THE COURT OF APPEAL **CL Appeal No.15/2022**

TURKS AND CAICOS ISLANDS **Appeal from CL 130/2014**

BETWEEN

THE HONOURABLE ATTORNEY GENERAL
OF THE TURKS AND CAICOS ISLANDS

APPELLANT

AND

GILBERT FITZROY SELVER

RESPONDENT

Before: The Hon. Mr. Justice K. Neville Adderley, JA, President (Ag.) (Presiding)

The Hon. Mr. Justice Stanley John, JA

The Hon. Mr. Justice Bernard Turner, JA

Appearances: Ms. Clemar Hippolyte, for the Appellant

Mr. George Missick, for the Respondent

Hearing Date: 26th October 2023

Date Handed Down: 17th April 2024

Crown Land- Occupation- Whether the Respondent unlawfully entered or remained on Crown Land- Conditional Purchase Lease- Offer of Conditional Purchase Lease- Expiration of offer- Whether offer of a Conditional Purchase Lease had expired - Contract for sale of Crown Land- Offer and Acceptance – Delay in acceptance- Date of Acceptance- Crown Land Ordinance- Impact of the enactment of the Crown Land Ordinance on offers for the sale of Crown Land made prior to its enactment- Whether the Respondent entered into a contract for the Sale of Crown Land.

Cases Considered:

1. ***AG TCI v M&A Services Ltd. (CL 155 of 2013) [2015] TCACA 3 (18 September 2015)***
2. ***Attorney-General (at the Relation of Tamworth Corporation and others) v Birmingham Tame and Rea Drainage Board, [1911-13] All ER Rep 926***
3. ***Big Blue Unlimited v Kathleen De Bruyne (CL-AP 1 of 2014) [2015] TCACA 7 (18 September 2015)***
4. ***Chang v Chang (CL-AP 41 of 2016) [2017] TCACA 9 (20 November 2017)***
5. ***CMK BWI Ltd. v. Attorney General [2022] UKPC 40,***
6. ***Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd [2010] EWCA Civ 1331***
7. ***Flannery v Halifax Estate Agencies Ltd [2000] 1 W.L.R 377***
8. ***Interhealth Canada TCI Ltd v Sandie Williams (CL-AP 43 of 2015) [2016] TCACA 13 (20 September 2016***
9. ***Propriet Ors. Strata Plan No. 67 v HMC Holdings Ltd. 2) HMC Holdings Ltd. v The Propriet Ors. Strata Plan No. 67 (CL-AP 5 of 2022; CL-AP 7 of 2022) [2023] TCACA 8 (24 March 2023)***
10. ***Simetra Global Assets Limited v Ikon Finance Limited [2019] 4 WLR 112***
11. ***Turtle Cove Hotel and Residences Ltd v Tides Development Project Inc; Phoenix Development Ltd v Tides Development Project Inc (CL-AP 1 of 2022; CL-AP 2 of 2022) [2022] TCACA 8 (13 July 2022)***

JUDGMENT

JOHN, JA:

1. This is an appeal from the judgment of the Honourable Carlos Simmons OBE KC delivered on the 29th April 2022, whereby he made certain findings against the appellant.

BACKGROUND

2. The learned trial Judge in his judgment helpfully summarized the history of the matter and the parties agreed the issues to be determined at trial namely:

    i. Whether Selver wrongfully entered on and remained in occupation of parcels 60602/429 ("429"), 60602/430 ("430") and 60602/431 ("431"), Norway & Five Cays without lawful authority and without having secured the requisite lease.

    ii. Whether the offers made to Selver for conditional purchase of leases (CPL) on parcels 429 and 430 (previously parcels 130 & 325) have expired.

    iii. Whether the letter from the Ministry of Lands and Resources dated October 29, 2008 relaying Cabinet's decision at its meeting on October 8, 2008 created a contract between the parties, resulting in a contract making Selver a purchaser in possession and entitling him to have parcels 429 and 430, transferred to him on the condition that he pays the freehold purchase prices of US$30,800.00 and US$73,500.00 or such other sum.

    iv. If it is found that a contract was created whether the said contract was discharged.

    v. Whether Selver is entitled to or should be granted an easement on parcel 431.

    vi. Whether the Turks and Caicos Islands Government (TCIG) is entitled to possession of the properties.

3. In his judgment of 29th April 2022, the learned trial Judge made the following orders:

    a) That the freehold to the properties be transferred to Selver for the prices of US$30,800.00 and US$73,500.00 respectively together with the survey and

registration fees as detailed in the letter to Selver dated 29 October 2008. (These were the prices Selver's counsel said at paragraph 60 of his closing submissions that Selver was ready and willing to pay and had indeed tried to pay. These prices also harked back to the finding the learned trial Judge made at paragraph 20 as to contract relations having been created).

b) The declaration as regards the easement was denied.

c) Special Damages were denied not having been particularized nor proved, as were damages for breach of contract, and interest.

d) The relief claimed by TCIG's on its counterclaim was refused.

e) Selver was awarded his costs of the action on the standard basis to be taxed if not agreed.

4. In this appeal the appellant seeks to set aside the judgment and order of the learned Judge.

THE APPEAL

5. The appellant's case as set out in the written submissions is:

i. On the documentary evidence and the evidence in the proceedings before the learned Judge it was not open to the judge to find that there was a contract formed between the respondent and the appellant.

ii. The learned Judge in reliance on the principles set out in the case of **AG v M & A Services Ltd, 2015[1] (M&A)** held that the letter from the Ministry of Lands and Resources dated October 29, 2008, relaying Cabinet's decision at its meeting on October 8, 2008, created a contract between the parties.

iii. The learned Judge failed to appreciate the appellant's submission that **M & A** is distinguishable from the instant case. Additionally, he failed to address the question of the respective offers made "without prejudice" and "subject to contract", nor did he consider the respondent's outright rejection of the offer and the counteroffer.

iv. The learned Judge failed to consider the effect of the Crown Land Ordinance on the purported offer of 2013.

[1] AG TCI v M&A Services Ltd. (CL 155 of 2013) [2015] TCACA 3 (18 September 2015).

v. The learned Judge erred in law in erroneously applying the wrong legal principles and thereby concluding that the letter of 29th October 2008 was the basis of a binding contract between the appellant and the respondent.

vi. The learned Judge fell into error in finding that the offer set out in the letter of 4th February 2003, in respect of the CPL over parcel 130 now 429 had not expired.

vii. The learned Judge fell into error in finding that an offer existed for a CPL over parcel 430. That finding was not supported by the evidence.

viii. Counsel also relied on the cases of **Flannery v Halifax Estate Agencies Ltd [2000] 1 W.L.R 377**, **Simetra Global Case** and **Re O (A child).**

THE RESPONDENT'S SUBMISSIONS

6. The respondent submitted the following:

i. That the learned judge was correct to find as he did, that there was a contract and that contract had neither lapsed nor expired. Additionally, the respondent submitted that the learned Judge properly applied the principles enunciated in the case of **M & A**.

ii. In respect of the appellant's submission that the learned Judge failed to give due consideration or sufficient weight to the evidence. Mr. Missick submitted that the cases of **Flannery v Halifax Estate Agencies Ltd [2000] 1 W.L.R 377**, **Simetra Global Case** and **Re O (A child)** relied on by the appellant were distinguishable from the instant case. He further submitted that the learned Judge addressed each issue separately in his judgment and his reasoning on each issue was clearly evident.

iii. On the complaint by the appellant that the Judge was wrong to find that there was a valid contract between the parties, he placed reliance on the case of **Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd [2010] EWCA Civ 1331** where the Court of Appeal confirmed the proper test for offer and acceptance.

iv. Mr. Missick submitted that the case of **M & A** was authority supportive of the instant case and the learned Judge properly applied the principles of **M & A** to the instant case.

THE LAW

Overturning Findings of the Court Below

7. Appellate courts will not easily interfere with the findings of the Court below. In the case of **Chang v Chang (CL-AP 41 of 2016) [2017] TCACA 9 (20 November 2017)**[2] in dismissing an appeal Stollmeyer JA said at paragraphs 37 and 38:

> [37] The Appellant has not persuaded me that **the decision of Schuster J cannot reasonably be explained or justified. He has not demonstrated that he made a material error in law; or made a critical finding of fact which had no basis in the evidence or which reflects a demonstrable misunderstanding of the relevant evidence; or that there has been a demonstrable failure to consider relevant evidence - any or all of which might allow this court to interfere with the findings of fact made by him.** The decision of the Privy Council in Sandra Juman v The Attorney General of Trinidad and Tobago and Another referring to the judgment in Henderson v Foxworth Investments is instructive:
>
> "14 ... The limited role of an appellate court when asked to review the factual findings of a lower court has been expounded and emphasised in authorities too many to mention. Their effect was summarised by Lord Reed in Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600, para 67, as follows:
>
> > "**in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified**."
>
> [38] Further, it therefore cannot be said that his findings of fact and his decision are perverse.
>
> [Emphasis Mine]

[2] See also **Propriet Ors. Strata Plan No. 67 v HMC Holdings Ltd. 2) HMC Holdings Ltd. v The Propriet Ors. Strata Plan No. 67 (CL-AP 5 of 2022; CL-AP 7 of 2022) [2023] TCACA 8 (24 March 2023); Interhealth Canada TCI Ltd v Sandie Williams (CL-AP 43 of 2015) [2016] TCACA 13 (20 September 2016; Big Blue Unlimited v Kathleen De Bruyne (CL-AP 1 of 2014) [2015] TCACA 7 (18 September 2015).**

8. In light of the foregoing authority an appellate court would only interfere with the findings of a trial judge if it can be established that;
    a. the decision cannot reasonably be explained or justified;
    b. the judge made a material error in law;
    c. the judge made a critical finding of fact which had no basis in the evidence or which reflected a demonstrable misunderstanding of the relevant evidence;
    d. the judge's decision cannot reasonably be explained or justified; or
    e. the judge's findings of fact and his decision were perverse.

9. To make this determination evaluating the reasons of the learned Judge is crucial.

10. In the case of **Turtle Cove Hotel and Residences Ltd v Tides Development Project Inc; Phoenix Development Ltd v Tides Development Project Inc (CL-AP 1 of 2022; CL-AP 2 of 2022) [2022] TCACA 8 (13 July 2022)** Adderly JA discussed the importance of written reasons. In the instant case, the learned Judge did provide written reasons. However, in my view he failed to sufficiently identify the evidence relied on to arrive at a crucial finding of fact that the offers for conditional purchase leases for 429 and 431 had not expired as they were never formally withdrawn. Further the learned judge appeared to merge the issues of the expiry of the commercial purchase leases, with the issue of whether a contract for the purchase of the freehold 429 and 431 had been entered into.

11. Whether a contract existed between the Appellant and Respondent for purchase of the lands is a primary issue to be resolved in this case, as well as the date of it was entered into. It impacts *inter alia* the applicability of the Crown Land Ordinance, and therefore the legality of the contract.

12. It was not possible on crucial issues to discern the reasons for the learned judge's decisions because he often incorporated by reference paragraphs of the written arguments of counsel without stating the substance or effect of those arguments in the judgment itself. The Judge has since retired. In the absence of sufficient reasons and as appeal to the Court of Appeal is a rehearing see Rule 11(1) of the Court of Appeal Rules and the case of **Attorney-General (at the Relation of Tamworth Corporation and others) v Birmingham Tame and Rea Drainage Board, [1911-13] All ER Rep 926 at page 939**, I will consider the evidence presented and as Lord Gorell said in **Tamworth** *"make such order as the judge could have made if the case had been heard by him".*

THE ISSUES

13. I will approach each issue in turn.

Whether Selver wrongfully entered on and remained in occupation of parcels 60602/429 ("429"), 60602/430 ("430") and 60602/431 ("431"), Norway & Five Cays without lawful authority and without having secured the requisite lease.

Parcels 429 and 430

14. In my view it is unnecessary to determine the lawfulness of the entry on to 429 or 430. The learned judge correctly concluded and provided sufficient reasons at paragraph 18 that any unlawful entry was waived by the actions of the TCIG. The evidence presented shows that subsequent to his entry onto 429 and 430 Selver negotiated with the TCIG for the purchase of the said parcels, with their full participation.

15. The waiver of Selver remaining on 429 and 430, regardless of whether his entry was lawful or unlawful, is evidenced the approach in 2013 of the then Director of Crown Land Unit (Leroy Charles) to Mr. Selver's occupation when the dispute over the purchase of the parcels arose. Ms. Tatum Clerveaux the Commissioner of Lands in her witness statement dated 7 February 2022 deposed at paragraph 45 that Mr. Charles had advised Selver that *"the matter has been referred to the Attorney General's Chambers for advice, but in the meantime he must* ***cease all further development*** *on the said properties until a resolution of the matter had been decided and her heard formally from the Department".* The Department did not call on Selver to deliver up possession of the said parcels. Subsequently, on 8 September 2014 Section 4 Notices to Discontinue Use Of/Or Works on Crown Land were issued to Selver in respect of 429 and 430[3]. The said notices also did not call on Selver to vacate the parcels. To rectify any alleged unauthorised occupation or possession the Notices called on him to *"Cease* ***any further*** *construction/repair works immediately".* In my view, there was a waiver of Selver remaining in occupation until the issue of whether he is a purchaser in possession is determined.

Parcel 431

16. As regards 431, in so far as the judge found that Selver did not unlawfully enter on or remain in occupation of 431, such finding is unsupported by the evidence.

17. Selver's evidence is that in or about 2000 he was given conditional approval to access 431. Selver relies on a letter dated 10 February 2000 from the Ministry of Natural Resources and the Environment Department of Planning[4]. By the said letter the Department informed him that it had no objection to the clearing of the road access (presumably through 431, though this is not stated in the letter) leading to Parcel 133 and Parcel 130 (now 429), subject to:

[3] Record of Appeal pages 189 and 190.
[4] Record of Appeal page 81.

a. The Lands and Survey Department demarcating the boundaries for road access, prior to the commencement of the clearing,
b. the clearing being restricted to the road parcel only, and that
c. the permission was granted to facilitate access to parcel 133.

There is no evidence that Selver complied with any of the said conditions.

18. On 21 September 2009, a Section 4 Notice to Discontinue Use Of/Or Works On Crown Land was issued to Selver, in respect of 431[5]. The Notice describes the unauthorized occupation, possession or activity as *"clearing and excavating Parcel 60602/431…to create what appears to be a road".* The Notice called on Selver to cease excavation work immediately, remove heavy duty equipment from 431, return all fill/aggregate removed from 431 and to restore the top soil and vegetation on 431.

19. On 19 January 2010 the Ministry of Environment & District Administration wrote to Selver referring to the Notice of 21 September 2009[6]. The said letter referred to *"the unauthorized clearance and excavation"* of 431 and informed him that he was authorized to use heavy equipment to replace aggregate and restore the top vegetation on the property.

20. On 14 February 2012, Selver wrote to the Permanent Secretary of the Ministry of Natural Resources seeking the grant of a Conditional Purchase Lease for 431[7]. In the said letter he *inter alia* admitted that he did not have a CPL and averred that he entered on to 431 under the mistaken belief that it was part of his property. He wrote:

> *"it was all along thought both by me and the Crown Lands Unit, that the property for which I am now applying, was a part of my property. Indeed you may recall that some years ago I did make application for a Conditional Purchase Lease in respect of lot 60602/431, but have heard nothing regarding same from your Ministry"*

21. On 14 November 2012 another Section 4 Notice to Discontinue Use Of/Or Works on Crown Land was issued to Selver[8]. This Notice describes the unauthorized occupation as *"clearing and erecting concrete building on Parcel 60602/431".* The Notice called on Selver to *"(i)Cease construction/development works immediately; (ii) Demolish all structures/building erected on the Property; (iii) Return all fill/aggregate removed from the property back to a location on the property; (iv) Restore the top soil and vegetation on the property".*

[5] Record of Appeal page 136.
[6] Record of Appeal page 139.
[7] Record of Appeal page 140.
[8] Record of Appeal page 142.

22. Ms Clerveaux in her witness statement dated 7 February 2022 deposed at paragraphs 47 and 48 that on 4 September 2014 she "*observed that the road which the Plaintiff had cut was being prepared for asphalting"* and that she informed Selver *"that he was operating illegally, as he did not have the requisite authorization to undertake those works and that he should cease and desist all operations immediately"*[9]. Further that Selver *"ignored all warnings to him and persisted in carrying out the unlawful works".* At paragraph 49 of the said statement Ms. Clerveaux deposed that the Section 4 Notices had been served on Selver to discontinue use of/or works on 431[10]. Save for indicating at paragraph 28 of his 2nd witness statement that TCIG *"intentionally and unreasonably"* denied him an easement to access his property from the Airport Road when other commercial developments in close proximity to his property all have access from the Airport Road and that he had been given conditional approval for access in 2000[11], nothing in Selver's evidence proves that he lawfully entered or remained on 431. Further his witness statement does not explain that he satisfied the requirements set out in the letter of 10 February 2000, or provide a good explanation for disregarding the Section 4 Notices.

23. Accordingly, the overwhelming evidence is that Selver was aware that he unlawfully entered on 431 and unlawfully remained thereon. The learned judge ought to have so concluded.

Whether the offers made to Selver for conditional purchase of leases (CPL) on parcel 429 (previously 130) and 430 (previously 325/392) have expired.

24. In my view the learned judge was wrong to conclude that the offers for CPLs of 429 and 430 had not expired, as they were never formally withdrawn. The learned judge helpfully, summarized Ms Clerveaux's evidence about the several changes to the Parcel numbering of the parcels in dispute at paragraph 13 of his judgment stating:

> *She told the Court that:*
> *a. the original Parcel 60602/130 is now Parcel 60602/429*
> *b. the original Parcel 60602/133 remains Parcel 60602/133*
> *c. the original Parcel 60602/325 became Parcel 60602/392 but, following mutation is now Parcels 60602/430 and 60602/431*
> *d. Parcel 60602/431 is the land over which the easement is being claimed.*

Parcel 429 (previously 130)

[9] Record of Appeal page 51.
[10] Record of Appeal page 51.
[11] Record of Appeal pages 39 to 42.

25. The offer for a CPL of 429, then called 130, was made by letter dated 4 February 2003. One of the terms stated in a separate paragraph 4 of the letter was *"The Lease must be executed within six months otherwise the Offer would be withdrawn."* This condition effectively made time of the essence and to the extent the learned judge found to the contrary in my opinion he was wrong in law. Selver accepted this offer by signing the letter on 13 February, however no CPL was executed (see WS of Clerveuax at paragraphs 21 and 22[12]) within 6 months which had the effect of the contract being withdrawn. Selver argues that he accepted this offer by conduct. However, on 12 August 2007 Selver applied for a renewal of the offer (see WS of Clerveuax at paragraph 25)[13]. Applying for a renewal of an offer is inconsistent with a case that he viewed the offer as subsisting. The parties negotiated further about the grant of a CPL, however no agreement was concluded (see WS of Clerveuax at paragraphs 29 to 32[14]). Ultimately on 29 October 2008, the TCIG instead offered to grant Selver freehold title of 429, then called 130, at a freehold purchase price (see WS of Clerveuax at paragraph 35 RoA page 50).

26. Despite not being formally withdrawn, the conduct of the TCIG and Selver leads to the conclusion that both parties were aware that the offer for a CPL of 429 made on 4 February 2003 did not remain open.

Parcel 430 (previously 325/392)

27. The evidence shows that no offer for a CPL was made in respect of 430. On Selver's own evidence, he was not offered a CPL for 430. In evidence is an application for a CPL dated 8 March 2001, which was at the time called 325[15].At paragraph 19 of his 2nd Witness Statement Selver deposed that in or about February 2002 he discovered that a dwelling house which he had constructed on another parcel, 133, had partially overlapped onto 325[16]. At paragraph 21 of his 2nd Witness Statement he deposes that on 25 February 2002, he wrote to the Government Minister of Natural Resources and requested a compensatory transfer of the parcel, indicating that it *"had been inadvertently encroached upon"*[17].

28. Ms Celrveaux deposes at paragraph 31 of her witness statement that by a letter dated 21 January 2007 (which should have been dated 21 July 2008, though nothing turns on this), the TCIG *inter alia* offered to grant Selver freehold title over 430, which was then called 392[18]. She deposed that Selver did not accept the offer and indicated so by a letter dated 19

[12] Record of Appeal page 48.
[13] Record of Appeal page 49.
[14] Record of Appeal page 49.
[15] Record of Appeal page 101.
[16] Record of Appeal page 39.
[17] Record of Appeal page 39; Record of Appeal page 105.
[18] Record of Appeal page 49; Record of Appeal page 115.

August 2008[19]. The subject of Selver's letter of 19 August 2008 is stated as *"**Application for Freehold Title on Parcel 60602/130 & 392pt Norway & Five Cays**"* (430 was at that time called 392 as aforesaid). In it Selver indicated that *"I'm unable to accept the offers laid out in it"*. On 29 October 2008, the TCIG instead offered to grant Selver freehold title of 430 at a freehold purchase price of $73,500.00.

29. In the circumstances, the learned judge was wrong to find that an offer for a CPL had been made for 430, and that it had not expired.

Whether the letter from the Ministry of Lands and Resources dated October 29, 2008 relaying Cabinet's decision at its meeting on October 8, 2008 created a contract between the parties, resulting in a contract making Selver a purchaser in possession and entitling him to have parcels 429 and 430, transferred to him on the condition that he pays the freehold purchase prices of US$30,800.00 and US$73,500.00 or such other sum.

30. To establish whether Selver is a purchaser in possession, the existence of an agreement for the sale of the said parcels must be shown. The contractual elements of offer and acceptance are relevant.

The offer

31. By a letter dated 29 October 2008 Selver was informed that on 8 October 2008, Cabinet had granted approval, for the sale of the parcels 429 and 430 (which was at the time called 130 and 392 respectively), that he was required to contact them to execute necessary documents and that the purchase price of 429 was $30,800 and of 430 was $73,500[20]. Additionally, he was informed that he was required to pay a Survey Fee and a Registration Fee. Vouchers for payment were also supplied. It is noteworthy that time had not been made of the essence in the offer of 29 October 2008.

32. In my view, despite being marked "Without Prejudice", the letter dated 29 October contained the offer of the grant of freehold title to Selver over 429 and 430. The offer is in writing, the terms of the offer are clearly evidenced along with what Selver was required to do to accept (i.e. payment of the purchase price, survey fee and registration fee).

33. To conclude a binding agreement, Selver would have needed to accept the offer either expressly or by conduct.

[19] Record of Appeal page 49.
[20] Record of Appeal page 131.

Acceptance

34. Selver did not immediately act on the offer. On 7 August 2009 Ms Clerveaux wrote to Selver informing him of a change in the numbering of Lot 392, which became 430[21]. On 20 August 2009 Ms Clerveaux again wrote to Selver, this time informing him of a change in the numbering of 130, which became 429[22]. Both letters referred to the purchase price of the respective parcels and were marked *"Without Prejudice Subject to Contract"*.

35. On 24 August 2009 Selver wrote to the then Governor of the TCI seeking a reduction of the purchase price of parcel 429[23]. Negotiating a reduction of the purchase price is evidence that at that date he had not accepted the offer in respect of 429. However, the offer was not withdrawn by the TCIG. On 20 January 2010, Ms. Clerveaux wrote to Selver explaining how the valuation for 429 and 430 were arrived at and indicating that the Ministry was unable to justify a reduction[24]. This is clear evidence that the offer remained open for acceptance by Selver, and that time was not of the essence.

36. On 31 January 2013 Selver wrote to Mr. Leroy Charles of the Land and Survey Department and requested to pay the purchase prices for 429 and 430 as offered to him in the letter dated 29 October 2008, copying the Hon Attorney General[25]. No explanation has been provided by Selver as to why he wrote to the Land and Survey Department, instead of Ms. Clerveaux, whom he had initially been corresponding with, though it appears she was aware of this letter. In the letter he said:

> *I am writing to you to requesting (sic) an opportunity to pay for the freehold titles over the above mentioned parcels. This offer had been extended to me in 2010 and I was in the process of following through when I met a major traffic accident that left me with severe injuries that resulted in costly and painful surgical intervention. ...I was for the most part physically challenged and financially challenged for cash as I had to seek urgent medical attention.*
>
> *...*
>
> *I would like to say that I am now in a position to pay for the freehold titles on the above mentioned parcels. I would be grateful if you could take steps to ensure that the necessary documents are drawn up for signature and the treasury payment document be written up for my collection and payment.*

37. Taken at its highest this letter dated 31 January 2013 was the first indication that Selver had accepted the offer. Selver deposed that he made several attempts to pay the purchase

[21] Record of Appeal page 132.
[22] Record of Appeal page 133.
[23] Record of Appeal page 134.
[24] Record of Appeal page 139.
[25] Record of Appeal page 143.

price. In his witness statement at paragraph 32 he deposes that he has "*made numerous attempts to pay the sums of $30,800 and $73,500.00"* but has *"not been allowed to do so".* This has been largely unchallenged. Ms. Clerveuax in her witness statement at paragraph 35, indicates that upon presentation of the offer dated 29 October 2008 Selver was presented with requisite vouchers to make the payments. At paragraph 36 she deposes that at the time no payments were received. At paragraph 36 she admits that in 2013 Selver indicated that he was ready and willing to make good the offer and had gone to the Treasury with the now expired payment vouchers with a view to making the requisite payments, but was advised that the payment vouchers he presented had been cancelled. At paragraph 45 she indicates that the Director of Crown Land's position was that the offer had expired.

38. In my view the earliest date of acceptance was 31 January 2013 when Selver indicated that he was ready willing and able to complete. Acceptance is also evidenced by his attempts to pay the purchase price. However, an important change in circumstances affects whether on or about that date, a legally enforceable contract could be entered into between Selver and the TCIG for the purchase of the parcels. This change was the enactment of the Crown Land Ordinance (the CLO).

The impact of the Crown Land Ordinance on the offer

39. While the offer to purchase the parcels predated the enactment of the CLO, which entered into force on 1 April 2012, Selver's acceptance did not.

40. As regards the applicability of the CLO, the date of acceptance and accordingly the date of entry into the purported agreement is highly relevant. In **CMK BWI Ltd. v Attorney General [2022] UKPC 40,** in dismissing an appeal against the judgment of Adderley JA on behalf of the Court (Mottley, P, Stollmeyer and Adderley JJA) in **CMK BWI Ltd. et al v AG [2021] TCACA 2**, Dame Sarah Asplin explained at paragraphs 45 to 48 that:

> 45. The real question for the Board is whether the changes to terms surrounding the grant of the Downtown Restoration Parcels Lease and the terms of the lease itself come within the scope of the CLO.
>
> **46. The purpose of the CLO is quite clear. Amongst other things, it prevents TCIG from granting leases of Crown land other than subject to a transparent process** and at a market rent**. Section 4 provides expressly that the objects of the CLO are, amongst other things: to ensure that Crown land is managed for the benefit of all the people of the Turks and Caicos Islands; to provide for the principles applicable to the acquisition, management and disposal of Crown land; and the regulation of the procedures in accordance with which, and the**

conditions under which, Crown land may be disposed of. The provisions apply in relation to a disposal of Crown land following a decision to do so whether by way of sale, lease etc.

47. If the ordinary and natural meaning of the words used in the CLO are construed objectively so as to give effect to its purpose and account is taken of the presumption against retrospectivity, does the CLO apply to the substantial changes to the 2008 obligations in relation to the Downtown Restoration Parcels Lease which were effected in 2013?

48. There can be no doubt that the CLO would apply if the 2008 Agreement had been rescinded and replaced entirely by the 2013 Agreement. In those circumstances, the relevant contract amounting to an allocation and/or disposition of Crown land would post-date the CLO and be subject to it. Equally, it is easy to see that it would be unfair if the CLO applied where an agreement itself pre-dated the CLO and the terms remained unchanged but were not performed until after the CLO had come into force. It is not clear that the natural meaning of the CLO and section 34 in particular, are sufficiently wide to capture such a situation and, applying the presumption against retrospectivity, the legislature should be presumed not to have intended to alter the law in relation to what, for the most part, was a past transaction. [Emphasis Mine]

41. It is noteworthy that in **CMK** an agreement had been concluded prior to the enactment of the CLO. Dame Asplin is clear in **CMK** that agreements which pre-date the CLO, with unchanged terms are not subject to the Ordinance, however agreements which post-date the Ordinance are subject to it. In this case, it cannot be said that an agreement, which requires both offer and acceptance, was concluded prior to the enactment of the CLO.

42. The TCIG and Selver could not in January 2013 legally enter into an agreement for the sale and purchase of parcels 429 and 430 (Crown Land), unless it was an agreement pursuant to the provisions of the CLO. Section 7(2) of the CLO provides that *"Crown land must not be disposed of unless the disposal is authorised by this Ordinance or any other Ordinance dealing with Crown land"*. The TCIG could not dispose of the parcels under the previous offer as the Ordinance creates the legislative framework for the disposition of Crown Lands, including restrictions (Section 9) and the imposition of conditions (Section 10).

43. Aside from the literal interpretation of Section 7 of the CLO, further evidence in the CLO that the Legislature intended for the CLO to apply to all contracts for the disposition of Crown Land post its enactment is Section 8 of the CLO, which allows for the recovery of lands disposed prior to 1 April 2012, when due process was not adopted and correct procedure were not followed. Section 33(2) of the CLO which governs Applications for allocation provides that *"An application for the allocation of Crown land made before 1*

April 2012 and not processed must be renewed within 6 months after that date and must contain any additional information required to show that the applicant meets the requirements of Schedule 2 and this Ordinance.". Finally, Section 34(1) which governs allocation of commercial land provides *"Crown land suitable for commercial use may not be sold, but the Governor may dispose of an interest in or over such land by means of a long lease, a licence or an easement."*

44. As Selver did not accept the offer prior to the enactment of the CLO, his letter of 31 January 2013 and subsequent attempts to pay could not constitute a valid acceptance, as any offer would be outside the CLO and unlawful.

45. Accordingly, no validly enforceable contract was entered into between Selver and the TCIG for the purchase of 429 and 430 as the offer to purchase the crown lands were rescinded by the passage of the CLO. In view of this finding I do not need to determine the effect of Ms. Clerveaux's correspondence being marked *"Without Prejudice"*.

If it is found that a contract was created whether the said contract was discharged.

46. In view of the finding above there is no need to address this issue. While Selver attempted to accept the offer, his acceptance was belated and no enforceable contract was concluded.

Whether Selver is entitled to or should be granted an easement on parcel 431.

47. In my view the learned judge correctly concluded at paragraph 22 that Selver is not entitled to an easement on parcel 431, for the reasons set out therein.

48. In view of my finding that no contract has been entered into for the sale of 429 and 430, I note that the request for an easement also impacts the access to another parcel owned by Selver, Parcel 133. Even if the access to 133 is considered, Selver is not entitled to an easement as there is alternative access to Parcel 133 through Kew Town, see the Site Plans "Location of Parcel 60602/429-431 Norway & Five Cays"[26]. In a letter dated 14 February 2012 to the Permanent Secretary of the Ministry of Natural Resources,[27] Selver also admitted that Parcel 430, and consequently 133 can be accessed from Kew Town. He stated that *"there is no access to my property from the main Airport Road, with the result that patrons to my development will be required to travel into Kew Town…to access the property"*.

[26] Record of Appeal 213 to 215.
[27] Record of Appeal pages 140 to 141.

49. Finally, as aforesaid at paragraph 23 above, Selver wrongly entered and remained on 431.

Whether the Turks and Caicos Islands Government (TCIG) is entitled to possession of the properties.

50. The learned judge at paragraph 23 concluded that the TCIG is not entitled to possession of the properties. He based this finding on, his erroneous conclusions about the non-expiry of the CPL, the existence of the contract, and apparently equitable considerations of *"the expenditure that the plaintiff has outlaid on the properties"*.

51. Unless I agree that it would be inequitable to remove Selver, the TCIG is entitled to possession of 429 and 430 there being no enforceable contract between Selver and the TCIG, and possession of 431 as Selver was never given permission to enter or remain thereon. I do not agree. Equitable relief was not pleaded in the alternative to the declarations sought. Further no submission was made on suitable equitable relief. Finally, in view of my finding that Selver unlawfully remained on 431, without proper explanation, Selver cannot be considered to have *'clean hands'.* Accordingly, I grant the Appellant the orders for possession sought.

52. As regards damages, in my view, the Appellant save for asserting that it was deprived of the rental value of the parcels, has not provided evidence on how any damages for unlawful occupation should be quantified. Ms. Clerveax's witness statement does not assist with quantifying loss or damages. It does not include information to show loss of rent, or the rental value of the parcels. Accordingly, I will disallow damages.

53. The Appellant in its counterclaim prayed that in the alternative of an order that Selver pull down and remove the buildings and/or infrastructural works on the parcels that the improvements attach to the land and no compensation be payable to Selver. In my view in all the circumstances, and in view of his unlawful entry on 431, this order is appropriate.

Disposition

54. For all the above reasons and having regard to the authorities cited I allow the appeal and order:
    a. The TCIG is entitled to possession of parcels 60602/431; 60602/429 and 60602/430.

b. The Respondent shall vacate parcels 60602/431; 60602/429 and 60602/430 within 90 days from the date hereof.
c. The TCIG is entitled to all attached buildings and/or infrastructural works on the parcels 60602/431; 60602/429 and 60602/430 attached to the land and no compensation is payable to the Respondent.
d. Costs to the Appellant both here and below to be taxed if not agreed.

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JOHN, JA

I AGREE

_____

ADDERLEY JA, PRESIDENT (AG)

I ALSO AGREE

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TURNER, JA