

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0090/2009

BETWEEN:

SIR EMILE RUDOLPH GUMBS
By his Lawful Attorney
CATHERINE ORCHARD

Claimant/Defendant

And

SHEFFIELD HOLDINGS LTD

Defendant/Counterclaimant

Appearances:

Ms. Nicola Byer for the Claimant/Defendant

Mr. Courtney Abel and Ms. Eustella Fontaine for the Defendant/Counterclaimant

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2011: October 26
2012: February 1
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JUDGMENT

[1] **BLENMAN, J:** This is a counterclaim by Sheffield Holdings Ltd (Sheffield Holdings) against Sir Emile Gumbs by his Lawful Attorney Catherine Orchard for breach of the covenant of quiet enjoyment. It is strenuously opposed by Sir Emile Rudolph Gumbs (Sir Emile).

Background

- [2] Sheffield Holdings is a company that is incorporated under the Companies Act of Anguilla. Sir Emile is the owner of property known as Registration Section Road Block 08412B, Parcel 174 (the Property). On 29th August 1979, he leased the property to Mariners Hotel for a period of 99 years.
- [3] Sheffield Holdings subsequently took over the lease from Mariners Hotel for the remainder of 82 years and continued to act pursuant to the amended terms contained in the lease.
- [4] Acting through his Lawful Attorney Catherine Orchard, Sir Emile caused a claim for possession of the premises to be filed against Sheffield Holdings, alleging that Sheffield Holdings breached a term of the lease. Among other things, he argued that Sheffield Holdings had assigned or subleased the property and had failed to comply with the terms of the lease in so doing.
- [5] Sir Emile stated in his claim that it was an expressed term of the lease that notification had to be given to the landlord of any assignment or subletting of the property. Indeed, clause 4 stated as follows:

"4(a) Within one month after every assignment, assent, transfer or under lease (other than by way of mortgage) of or relating to the demised land or any part thereof the lessee shall give notice in writing to the lessor. Of the lease by permitting the usage of the pool and reception areas for the hosting of entertainment promoter allegedly in breach of clause 5(a) of the lease."

- [6] Sir Emile stated that as a consequence of Sheffield Holdings, he was entitled to file a claim for possession which he did against Sheffield Holdings. He sought to rely on clause 5(b) of the lease which provides as follows:

“if the Lessee’s covenants are not performed or observed then and in any such case the Lessor may at any time thereafter re-enter upon the demised land or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to the Lessor’s rights to sue the Lessee for breach of the covenants herein.”

- [7] Sheffield Holdings vigorously defended the claim that it had breached the lease and denied that it had subleased the pool and reception area as Sir Emile had contended.

- [8] Sheffield Holdings then counterclaimed alleging that Sir Emile had breached the implied term of the lease. In so doing, Sheffield Holdings sought to rely on section 52(a) of the Registered Land Act, Revised Statutes of Anguilla Chapter R30. Sheffield Holdings further contended that it has paid its rent and observed the agreements and conditions contained or implied in the Lease Agreement.

- [9] Importantly, Sheffield Holdings asserted that Sir Emile has breached the obligation to allow for the peaceful and quiet enjoyment of the property by “filing the frivolous and vexatious claim”.

Sheffield Holdings also alleged that Sir Emile failed and/or rejected to serve a valid or any notice on it as required by Section 56 of the Registered Land Act, Revised Statutes of Anguilla Chapter R30, causing Sheffield Holdings to suffer loss and damage for interference with its peaceful enjoyment of its property by filing this frivolous and vexatious claim.

- [10] In the events that followed, Sir Emile withdrew the claim against Sheffield Holdings and Sheffield pursued its Counterclaim.

Issue

- [11] The issue that arises to be resolved by the court is whether Sir Emile has breached the implied covenant of the lease for the peaceful and quiet enjoyment of the property by the filing of the claim.

Law

- [12] Section 52(a) of the Registered Land Act of Anguilla provides as follows:

“So long as the Lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease on his part to be observed and performed, the Lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the Lessor or any person rightfully claiming through him.”

Defendant/Counterclaimant’s Submissions

- [13] Learned counsel Mr. Abel said that there was a breach of the covenant for quiet enjoyment.

- [14] After receiving the correspondence from the Sheffield Holdings’ Solicitors dated 29th June 2009, and prior to issuing his claim against Sheffield Holdings on 11th August 2009, Sir Emile was obliged by statute (Registered Land Act) to serve a notice on Sheffield Holdings to allow Sheffield Holdings the opportunity to cure the said alleged breach. However, it is Sheffield Holdings’ contention that Sir Emile well knew that the failure to serve such notice was evidence of Sir Emile’s intent and is further evidence that there was no breach as the same was explained in Sheffield Holdings’ correspondence dated 29th June 2009 to Sir Emile’s Solicitor.

- [15] What is clear from Sheffield Holdings' correspondence dated 29th June 2009 is that Sheffield Holdings gave fair and full and frank disclosure to Sir Emile and even gave Sir Emile the opportunity to appoint a representative who could communicate with Sheffield Holdings as it related to matters of the Property.
- [16] The lawsuit by Sir Emile was ill-conceived and premature as Sir Emile failed to provide Sheffield Holdings with the requisite notice of the breach and a period within which to cure the breach, if any – apart from being without any legal merit.
- [17] Therefore, notwithstanding anything in the Lease Agreement, Sir Emile ought to have provided Sheffield Holdings with notice pursuant to section 56 of the Registered Land Act/Registered Land Ordinance before bringing any action (even a vexatious and frivolous claim) against Sheffield Holdings for forfeiture of the Property, which claim in turn hampered and delayed the development plans of Sheffield Holdings.
- [18] Learned counsel Mr. Abel submitted that a party is fully within its right to bring proceedings against another party; however, in this present situation Sir Emile and Sheffield Holdings openly engaged in discussions on matters pertaining to the substance of Sir Emile's case and therefore Sir Emile was put on notice of Sheffield Holdings' redevelopment plans.
- [19] Further, Mr. Abel said that Sir Emile was at all times assisted by counsel and failed to take the necessary steps before launching a premature and ill-conceived lawsuit against Sheffield Holdings.
- [20] Further, if there was a breach by Sheffield Holdings, which it is denied, the breach could have been easily remedied had Sheffield Holdings been given the opportunity to do so. Therefore, this case, on its merits, sets it apart from a lawsuit being properly instituted by a Lessor (Claimant) against a Lessee (Defendant Company).

- [21] Learned counsel Mr. Abel in support of his argument that there was a breach of the covenant for quiet enjoyment said that notice ought to be taken of the manner in which Sir Emile conducted the lawsuit against Sheffield Holdings; the lawsuit should be viewed as part of an orchestrated strategy to blight and sabotage Sheffield Holdings' redevelopment plans which has succeeded in loss to Sheffield Holdings.
- [22] Mr. Abel advocated that the prior actions of Sir Emile should be viewed alongside the present action to show that by pursuing a deliberate, persistent and prolonged course of action by Sir Emile is an invasion of Sheffield Holdings' right to the quiet use and enjoyment of the Property.
- [23] Mr. Abel advocated that to buttress the counterclaim, Sheffield Holdings would specifically rely on Sir Emile's timing of the withdrawal of its action, namely, at the stage after pre-trial review hearing and before the full trial of the matter slated for 13th July 2011, Sir Emile on 11th May 2011 wholly withdrew his claim against Sheffield Holdings herein.
- [24] As a result of the above, Sir Emile has therefore breached its obligation to Sheffield Holdings pursuant to section 52(a) of the Registered Land Act, Revised Statutes of Anguilla, Chapter R30, by instituting this vexatious and frivolous claim against Sheffield Holdings and Sheffield Holdings ought to be compensated for the said breach. Learned counsel Mr. Abel relied on *Kenny v Breen* ibid in support of his argument.
- [25] Finally, Learned counsel Mr. Abel argued that as a result of the above breach Sheffield Holdings Counterclaim ought to be granted substantial damages to be assessed and costs on its Counterclaim.

Claimant/Defendant's Submissions

- [26] Learned counsel Ms. Nicola Byer argued that the Counterclaim cannot be sustained and should be dismissed. Learned counsel Ms. Nicola Byer said that Sheffield Holdings has sought to premise their argument as to whether the covenant of quiet enjoyment has been breached by Sir Emile on a purported history of a less than cordial relationship that has existed between the parties. The sole issue, Ms. Byer maintained, is whether by the filing of the claim against Sheffield Holdings Sir Emile has breached the covenant for quiet enjoyment.
- [27] Sheffield Holdings, by its submissions and not by its pleadings, seek to portray a picture of consistent harassment and interference by Sir Emile in the operation of the Lease. It is however noteworthy that nowhere in the extensive pleadings filed on behalf of Sheffield Holdings has there been any mention or reference to any such "history".
- [28] Learned counsel Ms. Byer maintained that the sole complaint by the Pleadings set out at paragraph 15 of the Defence and Counterclaim is as follows:
- "The Claimant has breached its obligation to the Defendant Pursuant to Section 52 (a) of The Registered Land Act Revised Statutes of Anguilla Chapter R30 by instituting this vexatious and frivolous claim against the Defendant."*
- [29] There is no other allegation with regard to this breach said Ms. Byer. It is now trite law that Sheffield Holdings in arguing the issue of whether the actions of Sir Emile amounts to a breach must be limited to what was laid as the foundation in the pleadings.
- [30] Ms. Byer in support of her position referred to the case of *LLewellyn Smith v Antigua Port Authority*, an unreported case out of Antigua found at citation ANUHCV2005/0105, the Learned Trial Judge, Mr. Justice Errol Thomas stated at paragraphs 11 to 15 in quoting

the case of *McPhilemy v Times Newspapers Ltd* [1999] 3 ALL ER 755:

"statements of case are required to mark out the parameters of the case that is being advanced by each party."

- [31] Learned counsel Ms. Byer submitted that the import of the argument based on the pleadings only allows Sheffield Holdings to raise the issue of whether the proceedings that were in fact filed by Sir Emile amounted to a breach, nothing more and nothing less.
- [32] Ms. Byer adverted the court to the relevant law namely: "*The covenant for quiet enjoyment is an assurance against interruption in possession of the thing demised it is an undertaking that the tenant shall have the property unfettered by the assertion of any lawful right which interferes with his ordinary and lawful enjoyment.*" *Hill and Redman's Law of Landlord and Tenant (2001)* para 6803.
- [33] Sheffield Holdings contends that the filing of the action in the matter interfered with its "ordinary and lawful enjoyment" of the land. Sheffield Holdings states that it was unable to utilize the property as they wished to because of the institution of the action.
- [34] Learned counsel Ms. Byer submitted that Sheffield Holdings was warned against subleasing but purported to do so in any event. This it purported to do by reference to the letter dated 29th June 2009 referred in its submissions which, however, from a reading of it, no such interpretation can be made. As a consequence of that breach of the covenant in the lease, Sir Emile, acting through his Lawful Attorney, filed the claim against Sheffield Holdings for possession.
- [35] Ms. Byer reminded the Court that it is on the bases of these assertions that Sheffield Holdings concludes that the covenant for quiet interpretation was in fact breached.

[36] However, Ms. Byer argued that the mere filing of an action cannot amount to a breach of such a substantial obligation nor can it be and of itself considered vexatious or frivolous. Learned counsel Ms. Byer maintained that the mere filing of the claim did not, and could not, amount to the "*substantial interference*" required for the breach of the covenant. This act must be substantial and is so regardless of whether it is direct or even a physical act. Further, the filing of the Claim by Sir Emile, Ms. Byer argued, did not interfere with Sheffield Holdings' ability to act as a tenant nor was at any time calculated to interfere with its peaceful and quiet enjoyment. Sheffield Holdings was not at any time forestalled by court order or otherwise from proceeding with whatever purported plans it had in relation to the demised premises. In fact, there is nothing that is presented to the Court upon which this Court could reasonably come to any such conclusion. Learned counsel Ms. Byer stated that Sheffield Holdings choice not to do so cannot be laid at the feet of Sir Emile so as to amount to a breach of any obligation on his part.

[37] In fact, the allegations upon which Sheffield Holdings seek to rely in its submissions are not pleaded, and instead, Sheffield Holdings seek to impose a course of conduct (which point, we say, they are not now entitled to do) on Sir Emile. If the Court therefore agrees that there was such a course of conduct that can be attributed to Sir Emile, Ms. Byer posited that what is complained of is still, by the authorities submitted by Sheffield Holdings, insufficient to warrant any consideration being given that this may amount to a breach of the covenant. In the authority proffered by Sheffield Holdings, namely, the case of *Kenny v Breen* *ibid*, the extent of the actions required to amount to a breach must be of such a disturbance and extent that it is apparent there is substantial interference. None of which Ms. Byer argued is in this case in any event or at all.

[38] Ms. Byer referred the Court to the words of Sir Nicolas Browne Wilkinson V.C. *in the case of Hillgate House Ltd v Expert Clothing Services & Sales Ltd, [1987] 1 EGLR 65 at page 67*, the Learned Judge referred to the requirement of the finding of a breach and stated that:

"similarly when we come to the cause of action based on the covenant for quiet enjoyment, it is a covenant that the tenant should enjoy without any interruption by the landlord but in my judgment it is clear that must mean without any unlawful interruption."

- [39] Ms. Byer maintained that the filing of a claim cannot be seen as unlawful interruption nor can it be seen as actions tantamount to substantial interference. Sir Emile acting through his Lawful Attorney is entitled to file a claim based on the facts as they were presented to them.
- [40] Ms. Byer reiterated that action cannot be considered a significant act so as to constitute a breach of this specific covenant.
- [41] Ms. Byer submitted that there is nothing before the Court as pleaded upon which this Court can rely on to create a picture of an *"orchestrated strategy to blight and sabotage the Defendant Company's redevelopment plans"*. There has been no action, whether passive or active, which could be considered even remotely as an assault on Sheffield Holdings' right to peaceful occupation of the demised premises. There is nothing to substantiate the claim of Sheffield Holdings. Accordingly, Ms. Byer said that Sheffield Holdings is therefore not entitled to substantial damages or damages of any nature or kind.
- [42] If, however, the Court finds that the covenant was breached, then Ms. Byer submitted that on Sheffield Holdings' own authority of *Kenny v Breen* *ibid* the damages, if any, would only be nominal.
- [43] Finally, Ms. Byer reiterated that the sole issue to be determined is clear. Sheffield Holdings, by its submissions, has sought "to muddy" the waters to introduce irrelevant and baseless arguments that have no relevance to the issue at hand. The question to be answered was whether the filing of the claim amounted to a breach of the covenant of quiet enjoyment implied in the lease agreement by statute.

[44] Ms. Byer categorically stated that it cannot and would not be sufficient to reach the high standard required by law to amount to breach of the covenant.

Court's Analysis and Findings

[45] The court has reviewed the relevant pleadings and the very lucid and helpful submissions of learned counsel.

[46] The court is of the considered opinion that the issue that is raised on the Counterclaim is a very narrow one, namely, whether Sir Emile by filing the claim has breached the covenant for peaceful and quiet enjoyment. It is therefore not open to learned counsel Mr. Abel to assert, as he skillfully did, that the issue is wider than that and should include matters such as whether or not the alleged conduct of Sir Emile through his lawful attorney, before and probably after the filing of the claim, amounted to a breach of the covenant. Indeed, these matters, even if they are true, are not cognizable within the Counterclaim that is engaging the attention of the Court. The Court finds the submissions of Ms. Byer very persuasive and will not repeat them in their entirety.

[47] The other matters to which learned Counsel Mr. Abel sought to refer are not pleaded at all in the Counterclaim. Learned Counsel Ms. Byer quite correctly indicated that if at all those matters arise, this is done exclusively through Mr. Abel's submissions and are not a true reflection of the background factual circumstances. They were not even foreshadowed in the pleadings. It is neither right nor lawful to allow Sheffield Holdings to seek to enlarge its Counterclaim through the submissions of learned counsel.

[48] On the pleaded Counterclaim, I am not of the view that the mere filing of the action without more could amount to a breach of the covenant for peaceful and quiet enjoyment.

[49] In *Kenny v Breen* *ibid*, the Court of Appeal held that although a mere challenge by the landlord to the tenant's title was not sufficient to constitute a breach of the implied

covenant for quiet enjoyment, the land's conduct, by pursuing a deliberate, persistent and prolonged course of intimidation and persecution was an invasion of the tenant's right to undisturbed possession and enjoyment of the premises, and even in the absence of any direct physical interference with the premises constituted a breach of the implied covenant for quiet enjoyment.

- [50] The court has no doubt that *Kenny v Breen* *ibid* is clearly distinguishable from the circumstances at bar. In *Kenny v Breen* *ibid*, the landlord had written several letters to the tenant making spurious claims as to the nature of the tenancy. In addition, in that case the landlord had written to the tenant a number of letters threatening to evict the tenant and to put her things on the street. As if not enough, the landlord had made the same threats on several occasions, orally to the tenant in those threatening terms. The landlord had also resorted to knocking on her door on a number of occasions over the period of about a year and causing her anxiety and fear. There is no such conduct in this case, even based on the submissions of learned Counsel Mr. Abel. There is simply no comparison with the circumstances that obtained in *Kenny v Breen* *ibid* and the facts of this case.
- [51] This in no way negates the fact that the court agrees with both counsel that the case of *Kenny v Breen* *ibid* which was helpfully referred to by both sides is very instructive. However, that case clearly indicates the very high handed and unlawful attitude of the landlord. There is no such conduct in the case at bar.
- [52] If ever there was any doubt, in *Kenny v Breen* *ibid* Lord Pearson stated that:

"the judge accepted Mr. Sheridan's first contention that a mere challenge by the landlord to the tenant's title, a denial by him of her title, would be sufficient to constitute a breach of the covenant. I am not able to adopt the judge's view on that point." In my judgment, a landlord by merely making that assertion, however wrong he may be, does not commit a breach of covenant. He is entitled to make that assertion, at any rate if he believes it to be true, frequently, emphatically and even rudely. He is entitled also to threaten proceedings in the courts for possession and damages".

- [53] Applying the principles that were enunciated in *Kenny v Breen* ibid, I emphasize that the Court is far from persuaded that the mere filing of the claim without more can amount to breach of Sheffield Holdings' peaceful and quiet enjoyment.
- [54] It bears repeating that the Court is not of the view that it is proper or lawful to allow Sheffield Holdings to enlarge its Counterclaim through the submissions of learned counsel Mr. Abel. The Court is fortified in its view above, particularly since in its Pre-trial Review Order of 19th January 2011 it had directed that the issue to be ventilated was whether Sir Emile has breached the covenant for quiet enjoyment. The court is quite prepared to even accept that learned counsel Mr. Abel had quite skillfully argued that the claim that Sir Emile filed was vexatious and frivolous. However, there is no basis upon which the Court can determine whether Sir Emile's claim was either frivolous or vexatious. The Court refrains from commenting on the claim, save as to the extent to determine the issue that has been joined.
- [55] It must also be borne in mind that in defence to the Counterclaim, Sir Emile has indicated that he was entitled to bring an action under the terms of the lease on the basis of the breach by Sheffield Holdings; therefore, it is equally true that at all times Sir Emile maintained that his institution of the claim is not breach of the covenant for quiet enjoyment. It may well be that Sir Emile believed that Sheffield Holdings had breached the lease. This is however not a live issue in the matter.
- [56] In view of the totality of circumstances, the Court is satisfied that Sir Emile's filing of the claim, without more, does not meet the required threshold to sustain the Counterclaim of breach of the covenant for quiet enjoyment.
- [57] Accordingly, the Counterclaim filed by Sheffield Holdings Ltd is hereby dismissed.
- [58] Learned counsel Ms. Nicola Byer, learned counsel Mr. Courtney Abel and learned counsel Ms. Eustella Fontaine have quite helpfully agreed costs in the sum of US\$3500.00.

Conclusion

[59] In view of the premises, it is hereby ordered that Sheffield Holdings Ltd Counterclaim against Sir Emile Rudolph Gumbs by his Lawful Attorney Catherine Orchard is dismissed.

[60] Costs agreed in the sum of US\$3500.00.

[61] The court gratefully acknowledges the assistance of learned counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla