CIVIL APPEAL NO. CL-AP 16/18
(From CL 118/16)

IN THE COURT OF APEAL
TURKS & CAICOS ISLANDS

IN THE MATTER OF THE TURKS AND CAICOS ISLANDS CONSTITUTION ORDER 2011 ("THE CONSTITUTION")

AND IN THE MATTER OF THE CROWN LAND ORDINANCE CAP 9.08 ("THE CLO")

AND IN THE MATTER OF A DEVELOPMENT AGREEMENT DATED APRIL 18th, 2008 AS AMENDED AND REINSTATED ON 19th AUGUST 2013 BETWEEN THE PLAINTIFFS AND THE DEFENDANTS ("THE DEVELOPMENT AGREEMENT")

B E T W E E N:

CMK BWI LTD.
BELL SOUND LIMITED
SAILROCK ESTATES LIMITED
LOWER SAILROCK ESTATES LIMITED
THE HIGHLANDS LIMITED
COCKBURN HARBOUR LIMITED
COCKBURN HARBOUR MARINA LIMITED
McCARTNEY CAY LIMITED

APPELLANTS

AND

ATTORNEY GENERAL OF THE TURKS & CAICOS ISLANDS

RESPONDENT

BEFORE:	**Sir Elliott Mottley, P** **The Hon. Mr. Justice Humphrey Stollmeyer, JA** **The Hon. Mr. Justice Neville Adderley, JA**
APPEARANCES:	**Mr. Ariel Misick QC and with him Ms. Deborah John-Woodruffe for the Appellants** **Ms. Clemar Hippolyte for the Crown**
DATED HEARD:	**21 March, 2019**
DATE DELIVERED:	**29 January, 2021**

JUDGMENT

[1]. **Adderley, JA.** The appeal seeks to determine whether or not the trial judge was right to hold that a development agreement dated 18 April, 2008 ("the 2008 Agreement") entered into between the Appellants and the Respondent was rescinded by a subsequent agreement entered into between them in 18 August 2013 ("the 2013 Agreement"). The Attorney General of the Turks and Caicos Islands ("TCI") is sued in her representative capacity and references to disposal of land by TCIG means disposal by the Governor in whom, by law, all Crown land reposes.

[2]. Under the 2008 Agreement the Appellants agreed to carry out a phased development at a cost of not less than US$100,000,000 and the Turks and Caicos Islands Government ("TCIG") agreed to dispose of certain Crown Land to the Appellants, and to provide certain financial, tax and other incentives by way of support to the Development. The Development was seen by the TCIG as being beneficial to the economy of the TCI.

[3]. After the signing of the 2008 Agreement and before the signing of the 2013 Agreement Parliament passed the Crown Lands Ordinance CAP 9.08 ("CLO "). That came into force on 1 April 2013, and an amendment to it came into force on 24 May, 2013 almost 5 years after the 2008 Agreement. The 2013 Agreement was dated 19 August, 2013 almost 3 months after the CLO had been in effect. Various issues arise as a result.

Background

[4]. The learned Chief Justice ("the Judge") in her judgment delivered 5 September, 2018 at paragraphs 1-7 helpfully summarized the background and issues and I gratefully rely heavily on her summary.

[5]. The Plaintiffs (and associated companies) ("the Developers") are the developers of property situated in South Caicos to whom TCIG under the 2008 Agreement granted the right to carry out a mixed use development on that Island comprising, among other things, a hotel, condominiums and luxury villas. The agreement also included the right to restore and use as a part of the development, certain Crown Land in downtown Cockburn Harbor, identified in the agreement as the 'Downtown Restoration Parcels'. These parcels were to be embodied in a lease ("the Downtown Restoration Lease") to the Developers at a peppercorn rent per annum if and immediately after they had invested USD 2 Million on "Island

Improvements" as defined in the 2008 Agreement. Additionally, TCIG agreed to use its best efforts to acquire Parcel 20202 ("the Valhalla Parcel") and upon acquisition transfer the freehold to the developers. The sum of $73,374.34 was inserted as the price for the Valhalla Parcel in Schedule 1 which comprised part of the 2008 Agreement depicting the property and Crown Parcels in South Caicos which were the subject matter of the agreement. An asterisk was next to the price of $73,374.34 with the following explanation at the bottom of the Schedule:

> "There is a query over the price calculation for the parcel 20202/9. The Developer believes that, based on previous figures, it ought to be $50,757.00. $73,374.34 is being paid on the date of the agreement on the basis that the discrepancy will be looked into if the figure is found to be overstated, that there shall be an appropriate reimbursement or credit to the Developer."

[6]. The 2008 Agreement was recited in a Deed of Settlement dated the same date as the 2013 Agreement. That settlement agreement recited that after the signing of the 2008 Agreement a dispute developed whereby each side made claims against the other for alleged breach of contract but the other denied. It also recited that to settle the dispute without admission of liability they agreed to enter into an "Amended and Restated Development Agreement". The negotiations to settle the dispute begun in 2010 and continued into 2013 focused in part on revising the terms on which the Developers would acquire the Downtown Restoration Parcels and the Valhalla Parcel.

[7]. The Valhalla Parcel was acquired by TCIG in 2011 after the company by that name had been struck off the register for the requisite period and the land it owned escheated to the Crown.

[8]. In clause 5.1(d) of the 2013 Agreement a sum USD$73,000 of the Escrow sum was stated to remain in escrow with the Developer's lawyers as security for the transfer of the unencumbered title to the Valhalla Parcel. Upon obtaining the unencumbered title, the Crown was to promptly transfer it to the Developer. Thereupon the sum of $62,000 was to be released to TCIG and $11,000 retained by the Developer to correct for the query in relation to the price of the Valhalla Parcel noted in Schedule 1 to the 2008 Agreement.

[9]. It was also agreed that the Downtown Restoration Parcels would be conveyed on a lease with a right of first refusal to the Developer in case TCIG elected to sell the land. These terms were incorporated in the 2013 Agreement. The next day, after signing the 2013 Agreement, the Developers notified TCIG of their intention to commence the Downtown Restoration. The Developers assert that they were told by representatives of TCIG that the Lease would be executed by December and it would seek to amend the CLO by March 2015 to deal with legacy issues like those arising under the Plaintiffs' lease.

[10]. In a letter to the attorneys for the Developers on 27 January 2015, TCIG informed the Developers that under section 34 and Part B of Schedule 2 of the CLO the grant of a lease of Crown Land was subject to a public competitive bidding process and the payment of a commercial rent. They also said that the CLO prohibited the sale of commercial Crown Land and so the Valhalla parcel and a planned road swap could not proceed as a freehold transfer but would have to be by long lease. In the spirit of negotiating in good faith to resolve the issue they proposed a 99-year lease with the option to convert the lease to freehold should the CLO be amended in the future to allow such transfers. TCIG indicated that there were discussions underway to propose amendments to the CLO to deal with these issues, but they could give no guarantees.

[11]. With that background the Developers took the view that there was a breach of the 2008 Agreement by TCIG and commenced proceedings accordingly for breach of contract, and for deprivation of property and/or interference with property rights guaranteed under section 1(c) and 17 of the Constitution. They sought the following relief:

(i) A declaration that the Crown Land Ordinance is not of retrospective effect so as to deprive them of their contractual rights acquired under the Development Agreement defined as the 2008 Agreement as amended by the 2013 Agreement.

(ii) A declaration that the Respondent is in breach of contract because of their failure to (a) execute the Lease without any variation of its terms; (b) obtain unencumbered title to the Parcel 20202/9 and transfer it to the Appellants.

(iii) If the Crown Land Ordinance is of retrospective effect, a declaration that it is unconstitutional to the extent it purports to deprive the Appellants of their rights under the Development Agreement to require the Respondent to execute the Downtown Restoration Lease.

(iv) A declaration that the Respondent's refusal to execute the Lease without variation constitutes a violation of the Appellants' fundamental rights to protection against deprivation and/or interference with property rights guaranteed by section 1(c) and 17 of the Constitution.

(v) A declaration that the Crown Land Ordinance violated the Appellants' legitimate expectation that its rights under the Development Agreement would not be taken away or interfered with unless proper notice and a reasonable explanation was given to the Appellants and the Appellants were also given an opportunity of being heard.

(vi) An order requiring the Respondent to execute the Downtown Restoration Lease in accordance with the terms set out in Schedule 4 to the Development Agreement without variation.

(vii) An order requiring the Respondent to transfer Parcel 20202/9 to the Appellants.

(viii) Alternatively, damages for breach of contract or compensation for breach of the Appellants' rights against deprivation of property under section 1(c) and 17 of the Constitution. 31.

[12]. At the hearing they abandoned (vi) and (vii).

[13]. The following matters were raised by way of defence:

(a) The Appellants' right with respect to the Downtown Restoration Lease and the Valhalla Parcel arose under the 2013 Agreement and not the 2008 Agreement.

(b) The Appellants had waived its rights under the 2008 Agreement by entering into the Settlement Agreement.

(c) The rights relating to the Downtown Restoration Lease and the Valhalla Parcel were not enforceable because the CLO prevented TCIG from giving effect to them.

(d) Clause 5.1 of the 2013 Agreement which provided for the parties to negotiate in good faith and endeavor to agree terms to be substituted for any provision which was found to be illegal, invalid and unenforceable.

(e) The Appellants were in breach of clause 16 of the Settlement Agreement [payment of certain legal fees] and should be denied relief.

[14]. At the hearing, the Respondent also contended that there was no binding obligation to transfer the Valhalla Parcel under the 2008 Agreement because TCIG did not own that parcel at the date of the 2008 Agreement and the purchase price had not been agreed.

[15]. The Respondents say that the 2013 Agreement extinguished the 2008 Agreement. Accordingly, it would be unlawful for TCIG to implement parts of the agreement in contravention of the CLO. It would be illegal for TCIG to deliver the Downtown Restoration Lease without complying with the transparency provisions in the CLO, and to convey the freehold in a commercial property (the Valhalla Parcel). As a result, the Developers could have no legitimate expectation that the government would carry out an illegal clause in the contract.

[16]. TCIG refused to sign the Downtown Restoration Lease and in order not to be in beach of the law offered the lease at a commercial rent of US$31,091 and added a rent review clause, none of which was in the draft lease appended to the contract and which was deemed a part of. Those amendments were proposed by TCIG to offer a good faith alternative in accordance with the requirement of the contract in case of a dispute arising.

The Judge's Decision

[17]. The Judge found that the intention to extinguish the 2008 Agreement was manifest because the variation in the terms of the 2008 Agreement were not temporary or minor, but fundamental, going to the root of the contract. She cited as an example that the 2008 Agreement provided that the Developers were required to spend US$2 million (matched by TCIG) on the Downtown Restoration before the Downtown Restoration Lease was to be granted, but in the 2013 Agreement the Developers could call for the lease by merely giving notice to TCIG to vacate the Downtown Parcels and make them available to the Developers.

[18]. She concluded that this showed that TCIG plainly intended to rescind the 2008 Agreement because the right for the Developers to sue to enforce that right against TCIG arose in the 2013 Agreement and did not depend on any term in the 2008 Agreement. I perceive that she relied principally on the statement of Lord Dunedin in ***Morris v Baron*** [1981] 1AC at pp25-26 where he stated:

> "The difference between variation and rescission is a real one, and is tested, to my thinking by this: in the first place there are no executory clauses in the second arrangement as would enable you to sue upon that alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way it is impossible that the two should be both performed.

[19]. The judge further stated that because the 2013 Agreement came into effect after the CLO came into force the provision for rent at a peppercorn as provided in the Downtown Restoration Lease was contrary to law and TCIG was unable to perform it. She noted that the 2013 Agreement was effective to alter the rights of the parties even if the altered rights cannot be enforced.

[20]. In relation to the Valhalla Parcel the judge found at paragraph 53 that once the land was acquired and a sale price was agreed there was an immediate obligation on the part of TCIG to transfer that property. However, at paragraph 48 of her judgment she agreed with Ms. Hippolyte's submission that there was no binding agreement until a price had been agreed and on her view of the evidence it had not been. She therefore held that the Developers were not entitled to declaration (i) [A declaration that the Crown Land Ordinance is not of retrospective effect so as to deprive them of their contractual rights acquired under the Development Agreement defined as the 2008 Agreement as amended by the 2013 Agreement].

[21]. Assuming that the 2008 agreement had been rescinded the learned judge pointed out that the new agreement (the 2013 Agreement) is effective to alter rights even if the altered rights cannot be enforced

Substitutive Performance

[22]. The judge noted that the 2013 Agreement provided for the possibility of supervening invalidity of any of its provisions by providing in such case for the parties to negotiate in good faith. She made reference to the mitigating clause 1.5 in the 2013 Agreement which dealt with invalidity, illegality or unenforceability of provisions of the agreement. It states:

> "In the event that one or more of the provisions mentioned herein contained shall be held for any reason to be illegal, invalid or unenforceable the parties shall negotiate in good faith and endeavor to agree the terms of a mutually satisfactory

provision to be substituted for the provision found to be illegal invalid or unenforceable as the case may be."

[23]. She stated that TCIG has made reasonable offers to the appellants under this clause both in respect of the Downtown Restoration Lease and the Valhalla Parcel. In the case of the Lease they have been offered a lease at a commercial rent with provisions for review of rent. In the case of the Valhalla Parcel instead of the freehold they have offered a 99-year lease. Accordingly, they are not in breach of the 2013 Agreement, the judge held.

[24]. The Judge also held that since TCIG had offered an alternative means of fulfilling its obligations to execute the lease to the Developers, they are not entitled to Declaration (ii), namely "A declaration that the Respondent is in breach of contract because of their failure to (a) execute the Lease without any variation of its terms; (b) obtain unencumbered title to the Parcel 20202/9 and transfer it to the Appellants"; nor damages under Declaration (viii), namely "Alternatively, damages for breach of contract or compensation for breach of the Appellants' rights against deprivation of property under section 1(c) and 17 of the Constitution.".

[25]. On the constitutional point of deprivation of property, the learned judge found that the expectation of their right to a lease at a peppercorn was based on a purported right which had accrued under the 2008 Agreement. However, that was changed in the 2013 Agreement by which time because of the CLO it was not possible to grant a lease at a peppercorn because it was unlawful to do so.

The law

[26]. On the prevailing authorities the overarching test in this type of case for determining whether a contract has been varied or rescinded is based on ascertaining the objective intention of the Parties.

[27]. The learned judge acknowledged this at paragraph 38 of her judgment. In identifying the issue in this case she stated:

"38. The primary issue for resolution is whether the parties intended to rescind or discharge the original agreement by substituting for it in the 2013 DA [Development agreement] or

whether they intended to vary certain terms of the 2008 DA such that the 2008DA is still in effect"

[28]. The intention of the parties is ascertained by the terms of the subsequent agreement and from all the surrounding circumstances. In relation to this principle parties relied on the same authority, namely per Auld J in ***Ginns v Tabor*** cited with approval in ***Viscoue Investment Limited Navigation Corporation*** [2014] EWCH at 20 :[1]

> "…Whether a subsequent agreement amounts to a rescission or a variation of an earlier one depends on the intention of the parties indicated by the terms of the subsequent agreement and from all the surrounding circumstances. See United Dominions Trust (Jamaica) Ltd v Shoucair [1969] 1 AC 340 PC. However, rescission will be presumed when the parties enter into a new agreement so inconsistent with the earlier one that it goes to its very root. See Benningtons Ltd. v NW Cachar Tea Co Ltd [1923 AC 48 HL, per L Atkinson at 62"

[29]. The new agreement only replaces and extinguishes the old agreement if the intention was to abrogate, rescind or extinguish it and this intention must be manifest. The principle was approved by Viscount Haldane in ***Morris v Baron & Co*** [1918] 1 AC at 19 even in relation to a subsequent parol contract where he said:

> "…What is, of course, essential is that there should have been manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of alteration, however sweeping, in terms which still leave it subsisting."

[30]. In order to examine whether or not it was the intention of the parties to rescind the 2008 Agreement and replace it with the 2013 Agreement, it is necessary to exam both agreements and also the surrounding circumstances.

The Agreements

[1] See also *Jagdeo Sookraj v Buddhu Samoroo* [2004] UKPC 50, *Morris v Baron & Co* [1918] 1 AC, and *Plevin v Paragon Personal Finance Limited* [2017] UKSC 23.

[31]. It would appear from a perusal that the 2008 Agreement and the 2013 Agreement are structured substantially the same with some amendments. This appears to have been the intention of the parties because in Recital 3 of the 2013 Agreement it states that, "…Whilst the terms of the 2008 Development Agreement remain substantially unaltered, the parties have now agreed to a revised set of terms in respect of the Development. The Deed of Settlement States at recital (G) that "…the Developers and TCIG have agreed to enter into the Amended Development Agreement…".

[32]. The revised set of terms are brought about in the 2013 Agreement by following the same format as the 2008 Agreement, and placing the word "[omitted]" at certain numbered clauses which contained text in the 2008 Agreement but the text was omitted in the 2013 Agreement. There are over a dozen of these. There is also the restatement of some of the terms, and sometimes an addition or deletion of terms that were contained in the 2008 Agreement. For example, clause 3.1.4 to 3.1.7 dealing with Phase Two through Phase Five of the development were omitted.

[33]. On the other hand, clauses 4.5A and 4.5B which describe in more detail the miscellaneous Government support that will be extended was added. A deletion at clause 2.0 removed certain conditionality which was contained in the 2008 Agreement. Clause 4.1.3 of the 2013 Agreement contained substantially different obligations in respect of "Island Improvements". Acknowledging in clause 4.13.5 that the Developers had already spent not less than US$647,995.99 on Island Improvements, the Developers were given absolute discretion whether or not and when to complete any portion of them, and it was subject to them being able to obtain financing.

[34]. Both agreements (the 2008 Agreement in clause 4.14.1 (by providing for application for approval under the Physical Planning Ordinance), and the 2013 Agreement in clause 4.15 (by providing for giving notice to TCIG of its intention to proceed) provided that such action in relation to Island Improvements be undertaken as soon as possible after the date of the agreement. So it was no surprise that the Developer applied immediately after entering the 2103 Agreement.

[35]. Both agreements also contain the clause that the parties agree that the obligations of the Government extend only so far as it may lawfully agree. This is germane to the changed obligations

of the Government introduced by the CLO. Clause 1.7 states that the agreement shall only be modified by an instrument in writing executed by all parties.

[36]. They both have an "entire agreement" clause, namely that the agreement constitutes the entire agreement of the Parties as to the subject matter of the agreement as at the date of the agreement.

[37]. The Deed of Settlement contained a full release for the parties. Clause 5 reads as follows:

> "This Deed is full and final settlement of, and each Party hereby releases, forgives, waives and forever discharges each other Party for, all and/or any criminal and civil actions, claims, rights, demands and set-offs, arising out of or connected with transactions, acts or omissions, defaults, delays or incidents of non-compliance with obligations that occurred before the date of the Deed.
>
> As to each party, this Deed, including the foregoing release, is binding upon, and inures to the benefit of, each of the party's parents, subsidiaries, assigns, transferees, representatives, principles, agents, beneficial shareholders and Related Benefiting parties, and their affiliates, trusts, officers and directors."

[38]. In respect of the Island Improvements, pertinent clauses of the 2008 Agreement provided:

> "4.13.1 As soon as is practicable after the date of this agreement, the Developer shall apply for such approval under the Physical Planning Ordinance (if any) as may be necessary for the Island Improvements.
>
> 4.13.3 The parties shall share the cost of the Island Improvements to a maximum total of $4 million of which the Developer shall contribute $2million and the Government $2 million…
>
> 4.13.7 In no event shall the expenditure obligations to the Developer or the Government pursuant to this clause exceed U$2 million.

[39]. In respect of the Downtown Restoration, clauses provided:

> …
>
> 4.14.1 As soon as is practicable after the date of this agreement, the Developer shall apply for such approval under the Physical Planning Ordinance (if any) as may be necessary for the Downtown Restoration.

…

4.14.4 In consideration of the Island Improvements, the Crown shall grant the Developer (or to such Affiliate as it may nominate) within 15 days of the delivery by the Developer to the Crown of reasonably satisfactory proof of the Developer's expenditure of not less than US$2 Million dollars in the Island Improvements, the Downtown Restoration Parcels Lease. Pending such grant, the Crown shall not transfer, lease, charge, contract to sell or grant an option in, over or to the Downtown Restoration Parcels or any of them.

[40]. The terms of the draft lease at Schedule 4 which is a part of both Agreements are on fundamentally the same terms: for a term of years at a peppercorn rent. In the 2008 Agreement the draft lease is for a term of 49 years and in the 2013 Agreement it is for 999 years. This appears to point to the fact that on this issue the parties intended that 2008 Agreement is to remain in effect, but only as varied in the 2013 Agreement as to the term of years

[41]. With respect to the Valhalla Parcel the 2008 Agreement provided that TCIG transfer to the developers certain Crown Land more particularly described in Schedule 1 to the Agreement at a price of US$6,690,725.06. Parcel 20202/9, the Valhalla Parcel, was including that price. At the date of execution of the 2008 Agreement there were some properties, including the Valhalla Parcel, in which TCIG did not own the freehold. It provided that the price, which included the price of the Valhalla Parcel, was to be paid upon signature of the 2008 Agreement, but in fact the developers held back $1,000,000 in escrow with their attorneys as security for completion of the remaining transfers and released it when the 2013 Agreement had been executed.

[42]. TCIG undertook to use its best endeavors to have Valhalla Parcel vested in the Crown and to transfer the freehold to the Developers immediately after acquisition of it. The freehold was transferred to TCIG on 3 November 2011.

The Surrounding Circumstances

[43]. At the date of the 2008 Agreement the CLO had not yet come into force. By the date of the 2013 Agreement it had been in force for about 3 months.

[44]. S.34 of the CLO prohibits the disposition of Crown Land suitable for commercial development except by means of long lease, a licence or easement.

[45]. Furthermore, subject to certain exceptions, Crown land must be disposed of at open market value. S 9(1) provides:

> "Crown land must only be disposed of at the open market value of the Crown's interest in the land unless:
>
> (a) the land is sold to a lessee of the land and the reduction in price is justified in view of the work carried out by the lessee;
>
> (b) …
>
> (c) …
>
> (d) The Governor is of the opinion after consulting the Advisory Panel that special circumstances exist justifying disposal of the land for less than the market value on the Crown's interest in the land for no consideration."

[46]. Schedule 2 of the Ordinance sets out the procedure which must be followed before a disposition of Crown land can be made. The procedure requires, among other things, a public tender process and publication of applications.

[47]. Mr. Misick QC observed that the foregoing restrictions and procedures would, subject to obtaining any exception, make the obligations of the Respondent in relation to the grant of the Downtown Restoration Lease and the Valhalla Parcel unlawful and unenforceable if the 2013 Agreement replaced the 2008 Agreement.

[48]. S.2 of the CLO defines "disposal" as a disposition of land in accordance with section 108 of the constitution which confers the power to dispose of crown land in the Governor, and it includes a transfer or a lease of Crown Land.

Discussion

[49]. Both agreements contained the clause that the parties agree that the obligations of the Government extend only so far as it may lawfully agree. It is uncertain why the parties did not make reference to the CLO which had come into force three months before the date of the 2013 Agreement. Mr. Misick QC suggested that it was because both parties had no intention of rescinding the 2008 Agreement. He points out that had that not been their intention the Appellants could have sought to take advantage of the provision in section 9 of the CLO because in clause 4.13.5 of the 2013 Agreement the government acknowledges that the Developer had already spent not less than US$ 647,995.99 on Island Improvements.

[50]. Furthermore, as pointed out by Mr. Misick QC the argument that the 2013 Agreement rescinded the 2008 Agreement involves the proposition that the parties had the intention to rescind the 2008 Agreement to replace it with the 2013 Agreement knowing that some of the provisions of the latter would be illegal and unenforceable. This is an extraordinary proposition when one considers that one of the contracting parties was the TCIG, advised by the Attorney General and her legal advisors. He submits that it is irrational to suppose that the parties would have agreed to rescind the 2008 Agreement which does not conflict with CLO which is presumed not to be retroactive, when the other objective which they wished to bring about could be achieved by varying it.

[51]. Indeed, the learned judge herself at paragraph 70 of her judgment, quite rightly, expressed curiosity of how it came to be that an agent of TCIG negotiated an agreement which included terms that the legislature had made unlawful and there is nothing before the Court to explain it. This is particularly so in light clause 1.10 in each agreement which reads

> **"1.10 The parties agree that the obligations of the Government extend only so far as it may lawfully agree"**

This clause must be regarded as having been inserted deliberately by the parties and is another indicator in the circumstances that the intention was not to rescind the 2008 Agreement. Although the TCIG was not able to lawfully perform the original term relating to the Downtown Restoration Lease due to the fact that the CLO intervened before the precondition for its performance had been

satisfied, the TCIG was capable of lawfully performing its obligation of transferring the Freehold in the Valhalla Parcel to the Appellants as far back as 2011 when TCIG had acquired it.

[52]. Having regard to the above discussion of the agreements and the surrounding circumstances including the recitals, the similar structure of the two agreements, the operative provisions which the court has adumbrated, can it be said that the learned judge was clearly wrong in law to conclude that it was the intention of the parties to rescind the 2008 Agreement?

[53]. It would appear that the learned judge failed to apply the test or applied it in the wrong way. By so doing the learned judge failed to take into consideration matters that she ought to have. She decided that a variation of a term in the 2008 Agreement went to the root of that Agreement and thereby made it manifest that there was an intention to abrogate the 2008 Agreement without first analyzing the law, the facts and surrounding circumstances in sufficient detail in order to ascertain the intention of the parties.

[54]. No consideration was given to the fact that under the 2008 Agreement TCIG acknowledged that the Developers had already paid about US$700,000, and that under Clause 5 of the Deed of Settlement each party had given to the other a full release from incidents of non-compliance with obligations under the Development Agreement. The amount given up by the TCIG on that term was less than 2% of the estimated development, and there were other clauses varied where it could be said that TCIG was the net winner. The obligation still remained on the developers to carry out the US$100,000,000 development. On the evidence and surrounding circumstances it could not fairly be said that it was a fundamental change that indicated rescission of the whole contract; it was a fundamental change in that clause only but the remainder of the 2008 Agreement remained intact. It was similar to the change of the interest rate clause in xxx which left the rest of the contract in place.

[55]. The judge also failed to give any or any due consideration to the words used in the agreement, and the structure of the agreements. It must be considered that the words used were deliberate. Those words stated that the parties agreed to vary the contract not to rescind it. If they wished to rescind

the 2008 Agreement, it would have been a simple matter to express that in the 2013 Agreement. No such express term was brought to the Court's attention, and it is not necessary to imply such a term.

[56]. Nothing turns on the "Entire Agreement Clause" which is found in both agreements. It is not the Appellants' case that any term is being imported from some external source into either agreement which is what the clause is intend to protect against. Nor is there anything in the claim that the 2013 agreement is one continuous document. It is evident that restating the terms which have not been disturbed after amendments is an efficient commercial way to place all amendments alongside the surviving provisions in one document to avoid the resultant back and forth that would otherwise be necessary to gain the full picture of the surviving agreement in one document.

[57]. By not focusing on the test relating to the intention of the parties and the surrounding circumstances the learned judge fell into error. Had she applied the test more fully she would have considered the matters adumbrated above and probably reached a different conclusion. She was clearly wrong not to have done so.

[58]. Applying the correct test to determine the objective intention of the parties, having regard to the words used and the surrounding circumstances, I find that the judge was in error to find that the 2008 Agreement was rescinded by the 2013 Agreement.

[59]. That the 2008 Agreement is not rescinded has consequences on the issue of breach of legitimate expectation, and damages.

[60]. With regard to the judge's reference to the mitigating clause 1.5 in the 2013 Agreement, which dealt with invalidity, illegality or unenforceability of provisions of the agreement, the Appellants argued that the clause is not applicable to the 2008 Agreement. Clause 1.5 provides:

> "1.5 In the event that one or more of the provisions contained herein shall be held for any reason to be illegal, invalid or unenforceable, the parties shall negotiate in good faith and endeavour to agree the terms of a mutually satisfactory provision to be substituted for the provision found to be illegal invalid or unenforceable as the case may be."

[61]. The Appellants' view was that the provisions relating to the granting of the Downtown Restoration Lease or conveying the Valhalla Parcel were not illegal, invalid or unenforceable because there is no absolute prohibition against alienating Crown Land below market value since section 9 of the CLO allows it in certain circumstances. In the case of the Valhalla Parcel a commercial long lease is not equivalent to obtaining the fee simple, and paying a commercial rent instead of a peppercorn unfairly enriches TCIG at the expense of the Developers.

[62]. This court agrees with the learned judge that the offers under clause 1.5 in the 2013 Agreement may be a form of alternative performance to mitigate the loss. This would be where both parties agreed to the term, perhaps, inadvertently overlooking the illegality, invalidity or unenforceability. It would appear that there should be evidence of negotiations to comply with the term. No such evidence was brought to our attention but the absence of good faith negotiations was not one of the grounds of appeal in this case.

[63]. Assuming there had been negotiations, if the rights under the agreement vested in the Appellants prior to the coming into force of the CLO, then, notwithstanding the negotiations, it would nevertheless be a breach of the clause which was no longer enforceable due to the intervening provisions of the CLO. The offshoot of that and of the 2008 Agreement remaining valid, is that the Appellants are entitled to damages for the failure of TCIG to deliver the freehold of the Valhalla Parcel. It would be up to the Appellants whether or not they decide to waive that breach.

Legitimate Expectation

[64]. The Judge summarized the proposition put forward by the Developers that the 2008 Agreement gave the Developers a right to call for the execution of the Downtown Restoration Lease at a peppercorn rent, that they had a legitimate expectation of being granted the lease on those terms, that the lease is a specie of property protected by the Constitution and that interference with that property gives rise to a claim for compensation against TCIG.

[65]. The only legitimate expectation that could arise from the 2008 Agreement in the case of the Downtown Restoration Lease was that if the condition of spending US$2,000,000 on the Island

Improvements was met, the Developers would obtain the Downtown Restoration Lease and it would be at a peppercorn rent.

[66]. The judge held that because the payment as a precondition of US$ 2 million had not been made under the 2008 Agreement a legitimate expectation to obtain the Downtown Restoration Lease at a peppercorn rent never vested, and by the time the right was given in the 2013 Agreement without such a precondition the CLO had already come into force thereby making it impossible for him to have a legitimate expectation to obtain such a lease because it was unlawful under the CLO. As pointed out by Mrs. Hippolyta in ***Cudgel v Chalk***[2] referred to in ***Silly Creek and Marina Co Ltd v AG of TCI*** [2017] CL-AP 13 "*a contract to lease Crown Land other than in accordance with statutory provisions is invalid*". Unlike the case in Silly Creek which was concerned with an ultra vires act, this concerns a possible illegal act, and TCIG could only give such a lease in compliance with the provisions of the law which required advertisement and the payment of a commercial rent. She therefore dismissed Declaration (iv) namely, "A declaration that the Respondent's refusal to execute the Lease without variation constitutes a violation of the Appellants' fundamental rights to protection against deprivation and/or interference with property rights guaranteed by section 1(c) and 17 of the Constitution".

[67]. In our judgment the learned judge was right on this issue; and no such legitimate expectation arose, nor any consequential deprivation of property rights arising therefrom under the constitution.

[68]. The position is different with the Valhalla Parcel.

[69]. As pointed out earlier by the 2018 Agreement, TCIG undertook to use its best endeavors to have the Valhalla Parcel vested in the Crown and to transfer the freehold to the Developers upon it having acquired it. The freehold was transferred to TCIG on 3 November 2011. Consequently, the right to have the Valhalla Parcel transferred by TCIG to the Developers vested long before the CLO came into force. The Developers had a legitimate expectation to have it transferred to them. Applying the

[2] *Cudgen Rutile Land (No2) Pty Ltd v Chalk* [1975] AC 520:

principles in ***Rowland***[3] cited with approval by the Judge the promise was unequivocal and lacked any relevant qualification, the expectation was objectively reasonable, and it would clearly be unfair for the Developers to be deprived of the property which they were promised as part of the exchange for their carrying out the planned Development. TCIG has not claimed that there is any overriding interest of the public which may be affected to justify it resiling from its promise.

[70]. Ms. Hippolyte argued for the Crown that the agreement to sell the Valhalla Parcel was not a concluded agreement because no purchase price, a fundamental term of a contract, had been agreed, and by the time a binding agreement for sale had arisen the CLO had come into effect.

[71]. The judge found, "*Having considered the evidence of the negotiations that led to the sale price and the submissions thereon it appears to me that there was no binding agreement for the sale of the Valhalla Parcel.*" Even though she found that there was an immediate binding agreement. No specific finding was made that the price had not been agreed but she found that the agreement pertaining to the Valhalla Parcel only came into effect after the CLO came in force. It is unclear what her reasons were for that.

[72]. In our judgment although there was no fixed price there was a mechanism for ascertaining a price set out in the 2008 Agreement. That agreement allocated $73,000, and a formula for arriving at a price. In the 2013 Agreement $62,000 was allocated to the property and $11,000 reserved in escrow to carry out an investigation referred to in Schedule 1 of the 2008 Agreement from previous figures so that any adjustments found to be necessary to derive the exact price may be made.

[73]. Our approach is based on the principle that the courts will strive to uphold a contractual bargain where possible and this is one of those cases where it should do so. As stated by Cranson J at paragraph 30 of ***Hughes v Pentagon Sabre Ltd*** [2016] EWCA adopting the view of Lord Wilberforce in ***Cudgen v Chalk***:[4]

[3] Rowland v Environmental Agency [2003] EWCA Civ per Peter Gibson LJ

[4] *Cudgen Rutile (No 2) Pty Ltd v Chalk*[1975] AC 520 at 536

"As a matter of general principle, the courts are readier in modern times to find a contract even though apparent certainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be found":*Cudgen Rutile (No 2) Pty Ltd v Chalk*[1975] AC 520 at 536, [1975] 2 WLR 1 at 10–11, per Lord Wilberforce."

[74]. We think that principle is applicable on the facts of this case. We are, therefore, not in agreement with the judge on this issue. Even if there was not a contract, for the reasons outlined above we are satisfied that the promise from TCIG created a legitimate expectation which vested in the Developers, from which TCIG resiled. This interfered with their property rights under the constitution. The consequence is that the Developers are entitled to damages

Conclusion

[75]. For the reasons set out above, we affirm the decision of the Judge and dismiss the appeal relating to the Downtown Restoration Lease.

[76]. We allow the appeal relating to the Valhalla Parcel. TCIG must compensate the Developers in damages for the resulting loss brought about by the breach of the promise to deliver a freehold title in the Valhalla Parcel to the Developers. In the event, we set aside the judge's order and grant the following declarations:

(i) Declaration (i) that the Crown Land Ordinance is not of retrospective effect so as to deprive them of their contractual rights acquired under the Development Agreement defined as the 2008 Agreement as amended by the 2013 Agreement.

(ii) Declaration (ii) that the Respondent is in breach of contract because of their failure to … (b) obtain unencumbered title to the Parcel 20202/9 and transfer it to the Appellants, and

(iii) Declaration (viii) Alternatively, damages for breach of contract or compensation for breach of the Appellants' rights against deprivation of property under section 1(c) and 17 of the Constitution. 31.

[77]. We therefore order that the Developers be granted compensation for the claimed breach of their constitutional rights under section 1(c) and 17 of the Constitution, to be assessed if not agreed. The

case is remitted to the Supreme Court for the assessment of damages. If the parties are not agreed by 1 March 2021, the Appellants should take immediate steps towards setting the matter down.

[78]. Having regard to the fact that the Appellants were only partially successful, costs are hereby ordered to be paid as follows:

(i) One half of costs both here and below to be paid by the Respondent to the Appellants, to be taxed if not agreed

(ii) The costs in (i) are not to include the costs of the assessment, which shall be decided by the judge carrying out the assessment.

Dated the 29 January, 2021

/s/ K. Neville Adderley
Justice of Appeal

I agree

/s/ Humphrey Stollmeyer
Justice of Appeal

PS. The judgment was unanimously agreed but Mottley, P has since demitted office