

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

COMMONLAW AND EQUITY DIVISION

2019/CLE/gen/01783

BETWEEN

AOG MAINTENANCE COMPANY LTD

Plaintiff

AND

SKY BAHAMAS AIRLINE LIMITED

Defendant

AND

2019/CLE/gen/1785

SKY BAHAMAS AIRLINES LIMITED

Plaintiff

AND

AOG MAINTENANCE COMPANY LTD

Defendant

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Michael Scott KC for AOG Maintenance Company Ltd

Mr. Ashley Williams for Sky Bahamas Airlines Limited

Judgment Date:

REASONS

1. The court gave its oral judgment on the 28th April 2023 granting judgment in favor of AOG Maintenance Company Ltd "AOG" and dismissing the counterclaim of Sky Bahamas Airlines Ltd. "Sky Bahamas" or "Sky".
2. In that judgment, the court held that there was a valid and binding oral lease agreement between AOG and Sky Bahamas.
3. The court also held that:
 - i. Sky Bahamas knew of the terms of the rental, the probability of eviction if the rent was not paid.

- ii. There was no evidence led of distraining by AOG, or any evidence of the value of the goods allegedly distrained.
 - iii. There was no breach of the covenant of quiet enjoyment which right could only exist between a landlord and a tenant. Sky Bahamas denied that there was a valid lease existing.
 - iv. The counterclaim of Sky Bahamas was dismissed.
4. The court stated at the hearing that expanded reasons for the decisions would be put in writing. The reasons are now set out herein.

Background

Action 2019/CLE/gen/01783 – AOG Maintenance Company Ltd v Sky Bahamas Airlines Limited (“Lead Action”)

- 5. AOG was a company incorporated pursuant to the laws of the Commonwealth of The Bahamas and carrying on business therein as an investor in commercial real estate. AOG claimed that it was the subtenant of a certain parcel of land being approximately 1.89 acres (“the **Property**”) owned by the Nassau Airport Development Company Ltd (“**NAD**”). AOG had a building erected on the Property (“the **Building**”) in 2015.
- 6. “**Sky**” is a company incorporated pursuant to the laws of the Commonwealth of The Bahamas and carrying on business as the operator of an airline. Captain Randy Butler (“Captain **Butler**”) was the CEO, principal and a director of Sky. Captain Butler was also a director and shareholder of AOG until 27 February 2019. For a period of time, the operations of AOG and Sky were intertwined as a result of directorships of Captain Butler in both entities and were not sufficiently separated.
- 7. An Annual General Meeting (“**AGM**”) of AOG was held on 17 December 2018 and was attended by all shareholders, including Captain Butler. During the AGM it was agreed that the affairs of AOG and Sky needed to be separated. The following was resolved:
 - a) 25% of the issued shares of AOG owned by Captain Butler, and 25% of the issued shares owned by another shareholder, would be purchased by and transferred to MCI Company Ltd.
 - b) Captain Butler would arrange for swipe cards providing access to the building to be issued to two of the other Directors of AOG.
 - c) Commencing 01 January 2019, Sky would be required to enter into a formal lease of the commercial building for a period of three years at a monthly rent of \$26,000.00 plus applicable taxes.
- 8. Captain Butler, in his capacity as a director of Sky, agreed that Sky would lease the Building.
- 9. AOG claimed that the terms of the lease were as follows:
 - a) Commencing 01 January 2019, Sky would be required to pay \$26,000.00 monthly along with applicable taxes.

- b) The lease was to subsist for three (3) years.
10. Although a formal written lease agreement was prepared, it was never executed by the parties, though AOG invoiced Sky monthly for rental payments and applicable taxes. Notwithstanding the agreement at the AGM, Sky never paid any rent or applicable taxes. Consequently, AOG claimed that Sky was in arrears of rent and applicable taxes (as at 01 August 2019) in the amount of Two Hundred and Four Thousand Eight Hundred Twenty-Six Dollars and Thirty-Five Cents (\$204,826.35).
11. Despite multiple demands by AOG to Sky, the outstanding debt remained owing.
12. By a Specially Indorsed Writ of Summons filed on 11 December 2019 ("**AOG Writ**") AOG brought an action against Sky for breach of contract seeking the following relief:
- a) **"Payment of the outstanding rent in the amount of Two Hundred Nineteen Thousand Nine Hundred Twenty-Eight Dollars and Seventy-Six Cents (B\$219,928.76) as a result of this breach;**
 - b) **Alternatively, damages for breach of contract in the same amount;**
 - c) **A Declaration that AOG is the lawful sub-tenant of the premises in question and that its eviction of Sky therefrom was a lawful exercise of its rights in that regard;**
 - d) **Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992;**
 - e) **Costs; and**
 - f) **Further or other relief as deemed just and appropriate by the Court."**

Action 2019/CLE/gen/1785 – Sky v AOG ("Second Action")

13. By a Generally Indorsed Writ of Summons filed 19 December 2019, Sky commenced its action against AOG for breach of contract and unlawful detention of assets situate in the Building and on the Property, and used. Sky claimed that it was the true sub-tenant of the Property and not AOG.
14. Sky claimed:
- "1. An injunction restraining the Defendant by its directors, officers and/or agents from preventing the Plaintiff by its directors, officers and/or agents from accessing and removing its assets contained at the aircraft maintenance hangar situated on premises belonging to Lynden Pindling International Airport.**
 - 2. An injunction restraining the Defendant by its directors, officers and/or agents from selling the assets of the Plaintiff including but not limited to aircraft engines, propellers and gears contained inside the said aircraft maintenance hangar.**
 - 3. A declaration that there existed a valid oral sub-lease agreement between the Plaintiff and the Defendant.**

4. Damages for breach of contract and unlawful retention of goods.
5. A permanent injunction to restrain the Defendant by its directors, officers and/or agents from interfering with the Plaintiff's business operations and assets situate at the said aircraft maintenance hangar.
6. Costs;
7. Such further and/or other reliefs as this Honourable Court deems fit."

Consolidation of Actions

15. By an Order of Justice Keith Thompson made on the 06 February 2020, Action 2019/CLE/gen/01783 – AOG Maintenance Company Ltd v Sky Bahamas Airlines Limited and Action 2019/CLE/gen/1785 – Sky v AOG were consolidated and the first action was ordered the lead action.

Defence and Counterclaim of Sky

16. By Sky's Defence and Counterclaim filed on 17 August 2021 in the lead action, it maintained that AOG and Sky never had a lease agreement between them in relation to the Property. Sky further claimed that it erected a commercial hangar on the Property and that AOG unlawfully, willfully and illegally occupied it at the expense and exclusion of Sky.
17. Sky further claimed that the eviction and distraint of its assets by AOG were wrongful and illegal and sought the following relief:
 - “(1) Delivery up of the goods wrongfully, illegally or negligently distrained by AOG or payment of their value.
 - (2) Damages for loss of quiet enjoyment.
 - (3) Damages for trespass to goods and civil conversion.
 - (4) Double Damages for wrongful and/or negligent distraint.
 - (5) Interest under the Civil Procedure (Award of Interest) Act.
 - (6) Costs.
 - (7) Further or other relief as the Court deems just.”
18. By AOG's Reply to Defence and Defence to Counterclaim filed 31 August 2021, it denied that the eviction and distraint were unlawful. It further denied all allegations made in Sky's Counterclaim.

Order made 20 September 2021 (“Consent Order”)

19. By the Consent Order, the determination of the Lead Action, would also determine the Second Action.

ISSUES

20. The Parties were not able to agree the facts and issues of the actions. In any event, the main issues which this Court had to determine were:-
- i. Whether there was a valid and enforceable lease agreement between AOG and Sky?
 - ii. Whether AOG legally evicted Sky from the Property?
 - iii. Whether AOG was owed damages for Sky's alleged breach of contract?
 - iv. Whether the alleged distraint of Sky Bahamas' goods by AOG legal?
 - v. Whether Sky was entitled to damages for the alleged distraint of its goods by AOG?

EVIDENCE

AOG's Evidence

21. The Plaintiff filed the initial Witness Statement of Frederick Kaiser ("Mr. Kaiser ") on 18 February 2022 which stated that Mr. Kaiser was a business owner, the sole Director and beneficial owner of Advanced Aviation Limited ("AAL") and Aviation Assets Limited ("**Aviation Assets**"). The Kaiser Witness Statement also confirmed that Mr. Kaiser was the owner of the Alpha Group of Companies.
22. Mr. Kaiser further provided that, AOG was incorporated to invest in commercial real estate. Since 17 February 2012, AOG was substituted as the sub-tenant under a sub-lease dated 01 June 2009, for twenty (20) years and that the sub-lease had been initially granted to Sky in respect of the Property owned by NAD. That lease was superseded by a new nine (9) year lease with effect from 01 April 2020.
23. Mr. Kaiser further stated that AOG had granted loans to Sky Bahamas and leased a fleet of aircrafts to Sky. He stated that Sky Bahamas occupied the Property under a bare licence-at-will. He also stated that an oral sub-lease agreement had been made between AOG and Sky in 2015 which Sky accepted due to Sky inviting the Court to make a declaration that a sub-lease existed between AOG and Sky.
24. Mr. Kaiser also stated that Mr. Kevin Peter Turnquest ("**Mr. Turnquest**") was in charge of the financial management of the Bahamian aspect of the Alpha Group of Companies. Mr. Turnquest provided Mr. Kaiser with regular updates on the financial affairs of the Alpha Group of Companies. He averred that it was later discovered that Mr. Turnquest had defrauded the Alpha Group of Companies and had failed to hold Sky Bahamas and other debtors to their financial obligations to the Alpha Group of Companies. This was only discovered once Ms. Rose Delancy assumed the role of Managing Director of the Alpha Group of Companies.
25. Mr. Kaiser set out the terms of the lease agreement which he said had been agreed at the AGM when Mr. Kaiser and Captain Butler were both in attendance:
- "....as of 01 January 2019, Sky Bahamas would be required to enter into a formal lease of the commercial building for a period of three years at a monthly rent of \$26,000 plus applicable taxes."**

26. Despite this agreement, no rent was ever paid nor was a formal lease executed by the parties, though a formal lease had been prepared. He further provided that items belonging to Sky were distrained following the eviction of Sky from the Property due to its failure to pay rent.
27. Despite injunctive relief obtained by AOG to prevent Sky Bahamas, its officers, employees and agents from entering the Property, Captain Butler entered the Property and removed a variety of items, including aircraft log books and financial records of Sky along with engines of several aircrafts. Sky also defaulted on hire purchase payments to JESCO I, LLC for leased engines being used in the aircraft.
28. On 05 June 2018 AAL paid Captain Butler \$750,000.00 for the transfer of his shares in AOG.
29. AOG also filed the Witness Statement of Rose Delancy ("Ms. **Delancy**") on 18 February 2022. Ms. Delancy is and has been the Financial Controller of the Alpha Group of Companies since April 2012, and assumed the role of Managing Director of the Alpha Group of Companies in May 2017. Ms. Delancy is the Corporate Secretary of AOG.
30. Ms. Delancy confirmed the existence of the lease agreement made at the AGM. She confirmed that Captain Butler, Mr. Kaiser and Ms. Victoria Ferguson were all present at the AGM along with herself as proxy for Mr. Turnquest and that there was clarity on the terms of the sub-lease agreement between AOG and Sky. She also confirmed the agreement by Captain Butler to sell his shares and transfer them to MCI. Captain Butler executed the assignment and endorsed his share certificates for transfer after the meeting.
31. She averred that Captain Butler broke into the Property and removed several items, following the eviction of Sky Bahamas for its failure to pay rent. All items which still on the Property were neatly and safely compiled and documented for records.
32. AOG also filed the Witness Statement of George Clifford Culmer ("Mr. Culmer") on 25 February 2022. On the first day of trial, Mr. Culmer's statement was struck out, as he was deemed to be an expert witness and no leave to call an expert had been granted by the court.

Sky's Evidence

33. Sky Bahamas filed the witness statement of Captain Butler on 28 February 2022. It provided that:-
- i. Sky was not a tenant of AOG and that no lease agreement or any form of tenancy had been established between AOG and Sky;
 - ii. Captain Butler never parted with his shares in AOG;
 - iii. Sky, due to legal and technical reasons, remained the sub-tenant to a sub-lease between itself and NAD regarding the Property;
 - iv. Sky, its officers, employees and agents were unlawfully evicted from the Property; and

- v. Sky was never provided with an inventory list of all items held by AOG post-eviction.

SUBMISSIONS

AOG's Submissions

34. AOG's submitted that AOG and Sky had a binding oral lease agreement by virtue of Captain Butler's agreement made at the AGM where it was agreed that Sky would pay a monthly rent of \$26,000.00 plus applicable taxes. The lease agreement was to take effect from 01 January 2019. AOG further submitted that there was never any agreement that Sky would occupy the Building on a gratuitous basis.
35. At common law and in assumpsit AOG was entitled to a reasonable sum for the use and occupation of the Property by Sky. There was an implied term that Sky pay a fair and reasonable rent for enjoyment of the Building. AOG relied the principles set out in **Marks and Spencer v BNP Paribas [2015] UKSC72** ("**Marks and Spencer**"). *Marks and Spencer* provided:-

“ “[15] As Lady Hale pointed out in *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 All ER 1061, [2013] 1 AC 523(at para [55]), there are two types of contractual implied term. The first, with which this case is concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship.

[16] There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In *The Moorcock* (1889) 14 PD 64 at 68, [1886–90] All ER Rep 530, Bowen LJ observed that in all the cases where a term had been implied, 'it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have'. In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, [1918–19] All ER Rep 143, Scrutton LJ said that '[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract'. He added that a term would only be implied if 'it is such a term that it can confidently be said that if at the time the contract was being negotiated' the parties had been asked what would happen in a certain event, they would both have

replied ' "Of course, so and so will happen; we did not trouble to say that; it is too clear"'. And in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 All ER 113, [1939] 2 KB 206, MacKinnon LJ observed that, '[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying'. Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied 'if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" '.

[17] Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, [1973] 1 WLR 601, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in *Liverpool City Council v Irwin* [1976] 2 All ER 39, 47, 50 and 53, [1977] AC 239, 258, 262 and 266 respectively. More recently, the test of 'necessary to give business efficacy' to the contract in issue was mentioned by Lady Hale in *Geys* at para [55] and by Lord Carnwath in *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] 2 WLR 1593(at para [112]).

[18] In the Privy Council case of *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:

'[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'

[19] In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which 'distil[led] the essence of much learning on implied terms' but whose 'simplicity could be almost misleading'. Sir Thomas then explained that it was 'difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue', because 'it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision', or indeed the parties might suspect that 'they are unlikely to agree on what is to happen in a certain ...

eventuality' and 'may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur'. Sir Thomas went on to say this (at 482):

'The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in Reigate, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ...'"

36. AOG further contended that its entitlement to a reasonable sum for use and occupation of the premises would arise even in a case of anticipation of an intended lease. It relied, *inter alia*, on **Cogan v Warwicker 3 Car & K 39**, where, a landlord let a warehouse to a tenant for a certain amount of funds. The formal agreement was not prepared, but the landlord permitted the tenant to occupy the premises, on the understanding that a formal lease was to follow. Ten weeks later, the landlord requested the tenant sign the lease but the tenant refused. It was held that the tenant was liable for use and occupation of the landlord's warehouse.
37. AOG denied that the eviction was unlawful and submitted that AOG was legally allowed to remove Sky from the Property for failure to pay rent. It further submitted that the counterclaim was misconceived as all goods were found on the Property were handled carefully and appropriately. Further, AOG contends that there was no evidence confirming the purported value plead in Sky's Defence and Counterclaim (being the \$3,200,000.00 to \$5,000,000.00). AOG contended that the value of Sky's goods did not exceed \$1,000,000.00. Only goods relating to the SAAB Beechcraft and which belonged to Advanced Aviation Limited were sold. No items belonging to Sky were sold.
38. AOG submitted that losses also flowed from Sky's failure to pay its rent, which include: costs for security services, personal security for Victoria Ferguson and expenses incurred due to the illegal entry of Mr. Randy Butler and his agents in December of 2019.

Sky's Submissions

39. Sky submitted that there was no legally binding lease agreement between itself and AOG. Sky relied on **Street v Mountford [1985] AC 809** which established the criteria required to find that there was a lease agreement. Lord Templeton provided:-

"My Lords, there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession..."

.....any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasize the fact that the grantee is entitled to exclusive possession and is a tenant.”

40. Sky relied on a letter dated 18 January 2019 sent to Mrs. Tara Archer Glasgow as counsel for NAD from AOG's then counsel, Ms. Karin Sanchez. The letter stated:-

“We concede that the Indenture of Sub-Lease between NAD and Sky is a valid contract which said contract has not been surrendered, determined, terminated for cause, expired or assigned. Whilst there is no question the said Sub-Lease between NAD and Sky is subsisting and therefore enforceable only against Sky, the Addendum from NAD to Sky dated February 17th 2012, purporting to amend inter alia Article 1, Section 1.1(a) of the Sub-Lease by substituting Sky's name to AOG is wholly invalid because there was not then and is now a Certificate of Name Change....If NAD, Sky and AOG intended for there to be an assignment of the Sub-Lease then Parties should have entered into a Deed of Assignment. There is no certainty of object, certainty of terms or privity of contract between AOG and NAD, the former lacks standing. From these facts, it is clear that NAD could only demand payments from the party with whom it originally contracted – Sky.”

41. Sky also advanced that the eviction of Sky by AOG's agents was unlawful and illegal as there was no valid lease agreement between AOG and Sky. AOG tortuously interfered with Sky's valid lease existing between itself and NAD.
42. Sky relied on **Gilbert Kodilinye's Commonwealth Caribbean Property Law** for clarification on what is considered excessive, unlawful and illegal distress, Kodilinye stated:-

“A wrongful distress may be either: (a) illegal (b) excessive; or (c) irregular. Illegal distress occurs where there was no right of distress at all (for example, where the relationship of landlord and tenant had ceased to exist at the time of the distress), or where, although there was a right of distress, a wrongful act was committed in the course of the levy itself (for example, where privileged goods were seized). Excessive distress occurs where more goods are seized than are reasonably necessary to satisfy the arrears of rent and proper charges of distress. Irregular distress occurs where, although there was a right of distress, a wrongful act was committed at some stage of the proceedings subsequent to the seizure (for example, where the proper procedure for selling the distrained goods was not followed)....Damages obtainable for illegal distress extend to the full value of the goods removed and sold, with no deduction for the

rent owed, although the landlord can counterclaim for arrears of rent....”

43. With respect to damages for distraint for the illegal seizure of its assets by AOG, Sky asserted that evidence of the value of its items wrongfully distrained by AOG included: (1) the inventory list prepared on 31 May 2017 which had the inventory valued at \$1,389,271.96 and also on 29 March 2019 which had the inventory valued at \$3,200,000.00; and (2) the police report valuing such goods between \$3,000,000.00 and \$5,000,000.00.

44. Sky relied on **Colina Insurance Limited v Enos Gardiner SCCivApp & CAIS No. 117 of 2015** to confirm that a record was prima facie proof of fact. There, Crane-Scott J stated:

“Quite apart from the fact that the DPH Summary was admitted in evidence by consent, it was also a “record” within the meaning of section 60 of the Evidence Act and was before the judge as prima facie proof of the facts stated therein.”

45. Due to the actions of AOG, Sky submitted that it was entitled to damages for loss of quiet enjoyment, damages for trespass to goods and civil conversion, as well as double damages as provided under **section 5 of the Distress for Rent Act, 1689** which provided:

“5. In case any such distress and sale as aforesaid shall be made by virtue or colour of this present Act for rent pretended to be arrear and due where in truth no rent is arrear or due to the person or persons distraining or to him or them in whose name or names or right such distress shall be taken as aforesaid that then the owner of such goods or chattels distrained and sold as aforesaid his executors or administrators shall and may by action of trespass or upon the case to be brought against the person or persons so distraining any or either of them his or their executors or administrators recover double of the value of the goods or chattels so distrained and sold together with full costs of suite.”

DISCUSSION

I. Whether there was a valid and enforceable lease agreement between AOG and Sky?

46. According to the minutes of the AGM, it was agreed that Sky would pay rent to AOG beginning 01 January 2019. It is noted that the following persons were present at the AGM: Victoria Ferguson, Karin Sanchez, Fredrick Kaiser and Captain Butler. The minutes of the AGM were signed by Rose Delancy and Fredrick Kaiser.

47. Captain Butler, was the CEO, principal and Director of Sky. At the time of the AGM, he also held 1500 Class A shares in AOG. This means that he was present at the AGM in a dual capacity (being a director, shareholder and CEO of Sky and a shareholder in AOG). At the AGM, there is no evidence that Captain Butler objected to or disagreed with Sky paying rent to AOG for the use of the Building. Though the minutes are not signed by him, he admitted that he was present at the AGM during his cross-examination. On page 52 at lines 24 to 31 of the 18 May 2022 Court Transcript Captain Butler stated:-

“Q. You see before it says annual general meeting of shareholders, Monday December [1]7th, 2018. Were you there?

A. Yes, sir.

Q. Now let’s look at item four.

A. Is this the minutes that I did not sign and –

Q. No, you admit that you were there.

A. Yes.”

48. According to **Street v Mountford [1985] AC 809**:

“There is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession... (emphasis added)”

49. Relying on the minutes from the AGM and **Walsh v Lonsdale**, where the court held that an equitable lease arises when there is an agreement to lease but not executed, both parties have the same entitlement as if it were a legal lease. The Court accepts that there was an oral lease agreement between AOG and Sky where Sky agreed to pay rent to AOG commencing on 01 January 2019 for a period of three (3) years. The minutes from the AGM confirmed that: (i) Sky would have exclusive possession of the ground floor of the Building; (ii) Sky would pay rent (based on the square footage of the building itself); (iii) that the lease agreement would commence on 01 January 2019; and (iv) the lease agreement would be for a term of three (3) years. Accordingly, I find that there was a legally binding lease agreement as between AOG and Sky for use of AOG’s Building on the Property.
50. There was no evidence of any objection to any of these terms. Captain Butlers’ sole defence is that he did not sign the minutes. I am satisfied that based on Captain Butler’s demeanor as observed from his evidence given at trial, if he did not agree to the lease and its terms at the AGM he would have firmly said so.
51. It is also noted that, though Sky was the original sub-tenant under the 2009 Lease between NAD and itself, the 01 April 2020 lease between NAD and AOG clarified who the sub-tenant was at 2012. It confirmed that AOG was empowered to enter into a

lease with Sky as it was AOG who had the sub-lease with NAD and not Sky. The recitals of that lease provide:

“(A) By an Indenture of Lease dated the 1st day of June A.D., 2009 (hereinafter referred to as “the said Lease”) and made between the Landlord of the one part and Sky Bahamas Airlines Limited (hereinafter called “the Prior Tenant”) of the other part the Landlord demised unto the Prior Tenant all that property described in the Schedule hereto (hereinafter called “the demised premises”) for the term of Twenty (20) years commencing on 1st day of August, A.D., 2009 (hereinafter called “the said Term”) at the rental set forth therein and subject to the terms stipulations and conditions therein contained, and the said Lease contained a covenant by the Landlord for the renewal of the said Lease (hereinafter called “the said Covenant”) upon the terms and in the manner therein mentioned.

(B) By an Amendment dated the 17th day of February, A.D., 2012, AOG replaced or purported to replace the prior Tenant as the Tenant under the said Lease (hereinafter called “said Amendment”)

(C) The said Amendment purported to assign the benefit of the said Lease from the prior Tenant to AOG by way of change of name.

(D) Doubts have arisen as to whether or not in the premises thereof the said Amendment was effectual for this and all other purposes.

(E) In order to correct the error and to properly effect the intention of the parties it has been agreed between the Landlord and AOG that AOG should enter into such assignment and surrender of the unexpired residue of the said term (together with the improvements thereon) as hereinafter contained together with the release to the Landlord of the said Covenant in consideration of the release as is hereinafter expressed and in consideration for a new Sub-lease of the demised premises to be entered into by the same parties as are the parties hereto but in the reverse order and contemporaneously herewith (emphasis added)”

By this document the landlord accepted that AOG was the appropriate party to enter into the proposed sublease with Sky as the tenant. NAD accepted that AOG could surrender the unexpired residue of the original 2009 lease and enter a new lease with it.

II. Whether AOG legally evicted Sky from the Property?

52. According to of Ms. Delancey's witness statement:

“3. I was present at the AOG's AGM on 17 December 2018. Mr. Turnquest had given me his proxy and I delegated for him at this meeting. The meeting took place at the AOG building in Nassau.

The individuals present at the meeting included Mr. Frederick Kaiser, Ms. Victoria Ferguson and Mr. Randy Butler. Corporate Counsel to the Corporation, Mrs. Karin Sanchez kept the minutes of the meeting.

4. The decision was taken at this meeting to move Sky Bahamas' executive offices from the second to the ground floor of the commercial building which was also occupied by Sky Bahamas. The rent was agreed at \$26,000 plus applicable taxes ("the rent"). The rent was stipulated at \$26,000 as a fair and reasonable amount in all circumstances and it was determined that payment of rent would commence in January 2019. Under the new lease it was stipulated that his occupancy would be limited to the first floor of the hanger. It was made clear at the meeting that failure by Sky Bahamas to pay the rent would mean that it would be asked to leave the building or face eviction. There was no lack of clarity regarding the agreement that had been reached.

5. From January 2019 to 17 August 2019, I sent monthly invoices for the rent and awaited payment of it. However, in breach of the agreement, Sky Bahamas did not pay the agreed rent or any part of it. At no point did Sky Bahamas state or advance the position that there was no rent payable. It was always accepted that as it was a commercial tenancy there would be an obligation to pay rent in consideration of such tenancy. In fact the lease was prepared (RD#1) but it was never executed by Mr. Butler. (emphasis added)"

53. Based on this evidence, Captain Butler knew what the consequences were if he did not pay rent. In addition, AOG, through Ms. Delancy, consistently sent invoices for rent payment to Sky. Sky did not refute that it owed rent at this time nor did it challenge or refute such invoices being sent to on a consistent, monthly basis. Sky does not deny that it failed to pay the rent owed. As over eight (8) months elapsed with no rent payments from Sky to AOG, AOG sought to evict Sky from the Property. Again I am satisfied that if Sky did not agree to the rental payments, the minutes of the AGM would have reflected his disagreement or he would have made AOG know of his disagreement once the first invoice was sent.

54. Even if Sky were to refute that eviction was discussed at the AGM it can be implied. In accordance with the principles emanating from *Marks and Spencer*, certain contractual terms can be implied. It can readily be accepted that, should a tenant not pay rent as it falls due and owing, the tenant faces the risk of eviction. In order to give business efficacy to such an arrangement, it can be readily understood that eviction can be implied if rent is not paid when due. Accordingly, this Court finds that the eviction was not only permissible under the terms agreed but legally executed due to Sky's failure to pay rent.

III. Whether AOG is owed damages for Sky's alleged breach of contract?

55. I have determined that there was a legally binding lease agreement between Sky and AOG and that Sky failed to pay the rent due from 01 January 2019 to trial. Consequently Sky breached the contract, and Sky owes AOG damages emanating from such breach. The purpose of damages for a breach of contract is to put the aggrieved party in the position it would have been in had the breach never occurred (**Hadley v Baxendale**). Accordingly, Sky shall pay the special damages as pleaded in AOG's Writ of Summons in the amount of B\$219,928.76 with interest at the rate of 1.5% from the date of commencement of the action to the date of judgment. Finally AOG is entitled to interest at the statutory rate from the date of judgment until payment.

IV. Whether the alleged distraint of Sky Bahamas' goods by AOG was legal?

V. Whether Sky is entitled to damages for the alleged distraint of its goods by AOG?

56. These two issues are related and will be addressed together. **Gilbert Kodilinye's Commonwealth Caribbean Property Law** provides a helpful discourse on the law relating to distraint of goods. He states:

"A wrongful distress may be either: (a) illegal (b) excessive; or (c) irregular. Illegal distress occurs where there was no right of distress at all (for example, where the relationship of landlord and tenant had ceased to exist at the time of the distress), or where, although there was a right of distress, a wrongful act was committed in the course of the levy itself (for example, where privileged goods were seized). Excessive distress occurs where more goods are seized than are reasonably necessary to satisfy the arrears of rent and proper charges of distress. Irregular distress occurs where, although there was a right of distress, a wrongful act was committed at some stage of the proceedings subsequent to the seizure (for example, where the proper procedure for selling the distrained goods was not followed)....Where distress is illegal, action should be brought against the bailiff who actually committed the illegal act, not against the landlord, unless the latter expressly authorized or ratified it. Damages obtainable for illegal distress extend to the full value of the goods removed and sold, with no deduction for the rent owed, although the landlord can counterclaim for arrears of rent. Where distress is excessive, action may be brought against the landlord or the bailiff. The measure of damages for excessive distress is the value of the goods wrongfully seized, less the arrears of rent and the costs of the distress. Where the excess goods seized have not been sold, so that the tenant has suffered no actual damage, he will recover only nominal damages. In the case of irregular distress, action may be brought against either the landlord, or the bailiff, or both. The tenant may recover only for any special damage sustained."

57. Mr. Kaiser, under cross examination stated:-

“Q. I put it to you that the eviction of Sky Bahamas from the demised premises by AOG was illegal because Sky Bahamas at that point had not been technically evicted from the premises from NAD.

A. They had been evicted from the terminal.

Q. That is separate and distinct?

A. I was told they were just told to cease and desist. They cannot operate out of the airport anymore.

Q. I put it to you that AOG failed to provide accounting of the items that were left in the hangar?

A. Everything was counted, but when he burglarize it he messed it all up.

Q. You say he burglarized it? When did he burglarize it?

A. In December of 2019.

Q. Did it occur when he obtained an injunction briefly when he was allowed to go back in the hangar?

A. No, he was not allowed to go back in the hangar. You have to read the injunction properly. All it was that the management of AOG was not supposed to sell or dispose of anything. There was no entry allowed whatsoever.

Q. The management of AOG was not supposed to sell anything.

A. It did not.”

58. Further, he stated:-

“Q. So AOG was not supposed to part with anything out of the hangar?

A. AOG was not supposed to dispose of anything until it’s all cleared up, and AOG did not dispose of anything.”

.....

“Q. Distraint is the right of a landlord to go into premises and take [into] custody and sell the items belonging to the tenant within the premises.

A. But there was literally nothing there that belonged to AOG or Sky Bahamas, because it was all AOG or it was the airplanes that

belonged to us. So the net value that Sky Bahamas had in there is pretty close to zero.

Q. I put it to you that the net value of the items held by Sky Bahamas in the hangar as provided in Sky's inventory list ranged from 3.5 to 5 million.

A. Okay, because you are not aware of this. Those parts legally belong to Advance. They were aircraft parts of airplanes. He had people take apart and put parts in the hangar. But they are still parts belonging to Advance not Sky."

...

..."Q. I put to you that Advance has not, and this is one of the things too Mr. Kaiser, why the distraint would have been negligent. You have to separate what is Advance, what is Sky. And then you say hey Sky, this is your things, this is our things.

A. On the burglary of the building they took everything that was theirs. There is nothing left. The rest was all aircraft parts that belonged to my airplanes and never to Sky.

Q. But earlier you also indicated that it was not just your aircraft parts that were in the hangar. It was Jesco's aircraft parts in the hangar. It was Jesco's aircraft parts in the hangar. It was Aerospace?

A. Yes, and we returned them to the rightful owner."

59. I found Mr. Kaiser to be a convincing witness. He remained consistent in his evidence, despite rigorous cross-examination by learned counsel. I accept his evidence and believe that there was no distraint of Sky's goods. The only goods taken which belonged to third parties who had leased engines to Sky and upon default of payment was entitled to their return which were taken by AOG and returned to them or engine parts which belonged to AOG. There was no evidence of any of Sky's goods sold by AOG.

60. Mr. Kaiser's evidence was corroborated by an email dated 25 March 2021 from Mr. Wayne Kissoondath of Jetstream Aviation Capital to Captain Butler confirming that AOG was assisting Jetstream with the return and receipt of its engines.

61. Further corroboration of the evidence of the removal of assets was provided by the oral evidence of Ms. Delancy under cross-examination where she stated:-

"Q. Was there any substantial value left in the Hanger that would belong to Mr. Butler?

A. No.

Q. Did you – after the break-in which you just discussed, did you have occasion to pack up Mr. Butler's effects?

A. Yes. When he took over the building that would have been after August 17, 2019.

Q. And where are those effects?

A. Those effects are in storage. But let me make it clear that when we took over that building, we did everything in our power, room by room to secure and to maintain the integrity of the contents of those rooms as we found them. Every item was placed in a box and properly labelled. And we did it, like I said, to safeguard the integrity of those items."

62. Like Mr. Kaiser, I found Ms. Delancy to be an honest and consistent witness. Her testimony is accepted. Her oral evidence also corroborated her evidence in chief where she confirmed that she had contacted Captain Butler to come and collect the boxes containing his personal effects.

63. Captain Butler on the other hand, continually contradicted his own written and oral evidence and was recalcitrant throughout the trial. He stated that an affidavit which he executed and swore to be true and correct was inaccurate. He even equivocated concerning his own signature to that affidavit. Examples of Captain Butler's consistent contradictions and refusal to answer questions directly can be found throughout the court transcript.

64. On 17 March 2022 Court Transcript, his evidence was:-

"The Court: Okay. Is this your affidavit?

The Witness: This is mine. I am familiar with it. Number 3, I saw this before and had problem with the first page.

The Court: Did you sign this document?

The Witness: This document, the first page is not –

The Court: No, no.

Mr. Scott Q.C.: No, no. That is not the question you asked him.

The Court: Did you sign this affidavit?

Q. There is a signature at the end of this affidavit. Is that your signature?

A. Well –

Q. Yes, or no?

A. That's a variation of my signature.

Q. Is this your signature?

A. It's not clear.

Q. No, no, no. Did you sign this document?

A. I did not sign a document with this number - "

65. On the 18th March 2022, he stated:-

"Q. How did you get in?

A. I did not break in.

Q. Did somebody let you in?

A. I told you I was told by my attorneys that I could go onto the property."

66. Captain Butler challenged in his oral evidence the minutes of the AGM which were corroborated by Ms. Delancy, even though he was present at the AGM. Until his oral evidence, there was no evidence led of his challenging the minutes of the AGM. On the 18 March 2022 Court Transcript, it reads:

"A. Well, I said I will say it [to] you again. These minutes I wrote them and tell them this thing was not exactly how we discussed it"

He did not produce any document proving this.

67. On the 18 March 2022 Court Transcript, it provides:

"Q. And it says: "sums due to NAD from AOG Company Limited. Now, you said that you were making all of these – your evidence this morning that you were making all of these payments to NAD monthly. This was your responsibility. You were adamant about that and you were saying that faithfully every month you made these payments?"

A. Yes, sir. Lease payments.

Q. Now, let's go to the second paragraph. This letter was written by Tara Archer-Glasgow. And she says: "Regrettably notwithstanding the opportunity....our client shall immediately commence legal proceedings, etc. Now, your evidence was that you have been faithfully making these payments. So first of all my first [question]

is how do you end up in a situation where you have \$436,000.00 worth of arrears?"

Due to the inconsistencies in Captain Butler's testimony, the Court does not find him to be a credible witness. It is clear from the documentary and oral evidence that agents of AOG prepared a comprehensive list of the items in the Property, carefully labelled and sorted the items, handled them with due care and provided Captain Butler an opportunity to come and collect those which belonged to him. Overall and after a review of the evidence I am satisfied that Captain Butler had several of the items which he is claiming as having been distrained in his possession. I am also satisfied that Captain Butler was provided with an opportunity to collect his goods. It is also accepted that he entered the premises without the knowledge and consent of AOG and after which the claim was made for distraint. It was then that AOG realized that boxes of items were removed from the premises. There is no evidence of any distraint by AOG of Sky's items.

68. Sky asserted that assets valuing \$3,500,000.00 to \$5,000,000.00 were distrained by AOG. The 18 March 2022 transcript provides:

"Q. You don't have – do you have all of the receipts to match?"

A. No, I don't. They are in the building.

Q. Now your claim or your claim in your counterclaim is for three and a half to five million. This is 1.3. How do you make up the rest of it?

A. Well, it's a number of things. There is documents.

Q. Such as?

A. Engines.

Q. Tell us.

A. The engines.

Q. Which engines?

A. Ones that I financed from Aerospace. There is one that I paid for. And the other there was quite a bit of equity in it. The ones from Jet Stream.

The Court: And the one?

A. One we bought financed by Sky Bahamas, Randy Butler, two engines from Aerospace. One of them were paid for. And one the other I can't remember but there was quite a bit of equity in it. And then there were two engines that were financed from Jetstream that had a lot of equity inside them also. And I think the amount for the engine and what was the equity I will have to refer to the exact documents.

Q. But this is your claim. I don't have to prove your claim. You have to prove your claim."

69. The 18 March 2022 Court Transcript also provides:-

"Q. We know 1.3 million of it is your claim for inventory. What about the rest? How did we get from 1.3 to 5?

A. All the individual things that happened.

Q. Such as?

A. For example the payment of transportation to get engines here. Payment of people that had to go and travel to hotels, the inspections all that stuff and it was a lot of stuff going on.

Q. Can I ask you a question please. Is any of that stuff before this court, before Her Ladyship?

A. In terms of that no sir. Some of that is not."

70. There is no evidence before the Court proving the value of Sky's goods at \$3.5 to 5 million dollars. Further the inventory being relied on was generated before the breakdown between the parties and no evidence was provided as to which items were taken from that list or which had been used in the operation of the business. No receipts were provided of the actual value of the items allegedly distrained. Although the court accepts that the inventory is a record for purposes of the Evidence Act, the inventory was dated prior to the breakdown of the relationship and Sky did not prove what was still in its possession or what had been allegedly taken at the time of the eviction.

71. The Court notes Captain Butler's letter to the police, but more compelling evidence is required. That letter simply reflects what Sky says the goods were valued at. Receipts, invoices or evidence of the like confirming values of the items would be more persuasive. In the circumstances, the Court finds that there was no distraint and even if there had been, there was no evidence to confirm what value was attributed to the assets allegedly distrained.

72. Sky also sought to advance a case for breach of the covenant of quiet enjoyment. This was a confusing claim as such a breach can only occur: (i) in a landlord and tenant relationship where the landlord does not permit the tenant to peacefully enjoy the land; or (ii) in circumstances where adjacent properties are bound by covenants attached to the land and a property owner breaches such covenant. The latter is not applicable in this matter. The former, however, is an arrangement which Sky vehemently denies as existing yet it is the only scenario in which such a claim can arise. In any event, the advancement of such a claim is misconceived. One cannot ask for quiet enjoyment when the party alleging the breach is guilty of breach of contract for non-payment of rent. The right to quiet enjoyment would fall away as the


lessee is entitled to determine the lease due to Sky's refusal to pay rent. Accordingly, that aspect of the counterclaim is dismissed.

73. The claims for damages for trespass to goods and civil conversion, are also rejected and dismissed. I have determined that there is a binding lease agreement between AOG and Sky and that Sky had breached the lease by failing to pay rent. Accordingly, Sky in refusing to vacate the premises would be the trespasser and any goods equivalent to the value of the rent arrears could be legally distrained by AOG. There is no evidence however of any goods being sold as at the date of the trial. Additionally, the claim for double damages also falls away as the Court has ruled that there was no distraint. The goods remain available for Sky's collection or further action by AOG. Accordingly these aspects of the counterclaim are also dismissed.

CONCLUSION

74. Upon reviewing all of the evidence and submissions, I confirm that there was a valid and binding lease agreement between AOG and Sky Bahamas, the eviction of Sky was legal, there was no distraint by AOG and Sky's counterclaim is dismissed.
75. In compliance with the Consent Order, Sky's Writ of Summons a in the Second Action is also dismissed.
76. Accordingly, the Court grants the following relief:
- A) A declaration that there was a binding oral lease agreement between AOG and Sky;
 - B) Sky is directed to pay AOG the sum of B\$219,928.76 with pre-judgment interest at 1.5% from the date of the commencement of the lead action until the date of the judgment and thereafter at the statutory rate until payment.
 - C) Sky's counterclaim is dismissed; and
 - D) Sky shall pay AOG's costs fit for two counsel, to be taxed if not agreed.

Justice G. Diane Stewart



Dated this 9th day of June, 2023