

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL

OF THE COMMONWEALTH OF THE BAHAMAS

B E T W E E N

**PARADISE ISLAND LIGHTHOUSE AND
BEACH CLUB COMPANY LIMITED**

Appellant

AND

**THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF THE BAHAMAS**

Respondent

CASE FOR THE RESPONDENT

Concurrent findings made below that the negotiations were subject to contract

1. Whether negotiated terms are intended by the parties to be final and binding at that stage, or are advanced “subject to contract”, depends on the context and the particular facts and circumstances of the case. It is plain in this case that the parties were negotiating towards a formal Crown lease. Either the negotiations would end in an executed Crown lease or they would not. Everything, in other words, was subject to contract. Whilst there are less formal scenarios in which a different conclusion might be inferred, these were negotiations for a lease from the State. It is obvious that there would be no deal until a contract was formally executed.

2. This was precisely the finding made by the trial judge, after careful consideration of the evidence and surrounding circumstances of the case. The Chief Justice held that the draft lease provided to the Appellant was not an unconditional offer but depended on execution by the Government. The Board can imagine, no doubt, why it might have been thought important to have the Appellant, as potential lessee, consider and agree in advance to what would or may be the terms of the demise should it go ahead. But the Minister, in sending the draft, was not irrevocably binding the Government to enter into the lease (on those terms or at all). As the Chief Justice held, had that been the intention, the Minister himself would have signed the lease and *then* sent it to the Appellant for final signature (HC judgment, para 33(iii) [30]).
3. On the basis of the evidence before him, the Chief Justice was entitled to hold that there was no final agreement. The potential demise was, as his lordship put it, “subject to execution” (HC judgment, para 33 [32]). This view is supported by the fact that the formalities required to demise Crown lands had not been complied with (see below).
4. Of course, there is a difference between, on the one hand, parties negotiating a position which is subject to contract and, on the other, parties reaching final agreement albeit further agreeing that *those terms* should be reduced into a formal written contract. In the latter scenario, there is already a binding agreement; in the former, not. As Lord Blackburn explained in *Rossiter v Miller* (1878) 3 App Cas 1124, at 1151 [AB 13/EB758] (as cited and helpfully explained by the English Court of Appeal in *Pretoria Energy v Blankney Estates* [2023] L&TR 28, paras 20ff) [AB 12/EB720]:

“[I]t is a necessary part of the Plaintiff's case to shew that the two parties had come to a final and complete agreement, for, if not, there was no contract...

But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not.

But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.” **[EB721]**

5. The effect of the Chief Justice’s judgment in this case was to find that the parties had not reached a stage where “the terms [were] already settled”, that the contract was “completed” or that the parties had “no... power to vary the terms”. The negotiations remained at the “subject to contract” stage.
6. The Chief Justice was also entitled to reject any application of the principle in *Walsh v Lonsdale* **[AB 15/EB794]** on the further or alternative basis of part performance. The Appellant had not gone into possession and there had been no part performance.
7. To the extent that the rejection, by the courts below, of the existence of a final and binding agreement for a lease was based on findings of fact, any further challenge before the Board is precluded by the principle in *Devi v Roy*. This includes, at the very least:
 - 7.1. The inferences to be drawn from the conduct of the parties at the time (see the HC judgment, para 33(a) and to a lesser extent para 33(c) **[30]**). These findings were summarised by Smith JA (COA judgment paras 26-28 **[125]**) and upheld by him (see para 29 **[126]**). Smith JA concluded at para 35 as follows: “the words used and the conduct of the parties showed that both the Minister and Mr. Smith (on behalf of Paradise) knew and expected that the Minister had to formally sign the contract before any agreement could be reached” **[127]** (emphasis added); and
 - 7.2. The rejection, on the evidence, of any part performance of the unexecuted draft lease. The Chief Justice expressly rejected the suggestion that the Appellant had performed or incurred relevant costs and expenses in reliance on the draft lease (HC judgment para 36 **[32]**). Smith JA upheld this finding, holding that “there were no sufficient acts on the part of Paradise that could be considered as part performance of any agreement” (COA judgment, para 42 **[129]**). The Court of Appeal expressly rejected the suggestion that a payment had been made for rent under the draft lease (COA judgment para 44 **[129]**).

8. The absence of any error in self-direction, coupled with these concurrent findings of fact, renders the Appellant's proposed appeal, it is submitted, impossible.
9. Nonetheless, the Respondent addresses some of the points made by the Appellant. The Appellant submits, amongst other things:

- 9.1. That the Court of Appeal was wrong to focus on the fact that the draft lease was not signed by the Minister, this being irrelevant to the question of whether there was in fact an agreement between the parties.

Response: The Court of Appeal was entitled (and right) to focus on this point (amongst others). Where parties go to the time and trouble of producing a draft lease, this may be good evidence that they intend for their negotiations, if ultimately successful, to be reflected in an executed written agreement. Where a draft lease is produced but not in the end executed, this may well be relevant evidence that no final agreement was reached.

- 9.2. Adopting the point made by Sir Michael Barnett, that the draft lease contained all necessary terms. There was nothing left to negotiate.

Response: The test is not whether the terms of the draft lease would have been good and sufficient to demise the lands, nor whether those terms would or may have changed in a later fully executed lease (as Sir Michael put it: "There was nothing further to be negotiated"), but, rather, whether the parties had in fact agreed to those terms. There are concurrent findings that they had not.

- 9.3. The courts below were wrong to rely (a) on the subjective views of and (b) the oral evidence of the Appellant when assessing the question of whether agreement had been reached. The Chief Justice observed that the Appellant's letter seeking "comfort" from the Minister tended to betray the Appellant's own understanding that a final and binding agreement had not been reached (HC judgment para 33(c) [30]). The Chief Justice "did not accept Smith's [oral] explanation to the contrary" [31].

Response: The judge was entitled to look at all of the facts and circumstances of the case, including the entire run of correspondence and what the parties

must have had in mind by it.¹ The judge was not embarking on a process of contractual interpretation, but, rather, was addressing the prior (and broader) question of whether in fact the parties had reached a final agreement. The Appellant's subjective understanding was not, anyway, a central plank of the judge's reasoning, but rather simply an observation which the judge considered to be telling (which indeed it was; i.e. even the Appellant did not seriously think that a final and binding agreement had been reached).

Section 54 of the Conveyancing and Law of Property Act

10. Section 54 of the CLPA [AB 1/EB598] provides that the power to make “grants and dispositions of any lands or immovables in The Bahamas”, previously exercisable by the Governor under section 24 of the 1969 Constitutional Order [AB 3/EB621], is now exercisable, following the 1973 Constitutional Order, by the Minister. Furthermore: “wherever the employment of the Public Seal would have been required under that section [section 24], the official seal of the Minister shall be employed instead”. Section 24 of the 1969 Constitutional Order granted power to the Governor to make such “grants and dispositions of any lands or immovables in The Bahamas”, but only under Public Seal. Accordingly, any grant or disposition of Crown lands in The Bahamas must now be done, following section 54 of the CLPA, under Public Seal of the Minister.
11. An agreement to enter into a lease is not, itself, a grant or disposition of land. Rather, it is an agreement to make a grant or disposition, later. A Public Seal is not required, therefore, to make an agreement for a lease.
12. The Appellant's case, however, has always been that the agreement to enter into a lease *and* the terms of the lease itself are all one and the same, being contained in the detailed draft lease attached to the letter. Those terms, if effective, *would* comprise a grant or disposition of land and (accordingly) would require a deed signed and sealed by the

¹ See *Hussey v Horne-Payne* (1879) 4 App Cas 311, at 316 [AB 10/EB699]: “you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, ‘We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.’ In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them”. And *Bristol, Cardiff, and Swansea Aerated Bread Company v Maggs* (1890) 44 Ch D 616 [AB 7/EB660] (correspondence following the alleged agreement, tended to show that the agreement was not final).

Minister.² It is notable in this regard that, in his statement of claim, the Appellant sought “A declaration that by letter dated 9th day of January A.D., 2020, there is a concluded Agreement for a Lease between the Plaintiff and the Minister responsible for Land and Surveys” [37].³ To the extent that the Appellant’s true case is that the Minister has already agreed to the terms of the draft lease, this *may* give rise to difficulties under section 54 [AB 1/EB598].

13. However, for the reasons given (see paragraph 11 above) the Respondent would prefer to limit himself to the more modest submission that the formality requirements in section 54 are part of the factual matrix and which tend to support the findings of the courts below that the parties intended that their negotiations were all subject to contract. The formalities do not apply to private demises, but only to Crown lands which (for obvious reasons) are a special case. These formalities add weight to the idea that the parties would not have intended to finally bind themselves by the exchange of an unsigned draft lease and a letter.
14. This appears to have been the point made by Smith JA in his judgment at paras 37-38 [128] (i.e. that, given the formality requirements, the parties would not have expected a binding agreement to arise simply by an exchange of correspondence and provision of an unsigned lease). In any event, the Respondent submits that this is the better point to make in respect of section 54.
15. To the extent that Smith JA’s reliance on section 54 arguably went beyond this (see his para 38 [128]), it is submitted that this does not matter. Smith JA had already held, separately and on the evidence, that the parties in fact knew and expected (and therefore intended) that the negotiations would require a signed contract “before any agreement could be reached” (para 35 [127]).

Fresh evidence

16. The Appellant does not have leave to appeal the refusal to admit the fresh evidence, which, furthermore, is a case management (procedural) decision with which the Board would not ordinarily be expected (or invited) to interfere.

² See by analogy *Director of Public Works v Ho Po Sang* [1961] AC 901, 926-927 [AB 5/EB649-650].

³ Section 14 of the Crown Proceedings Act [AB 2/EB609] may preclude an order for specific performance in any event.

17. The first fundamental problem with the application to adduce the fresh evidence is that it was advanced before the Court of Appeal (at least orally) on the basis that it supported a new case that in fact the Minister may have signed the draft lease.⁴ The Appellant submitted that he had lost the opportunity to cross-examine the State's witness on this point.
18. Put in this way, the Court of Appeal refused the application on the basis that "we [the Court of Appeal] are not satisfied that it will assist us in the resolution of this appeal" [548/19]. The Court of Appeal looked at the evidence *de benne esse*, but it is plain from the exchanges with counsel during the hearing that the Court of Appeal considered that none of the documents took the case any further. As Sir Michael put it: "There is no suggestion in those documents that the Minister actually signed the document, is there?" [541/1]. Indeed, the whole case advanced by the Appellant below was that, even though only he signed the draft lease, nonetheless the parties had reached a final agreement [542/8-22]. The documents did not move the dial on this issue. No other basis was pressed before the Court of Appeal for the admission of the fresh evidence.
19. There can be no merit, therefore, in the submission made by the Appellant that the fresh evidence, if admitted "would have allayed any concerns on the part of the learned Justices of Appeal (by majority) that there was no concluded agreement for lease" (Appellant's Case, para 68(6)). The Justices of Appeal considered the evidence and expressly held that it made no difference.
20. Before the Board, the Appellant seeks to challenge the refusal to admit the fresh evidence on a different basis namely that "[t]he additional documents taken as a whole demonstrated that there was a clear understanding between the parties that there was a binding agreement for lease and that a lease for ready for execution had been prepared" (Appellant's Case, para 66). This submission accords more with the Appellant's written submissions filed in the Court of Appeal [204ff], however, as submitted, this was not the point pressed orally and on which (therefore) the Court of Appeal decided the application.

⁴ See the submissions made by the Appellant's counsel at the hearing on 13 December 2023 [540].

21. In any event (and without accepting that this is a live issue before the Board), the fresh evidence took the matter no further in that regard either. The opposing positions of the parties (on the one hand, the Appellant submitting that the letter and draft lease (considered in context) evidenced a final agreement, and on the other hand the Respondent saying that it did not) were not impacted by the fresh evidence which did not add anything to the submissions about the (objectively assessed) intentions to be inferred from those documents.⁵

Conclusion

22. For the foregoing reasons (to be expanded upon orally at the hearing, if necessary) the Respondent submits there to be no merit in the appeal. The Board is invited to dismiss the appeal with costs.

Rowan Pennington-Benton

3 Hare Court Chambers

⁵ The Appellant's submissions on the fresh evidence, with the schedule of the fresh evidence following, begin at [204]. The documents primarily comprise internal emails and other correspondence concerning preparation of the draft lease. None of these documents (which the Appellant would not have read or seen at the time), move the dial in respect of the question of whether the exchanges between the parties (which is what matters) amount to a final agreement.

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