COMMONWEALTH OF THE BAHAMAS **2020/CLE/gen/00901**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

BETWEEN:

JETLINE SIMULATION BAHAMAS LIMITED

Plaintiff

AND

NEWORLD ONE BAY STREET

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Ryan Brown for the Plaintiff
Attorneys Lisa. R. Bostwick-Dean and Deandra Johnson for the Defendant

Date of Hearing: 22nd July 2022

DECISION

FACTUAL SUMMARY:

1. This matter stems from a landlord and tenant dispute. On July 1 2017, the Plaintiff, Jetline Simulation Bahamas Ltd as tenant, and the Defendant, Neworld One Bay Street Ltd as landlord, entered into a Retail Lease Agreement for Shop #115D situated at "the Point Plaza One" Nassau, The Bahamas, comprising of 1,000 square footage for a term of three (3) years. The Agreement also included an option to renew provision for an additional two (2) years. The agreement provided for monthly rental payments of $38 per square feet or a total basic rent of $38,000 ($3,166.67 per month) for the first year; $45 per square feet or total of $45,000 ($3,750 per month) for the second year; $50 per square feet or a total basic rent of $50,000 ($4,166.67 per month) for the third year. It was the Plaintiff's intention to operate a flight simulation business from the shop space.

2. The lease and rent payment commenced October 1 2017, although the Plaintiff took up occupancy in July 2017 to prepare the space for operation. The Plaintiff installed a Boeing fixed-based trainer and a NatVis 200x40FOV GD Visual System ("the flight simulator kit") which is the subject of a Deed of Debenture, along with other items essential to the

operation of the flight simulation kit. In September 2017, The Plaintiff commenced operation.

3. The Plaintiff alleges that during the months of March, April, May, June, July and August 2018, electrical power was not provided to shop #115D due to the inadequacy of infrastructure as other units were being constructed. Thus, resulting in the Plaintiff losing revenue. The Plaintiff approached Engel and Walker, the agent of the Defendant, to pay rent minus any legal or equitable set-off. However, the agent did not accept the rent from the Plaintiff. Meetings were held between the Plaintiff and the Defendant's agent to discuss the various set-offs which the Plaintiff claimed due to the interruption of electrical supply to Shop #115D. Attempts to resolve the dispute over the amount owed were not successful. The Plaintiff eventually advised Morley Realty, the Defendant's agent at that time that it was affected by Hurricane Dorian and thus wanted to discuss a reduction in the rental payment. On November 6, 2019, at approximately 8pm the Defendant repossessed and locked the Plaintiff out of Shop #115D. The Plaintiff has not been permitted to remove any of its "goods, chattels, trade, personal items of its employees or perishable goods and the other fixtures."

PROCEDURAL HISTORY

4. On September 11, 2020, the Plaintiff commenced this legal action by filing a Writ of Summons, seeking damages for loss of revenue, excessive, illegal, and wrongful distress, and exemplary damages for harsh behavior. A Notice and Memorandum of Appearance was filed on behalf of the Defendant, and on October 13, 2020 the Plaintiff filed a Statement of Claim. On November 1, 2020, the Defendant entered a defence and counterclaim, seeking damages for rental arrears from October 31st to the date of decision, and payments for electricity, interest, and costs.

5. On December 3, 2020, Justice Ruth Bowe-Darville made an order that prohibited the Plaintiff from removing the Fixed Based Trainer from the rental space and awarded costs to the Defendant.

ISSUES

6. This ruling addresses three summonses filed by the parties to determine:

   a. Whether the issues which arise should be determined as preliminary issues before the trial of the entire action?

   b. Whether Paragraph 45 (b) of the Defendant's Defence and Counterclaim filed December 10, 2020, should be struck out on the grounds that it is scandalous, frivolous and vexatious, and an abuse of process?

   c. Whether the Defendant should be granted leave to amend the Defence and Counterclaim filed August 31, 2021, and be relieved of their undertaking not to remove the Plaintiff's equipment from the rental space?

PLAINTIFF'S CASE

7. The Plaintiff contends that Paragraph 45 (b) of the Defendant's Defence and Counterclaim, filed on November 3, 2020, should be struck out on the grounds that it is scandalous, frivolous or vexatious, discloses no reasonable cause of action, may prejudice, embarrass, or delay the fair trial of the action and/or it is an abuse of the process pursuant to Order 18, rule 19(1) of the Rules of the Supreme Court. The Plaintiff argues that upon reentry the landlord is only allowed to sue for rent in arrears, and not beyond the date of reentry, and rely on ***Cleare (trading as Seago's Sports Bar) v Caltiff Holdings Limited (2015) 3 BHS J.No. 14,*** where the court rejected the claim for rent after the date premises were repossessed from a distressed tenant. After reviewing the decision of ***Rolle v CE Darville et al [2004] BH J No.63***, the learned Justice Winder, as he then was, added *"In any event, having repossessed the premises the landlord cannot insist on rent accruing after the lockout. As Thompson J found in the case of Rolle v CE Darville et al. [2004] BHS J No 63, the locking out of a tenant effectively terminated the lease arrangements."*

8. The Plaintiff therefore argues that the Defendant is not allowed to sue for future rent, as locking out the Tenant on November 6, 2019 resulted in the lease being effectively terminated, and notes clause 7(1) of the Lease Agreement which provides as follows: "the Landlord at any time thereafter and notwithstanding the waiver of any previous right of reentry to re-enter into and upon the Premises or any part thereof in the name of the whole and thereupon the Lease Term shall absolutely cease and determine but without prejudice to any rights or remedies which may then have accrued to either party against the other in respect of any antecedent breach of any of the covenants herein contained…".

9. The Plaintiff argues that the Defendant would only succeed on the claims made out in paragraphs 45(b) and 46 of the Defence and Counterclaim if the court forced the Plaintiff to reenter the Lease Agreement beyond the natural term of the lease, which would be beyond the jurisdiction of the court. Hence, the paragraphs must be struck out and the claim for rental arrears from November 1, 2019, to August 31, 2021, must fail.

10. The Plaintiff urges by virtue of a second application filed December 18, 2020, pursuant to Order 33 Rule 3 of the Rules of the Supreme Court 1978 and/or under the inherent jurisdiction of the Court, that the questions the Plaintiff places before the court be tried as preliminary issues before trial, and that all further proceedings in this action be stayed pending the trial of the preliminary issues. The Plaintiff seeks directions as to the way the issues should be stated if the issues are not accepted as being adequately stated in the Summons. Relying on ***The Ontario Securities Commission v Pushka and another (2018) BHS J No. 94***, the Plaintiff highlights the recitation of the learned Justice Winder of the court's powers under Order 31A of the Rules of The Supreme Court where the court invoked it's jurisdiction to consider questions of law and/or fact prior to the trial of other issues in actions where the preliminary hearing might be determinative of the proceedings.

11. The Plaintiff submits that a landlord who has relied on the remedy of distress does not have the right to keep tenant fixtures, but must permit the removal of those items, and again cite the decision of the learned Winder J in **Cleare (trading as Seago's Sports Bar) v Caltiff Holdings Limited (2015) 3 BHS J.No. 14.** It is submitted that the relevant items, namely the Fixed Based Trainer by Flight deck Solutions Type B737NG and the NatVis 200x40FOV HD Visual System, constitute tenant fixtures as they are not affixed to the land, but rest on their own weight. It is further submitted that some items also constitute

trade fixtures, as they were used by the Tenant in the course of his business, under either definition, the Plaintiff submits that they should have been given a reasonable opportunity to remove these items, and that the items were privileged from distress.

12. The Plaintiff acknowledges that a trial of the Preliminary issue will delay the substantive trial, but argues that the potential effect on the resolution of the dispute justifies the preliminary determination, and the evidence obtained would not likely be reheard at trial as those issues would have been determined.

13. With respect to the application to amend by the Defendant, the Plaintiff submits that they were denied an opportunity to remove the tenant fixtures, and that the Defendant has also not removed the fixtures, despite seeming to believe that it was legally permissible to distrain tenant fixtures. Removal by either party would have enabled the Defendant to rent the property from November 2019. The Plaintiff therefore submits that the amendments sought by the Defence are not relevant to any fact in issue, and should not be permitted.

DEFENDANT'S CASE

14. The Defendant acknowledges that trial of a preliminary issue is within the jurisdiction of the court, but submit that there must be a question of law that can be identified amongst the issues. The Defendant argues that the issues raised in the Plaintiff's summons are not suitable for a preliminary trial as the question of law cannot be decided without evidence being given, and cite the decision of ***Michael B. Westenhoefer v Coral Beach Management Company Ltd (2012) CLE/gen/FP/273***, in which the learned Hanna-Adderley J cites ***Tara Exploration and Development Company and Tara Mines Limited v The Minister for Industry and Commerce (1975) IR 242*** at page 256 as follows:

> **"The infrequent use of this procedure may be explained by the restricted field in which it can operate . First of all, there must be a question of law which can be identified amongst the issues in the action. Further, this question of law must be such that it can be decided before any evidence is given. If special facts have to be proved, or if facts are in dispute, the rule does not apply. In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and the just."**

It is therefore submitted that as the answer to the question of law is dependent upon facts which have not been ascertained, and which are beyond those which appear in the pleadings, the application should be rejected.

15. Further, the Defendant argues that the proposed preliminary questions of law are not carefully framed to avoid difficulties of interpretation as to the real question to be determined. It is the Defendant's contention that it is not fair, proper, or just to try questions of law and fact prior to evidence being given in this matter, and that the resolution of the matters raised in the summons will not significantly shorten the hearing of the substantive action; will not dispense with any further trial of remaining issues such as quantification of arrears, value of distrained goods (if distrained), value of counterclaim and awards arising

from the quantification of these matters, and will not save time and costs. They further submit that dealing with these matters as a preliminary issue will increase time and cost, and rely on an excerpt from ***Tilling v Whiteman [1979] 1 All ER. 737*** wherein the court *"protested against the practice of the Court of first instance allowing preliminary points of law to be tried before and instead of first finding the facts, since this course frequently adds to the difficulties of Courts of Appeal and tends to increase the cost and time of legal proceedings."*

16. With respect to the application to strike out by the Plaintiff, the Defendant takes issue with the support the Plaintiff seeks to derive from the decision of Winder J in ***Cleare (t/a Seago's Sports Bar)***, and submit instead that that case can be distinguished, as the lease in that case was on a month to month basis. They therefore contend that there is no basis for the proposition that the Defendant cannot claim for rents beyond the period of re-entry.

17. The Defendant therefore submits that the application for a determination of preliminary issues, and the application to strike out paragraph 45b of the Defence and Counterclaim should be refused, and the Defendant should be permitted to amend the Defence and Counterclaim as prayed.

18. With respect to the application by the Defendant to amend, and to remove the belongings and equipment of the Plaintiff from the rental space, the Defendant submits simply that such an amendment would normally be granted without objection on terms as to costs, as a party can amend pleadings at any stage during proceedings. The Defendant further submits that they should be relieved of the undertaking not to interfere with the equipment, as the matter is not proceeding in a timely fashion, and they are continuing to suffer loss as a result of not being permitted to lease the space to another tenant.

ANALYSIS

Trial on preliminary issues

19. ***Order 33 Rule 3 of the Rules of the Supreme Court*** provides: *" The Court may order any question or issue arising in a cause or matter, whether of fact, law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."* This gives the court the power to try issues of both fact and law preliminarily where they arise from the pleadings or otherwise.

20. In the ***Ontario Securities*** case cited by the Plaintiff, the learned Winder J, after noting the provisions of Order 33 and the duty of the court pursuant to Order 31 A to "deal with cases actively by managing cases, which may include ... (b) identifying the issues in the case at an early stage ... [and] (d) deciding the order in which issues are to be resolved", cited the decision of Hepburn J in ***Tyrone Morris v Paradise Enterprises*** as follows:

> "8 Hepburn J. in the Supreme Court case of Tyrone Morris One Hundred and Sixty-One Others and Paradise Enterprises Ltd 2014/COM/gen/00471 relying on the decision in Steel v. Steele (2001) CP Rep 106 enumerated the considerations to be taken into account by a court in determining not to exercise its discretion to order a trial of preliminary issue(s). These were:

(i)"The first question the court should ask itself is whether determination of the preliminary issue would dispose of the whole case or at least one aspect of the whole case."

(ii)"The second question that I think the court should ask itself is whether determination of the issue would reduce the time involved in pre-trial preparation;

(iii)"Thirdly, if, as here, the preliminary issue is an issue of law, the court should ask itself how much effort, if any, will be involved identifying the relevant facts for the purpose of the preliminary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue. (...) The cost and effort in agreeing such a document must to my mind be highly questionable, particularly if there is bound to be a trial relating to a great majority of the issues of law and fact whichever way the preliminary issues is decided."

(iv)"Fourthly, if the preliminary issue is an issue of law, to what extent is it to be determined on agreed facts? The more the facts are in dispute, the greater the risk that the law cannot be safely determined until the disputes of fact have been resolved. Indeed, the determination of a preliminary issue, if there are serious disputes of fact, will run a serious risk of being either unsafe or useless. Unsafe because it may be determined on facts which turn out to be incorrect, and this could even risk unfairly prejudicing one of the parties; useless because, having been determined on facts which turn out to be wrong, it would be of no value."

(v)"Fifthly, where the facts are not agreed, the court should ask itself to what extent that impinges on the value of a preliminary issue."(...) "The characterization of the claim, if there is one, may depend on detailed assessment of the evidence which will have to be considered when determining issues of fact. That can only be achieved at trial. It could be that, at the hearing, after considering the facts, the trial judge might take a view as to the characterization of the claimant's cause of action which differs from the view taken by the court hearing the preliminary issue."(...) "It may be that it would not be open to the claimant to raise the argument at trial, because it has not been pleaded, but it seems to me that determination of the preliminary issue would cut down the flexibility at trial."

(vi)"That, indeed, is effectively a sixth factor which the court should at least take into account when considering whether or not to order or to determine a preliminary issue, namely whether the determination of a preliminary issue may unreasonably fetter either or both parties or, indeed, the court, in achieving a just result which is, of course, at the end of the day what is required of the court at the trial."

(vii)"Seventhly, the court should ask itself to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. Plainly, the greater the delay caused by the preliminary issue and the greater any possibility of increase in cost as a result of the preliminary

issue, the less desirable it is to order a preliminary issue. However, in this connection, I consider that the court can take into account the possibility that the determination of the preliminary issue may result in a settlement of some sort. In other cases the court may well decide that, although the determination of a preliminary issue would not result in a settlement, it will result in a substantial cutting down of costs and time."

(viii)"Eighthly, the court should ask itself to what extent the determination of a preliminary issue may be irrelevant. Clearly, the more likely it is that the issue will have to be determined by the court, the more appropriate it can be said to be to have it as a preliminary issue."

(ix)"Ninthly, the court should ask itself to what extent is there a risk that the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination."

(x)"Tenthly, the court should ask itself whether, taking into account all the previous points, it is just to order a preliminary issue. In this connection, it should be mentioned that the nine specific tests overlap to some extent."

21. The four questions as framed by the Plaintiff are:

> "i. Whether or not the Defendant as Landlord, distrained, sought to distrain, held, or possessed the tenant fixtures of the Plaintiff when it locked out the Plaintiff from Shop #115D, Point Plaza One, Nassau, The Bahamas, the leased premises, on 6 November 2019, without allowing the Plaintiff and its agents to remove or collect any tenant fixtures from the leased premises."
>
> "ii. Whether or not tenant fixture remain in the possession of the Defendant"
>
> "iii. Whether or not the Fixed Based Trainer by Flightdeck Solutions Type B737NG and the NatVis 200x40FOV HD Visual System constitute tenant fixtures"
>
> " iv. Whether or not the Defendant, by purporting to distrain tenant fixtures which are valued in excess of the rent in arrears being claimed by the Defendant, committed excessive distress?"

22. In considering the framed questions, it seems clear that there are significant disputes of fact. All four questions refer to "tenant fixtures". As has been stated above, a consideration of that term and whether the items fall within the definition of tenant fixtures involves evidence as to the manner in which the items are affixed in the premises. None of this is agreed between the parties. The court would be required to embark on a trial of that issue, which might even extend to a visit to the locus in quo, but that determination would have to be made before the other questions could even be considered.

23. With respect to the first and second questions, it seems clear that the Landlord locked out the Tenant, that the premises are under the control of the Defendant, and that the items remain in the possession of the Defendant. The questions as framed again turn on the

characterization of the items as "tenant fixtures", and involve a consideration of the legality of the actions of the Defendant. With respect to the fourth question, the affidavit of Ryan Moree filed 3rd November 2020 contains documents that give the value of the Fixed Base Trainer as $135,695.95, while the value of the NatVis system is given as $27,025.00 for a total of $162,720.95. There is also a Counterclaim by the Defence claiming special damages in the amount of $111,367.80, general damages, interest, and costs. The answer to the question of whether the Defendant has committed excessive distress would therefore necessarily involve a consideration of the validity of the counterclaim.

24. In my view, it is clear that the power of the court to order issues to be tried as preliminary issues is a discretionary power, as the provision states that the court "may" order any question. In exercising this discretion, the court must be cautious. In ***Westenhoefer v Coral Beach Management Company Limited*- Bahamian Common Law and Equity Action CLE/gen/FP/273,** The Honourable Madam Justice Hanna Adderley cited Higgins C.J. in ***Tara Exploration and development Company and Tara Mines Limited, Plaintiffs v The Minister for Industry and Commerce, Defendant [1975] IR 242*** where he stated: *"The infrequent use of this procedure may be explained by the restricted field in which it can operate. First, there must be a question of law which can be identified amongst the issues in the action. Further, this question of law must be such that it can be decided before any evidence is given. If special facts have to be proved, or if facts are in dispute, the rule does not apply."* In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve a consideration of the effect on the other issues in the case and whether its resolution will reduce these significantly or shorten the hearing."

25. I note also that The White Book 1999 at paragraph 333/3/1 at page 644 provides: "The House of Lords has strongly protested against the practice of the Court of first instance allowing preliminary points of law to be tried before and instead of first finding the facts, since this course frequently adds to the difficulties of Courts of Appeal and tends increase the cost and time of legal proceedings." Moreover, Lord Wilberforce and Lord Scarman stated in ***Tilling v Whiteman [1979] 1 All E.R. 737*** that "preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety and expense."

26. In order to determine the questions raised by the Plaintiff, the court would be required to take evidence of the manner of installation of the referenced items, and to consider the agreement pleaded by the Defendant, and take evidence on the circumstances leading up to the Defendant taking possession to decide whether the actions of the Defendant were in accordance with the agreement or in fact a distraining of the Plaintiff's chattels.

27. Having considered the ten points endorsed by Hepburn J in the ***Tyrone Morris*** case referenced above, I note particularly the fifth point, which reads as follows: (v)"Fifthly, where the facts are not agreed, the court should ask itself to what extent that impinges on the value of a preliminary issue."(...) "The characterization of the claim, if there is one, may depend on a detailed assessment of the evidence which will have to be considered when determining issues of fact. That can only be achieved at trial. It could be that, at the hearing, after considering the facts, the trial judge might take a view as to the characterization of the claimant's cause of action which differs from the view taken by the court hearing the preliminary issue."(...) "It may be that it would not be open to the claimant to raise the argument at trial, because it has not been pleaded, but it seems to me that determination of the preliminary issue would cut down the flexibility at trial."

28. In ***Michael Andrew Westenhoefer vs Coral Beach Management Company Limited 2012/CLE/gen/FP/273*** Justice Hanna Adderley said the following: "*To my mind, the essential purpose of the determination of a preliminary point of law is to save time and costs.*" Given the factual determinations that would have to be made to answer the proposed questions, and the costs and delay that would necessarily follow in what would be a bifurcated trial, I am unable to conclude that it would be convenient or just to determine these questions as preliminary matters. As was said by Lord Scarman, the proposed course amounts to a "treacherous shortcut." I therefore refuse the application for the preliminary determination of issues.

Striking Out Application

29. ***Order 18 Rule 19 of the Rules of the Supreme Court*** provides:

> "19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous, or vexatious; or
> (c) it may prejudice, embarrass, or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

30. It is to be noted that paragraph 45(b) of the Defence and Counterclaim, relates to claims for rent after the reentry by the Defendant from November 2019 to November 2020, while paragraph 46 of the Defence and Counterclaim seeks rental arrears from October 31, 2020 to the date of the ruling.

31. The Plaintiff relies on the decision of ***Cleare (trading as Seago's Sports Bar) and another v. Caltiff Holdings Limited and another [2015] 3 BHS*** J **No. 14** where Winder J decided that in an action for damages for wrongful distress and unlawful lockout on the part of the Plaintiffs, the first Defendant could not seek sums due and owing for rent for a period after the lockout. That decision cites the decision of Thompson J in ***Rolle v CE Darville***, where a similar statement was made. The Defendant counters that the decision is distinguishable, as the lease in ***Cleare*** was month to month. I have also read ***Rolle v CE Darville*** and note that there is no indication in that case of the details of the lease. I accept that the decisions are distinguishable, but that is not the end of the matter.

32. In the text Principles of Land Law Fourth Edition by Martin Dixon at paragraph 6.7.5 the author states as follows:

> "By far the most powerful weapon in the armoury of the landlord in the event of a breach of covenant is the remedy of forfeiture. In principle, this remedy is available for breaches of all covenants, including the covenant to

pay rent, and the effect of a successful forfeiture of the lease is to bring the lease to an end."

33. At paragraph 6.7.6 the following is stated:

> "In general terms, in order for forfeiture to be available at all, the lease must contain a right of re-entry. This is a stipulation that the landlord is entitled to re-enter the premises should the tenant fail to observe his covenants. All professionally drafted leases will contain such a right, and one will be implied in all equitable leases (Shiloh Spinners v Harding (1973)). By s 4 of the LTCA 1995, the benefit of the landlord's right of re-entry will pass automatically to assignees of the reversion for a legal or equitable lease. Subject to what will be said below about statutory safeguards, the existence of a right of re-entry gives the landlord two potential paths to a successful forfeiture. First, the landlord may physically re-enter the property by obtaining actual possession of it; a typical example being the changing of locks..."

34. In the text Commonwealth Caribbean Property Law by Gilbert Kodiline, at page 44, the learned author states as follows:

> "Where a condition in a lease is broken, the landlord is entitled to resume possession by re-entry upon the premises and the lease will be terminated, as the continuance of the lease has been made conditional on the tenant's carrying out his obligations."

35. As for reentry, it has been further contended that the Plaintiff and the Defendant were aware of Clause 7 (1) of the Lease Agreement that the landlord may repossess the lease premises before the end of the term, allowing the landlord to sue for rent in arrears. Having regard to the authoritative texts cited above, the re-entry by the Landlord brings the lease to an end. I am therefore satisfied that there can be no claim for rent after the lock-out of the Plaintiff, with the result that paragraphs 45(b) and 46 must be struck out, as I find those claims to be unsustainable.

Leave to Amend the Defence and Counterclaim

36. ***Order 20 Rule 5 of the Rules of the Supreme Court*** empowers the court to grant leave to amend a pleading or writ, even if that amendment amounts to a new cause of action. Having considered the submissions of counsel, I see no prejudice to the Plaintiff in permitting the amendment at this stage, when the matter has not yet even proceeded to case management. I therefore grant the Defendant leave to amend its Defence and Counterclaim.

37. With respect to the application to be relieved of its undertaking by the Defendant, I note that in the affidavit of Daniel Liu filed 22nd January 2021, the Defendant proposes the following:

    i. The flight simulator and other distrained items be moved to independent storage facilities at the Plaintiff's sole cost and kept there until the conclusion of the trial of this matter.

ii. The Plaintiff shall pay the cost of bringing the specialist(s) to move the simulator, the cost of transporting it to the storage facility and the cost of the storage until the conclusion of the trial of this matter.

iii. The Plaintiff shall insure the simulator and other distrained items for the benefit of the Defendant up to the amount of the Defendant's claim at the time of any loss and costs until the determination of this matter.

iv. The Defendant shall not be liable for any loss or damage sustained to the simulator or other items moved into storage once they have been removed from the Defendant's premises.

38. While the desire of the Defendant to mitigate losses is understandable, I cannot accept that the Plaintiff should be required to pay for the removal and storage of the items, merely to keep them available to satisfy any debts found to be owing to the Defendant at the conclusion of these proceedings. It would seem that the Defendant wishes to preserve the ability to distrain, at the Plaintiff's expense, but without the Plaintiff being able to also mitigate losses by reinvigorating the business if possible. In my view, the preferable course of action is that the items be removed at the expense of the Plaintiff, who would be permitted to establish the business at a different location should they choose to do so, and with the express direction that the Plaintiff will take no actions to dispose of the items or to diminish the value of the equipment prior to the conclusion of this matter.

39. As the Plaintiff has been unsuccessful on the application to determine preliminary issues, but has been successful on the application to strike out portions of the defence, the costs of those two applications are offset. However, the Plaintiff is awarded the costs of and occasioned by the amendment of the defence and counterclaim, to be taxed if not agreed.

Dated this 14th day of September A.D., 2023

Neil Brathwaite
Justice