

IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS

CL 154/2001

BETWEEN

THE HON ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

PLAINTIFF

AND

HOLIDAY RESORT DEV., LIMITED

DEFENDANT

BEFORE HON JUSTICE RAMSAY-HALE

Mr. David Phillips QC with Mr. Patrick Patterson and Ms Khalila Astwood for the Crown

Mr. Hugh O'Neill for the Defendant

Heard on the 13th 14th and 15th of February, 2013

JUDGMENT



THIS APPLICATION

1. This is the judgment on the Plaintiffs claim for a declaratio ment made
between the parties on the 24th July, 2002 for the transfer of the freehold interest in 50 acres of land comprised in parcel 60300/35 at Frenchman's Creek, Providenciales in the Turks and Caicos Islands for the transfer of land of 50 acres of land had been automatically terminated in consequence of the Defendant's breach, a declaration that the transfer of the *said* land from the Plaintiff to the Defendant be set aside and a direction that the plaintiff be registered at the Land Registry as the freehold owner of the Land.
2. The claim is brought by the honourable Attorney General on behalf of the *Turks and Caicos Islands Government* and on behalf of the Crown.
3. The Defendant is a company that was incorporated on 26 July 1996 in the Turks and Caicos Islands, and which was primarily set up to develop the Land. The *shares* in the Defendant are divided equally among the following fifteen individuals who are all Turks and Caicos islanders: Samuel Lightbourn Sr.; Percy Williams; Enos Gardiner; Christoval Williams; Wendal Swann; Albert Grant; Chris Stubbs; Sydrian Pratt; Tom Lightbourn;

Oswald Williams; Conrad Howell; Edith Cooper; Ivy Cunningham; James O. Rigby; and Claridge Wilson.

THE FACTS

4. In 1996, the Defendant approached the Government with a proposal to develop a hitherto undeveloped area of south west Providenciales. The proposal was an ambitious one which involved the construction of hotels, residential property, marinas &c spread over a 300 acres site. The parties engaged in protracted negotiations from 1996 until finally, in July 2002, an agreement was reached for what was a rather more modest development of 100 acres of Crown land.
5. The primary purpose of the agreement, which was executed on the 24th day of July 2002, was to ensure that the Crown did not dispose of any part of a one-hundred acre plot within parcel 60300 that the Defendant was interested in purchasing and developing. The Defendant made an upfront payment of \$25,000 under the agreement, in consideration for the TCIG's agreement not to dispose of the affected land.
6. It was agreed, *inter alia*, that if the Defendant constructed an access road to a standard approved by the Department of Planning and the Chief Engineer and not less than the standard required for the construction of the Millennium Highway, the Crown would (1) transfer the first 50 acres to the Defendant, and (2) would set off against the purchase price of \$30,000 per acre, the sums actually spent by the Defendant in constructing the road.
7. On 21 March 2003, the Physical Planning Board granted conditional approval for the construction of the road which required the road to be "*constructed of well-compacted fill and asphalt surfaced*".
8. Between 2003 and 2005, the Defendant *made* efforts to comply with the Agreement to build the road to the requisite standard but despite the efforts of those persons who were behind the proposed development, it became clear that the Defendant did not have the necessary funds to complete the road to the requisite standard or to undertake the studies, surveys and other matters required to meet its obligations under the terms of the agreement.
9. The Defendant made several overtures to the Government in 2005 asking it to vary the terms of the agreement and transfer the 50 acres to the Defendant in exchange for the work which had already been done on the road to allow the Defendant to raise the financing necessary to progress the development.
10. On 13 January 2005, the Defendant wrote to the Minister of Natural Resources asking him to lend his support to its request that it be given of 50 acres of land in exchange for some 7 Y2 miles of road work already done.
11. On 31 May 2005, the Defendant applied to the Government for the transfer of the first 50 acres. In that letter it asserted that it had "*completed the preliminary road as required by the Agreement*" and that "*The cost of completion of the roadway to that standard had been estimated at over \$1.3M and the cost of putting in basic infrastructure such as*

electricity is above the \$200,000 difference between the cost of the road and the value of the land". It is accepted that the assertions made in this letter were untrue.

12. The letters of January and May 2005 were referenced in Exco paper no 06/599 which recommended to the Cabinet that the freehold title be granted to the Defendant. On the 6 September 2006, at the meeting of the Cabinet, the Minister of Natural Resources advised the Cabinet that the road had been completed. The Premier stated that he *"wished for the matter to be concluded and the proposed developers being granted the fifty acres of land as full and final settlement for the work they had undertaken in putting in the road"*
13. This proposal was rejected by the President who, while he appeared to accept that the road was completed, stated that he *"could not accept the recommendation as he saw no evidence that the provisions of the Head of Agreement had been met, with the exception of the road work, although this had not yet been surveyed"*
14. The Cabinet agreed to defer the matter for one week to allow opportunity for further discussion.
15. The Minutes record that at the Cabinet meeting of 13 September, 2006, *"Cabinet advised that... 2. It approved in principle the grant of Freehold Title over 50 acres of parcel 60300 at Proggins Bay. Providenciales to Holiday Resort Development to construct a high end tourist resort development subject to the Company obtaining a Certificate of Completion to show that the road has been completed to the standard required in the agreement; to an official valuation of the road setting its value at least \$1.5 million; and to an Environmental Impact Assessment being conducted and its findings taken into account as part of the process of securing planning consent."*
16. This decision of the Cabinet was communicated to the Directors of the Company on 19 September, 2006 by the Minister of Natural Resources in a letter which reproduced the minutes of the Cabinet's decision in full.
17. In March of 2007, a valuation of the roadway was prepared by Herrol Sadler the Senior Resident Engineer in the Department of Engineering and Maintenance Service. The estimate of the road works was said to be prepared in respect of 'work executed' on 6.3 miles of road of an average width of 30' with an average compacted fill of 12". It is estimated the cost to clear the site and undertake earthworks at \$299,376 and the cost of an imported quarry base at \$1,404,480. Mr. Sadler has clarified that the estimate was not an estimate of what was done but an estimate based on the assumption that all items stated therein would be done and that, in fact, no imported fill was used, only material from the site which was pushed in place (cut/fill) and that there had been no compaction of the road surface.
18. The Defendant agrees that the road works were as described by Mr. Sadler and by Mr. Watts, an advisor to Public Works, whose *evidence* is that the road was a basic cut to clear a path through the shrubbery and other obstacles, with a surface constructed of locally sourced crushed, compacted limestone with no asphalt —apart from a small section installed by Priton Affordable Homes- the construction of which was consistent with the invoices from Cove Construction for leasing D8 and D6 dozers to cut the road and the grader which would have been used for levelling it. The sum of the invoices from Cove Construction was \$138,000.

19. The estimate was relied on by the Minister of Natural Resources when he advised the Cabinet at a meeting on 16 May 2007 that he had received correspondence from Mr, Alfred Smith regarding the costs of the road works undertaken by the Defendants and that the cost was *"in the amount of \$1,703,856 which exceeded the amount stipulated by Cabinet and on this basis, he was requesting that the developers of Proggins Bay be given approval to draw down on the 50 acres of land"*
20. The fact of the approval and the reason for it was communicated to the Defendant in a letter dated July 6 2007 from the Minister of Natural Resources.
21. On 10 January 2008, the Government transferred 50 acres of land to the Defendant. The Transfer expressly records the consideration in the following terms: *In consideration of the construction of an access road in relation to the above-referenced title__ the cost of which being ONE MILLION SEVEN HUNDRED AND THREE THOUSAND AND EIGHT HUNDRED AND FIFTY-SIX UNITED STATES DOLLARS (US\$1.703,856.00) as valued and certified by the Crown (the receipt whereof is hereby acknowledged).*

THE ISSUE

22. Mr. Phillips submits that, when on 16 May 2007 the Cabinet approved the transfer of the 50 acres to the Defendant, it did so in execution of the decision that had been taken in principle at the Cabinet meeting held on 13 September 2006. He submits that it is plain that the Cabinet was proceeding on the basis of the terms of the agreement of 24 July 2002 and that it is equally plain that the Cabinet was acting under a mistaken belief as to what had been constructed and at what cost. He submits that the Defendant knew the basis on which the Government was proceeding when it agreed to transfer the land but it took no steps to correct the Government's mistake, a mistake which stemmed in part from the Defendant's own letter of 31 May 2005 which incorrectly stated that *"the preliminary road as required by the agreement was completed... at a cost of over \$1.3m"*.
23. Mr. Phillips further submits that the Defendant likewise knew the transfer inaccurately stated the consideration as being *the construction of an access road in relation to the above-referenced title..., the cost of which being US\$1.703,856.00*, but did not correct the mistake, instead permitting the Government to transfer the land to it, knowing there had in fact been a total failure of consideration, Alternatively, the Defendant believed that the cost of the works had *been valued* at \$1.7m in which case it was mistake as was the Government. In either case, Mr. Phillips submits, the transfer had been executed by mistake and should be set aside.
24. It is the case for the Defendant, however, that the agreement between the parties had been varied and that the land was transferred to it by the Government in consideration of the work actually completed on the road and in consideration of the Defendant abandoning its entitlement to the transfer of any further land under the Agreement.

THE EVIDENCE

25. In support of its case, the Defendant relies on the evidence of Mr. Christoval Williams who states that the Defendant came to an agreement with the Premier of the day that the Government would deliver to the Defendant 50 acres of freehold land in exchange for the

road as built, provided that the Defendant gave up any entitlement to any other land in the West Harbour Bluff area.

26. His evidence is supported by the evidence of Galmo Williams, a past Premier of the Turks and Caicos Islands and former Minister of Natural Resources, who asserts that the Government of the day placed such a high value on the work done by the Defendant in opening up a quarter of what was previously inaccessible prime development land by building the road, that it negotiated and agreed to a straight transfer of the 50 acres of land in the full knowledge that the road was not built to the standard required under the agreement. He states that he *quid pro quo* for the compromise was that the company lost any entitlement to apply for any further land pursuant to the 2002 Agreement.
27. There is absolutely no documentary evidence to support this alleged variation in the agreement which the Court is asked to find, which is extraordinary against the background of the negotiations between the parties which all find expression in documents created contemporaneously, all of which contradict the assertions made on behalf of the Defendant.
28. The only written response to the several letters written by the Company in 2005 seeking a variation in the terms of the agreement was given by Clayton Been of TCInvest in response to a letter from Chalmers Misick dated 28 June 2005 again requesting the grant of freehold title on the first 50 acres of land, in which Mr. Been reiterated the Government's position, that it was prepared "*to transfer the freehold to 50 acres of land or such amount being less or more equivalent to the amount expended... in constructing the road.*"
29. Mr. O'Neill invites the Court to find that the letter of 6 June 2007 from the Minister of Natural Resources is proof that the agreement was varied and he relies on the fact that it was headed "*Without Prejudice Subject to Contract*" and purported to be "*an offer made by Cabinet*" in support of this submission.
- 30.1 am, with respect, unable to see how the indication that approval was given for the drawdown of 50 acres *in accordance with the agreement* as the cost of building the road had been certified to be \$1,703,856 which *exceeded the amount stipulated* could be construed as evidence of an agreement to transfer 50 acres of land for a road which was simply pushed through the bush at a cost to the Defendant of less than \$140,000. The only amount stipulated in any agreement between the Government and the Defendant was the purchase price of \$1.5 million (\$30,000 per acres) for the land, against which the Defendant would be permitted to set off the costs incurred by it in building the road.
31. Mr. O'Neill's submission that there was, in any event, no mistake on which the Crown can rely as the cost of the road was valued and certified by its own valuator and as all the members of the Cabinet were well aware of the condition of the road as they all lived in Provo, is not supported by any evidence.
- 32.1 am satisfied and so find that the transfer was executed under a mistake that the Defendant had built a road at a cost of US\$1.7m. There was in fact a total failure of consideration and the transfer must be set aside.

33. I enter judgment for the Plaintiff and order that the Crown be registered at the Land Registry as the freehold owner of the subject parcel.

34. Costs follow the event and are awarded to the Plaintiff to be taxed if not agreed.

DATE 10th OF FEBRUARY, 2013



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JUD 10th OF FEBRUARY, 2013

