THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2006/0208

BETWEEN:

Claimant

KINGS CASINO LIMITED

AND

GRAND ROYAL ANTIGUAN BEACH RESORTS LIMITED

Defendant

APPEARANCES:

Mr. Septimus Rhudd and with him Ms. Gail Pero, for the Claimant

Mr. Roger Ford Q.C. for the Defendant

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2009: March 2

2009: April 24

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JUDGMENT

1. **Harris J.** This is an action for a breach of a lease agreement and related agreement for the provision of gaming services ('the agreement') between Kings Casino and the Grand Royal Antiguan Beach Resort.[1]

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2. In October of 2004, one Mr. Wexelman the Managing Director of the Claimant together with Ms. Emilio Fagalde, the General Manager of the Claimant met with Mr. Paul Langas and Mr. George Marine both representatives of the Defendant Company.

3. The parties there discussed the prospect of the Claimants setting up and operating a Casino on the Defendant premises with short notice.

4. The parties agreed that Kings Casino would undertake the operation (Casino). It appears that several issues concerning the said Casino operation were discussed including the desirability of obtaining duty free concessions for the Claimants importation of gaming equipment; the waiver of the Government of Antigua and Barbuda ('Government') Casino slot license fee; the refurbishment of the Hotel (the defendant's premises) and the prospect of the defendant's Hotel commencing operations as either part of the Hilton Group or Crowne Plaza. [1]

5. A series of telephone and e-mail communications took place between the parties thereafter; more particularly between Mr. Wexelman of Kings Casino and Mr. George Marine of the Defendant, Grand Royal Antiguan Beach Resort Ltd.

6. Mr. Wexelman's uncontested evidence in Chief is that Mr. George Marine and Mr. Langas at the October meeting indicated that the Casino was to be operational as a matter of urgency. They said that the Hotel was being advertised as a Resort and Casino and therefore the Hotel *".....would need to have a Casino up and running for the winter season so as to satisfy the expectations of the tour operators and guests."* [2]

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1. The key terms of a gaming service agreement (if that is what it is) are substantially incorporated and set out in the draft unexecuted lease agreement for the premises situate on the Defendant's hotel property.

[1] The representation "...Hilton Group **or** Crowne Plaza" is inconclusive and does not lend itself to being a sufficiently firm representation (if a representation at all) that a reasonable person would act upon.
[2] See para 4 of Wexellmans witness statement at pp 24 of the Trial Bindle.

7. On the 13th of October 2004 and days after the meeting between the parties Mr. Wexelman by e-mail to one Mr. Ramnarine of the defendant, outlining the Claimant's proposal. This proposal touched on several issues including obtaining a waiver of a Government license fee, and duty-free importation of the gaming equipment.[1]

8. Mr. Wexelman for the Claimant, again, on the 18th November 2004 sent an e-mail to Mr. Marine on this occasion attaching a *'letter of intent'* setting out several of the terms of the agreement between the Claimant and Defendant including the acquisition by the claimant of new slot machines imported duty- free. The duty-free and license concession raised earlier by the Claimants were not articulated with the same specificity in this communication.

9. Sometime after the 18th November 2004 e-mail from Mr. Wexelman, it appears a draft lease came into being purporting to contain the agreed terms and conditions for the operation of the casino at the Defendant's premises.[2]

10. By e-mail from Mr. Wexellman on the 13th December 2004 to Attorneys for the Defendant, Hill & Hill, Mr. Wexelman expressed satisfaction with the terms of the draft lease agreement which as a matter of fact, did not include the terms as set out in para. 4 above as an obligation on the part of the defendant.

11. The Claimant by virtue of the October discussion and without an agreement in writing proceeded to the importation of several items of gaming equipment all set out in its Statement of Claim.

12. Certain equipment belonging to the Claimant that was already in Antigua was relocated to the demised property. The casino operation was commenced in January 2005. There is no issue over the date of the commencement of the agreement. At this time it is taken that there was a settled agreement in place between the parties.

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[1] See pp 42 of Trial Bindle

[2] The draft lease is referred to herein variously as the "unexecuted lease", the 'draft lease document', 'lease document'.

13. Prior to this, the draft lease was signed by the Claimant and sent to the Attorney for the Defendant. The draft lease was never signed by the Defendant and remained a mere document – a memorandum in writing (hereinafter referred to also as the 'draft lease document').

14. The said lease document contained several provisions including the provision with respect to payment of US$ 2000 /month rental, the first and last months rent, and a security deposit. It also provided; that in addition to the minimum guaranteed monthly rental of US$ 2000.00 per month, the lessee shall also pay to the lessors other amounts not relevant to this matter.[1] On the evidence of Mr. Wexelman the claimant did in fact pay these sums and I accept this as an agreed term of the agreement between the parties.

15. Further, the lease document provided in clause 5(9)for the defendant to use *"its best endeavors to ensure that the lessee obtains during the term of this lease, Government approved for exemption from the payment of all duties and taxes associated with the importation of ..... equipment and all other items required for ..... the leased premises."* On the evidence of Mr. Wexelman and on the commercial and practical logic of the undertaking, in all the circumstances of this case I accept this as a term of the agreement between the parties.

16. The said lease document found at pp 49 of the Bundle, the lessees covenants at Cl. 5(9) to apply for and obtain all licenses, permits and permission required for the operation of the business of the lessee on the demised premises.

17. The lessors/Defendant covenanted to Cl. 32 of the lease document which provides for the termination of the lease by either party for *just and sufficient cause.*

18. The claimant by way of Mr. Wexelman in cross examination accepted that the clauses specifically referred to above were agreed to between the parties. Wexelman considered the

[1] The lease contains several terms and conditions pertinent to the operation of a business and agreement thereto.

claimant bound by the several terms, and this, even without a written valid and registered lease agreement in place.[1] Again, on the evidence of Mr. Wexelman and on the commercial and practical logic of the undertaking, I accept the content of these provisions as forming terms of the concluded agreement between the parties.

19. The Defendant made an application to the relevant Government department, to secure for the Claimants, duty free concessions on the importation of the equipment by the Claimant for use on the premises of the Defendant. The application was not approved; a real possibility if not probability that would have been anticipated by both parties at the time of contracting and certainly anticipated by the reasonable man/investor in Antigua and Barbuda.

20. The evidence in this matter suggests that the Claimant continued in communication with the Defendant through out its period of operation and on the 22nd of February 2004, Mr. Wexellman sent an e-mail to Mr. Marine of the Defendant.

21. The e-mail of the 22nd of February 2005 forms the basis of the stated reason for the termination of the Claimant by the Defendant and I set it out below:

> *"Dear Mr. Marine,*
> *I have not heard anything from you about the duty free status.*
> *Also today King's Casino was told it would have to pay EC$5800 per week to operate the Royal Casino as a slot license fee.*
> *We were told at the beginning that your company was told to keep the Hotel open at the request of the Prime Minister and that there would not be a Casino license fee.*
> *You have to realize that the Casino does not take in enough to pay the license fee- let alone pay salaries, rent and duties etc.*
> *This is a weekly charge and if this is not worked out immediately we have no choice but to turn off the machines and vacate the premises.*

[1] Wexelman maintained that the agreement between the parties included also an absolute undertaking by the defendant to obtain the duty-free concession for the importation of the gaming machines by the claimant..

I hope you understand the severity of this matter.
Since Inland Revenue will no doubt come to King's Casino to collect this fee it must be resolved immediately.
Elliott"

22. Mr. Wexelman e-mailed Mr. Marine on March 17 indicating he was *"getting the feeling that you do not want us there any longer. We have tried our best but keep on running into obstacles"* referring to the Casino premises at the Defendants property.

23. Mr. Marine of the Defendant, by e-mail of the same date assures Mr. Wexelman on the Defendant wants Kings Casino to operate the Casino in the Hotel.

24. By letter of 31st May 2005 the Defendants Attorneys, Hill & Hill, on instruction serve the Claimant with a notice to quit. The contents of this notice are set out below:

"We are instructed by and act on behalf of Grand Royal Antiguan Beach Resorts Ltd.

Our instructions are that by an email message of February 22nd, 2005 you advised our clients that you are not in a position to pay to the requisite fees to operate a casino on their premises. The obtaining of licenses and the costs thereof are your responsibility and not our client's; and as you have admitted your inability and unwillingness to pay the said fees as required by law and expressed your desire to vacate the concerned premises, our clients have elected to terminate your occupation of their premises.

We are instructed to serve you with the attached ***Notice to Quit*** *and you are hereby required to quit and deliver up possession of the premises on or before the 30th day of June 2005.*

We anticipate your kind cooperation."

25. This letter precipitated a series of events culminating in the Claimant vacating the premises, receiving a pro-rated portion of the months rent along with its equipment and subsequently filing this action.

26. At trial, at the close of the case for the claimant, the Defendant declined to lead any evidence, opting to rely on the Claimant evidence and admissions in support of the defence obtained through cross examination.

27. Several issues arise in this matter:

(i) What if any representations were made by the defendant to induce the claimant to enter into contractual relations with the defendant.

(ii) What were the terms of the parties agreement (s)

(iii) Which party is in breach of the agreement (s)

(iv) Was the agreement lawfully terminated

(v) If so, what damages can the Claimant claim.

ISSUE (i) What if any representations were made to the claimant to induce it to enter into contractual relations with the defendant?

The Claimant's submissions

28. The claimant submits as far as the court can determine, that the defendant made certain representations prior to concluding the agreement, to induce them to enter into the contract such as (i) that the Defendant Hotel was soon to commence operations as part of the Hilton Group or Crowne Plaza and (ii) that the defendant would secure duty free concessions for the importation of the claimant's gaming machines and equipment for use at the demised

premises. (iii) that for the initial 'slow' period at the hotel the slot license fee payable to the Government would be waived.

29. The claimant contends that neither representation upon which they relied materialized. It submits that the representation was calculated to cause the claimant ('a reasonable man') to enter into the agreement and in fact it did (or in part did) cause the claimant to enter into the agreement.[1] The claimant, by its statement of claim, conduct of its case and submissions appear also to contend that the said representations also formed part of the concluded agreement between the parties.

The defendant's submissions

30. The defendant's submissions are largely rolled up in the court's findings below.

Court's Findings

31. I find that a reasonable person doing business in Antigua(and in this case the claimants had been doing business in Antigua prior to this agreement) would not have been induced to enter into the subject agreement by representations by the defendant, a private company, including that the defendant could secure for the claimant an exemption from Government import duties or waiver of Government slot license fees. The right to grant or not to grant these facilities surely vests in the government and at best a party could only undertake to use its best endeavors to assist the claimant to obtain these facilities in the future. Further, if it were so critical a representation so that it was to be a term of the agreement, I would have expected to see a clause in the agreement (whether oral or in writing) specifically providing for the event of the failure of the defendant to secure the concessions. None has been proved in this trial.

32. But, perhaps the most fatal legal principle applicable to this issue is that; the representations[2], if they were made at all, must be statements of fact not statements of intention as are these alleged representations. It must relate to some existing fact and contain no element of futurity.[1]

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[1] Partial cause of the inducement is sufficient; see Edgington v Fitzmaurice (1885) 29 Ch.D 459.
[2] Common Law Negligent Misrepresentation.

33. Even if I were to accept the evidence of the claimant on this point (which I do not), the defendant's undertaking to secure the concessions were to take effect in the future, albeit near future. Likewise, the defendant's representations of its future operations as a Crowne Plaza or part of the Hilton group is just that; a future possible occurrence[2]. The representations would be classified either as an innocent misrepresentation which as Mr. Ford Q.C submitted, would only entitle the claimant to rescind the agreement or as a fraudulent misrepresentation. The only thing that could exist as a present fact would be the defendant's knowledge at the time of making the representations that such representations were, for instance, untrue. This takes the claimant's case into the realm of fraudulent misrepresentation (common law action of deceit). Further, having regard to the claimant's contention as to the critical importance of these representations as terms of the agreement, it lends itself to have been cast in writing before the claimant acted on the agreement[3]. **The claimant has simply not led sufficient evidence to establish the allegation of misrepresentation and fraud nor has it pleaded this case[4] or claimed the relief of rescission.**

ISSUE (ii): What were the terms of the parties agreement (s)

The Claimants Submissions

34. The Claimant contends that the Claimant entered into two (2) agreements with the Defendant; one agreement concerned the lease of the Defendants premises and the other agreement was to provide gaming services at the said premises.

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[1] The Law of Contract, Cheshire, Fifoot and Furmston, 8th edit. Pp244; Halsbury's Laws of England 4th edit Vol. 31 para. 1055

[2] The letter from counsel for the plaintiff to the defendant dated 8th December 2005 at pp 86 of the Trial Bundle alleges that the defendant said that "*..The Resort would shortly commence operating as a Hilton Hotel*". This narrower assertion is not consistent with the pleadings and evidence of the claimant.

[3] Even when the claimant had an opportunity to crystallize these terms in writing in the draft lease agreement, it failed to do.

[4] See Precedents of Pleadings 16th edit Vol 2 para. 49.02

35. The agreement to provide gaming services the Claimant contends, was partly oral and crystallized through several conversations between the parties commencing at the meeting of Oct 2004 and continuing throughout and beyond the Claimants signing of the document headed "Lease" (sees pg 52 of the Trial Bindle for Document).

36. The terms of the other limb of agreement - to provide gaming services on the premises of the Defendant - included the Defendant securing for the Claimant, duty - free concessions from the Government of Antigua and Barbuda on the importation of the gaming equipment by the claimant.

37. This undertaking by the Defendant, contends the Claimant, supersedes or exists apart from[1] the agreement reflected in S. 27 of the lease document which there merely placed a commitment on the Defendant to use its best endeavors to assist the Claimant in obtaining the requisite duty free concession from the Government of Antigua and Barbuda.

38. The Claimant further contends that it was a term of the agreement[2], and understood as such between the parties and also reflected in the partially executed lease document (at Cl. 32 at pp 53 of the trail bundle) that the agreement may only be terminated for just and sufficient cause.

39. The Claimant contends further, that the lease was not signed by the Defendants so the Defendant cannot rely on it as containing the terms of the lease agreement. Further, they contend that the draft lease was not in any event stamped and/or registered so cannot be admitted into evidence and relied on.

The Defendant's Submission

40. The defendant contends, that on the question of the draft lease not being signed by the Defendant; that the Claimant itself is relying on the draft lease document in support of the

[1] The Claimant position on this issue is not entirely clear.

[2] The claimant submits that the 'agreement' was partly oral and partly in writing and consists of an agreement for the provision of gaming services and the rental of the premises and they both affected each other.

termination clause and further it is relying on oral representations that were obviously not signed and further, they rely on the *'letter of intent'* that also was not signed along with several e-mail communications that moved between the parties.

41. The evidential weight of the document headed "Lease" and signed by the Claimant is buttressed by the evidence that prior to the signing of the lease by the Claimant, Mr. Wexelman of the Claimant, perused, signed the lease and returned the lease to the Defendant[1]. Counsel for the Defendant Mr. Roger Ford Q.C pointed to the testimony under cross examination of Mr. Wexellman where he accepted terms of the said draft lease as representing the draft lease agreement.[2]

42. When directed to Cl. 2 and 3 of the lease document, Mr. Wexellman admitted having complied with those terms and paying US$ 6000.00 pursuant to that lease document and the court observes, in any event, paying the said rent pursuant to an agreement between the parties.

43. When directed to clause 32 of the draft lease document, he admitted that termination of the lease was governed by the terms of that clause and it did represent the understanding between the parties i.e. that the agreement could only be terminated for just and sufficient reasons.

44. When further directed to Cl. 23 of the draft lease document, he admitted that the Claimant did obtain the required insurance coverage pursuant to the terms of the said Cl. 23 and that payment represented the understanding between the parties.

45. Directed to Cl. 27 of the lease document concerning the lessors covenant to use their best endeavors to secure import duty, tax and other concessions on behalf of the lessee, Mr. Wexelman acknowledged that it was what, by that draft lease agreement between the parties

[1] See e-mail from Mr. Wexellman to Attorney Tomlinson as 44 of the Trial Bindle.

[2] Ibid, Mr. Wexelman did in his testimony allude to other terms which were not contained in that draft lease, more specifically ,the terms requiring the defendant to obtain certain waivers and concessions from the Government of Antigua and Barbuda.

to which the claimant had agreed and appended its authorized signature, the lessor covenanted to do.

46. Mr. Wexellman was referred to Cl. 5(b) of the lease concerning the lessees covenant to pay all rates, taxes outgoings charged upon the occupants of the premises and he acknowledged that the Claimant had agreed to comply with the terms of the covenant.

47. Mr. Wexelman further acknowledged that when the Claimant commenced operation in January of 2005 they had already signed the aforementioned lease document and paid their rent pursuant to the agreement between the parties and reflected in the draft lease document.

48. In cross examination Mr. Wexelman said that after the meeting of Oct 2004 he e-mailed the Claimant's proposal to the defendant.[1] This e-mail he said, contained the Claimant's proposal to the Defendant, but he did not receive an e-mail from the Defendant accepting the proposal.

49. What happen instead, said Mr. Wexelman, is that the Defendant called him and they had a discussion at the end of which he was requested to submit a *"letter of intent"*, which he did.[2]

50. Mr. Wexelman admitted in cross examination that the letter of intent did say that the first two months of operation would be rent free. This he said represented the intent then. He later, when put to him in cross examination, acknowledged that this ultimately did not form part of the final agreement between the parties.

51. Counsel for the Defendant Mr. Roger Ford Q.C put to the witness that not all that was initially discussed and/or intended found its way into the final agreement or understanding. Mr. Wexelman agreed.

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[1] See e-mail of Oct 13/04 at pp 43 of Trial Bundle.

[2] See e-mail of Thursday Nov 18th 2004 at pp 43 of Trial Bindle.

52. Further, counsel for the Defendant contends that what ever may have been said or intended initially was superceded by the final understanding and agreement between the parties which were reduced into writing, now reflected in the partially executed lease document.

53. Mr. Wexelman has acknowledged substantially, the terms of the lease document as reflecting and governing the commercial relationship between the parties. Curiously, although he agreed that the terms of Cl. 27[1] of the lease document was a covenant by the defendant, he maintained that the partly oral agreement between the parties, to the contrary, placed the primary contractual obligation to obtain the import duty-free concessions for the claimant on the defendant.

54. Mr. Roger Ford Q.C. contends, that whatever you may wish to call the draft Lease document, whether a contract for a license to use the premises or otherwise; that partially executed document (exhibited at pp52 of the trial bundle) reflects the terms of the entire agreement between the parties.

55. The document does not comply with the provision of the Registered Land Act (R.L.A). In any event, if it did so comply, the definition of a lease therein would preclude the Claimant from maintaining this action against the Defendant.[2]

56. Mr. Ford Q.C submits that the terms of the lease govern the relationship between the parties and that consequently, in light of the substance of clauses 5, 9 and 32 of the lease, the Defendant was: *"(i) not obliged to obtain any license (ii) not obliged to defray expenses incurred by the Claimant and (iii) was entitled to determine the relationship by giving one month notice."* Further, Mr. Roger Ford Q.C. submits that the Defendant was not required to set out the *"just and sufficient"* cause in the *"Notice of quit"* but it is sufficient to establish a just

[1] See para. 39 above for the substance of this clause.
[2] See S 46 of the Registered Land Act Cap 374 and the definition of "proprietor" in S. 2 under the R.L.A together with the absence of any evidence in this matter sufficient to find the Defendant as a :proprietor". A lease of the duration of this lease – including the option to renew is required to be registered under the R.L.A.

and sufficient cause at trial. The defendant submits that the claimant has failed to obtain for itself the requisite duty and license fee waivers.

Court's Findings

57. The court, mindful of the content and character of the communication between the parties before and after commencement of the operation and up to termination of the lease agreement; is convinced by the arguments of the Defendant on this issue.

58. I accept as containing the primary applicable Law on the interpretation of Commercial Contracts; that which is found in the authorities of; **ICS** v **West Bromwich** [1981] 1 ALL ER 99 per Lord Hoffman[1]; **Antaios Cia Nauiera S.A.** v **Salen Rederierna AB, the Antaios** [1985] AC 191[2]. and **Ove Arup & Partner International Ltd. and another** v **Mirant Asia – Pasific Construction (Hong Kong) Limited and another** 2003 ECWA 1729[3].

59. Counsel for the Defendant Mr. Roger Ford Q.C. submits that in this case, in order to determine what agreement governed the relationship between the parties from November 2004 to June 2005 that the court must examine the negotiations, the letter of intent and the lease document executed by the claimant and all other relevant circumstances. I agree with this proposition and I believe I would be correct in saying that counsel for the Claimant would be in agreement with this.

60. Lord Hoffman in the ***ICS case*** said that *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

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[1] See Lord Hoffman at pp 115h.

[2] See Lord Diplock at pp 201

[3] See para 62.

61. Lord Hoffman went on to say that *"The B 'rule' that words should be given their 'natural and ordinary meaning" reflects the common – sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. In the other hand of one world nevertheless conclude from the background that something must have gone wrong with the language, the law does require judges to attribute to the parties on contention which they plainly could have had....."* Here, Lord Hoffman quoted Lord Diplock in the ***Antaios*** case supporting this approach.

62. In concluding an agreement there has to be an unequivocal acceptance of an offer which stipulates terms essential to the existence of the Agreement[1]. The Claimant's assertion that two agreements governed the relations between the parties with one being substantially oral is negated by the absence of the essential terms from which one can infer that other substantially oral contract. It is not sufficient to say that one of the terms is that the Defendant shall procure the import duty concession, operate as either a Crowne Plaza or Hilton Group and then ask the court to conclude that all the other essential requirement for the alleged separate agreement were in existence. In any event, the manner in which the claimant's case is pleaded and the content of the evidence does not sufficiently distinguish the terms of the two agreements.

63. The Defendant submits that the terms of the agreement on the table so to speak, can be found entirely in the partially executed lease document or in any event, sufficient of them as were admitted to by Mr. Wexelman in cross examination.

64. The ***Ove Arup***[2] case goes on to say that, Acceptance [of an offer] may be by conduct, but the conduct needs to be clearly and unequivocally referable to the Agreement contended for.

65. The conduct of the Claimant in complying with various terms of the lease document and admitting to be bound by it, I believe, am unequivocally referable to the 'Lease' document but

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[1] See para 62 of the ***Ove Arup*** case; see pp 7 of the Defendant written submission filed Feb 27th 2009.
[2] Supra.

perhaps even more importantly to the terms of an agreement admitted to in the witness box by Mr. Wexelman. These terms admitted to by the said witness are also consistent with key terms of the said partially executed lease document. Further, the Defendant, even after commencement of the gaming operations never did, by its conduct or otherwise accept that it was obliged to secure for the Claimant, the import duty concessions or any other concessions given by the Government of Antigua and Barbuda or to continue operations as part of the Hilton Group or Crowne Plaza .

66. Upon a close look at the draft lease document, it appears to me that not only does it provide for the rental or the contract for a license for use of the premises, but incorporated the fundamental aspects of a commercial agreement for the provision of gaming services, remuneration for which is provided through and expressed as, a percentage of the gaming revenues of the Claimant. The claimant has submitted that there were two agreements one for the lease of premises and another for the provision of gaming services and that both were partly in writing and partly oral.

67. Be that as it may, I am of the view that in the find analysis the parties concluded an agreement the terms of which are also set out in that draft 'lease' document signed by the claimant and, quite apart from that document, certain critical terms referred to earlier in this judgment were accepted by Mr. Wexelman in his evidence, in some instances in chief and in cross examination, as binding on the Claimant. I understood his evidence in relation to the clauses he agreed to be bound by, to be founded in his understanding of; (i) the prior negotiations in which he was intimately involved and, (ii) the resulting agreed terms, which subsequently were reduced to the draft lease document which the claimant signed. These terms as admitted to, even without the draft lease document, are sufficient to create a lease or license, for our purposes here.

ISSUE (iii) and (iv): Which party is in breach of the agreement?

68. The answer to this issue[1] turns substantially on **what were the terms of the agreement.**[2] The court has found that the governing terms of the agreement are also reflected in the terms set out in the draft lease document and more specifically those terms that were in any event complied with by the Claimant and defendant and those admitted to in cross examination by Mr. Wexelman as binding on the Claimant and covenanted to by the defendant. The lease document is not admitted in evidence as a lease because it's non compliance with the requirements of a contract (not signed by both parties) and the formalities of the Registered Land Act, the Stamp Act and the Registration and Records act. Otherwise, neither party formally objected to it forming part of the trial bundle on any grounds at the case management stage or at any other time prior to trial. The defendant and the claimant must however prove its terms if either intend to rely on the substance of the provisions in that memorandum in writing or any of them. It is however a memorandum in writing signed by the claimant's representative and which was put to Mr. Wexelman at trial.

Claimants Submission

69. The claimant submits that the Defendant was in a breach of the agreement between the parties by **(i)** failing to obtain the import duty concessions pursuant to a binding oral agreement originating from the meeting of Oct 2004 and **(ii)** unlawful termination of the agreement and **(iii)** failing to operate as a 'Hitlon' or 'Crowne Plaza' entity.

DEFENDANT'S SUBMISSIONS

70. The defendant denies breaching the agreement as aforesaid. The defendant submits that it had no duty under the agreement nor did it represent to the claimant that it would obtain import duty concessions from the Government of Antigua and Barbuda for the benefit of the claimant. Further, the defendant submits that it did not terminate the agreement unlawfully but terminated it in accordance with the agreement on the grounds of an anticipatory breach by the

[1] Issue (iv)
[2] Issue (iii)

claimant. The defendant contends further still, that it did not represent to the claimant that it would operate as Crowne Plaza or as part of the Hilton Group so as to induce it to enter into contractual relations with the defendant and contends that these alleged representations did not form part of the terms of the agreement between the parties.

COURT'S FINDINGS

71. I have already found above that the terms (incl S. 27) of the lease document although not a lease itself; is a memorandum in writing forming part of the surrounding or background circumstances in this matter. [1] A key understanding and agreement between the parties was that the Defendant was not responsible for securing import duty concessions for the Claimant. I note further, that the effort the Defendant did make to secure the said concession for the Claimant was consistent with the Defendant's contractual obligation to use its best endeavors to ensure the Claimant obtained the concessions.

72. I would have thought that had the Defendant not applied to the Government for the concession for the Claimant as the evidence discloses it did, it would have breached it's obligation to use its best endeavors to secure same as also provided under the terms of the said S. 27.

73. **In the circumstances, the Defendant was not in breach of a duty to secure the import duty or any other concession**

74. On the question of the unlawful termination of the agreement, the Claimant accepts that if the defendant was desirous of terminating the lease, then the Defendant was under a duty - whatever the other terms of agreement were - to terminate the lease agreement only for *just and sufficient* cause.[2]

75. The Claimant contends that one has to view the sufficiency of the notice to quit by inter alia, looking at the e- mail of the 22 February 2005 referred to in the notice to quit.

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[1] See Lord Hoffman in the ***ICS case*** above for the rules of interpretation of contracts.
[2] The claimant by this, tacitly if not expressly, relies on the said partially executed lease document as evidence of at least the termination clause of the lease.

76. The Notice To Quit dated the 31 May 2005 submits Mr. Rhudd, counsel for the Claimant, does not disclose a just and sufficient cause. The Notice to quit alleges that by e-mail message of the 22nd February 2005 from the Claimant to the Defendant, the Claimant **(i)** advised the Defendant that they the Claimants were not in a position to pay the slot license fee **(ii)** admited their inability and unwillingness to pay the said slot license fee and **(iii)** expressed their desire to vacate the subject premises. The defendant terminated the lease agreement on these grounds.

77. The e-mail of the 22nd February 2009 from Mr. Wexelman to Mr. Marine is exhibited at pp 65 of the bundle and set out in para. 29 above. Counsel for the Defendant contends that the import of that letter is consistent with the grounds set out in the notice to quit and at the very least apprehends an anticipatory breach of the agreement.

78. Looking at the statements made by Mr. Wexelman in the said e-mail, he is asserting that the Claimant was not supposed to pay at this time the $5,800.00 monthly slot license fee now imposed on them, and that if this charge is not *"worked out immediately"* they will have no choice but to turn off the machines and vacate the premises.

79. About 1 month later, on March the 17th 2005, the Mr. George Marine e-mails Mr.Wexelman and in no uncertain terms informs him that "*The hotel is not able to have an exemption from paying any casino operation fees, therefore you would have to discuss and negotiate directly regarding payment of such fees*"[1]. Here Mr. Marine is referring to claimant negotiating with the Government.

80. At this point if not before, the Claimant threatened to shut down the gaming machines and vacate the premises. Based on the substantial figures that the claimant is claiming as its loss in this action, this was a high stakes situation that did not lend itself to 'bluffing'.

[1] See pp 68 of Trial Bindle

81. By the month of March the tenor of the communications between the Claimant and Defendant had deteriorated. E-mail of the 17/Mar 09 from Wexelman to the Defendant, speaks of his getting the feeling that the Claimant is no longer wanted operating at the demised premises. E-mail of Mr. Marine in his response of the same day gives his assurance that the Defendants want the Claimant to operate the Casino. In that e-mail the Claimant is given permission to remove a malfunctioning machine belonging to the Defendant on the condition that the Claimant is committed to continue operating the Casino.[1] The introduction of this 'condition', to my mind, reflects a real concern in the Defendant that the Claimant is not committed to continue the operation consistent with its threat contained in the e-mail of the 22nd of February 2009. It appeared that at this time the claimant had doubts about the profitability of what was a rushed venture.

82. The Defendant's position through all of this, by its conduct and ultimately by its words of the e-mail of the 17th of March 2005 (see para. 70 above), is that it is not contractually responsible for obtaining a waiver of the slot machine casino operating fees. The defendant maintained elsewhere that it was not responsible for securing the import duty–free concessions for the Claimant. The underlying flashpoint for the claimant carrying out its threats of the e-mail of the 22nd February had now crystallized.

Anticipatory Breach

83. The simple position in Law is that *"If before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way so as to lead a reasonable person to the conclusion that he does not intend to fulfill his part, this constitutes an "anticipatory breach" of the contract and entitles the party to take one of two courses. He may "accept" the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait for the time for performance arrives and then sue"* [2]

[1] See pp 67 of the Trial Bindle
[2] Para 25-020 Chitty on Contracts Vol. 1 28th edit.

84. The defendant in this matter submits that the claimant evinced an intention to breach the agreement. They accepted it. Further or alternatively, **The defendant opted to terminate the contract by giving notice under the termination clause of their agreement. Termination under this clause is a justified and valid termination if the defendant can establish the anticipatory breach. This in my view, the defendant has done.** The law provides for a party facing an anticipatory breach to take protective action in a timely manner. The defendant's arguably cautious response in the circumstances of the commercial environment applicable to this matter was affected in a timely manner.

85. Further, counsel for the Defendant submits that neither the Cl. 32 – Termination clause - nor the governing law, whether it be the R.L.A or the Common Law require the reason for the notice to quit or the "just or sufficient" cause to be set out in the notice to quit but rather, it may be given at trial. Counsel for the Claimant did not contradict this proposition. I am satisfied that is the law. The fact that the notice to quit limits itself to its terms and if the Defendant now wants to raise additional or even other causes goes I think, to the weight of the evidence.

86. Counsel for the Defendant however, is asking the court to rely on the terms of the letter together with the e-mail of the 22nd Feb 2005 and to view these documents in the context of the background of the whole of the case, in interpreting the validity of the notice to quit.

87. **The Court finds that the claimant was in breach of the agreement (anticipatory breach) and that the agreement was lawfully terminated in a timely manner by a valid notice to quit.**

CONCLUSION

88. The claimant has claimed Damages for misrepresentation and for Damages to be assessed for breach of contract. **As provided above** under "ISSUE 1" [1] the claimant has not succeeded in proving the 'misrepresentation'. As a result, this cause of action fails. **Further, for the reasons provided above**; the claimant has not, on a balance of probabilities, succeeded in proving the breach of contract by the defendant by its; failing to operate as a Hilton or Crowne Plaza; failing to secure duty – free concessions for the importation of the claimant's gaming equipment; failing to cause the waiver of the slot license fees or any other relevant breach.[2]

89. Pursuant to Part 64.6 of the CPR 2000, the successful party is generally entitled to costs. To do otherwise the court must have regard to considerations that include those provided under Part 64.6(6). Further, if the court has discretion as to the amount of cost to be allowed to a party, the basis of the quantification of that amount is provided by Part 65.2 of the CPR 2000. Part 65.5 – Prescribed costs – appears to be the applicable basis for the award of costs in this matter and 65.5(4) gives the court discretion in awarding a proportion only of such prescribed sum. The rule directs that such a discretion be exercised having taken account of the said considerations set out in the rule 64.6(4) and (5). Rule 64.6(5) logically attracts the considerations under 64.6(6).

90. Having regard to the aforementioned rules with respect to costs in this matter, in particular rule 64.6(5), I have also considered; that both parties consented to and participated in mediation in an effort to resolve this matter; the matter is not a novel, weighty or complex matter; the trial did not in fact take up much time; the apparent near faultless conduct of the parties before as well as during the proceedings; that counsel for the defendant is of a senior grade - Queens counsel; and in all the circumstances determine what is reasonable and what appears be fair both to the person paying and to the person receiving such costs.

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[1] See also the full text and authorities of the Defendant's skeleton Arguments filed on the 27th February 2009

[2] The other witnesses for the claimant were for the most part heresay or otherwise not particularly helpful to the court. All the same their evidence was considered and accorded the weight it deserved.

91. **FOR THE REASONS PROVIDED ABOVE IT IS HEREBY ORDERED:**

I. That the Claimant's claim for damages for misrepresentation is dismissed

II. That the claimant's claim for damages for breach of contract is dismissed

III. That costs are the Defendant's costs

IV. That the Costs awarded above are fifty percent (50%) of the Prescribed Costs scale amount.

David C. Harris
High Court Judge
Antigua and Barbuda