ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 2005

BETWEEN:

KING'S CASINO LIMITED

Appellant

and

PIZZA HOUSE LIMITED

Respondent

Before:

The Hon. Michael Gordon, QC — Justice of Appeal
The Hon. Denys Barrow, SC — Justice of Appeal
The Hon. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Anthony Astaphan, SC and Mr. John Fuller for the Appellant
Mr. Gerald Watt, QC and Dr. David Dorsett for the Respondent

2006: March 7;
May 8.

JUDGMENT

[1] BARROW, J.A.: Counsel for the respondent conceded that his client possessed only a monthly tenancy and not a lease for 8 years; that the appellant landlord was entitled to forfeit the tenancy for breach by the respondent of its covenant to pay rent; that the relevant law precluded the grant to the respondent of relief against forfeiture; and that the damages awarded to the respondent for breach of the covenant for quiet enjoyment cannot stand. In effect the respondent surrendered the landlord and tenant battleground that it won by the judgment in its favour in the High Court but it made its last stand in this court on the field of trespass, conversion and negligence.

[2] The respondent had based its claim on a lease that the parties signed that was to run for 8 years from 1st January 1991 and on an addendum to it. In the High Court the judge thought it permissible to overcome the prohibition on receiving an unstamped document into evidence that section 21 of the Stamp Act imposes by ordering that because of its "better financial position"[1] the landlord, the very party who objected to the admission of the lease, should pay the stamp duty on the lease. The judge obtained (the appellant says imposed) an undertaking from the landlord to pay the stamp duty and on that condition admitted the lease into evidence.

[3] Before this court Mr. Astaphan S.C., counsel for the appellant, relied on the provisions of section 46 of the Registered Land Act[2], section 4 of the Registration and Records Act[3] and section 21 of the Stamps Act[4] as well as statements by this court in Soumitra Sengupta v Woods Development Ltd[5] to show that it was not permissible for the judge to admit into evidence a document that failed to comply with the legal requirements as to form, that was not registered, and that was not stamped. Section 21 of the Stamp Act is in firm language:

> "Save and except as aforesaid, no instrument executed in any part of Antigua and Barbuda or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of Antigua and Barbuda shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

[4] Mr. Watt Q.C., counsel for the respondent, conceded that the judge erred in receiving the unregistered and unstamped lease into evidence and in allowing the respondent to place any reliance on it. Mr. Watt conceded that the consequence that followed was that the respondent therefore had only a tenancy from month to

---

[1] Paragraph 4 of the judgment in Suit No ANUHCV 1999/0481 delivered January 17th 2005 (the judgment).
[2] Chapter 374 of the Laws of Antigua and Barbuda 1992 Revised Edition
[3] Chapter 375 of the Laws of Antiuga and Barbuda 1992 Revised Edition
[4] Chapter 410 of the Laws of Antiuga and Barbuda 1992 Revised Edition
[5] Antigua and Barbuda Civil Appeal No. 20 of 2003

month. Those concessions amounted to a rout because it meant that the tenancy was terminable by giving one month's notice and the damages to be awarded, if any, would have to be limited to the injury caused by failure to give such notice. This is on the basis that a party to a contract which provides for its termination "would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself, that us to say, that he would have determined the contract at the earliest date at which he could properly do so". [6] .

[5] In the High Court the respondent had claimed damages for breach of the covenant for quiet enjoyment contained in the lease and implied, as the judge found, in all leases. That covenant was that "so long as a lessee pays the rent and observes the agreements and conditions contained in the lease on his part that the lessee shall peacefully and quietly possess and enjoy the leased premises without any lawful interruption from or by the lessor or any person rightfully claiming through him."[7] The judge found that there had been four re-entries by the appellant and that each of these had been unlawful and was a breach of the covenant for quiet enjoyment. The judge awarded total damages of $969,345.99 to the respondent.

[6] In relation to each re-entry the judge found that the respondent had been in breach of its obligation to pay monies due under the lease and that the re-entry had been by way of forfeiture of the lease by the appellant. The judge found that the re-entries were unlawful for two reasons. In relation to the first re-entry, which was made on 13th March 1995, the judge found that the appellant had served notice on the respondent to pay 14 months' arrears of electricity payments (claimed in consequence of the respondent's tampering with the meter) and gave it 28 days to do so or the lease would be forfeited. The judge held that the time that the appellant gave for the tenant to remedy its breach was not a reasonable time, which section 56 of the Registered Land Act states must be given, and that the failure to give a reasonable time made the re-entry illegal and a breach of

[6] Gunton v London Borough of Richmond Upon Thames [1980] 3 All ER 577 at 588.
[7] paragraph 19 of the judgment

covenant for quiet enjoyment. The judge held that the appellant was liable for all damages resulting from that breach. The respondent regained possession after two days pursuant to a mandatory injunction.

[7] In relation to the second re-entry, on 4th October 1996, the judge found that the failure of the appellant to obtain a court order authorizing the forfeiture made it unlawful.[8] It appears that the judge held the third re-entry, on 6th March 1997, and the fourth re-entry, on 6th March 1998, to be unlawful for the same reason.[9]

[8] Although Mr. Watt argued in support of the judge's decision that the forfeiture was unlawful in the end he rightly and commendably conceded that the effect of an "unlawful" forfeiture is that it is vulnerable to being relieved against. He did not contend that the forfeiture was ineffective. I think this was a proper appreciation of the true legal position, as stated in a leading text, which is that if the forfeiture is relieved against "the lease is re-established as from the very beginning".[10] The fact that the lease is re-established if relief against forfeiture is granted confirms that until it is re-established the forfeiture has effect. It follows that if there is no relief against forfeiture the forfeiture stands and the lease is terminated.

[9] Mr. Watt was forced to concede, as well, the impact of Mr. Astaphan's argument as to the effect of section 57 (4) of the Registered Land Act[11], which plainly states that the court has no power to grant relief against forfeiture for non-payment of rent. The conclusion that flows inevitably from this position was that the respondent was incapable of obtaining relief from forfeiture for non-payment of rent so its lease was well and truly forfeited. I would therefore hold that there was no breach of the covenant for quiet enjoyment and the respondent was not entitled to any damages for the alleged breaches.

---

[8] Paragraph 35 of the judgment

[9] Paragraphs 40 and 45 of the judgment. The respondent resumed possession pursuant to injunctions after both the second and third re-entries. The respondent was kept out of possession for some 7 weeks after the second re-entry and for 10 months after the third re-entry. It did not go back into possession after the fourth re-entry.

[10] See Cheshire & Burn's Modern Law of Real Property, 14th edition, p. 410

[11] Chapter 374 of Laws of Antigua and Barbuda 1992 Revised Edition

[10] I note that the first forfeiture was for non-payment of money other than rent. The only effect of that distinction is that the first forfeiture could have been relieved against. The availability of relief from forfeiture does not diminish the fact that the respondent was in breach of its obligation under the tenancy and the appellant had a right to forfeit the tenancy. The judge thought that the 28 days that the appellant gave to the respondent to pay money that the respondent owed to the appellant for electricity that the appellant supplied to the respondent did not give the respondent a reasonable time within which to pay. It seems to me that the judge erred in reaching that conclusion because she failed to consider relevant facts.

[11] In considering the first forfeiture the judge referred to the fact that the money that was unpaid was money that the appellant claimed following its discovery that the respondent had tampered with the meter. The judge expressed surprise that "no issue was specifically taken with the serious allegation of meter tampering"[12] and proceeded on the assumption, without deciding at that stage, as she expressly stated[13], that the claim was meritorious. Much later in the judgment, in upholding the appellant's counterclaim, the judge found that the respondent had been guilty of meter tampering.[14] This was a finding of dishonesty on the part of the respondent and it was highly relevant to a consideration of how much time should reasonably have been given to the respondent pay the money that it had been defrauding. It was also highly relevant in considering what was a reasonable period of time to give for the judge to have considered that it was over a period of 14 months that the respondent had fraudulently kept the appellant out of its money. I am certain that if the judge had considered these factors in considering whether 28 days was a reasonable time to give the respondent to pay money that it had defrauded the judge would have found it more than the respondent reasonably deserved. On that basis I would interfere with the judge's exercise of

[12] Paragraph 23 of the judgment
[13] Paragraph 11 of the judgment
[14] Paragraph 78 of the judgment

her discretion and hold that the respondent was given a reasonable period of time in which to remedy its default and that the forfeiture following its failure to remedy its default was proper and lawful. Accordingly, in my view, there was no breach of the covenant for quiet enjoyment.

[12] The judge had also awarded damages to the respondent for the costs of repairs to the premises that the respondent had effected consequent upon damage caused by Hurricane Luis on 4th September 1995. The judge found that the appellant refused to repair the premises and the respondent carried out repairs. The judge concluded that under the terms of the lease the appellant was obliged to repair hurricane damage and that this was not changed by the terms of the addendum that provided that the respondent would be responsible for *all* repairs. I find considerable merit in Mr. Astaphan's submission that it was simply not open to the judge to neutralize that clear provision by relying on evidence from the respondent that the appellant had carried out certain repairs to conclude that therefore the parties could not have intended by the use of the word "all" that the respondent would be responsible for all repairs. However, there is no point in considering the merits of the judge's decision because, in my view, the entire foundation of the judgement is destroyed by the determination that I have made that the unstamped lease ought not to have been received in evidence. It follows, in my view, that it was not permissible to rely on any provision in the lease as a basis for imposing liability to repair upon the appellant.

[13] In addition, on the view that I have taken, at the date of the hurricane (4th September 1995) the appellant had effectively forfeited the tenancy (13th March 1995), and the respondent had no right to be in the premises far less to carry out repairs in mitigation of the supposed damage that the landlord was causing to the respondent by failing to repair for the respondent's benefit. In my view there is no basis for making the appellant liable for the unilateral action of the respondent in repairing the premises over the manifest opposition of the appellant.

[14] Because the judge found for the respondent on its claim for breach of the covenant for quiet enjoyment she did not consider the respondent's alternative claim for damages for trespass, conversion and negligence. In the course of making his oral submissions, when counsel for the respondent saw how the battle was going he urged this court to consider the claims in tort, notwithstanding that the respondent had not filed a counter notice of its intention assert those claims. Mr. Astaphan did not object to the court so proceeding.

[15] In its written submissions before the High Court the respondent summarized its claims in tort as follows:

> "The Claimant's claim in the alternative to breach of contract is in tort, and is for damages, for trespass and/or conversion and/or negligence and is based on the unlawful lockout of the Claimant's from their business, the failure of the Defendants to properly protect the assets of the Claimant company which were lawfully in their custody and the disappearance of the said assets while these assets remained under lock and key by the … defendants. All the ingredients in these costs (sic) are disclosed by the evidence in this case."

[16] This court did not have the benefit of submissions from counsel for the respondent on what makes these claims still maintainable if the tenancy was lawfully forfeited, as I consider it was. The unassisted view that I take is that because the re-entry was lawful there was no wrongful interference with possession and so no trespass. As regards the claim for conversion there is nothing on the evidence to make out a case for conversion. The appellant did not deny the respondent's entitlement to the goods that the respondent left in the premises, and in the circumstances of this case a denial of the respondent's ownership or rights to the goods would have been essential to establish the case for conversion. Rather, it seems, the respondent did not seek to remove its goods because, in relation to the first three re-entries certainly, the respondent was maintaining its right to remain in possession of the premises.

[17] According to the witness statement of the respondent's witness, Charles Clayman, it was after the respondent regained possession following the third re-entry that it found that many of the items it had left in the premises had been stolen. This accords with the particulars of special damage given in the statement of claim. The respondent, as I have found, left behind the items because the respondent intended to regain possession. In view of my finding that the appellant had lawfully re-entered it follows that the respondent should have removed its goods. It was the respondent's failure to remove its goods that allowed the goods to be stolen. I do not see that there was any duty of care (beyond the around- the- clock security service that the appellant engaged) that the appellant owed to the respondent to safeguard the goods that the respondent chose to leave behind. I would therefore reject the claim for negligence, as well.

[18] I would allow the appeal and set aside the judgment in favour of the respondent. I would enter judgment for the appellant dismissing the respondent's claim with prescribed costs to the appellant. I would award the costs of the appeal to the appellant at the rate of two thirds of the High Court costs. The value of the respondent's claim was $1,946,274.39 and I calculate prescribed costs in the High Court at $58,388.23 and costs of the appeal at $ 38,925.49. The judgment for the appellant on its counterclaim is unaffected by the result of this appeal.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal