interior of the demised premises and all additions thereto and the walls, fences, drains and appurtenances thereof in good and tenantable repair, condition and decoration."
3. Under Clause 2 (9) –  
"Not to make or permit or suffer to be made save as is hereby authorized any alterations in or additions to the demised premises without the previous consent in writing of the [Crown]."
4. Under Clause 2 (10) –  
"Not during the term [of the lease] to assign or underlet the demised premises or any part thereof without the consent in writing of the [Crown] first had and obtained, such consent not to be unreasonably withheld in the case of a respectable and responsible assignee."

[6] Ms. Martin stated that the Defendant is in breach of the aforesaid covenants in that the Defendant:

1. Never obtained any written consent from the lessor to do any alterations, additions, assignment or sublease of the demised premises.
2. Contrary to Clause 2 (3), converted the Powder Magazine to office spaces for the period 1980 to 1995 and housed various business ventures, permitted Carlo Falcone to use the Powder Magazine as a storeroom from 2001 to the present time, failed to build four dwelling houses at their own cost, instead, three dwelling houses were built on the demised premises by various sub lessees, and failed to construct a slipway for yachts.
3. Contrary to Clause 2 (7), failed to keep the Powder Magazine in good tenantable repair in that:  
the roof is leaking;  
the wooden floor is rising;  
the entire structure is full of termites;  
there are large cracks in the walls;

the stones are falling out of the building.

4. Contrary to Clause 2 (9), the Defendant has permitted V.E.B. Nicholson and Sons (Antigua) Ltd. to construct an office on the old Stanley Tavern Ruin without the prior consent of the Crown and subdivided portions of the land to make provisions for the Carib Marine Supermarket and Chandlery without prior written consent of the Crown.

[7] Ms. Martin stated that on 28<sup>th</sup> April 2005 the Claimant served a notice on the Defendant specifying the aforesaid breaches of the covenants and requiring the Defendant to remedy them. That the Defendant, by letter dated 6<sup>th</sup> October 2005 written by Desmond V. Nicholson, admitted the aforesaid breaches, but the Defendant has failed to remedy the breaches.

[8] In her testimony in Court. Ms. Martin testified that the Crown became aware of the breaches of the covenants in the lease from March 2001 when she was approached in her capacity as Parks Commissioner by Mr. Carlo Falconie concerning his intention to undertake a commercial development on the demised premises. That this led to several meetings being held and to the breaches being outlined to the Defendant's Manager. That no action was taken by the Defendant to correct the breaches, which resulted in the Solicitor General writing to the Defendant in March 2003 informing them that a representative of the Crown would be coming to inspect the demised premises to determine whether the obligations of the lease were met. That in July 2003 the Crown attempted to re enter the demised premises and forfeit the lease for breaches of the covenants, but the Defendant instituted proceedings against the Crown challenging the forfeiture and the Court ruled in favour of the Defendant on the basis, inter alia, that the Crown did not properly serve the forfeiture notice in accordance with the Registered Land Act, Cap. 374 of the 1992 Revised Laws of Antigua and Barbuda (the Act).

[9] Ms. Martin also testified that the demised premises were not used for enhancing the yachting industry, the slipway was never built and, except for a number of subdivisions for residential development, nothing else happened under the lease. That the last time she visited the demised premises, the Powder Magazine was in a state of disrepair, the roof was leaking and sections of it

were taken off, there were lots of termites in the building, some of the stones had fallen out of the building, there was old wood, electrical cables and used oil dumped on the premises.

[10] Under cross examination, Ms. Martin testified that on 22<sup>nd</sup> July 2003 the first notice of forfeiture was served on the Defendant by the Solicitor General as a result of the breaches of the lease and the condition in which the demised premises were being kept, but the Nicholson family obtained an injunction preventing government from entering upon the property and terminating the lease. That she is aware that the judge ruled that the notice of forfeiture was not proper and that government was not therefore able to carry out its intention to forfeit the lease. That after the first case the Solicitor General served a second notice of forfeiture dated 27<sup>th</sup> April 2005 on the Nicholsons giving them 6 months to correct the breaches, but nothing was done to correct the breaches.

[11] The second witness to give evidence at the trial was Mrs. Lisa Nicholson – the first of the two witnesses for the Defendant.

[12] In her Witness Statement, Mrs. Nicholson stated that she is a director of the Defendant and the sole beneficiary of the Estate of the late Desmond Nicholson, formerly a director and shareholder of the Defendant. That the assignment of the lease to the Defendant by the original lessees was dealt with by the High Court in Claim No. ANUHCV2003/0394 and the Court ruled that the Government had waived its right to object to the assignment. That the Powder Magazine was fully converted for use as a dwelling house in the year 1962 and was lived in by the original lessees and later their granddaughter (Dana Nicholson) until it was seriously damaged by Hurricane Hugo in 1989. That to that extent the Defendant was not in breach of covenant. That during the period that Dana Nicholson was in the building and following its reconstruction, the Powder Magazine was made available for use as a temporary location for various businesses. That this was in compliance with the wishes of the person who was then in charge of the dockyard, who felt that all historic buildings should be open for use by the public.

[13] Mrs. Nicholson stated that the Court having ruled against Government in its attempt to forfeit the lease in Claim No. 394 of 2003, the present claim is another effort to accomplish forfeiture. That the Defendant again pleads for relief from forfeiture under Section 57 of the Act in view of the fact

that these assignments (by which she is understood to mean sub leases) were made many years ago so that records have been lost and in view of the fact that the lease says that consent is not to be unreasonably withheld in the case of a respectable and responsible assignee and that all sub leases are held by respectable and responsible people who have invested a great deal into Antigua over the years, so that she feels that the spirit of the lease has been honoured. That furthermore, the Government has always been aware that the sub leases were in place and had not questioned them until lately.

[14] As to the alleged breach by the Defendant's failure to build four other dwelling houses, Mrs. Nicholson is of the opinion that the Defendant has largely and substantially been in compliance with its obligation under the lease because a total of three dwelling houses were built by sub tenants of various plots on the demised premises and the fourth dwelling house was the one built around the old Powder Magazine by the original lessees.

[15] As to the failure of the Defendant to build a slipway, Mrs. Nicholson stated that the Claimant gave exclusive slipway rights to Antigua Slipway Ltd. in 1967, so this responsibility and privilege was no longer available to the Defendant. That the agreement with Antigua Slipway Ltd. was entered into by the Claimant without any notice to the Defendant, as required by Section 56 of the Act, specifying that the Defendant was in breach of this particular covenant and requiring them to rectify the same. That furthermore, it is now known through increased environmental knowledge that it is not wise to damage mangroves, which would have happened if a slipway were located on Ordinance Point, so environmentally it is best that English Harbour's slipway is located where it is.

[16] As to the various breaches of clause 2 (7) of the lease, Mrs. Nicholson stated that the Defendant does not consider that it is in breach of the lease because the historical structures contained within the geographical area demised by the lease are all basically intact; the only building which is in need of repair is the relatively modern building built around the Powder Magazine by the original lessee; the essential character of the premises and the integrity of those historical sites have remained the same.

- [17] Mrs. Nicholson stated that on 19<sup>th</sup> December 1995 the Defendant paid the rent due to the Claimant for the period from January 1996 to 2026 and, if the Court finds that the Defendant is in breach of any of its covenants under the lease, the Claimant has by accepting rent which has become due since the breaches were committed, waived its right to act on those breaches. That all of the breaches alleged by the Claimant were committed by or commenced prior to 1996 and by accepting the rent from 1996 to 2026 the Crown has waived its right to forfeiture because it had knowledge of such breaches, as shown by the notice served on the Defendant which led to the legal proceedings in the High Court in 2003.
- [18] Mrs. Nicholson in her Witness Statement asked that the Court grant the Defendant relief from forfeiture under the equitable and discretionary powers conferred on the Court under Section 57 of the Act, having effectively conceded breaches by the Defendant of the lease but appealing to be allowed to sell the Defendant's shares to Carlo Falcone so that she (Mrs. Nicholson) and the other current shareholders in the Defendant can be compensated for the efforts made by the Nicholsons over the years towards the development of the yachting industry in Antigua.
- 19] Under cross examination, Mrs. Nicholson again effectively conceded the breaches of covenant alleged by the Claimant, albeit attempting to explain the reasons for the failure of the Defendant to correct the breaches and suggesting that some of the breaches may not actually be significant.
- [20] The third and final witness in the case and the second of the two witnesses for the Defendant was Miss Dana Nicholson.
- [21] In her Witness Statement, Miss Nicholson stated that she is the eldest granddaughter of the original lessees and the daughter of Rodney Nicholson, who is the owner of half of the shares in the Defendant. That her father has senile dementia and she is his legal guardian in Antigua.
- [22] Miss Nicholson used her Witness Statement for the most part to contend that the additions made to the Powder Magazine constituted an additional dwelling house rather than an adaptation of the Powder Magazine for use as a dwelling house, that the slipway built by Antigua Slipway Limited on land other than the Ordinance Land fulfilled the obligation of the Defendant to build a slipway on

the Ordinance Land and that the Defendant sought but never received consents to do certain things on the demised premises which required prior consent, and concluded her Witness Statement with the assertion that her family is interested in selling the shares in the Defendant and could sell them to the Government for the right price.

[23] At the conclusion of the evidence of Miss Nicholson and on application by Counsel for the Claimant - with no objection by Counsel for the Defendant - the Court rose to view the locus in quo, from which the Court gained a visual impression of the demised premises and some of the alleged breaches in relation to the demised premises.

[24] Closing submissions were filed on behalf of the Claimant and the Defendant by 30<sup>th</sup> November 2009 as ordered by the Court.

[25] The question as to whether or not the Defendant breached the covenants in the lease as alleged by the Claimant became a virtual non issue as the case progressed, because the witnesses for the Claimant essentially admitted the breaches, though endeavouring to offer explanations or excuses for them. The sole issue in the case effectively became whether or not the Court should grant relief from forfeiture, as permitted by Section 57 of the Act.

[26] To be sure, the issue of forfeiture of the lease for its assignment by the original lessees to the Defendant without the prior consent of the Crown is *res judicata*, having already been determined by the High Court in Antigua and Barbuda in a case involving the parties to this suit. In any event, although the Claimant alleged in the Statement of Claim in this case that the lease was assigned to the Defendants without the prior consent in writing of the Crown, the Claimant did not include this as one of the particulars of breach for which relief is being sought from the Court. The fact too that the Claimant has sued the Defendant - who is the assignee of the original lessees - and not the estate of the original lessees, is itself an acknowledgement and acceptance by the Claimant of the assignment of the lease to the Defendant and would suffice to constitute acquiescence.

[27] In terms of the breaches particularized by the Claimant in the Statement of Claim, these were substantiated by the evidence of the Claimant's witness and substantially admitted by the

Defendant's witnesses. Ms. Martin stated in her evidence that the Powder Magazine was used for various commercial purposes, which she itemized, including as an office for a travel agency and as a storeroom for Carlo Falcone, and Mrs. Lisa Nicholson in her testimony stated that she accepts what Ms. Martin said in her evidence as to the various businesses which were conducted on the Ordinance Land. Ms. Martin stated in her evidence that the Defendant had failed to build four dwelling houses at their own cost as stipulated in the lease, which was not denied by the Defendant's witnesses, but they contended that three dwelling houses built by sub lessees should be treated as dwelling houses built by the Defendant and that the additions to the Powder Magazine to adapt it for use as a dwelling house should be treated as a fourth dwelling house. The lease agreement was quite specific and explicit in stating the obligation of the lessee in this regard as: "At their own cost to renovate and adapt for use as a dwelling house the Powder Magazine, to build four other dwelling houses ... all to a total cost of not less than one hundred and forty-four thousand dollars." On the evidence, neither the Defendant nor the original lessees built a single dwelling house at their own cost, the only expenditure incurred by them was in the renovation and adaptation of the Powder Magazine for use as a dwelling house, which renovation and adaptation did not constitute the building of a fourth dwelling house. Ms. Martin stated in her evidence that the Defendant failed to construct a slipway for yachts within five years of the date of the lease, as required by the lease. Mrs. Nicholson conceded that the Defendant had failed to build the slipway, but blamed this on the Government having given exclusive right to build a slipway to Antigua Slipway Limited, although the evidence is that this right was given to Antigua Slipway Limited more than five years after the date of the lease. Ms. Dana Nicholson – the other witness for the Defendant – preferred to say that the building of the slipway by Antigua Slipway Limited was the same as the slipway being built by the Defendant, although Antigua Slipway Limited is a completely different company from the Defendant and although Antigua Slipway Limited built the slipway on land other than the Ordinance Land on which the Defendant covenanted to build the slipway. Ms. Martin stated in her evidence that the Powder Magazine was not kept in good tenantable repair in that the roof is leaking, the wooden floor is rising, the entire structure is full of termites, there are large cracks in the walls and stones are falling out of the building, which is at least partially admitted by the Defendants' witnesses. Ms. Martin stated in her evidence that the Defendant permitted V.E.B. Nicholson and Sons (Antigua) Ltd. to construct an office on the old

Stanley Tavern Ruin without the prior written consent of the Crown, which was not denied by the witnesses for the Defendant.

- [28] The Court can reasonably conclude therefore that the Defendant is guilty of breaching some or all of the covenants alleged by the Claimant to have been breached and indeed this was all but conceded in the closing submissions filed on behalf of the Defendant following the conclusion of the trial.
- [29] In their Defence, the Defendant alleged that, if the Defendant has committed the breaches alleged in the Statement of Claim, the Claimant has waived its right of forfeiture under the provisions of Section 55 (3) (a) of the Act by accepting rent which became due since the breaches were allegedly committed or alternatively has waived its rights pursuant to Section 55 (3) (b) since the Claimant had been or should by reasonable diligence have been aware of the commission of the various breaches alleged.
- [30] As to this contention of the Defendant, the Court notes that it did not find expression in the closing submissions on behalf of the Defendant, which would suggest that it had by then been abandoned. The Court notes too that what was presented as alternative grounds for waiver of the Claimant's right of forfeiture under Section 55 (3) of the Act are in fact conjunctive requirements for a waiver of that right, both of which must be satisfied before the right of forfeiture can be deemed to have been waived. The Court also notes that although there was evidence that rental of the demised premises for the period from 1996 to 2026 was paid and accepted in December 1995, the evidence is that some at least of the breaches alleged and admitted were breaches which continued after December 1995 and which could not therefore have been waived by the payment and acceptance of rental in December 1995.
- [31] The Court comes now to deal with the issue focused on in the closing submissions filed on behalf of both of the parties, that is, whether or not the Court should grant the Defendant relief from forfeiture as provided for in Section 57 of the Act.

- [32] Section 57 (1) of the Act states as follows: "A lessee upon whom a notice has been served under section 56 or against whom the lessor is proceeding, by action or re-entry, to enforce his right of forfeiture, may apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit, and, if it grants relief, may grant it on such terms as it thinks fit."
- [33] It was alleged in the Statement of Claim and admitted in the Defence that on 28<sup>th</sup> April 2005 the Claimant served on the Defendant a notice dated 27<sup>th</sup> April 2005 specifying a number of breaches of covenants in the lease and requiring the Defendant to remedy the breaches within six months of the date of the notice. It was also alleged and not denied that the Defendant has failed to remedy the breaches within a reasonable time or at all and that the lease has become forfeited to the Claimant. On 8<sup>th</sup> November 2007 the Claimant instituted these proceedings against the Defendant seeking possession of the demised premises, damages for breach of the covenants under the lease, interest and costs. Although the Defendant did not seek relief from forfeiture in the Defence filed on 31<sup>st</sup> October 2008, where this application should properly have been made, relief was however sought by the Defendant via the Witness Statement of its principal witness, Mrs. Lisa Nicholson, filed on 30<sup>th</sup> March 2009.
- [34] This case therefore is one in which notice has been served on the lessee (the Defendant) and the lessor (the Claimant) is proceeding by action to enforce his right of forfeiture and the lessee has applied to the Court for relief. In accordance with Section 57 (1) of the Act, the Court has the power to grant or refuse relief as it thinks fit, having regard to the proceedings and the conduct of the parties and the circumstances of the case.
- [35] Based on the evidence, it would appear that almost fifty years ago the Government of Antigua, represented at that time by an Administrator, granted a ninety nine year lease to a retired naval commander and his wife of 7.056 acres of land at the Dockyard in English Harbour for a peppercorn rental of \$100 per year and obligated them to invest their funds in the development of the land by renovating the Powder Magazine located on the land, building four dwelling houses on the land and constructing on the land a slipway for yachts. Several other obligations were imposed on the lessees in return for this virtual gift of real estate to them, including a minimum investment of

their own funds in the development of the land (not less than \$144,000 at the time), the preservation of the character of the demised premises (including by prohibiting the commercializing of the premises other than by the conduct of the business of docking and repairing of boats on the slipway to be built) and its maintenance (both the leased premises and the additions thereto) in good and tenantable repair, condition and decoration.

- [36] On the evidence, it does not appear that the lessees have lived up to their side of the bargain, because other than making additions to the Powder Magazine to adapt it for use as a dwelling house, the lessees' obligations under the lease have remained largely unfulfilled. First of all, the original lessees assigned the lease without the prior consent of the lessor and, although this breach has been waived and could not now be used as a basis for forfeiture, its occurrence does form part of the history of the matter and is relevant to an assessment of the conduct of the parties and the circumstances of the case; and the Defendant's averment that the lease was assigned to a company whose shareholders were the lessees themselves is of no significance, because there is nothing to stop the shares in the company from being transferred to anyone at anytime without the knowledge or consent of the lessor. Secondly, portions of the demised premises were sub leased and alterations and additions were made to the demised premises without the consent of the lessor. Thirdly, the Powder Magazine, which under the lease was to be renovated and adapted for use as a dwelling house, was converted to office spaces and housed various business ventures, including a storeroom for use by a neighbouring business, and other portions of the demised premises also accommodated various business ventures. Fourthly, the lessees never built the four other dwelling houses at their own cost, as per the covenant in the lease, but instead sub leased portions of the demised premises (without the consent of the lessor) to various persons and three dwelling houses were built by sub lessees on the demised premises. Fifthly, the lessees never constructed a slipway for yachts. Sixthly, the lessees did not keep the demised premises in good and tenantable repair, condition and decoration. Seventhly, alterations and additions were made to the demised premises (including the construction of an office on the Stanley Tavern Ruins) without the consent of the lessor. In fact, the lessees' covenants under the lease were observed more in the breach than otherwise and rather than invest money in the development of the over seven acres of Dockyard land leased to them for a peppercorn, the lessees evidently set out to make

money from the leased property without any expenditure on their part, other than in the initial renovation and adaptation of the Powder Magazine for use as a dwelling house for themselves.

[37] At this juncture, nearly fifty years on, the Defendant asks the Court to give them relief from the forfeiture occasioned by their non fulfillment of their obligations under the lease, so as to enable the heirs of the heirs of the original lessees to get a windfall from the sale of shares in the Defendant to a businessman.

[38] Having regard to the proceedings, having regard to the conduct of the parties, having regard to the circumstances of the case, this Court will refuse to grant the relief sought by the Defendant and will instead grant the Claimant's claim for possession of the land or premises known as the Ordinance Land, particularly described as Registration Section English Harbour, Block 35 2480 D, Parcel 55. No award will be made for damages or interest, but the Claimant is entitled to costs to be agreed or otherwise assessed.

[39] The following authorities were cited by Counsel and considered by the Court:

1. **Segal Securities Ltd. v Thoseby**<sup>1</sup>;
2. **Penton v Barnett**<sup>2</sup>;
3. **Shiloh Spinners Ltd v Harding**<sup>3</sup>;
4. **Westminster (Duke) v Swinton**<sup>4</sup>;
5. **Quilter v Mapleson**<sup>5</sup>;
6. **Borthwick-Norton v Ronney Warwick Estates Ltd**<sup>6</sup>;
7. **Central Estates (Belgraria) Ltd v Woolgar (No.2)**<sup>7</sup>;
8. **Hammersmith & Fulham L.B.C. v Tops Shop Centers Ltd**<sup>8</sup>;

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<sup>1</sup> [1963] 1 Q.B. 887

<sup>2</sup> [1898] 1 Q.B. 276

<sup>3</sup> [1973] 1 All ER 90

<sup>4</sup> [1948] 1 K.B. 524

<sup>5</sup> [1882] 9 Q.B. 672

<sup>6</sup> [1950] 1 All ER 798

<sup>7</sup> [1972] 1 W.L.R. 1048

<sup>8</sup> [1990] 1 Ch. 237

9. **Hyman et al v Rose**<sup>9</sup>;
10. **Associated British Ports v C. H. Bailey PLC**.<sup>10</sup>



**Mario Michel**  
High Court Judge

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<sup>9</sup> [1912] A.C. 623

<sup>10</sup> [1990] 2 A.C. 703