Michaelmas Term
[2017] UKPC 39
Privy Council Appeal No 0032 of 2015

JUDGMENT

The Attorney General (Appellant) *v* River Dorée Holdings Limited (Respondent) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lord Mance
Lord Reed
Lord Carnwath
Lord Hodge
Sir Bernard Rix

JUDGMENT GIVEN ON

11 December 2017

Heard on 9 May 2017

Appellant
James Guthrie QC

(Instructed by Charles Russell Speechlys LLP)

Respondent
Nicholas Dowding QC
Stanley Marcus SC
(Instructed by Eversheds Sutherland (International) LLP)

SIR BERNARD RIX:

1. This appeal raises a central issue of construction arising out of a lease of agricultural land granted, in the name of Her Majesty Queen Elizabeth the Second, by the Government of St Lucia, represented here by its Attorney General, the appellant, to River Dorée Holdings Limited, the respondent. The lease, which was dated 20 February 1987, was for an initial period of 50 years commencing on 24 October 1986, and contained an option to purchase. The issue of construction arises out of a mismatch between a recital (recital E) and the dispositive part of the lease providing for the option to purchase (clause 9(9)). The Board will refer to the "Government", "River Dorée", the "Lease" and the "land".

2. Recital E stated that "at the end of the first ten (10) year period of this Lease" the Lessee (River Dorée) would be permitted by the Government to purchase the property "provided THE LESSEE has satisfactorily carried out the terms and conditions of this Lease including the Development Program". Whereas clause 9(9) provided that the option to purchase could be exercised by notice given "[a]t any time after the end of the tenth year of the term" without reference to any condition requiring that River Dorée had satisfactorily carried out the terms and conditions of the Lease including the Development Program.

3. The Development Program was a programme imposed on River Dorée, elaborated in detail in the Lease's Schedule 6, designed to improve, indeed to "transform", the leased land into a modern highly productive farm area for the production of food both for domestic consumption and for export, utilising and promoting modern scientific agricultural methods.

4. When River Dorée sought to exercise its clause 9(9) option by notice dated 10 January 1997, the Government gave no substantive reply until 21 June 1999, at which time the Permanent Secretary at the Ministry of Agriculture invited comments from River Dorée on an Interim Report, commissioned by the Government, which had concluded that the Lease's Development Program had not been satisfactorily carried out. That was also the conclusion of the Final Report. This led to the current dispute, wherein River Dorée insisted on its right to purchase the land, in reliance on clause 9(9) of the Lease, and the Government, relying on recital E, refused to acknowledge any such right, on the ground that the Development Program had not been satisfactorily carried out.

5. In due course this litigation was commenced by River Dorée on 2 August 2005, claiming a declaration that the exercise of its option on 10 January 1997 entitled it to a

transfer and a deed of sale in respect of the land. The Government disputed this, relying on what it alleged was River Dorée's failure to comply with the Development Program.

6. In the meantime it had sought to determine the Lease by a letter dated 16 June 2003 and compulsorily to acquire the land.

7. By a notice of application dated 24 January 2006, the Government sought a preliminary issue on the interpretation of clause 9(9) in the following terms:

> "Whether Clause 9(9) of the Lease Agreement between the Majesty Queen Elizabeth the Second, and River Doree Holdings Limited speaks to an automatic transfer of title of the property subject to the Lease on the effluxion of ten years; or whether it is conditional on the satisfactory performance of the terms of the lease."

8. On 27 October 2006 Master Cottle gave judgment on that preliminary issue in favour of the Government's contention, overruling River Dorée's submission that a preliminary issue should not be debated. He considered that the issue might lead to the end of the litigation; and that it was a short point which required no evidence. In a brief judgment, he concluded (at para 10) that reading recital E and clause 9(9) together made it clear that -

> "… the option to purchase is conditioned upon the Lessee having satisfactorily carried out the terms and conditions of the lease including the development program."

9. Master Cottle gave two reasons in support of his decision. The first was that recital E's importance was emphasised by the fact that it was there that the parties had provided for payment of the lease rent. In that he was mistaken. The second was that clause 9(9) was subject to clause 9(11) which provided that upon the option being exercised the Government was to grant River Dorée a licence which was to provide for the forfeiture of the land if the Development Program was not carried out as far as practical. On this appeal to the Board, Mr James Guthrie QC who appeared on behalf of the Government said that he did not rely on either of these reasons.

10. There was no formal appeal from that ruling at that stage, but Master Cottle's anticipation that his decision would put an end to the litigation was not fulfilled. The case went forward to a trial in which inter alia the issue of interpretation was re-argued, with the consent of both parties, this time with the Government relying on evidence of certain matters occurring prior to the making of the Lease as an aid to its construction.

The Board will refer to those matters below. One of them was referred to by Georges J in his judgment (at paras 49-50), but was not subsequently relied on by him for the purposes of his conclusion on the issue of construction.

11. In a lengthy judgment, dated 30 July 2012 (nearly three years after trial), devoted in the main to the issue of whether River Dorée had failed to comply satisfactorily with the Development Program, Georges J upheld Master Cottle's interpretation of the relationship between recital E and clause 9(9). His reasoning exactly echoed and supported that of Master Cottle (at paras 10-12 and 306-307 of his judgment). For the rest, Georges J concluded, to summarise the matter briefly, that River Dorée had not complied satisfactorily with the Development Program; that although there had been "remarkable development progress" between 1987 and 1993 "which had been achieved within that era starting as it were in a sense virtually from scratch" (at para 117); and although there had been "critical benefits achieved by the claimant for agricultural diversification in St Lucia as well as the introduction of annual crops such as vegetables, hot peppers, melons etc together with the application of drip irrigation and other appropriate technologies" (at para 373); nevertheless River Dorée had not satisfactorily fulfilled "the terms and conditions of the Deed of Lease including specifically its obligations in respect of the Development Program as per clause 9(9) of the Lease", and the Government, although it generally knew of these failures, had not acquiesced in them (para 383). The reference above to "as per Clause 9(9)" (at para 383(i)) is puzzling since clause 9(9) does not refer to the Development Program, but it suggests that, on the judge's interpretation, following Master Cottle, clause 9(9) was read as somehow incorporating recital E.

12. On appeal to the Court of Appeal of the Eastern Caribbean Supreme Court, the judgment of Georges J on the issue of interpretation was reversed and set aside. In a judgment given by Justice of Appeal [Ag] John Carrington QC, concurred in by Dame Janice M Pereira DBE, Chief Justice, and Justice of Appeal Davidson K Baptiste and handed down on 25 November 2013, it was held that clause 9(9) was unambiguous and complete in its own terms, so that there was no need to have recourse to recital E to assist in its construction (at para 46). Indeed, its terms were in conflict with recital E (at para 44). The judgment cited *Mackenzie v The Duke of Devonshire* [1896] AC 400, 408 for the proposition that it was "settled principle that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention" (at para 45). The Government was therefore in breach of its obligations under the lease by failing to commence the process leading to the execution of the Deed of Sale and grant of the Aliens Landholding Licence required by the Lease upon receiving notice of the exercise of the option in January 1997. Since, however, River Dorée had not satisfactorily quantified the extent of its financial loss, it was entitled to only nominal damages in the amount of EC$50,000 (at para 98). It therefore concluded that River Dorée was entitled to the following relief (at para 99):

> "a. A declaration that the appellant on the 10th day of January 1997 became legally entitled to the transfer and a Deed of Sale of and in respect of the freehold interest of and in such of the lands described in the First Schedule to the Deed of Lease dated 20 February 1987 …
>
> b. A declaration that the appellant on the 10th day of January 1997 became legally entitled to the grant of an Alien's Landholding Licence by the Government of Saint Lucia for the purpose of holding the freehold interest in the said lands.
>
> c. A declaration that on the 10th day of January 1997 the Government of Saint Lucia became trustee on behalf of the appellant in respect of the said lands …
>
> d. Damages in the sum of EC$50,000 for breach of the terms and conditions contained in the said Deed of Lease …"

13. The Court of Appeal also awarded River Dorée costs in the appeal and in the court below.

14. On this further appeal to the Board, the Government seeks to restore the answer to the issue of construction given by Master Cottle and Georges J, albeit in reliance on some fresh arguments.

15. Nothing however turns so far as the Lease is concerned on the answer to be given by the Board, since the Board is told that the land concerned has now been compulsorily acquired by the Government. However, the decision on this appeal may affect the level of compensation for which the Government has acquired the land.

16. In the light of the Court of Appeal's conclusion, it decided that there was no purpose in reviewing the findings of Georges J concerning the performance of River Dorée's obligations under the Lease with respect to the Development Program or otherwise. On this further appeal, the parties were content that, if the Government's appeal succeeded, River Dorée's appeal from Georges J on the question of its performance of its obligations under the Lease should be remitted to the Court of Appeal.

The background facts

17. The following facts are agreed, even if the admissibility and relevance of some of them are not.

18. River Dorée is a company incorporated in St Lucia essentially for the purpose of acquiring and operating the land and was formerly owned and controlled by a private Danish foundation, Faelleseje.

19. The land concerned is situated at River Dorée in the Quarter of Choiseul and Laborie, in the south west of St Lucia. The Lease refers to it as comprising 1,337 acres.

20. On 20 June 1986 the acting permanent secretary at the Ministry of Agriculture, Mr Cosmas Richardson, wrote to McNamara & Co, a firm of attorneys representing Faelleseje, in the following terms:

> "I am pleased to inform you that Cabinet agreed to the acquisition of a property comprising 1,337 acres more or less being a dismemberment of Park Estate (1962) Limited and Club Santa Lucia Limited with funds to be provided by FAELLESEJE a Danish Company (the Danes). (The cost of the lease will pay for the cost of the acquisition.)
>
> Cabinet further agreed to lease the said property to FAELLESEJE (the Danes) for a period of fifty (50) years with a right of renewal for a further twenty-five (25) years subject to terms and conditions to be agreed upon by both parties.
>
> If after ten (10) years of the lease FAELLESEJE (the Danes) have developed the property in accordance with the terms of the lease Government will sell the property for the sum of Ten dollars ($10.00) (after granting an Aliens Licence for that purpose).
>
> In accordance with the Aliens (Landholding Regulation) Act, Cabinet also approved the issue of an Aliens Landholding Licence to FAELLESEJE (the Danes) to enable them to lease the said property from the Government."

21. A few days later, on 24 June 1986, the Prime Minister of the then Government, Sir John Compton wrote to McNamara & Co as follows:

> "Cabinet considered the application of your clients to purchase from Mr Eric Lawaetz certain estates in the Quarter of Choiseul and agreed that because of the unfortunate experience with the present owners, the estates should not again be placed in the hands of aliens.
>
> Cabinet however agreed that Government will purchase the estates from Mr Lawaetz and lease them to your clients for a period of 50 years, provided your clients pay the cost of the acquisition with an option for renewal for a further 25 years should all obligations under the lease be satisfactorily discharged by your clients.
>
> If however your clients carry out an agreed development programme, your clients will after a period of ten years be permitted to exercise the option to purchase the said estates, or such part thereof as mutually agreed, for the sum of $10.00 and your clients will be granted an Aliens Landholding Licence for this purpose."

22. In the present appeal, the Government relies on these two letters as setting out the mutual matrix forming the background to the Lease and informing its interpretation. The second letter was referred to by Georges J in his judgment with the comment that it formed "the bedrock on which the negotiations proceeded and always rested" (at paras 49-50). However, he did not refer to either letter in his discussion, analysis and conclusion concerning the interpretation of the Lease, which, as stated above, exactly mirrored the reasoning of Master Cottle. On behalf of River Dorée, Mr Nicholas Dowding QC submits that these letters are inadmissible as part of the negotiations leading up to the Lease.

23. The Government also relies, for the first time on this appeal, on a further document as informing the issue of interpretation, and that is the Licence dated 12 January 1987 granted to River Dorée to lease the land. The Licence reads in its essential part as follows:

> "UNDER the authority of the Aliens (Landholding Regulation) Act 1973 (No 10 of 1973) as amended the GOVERNOR-GENERAL hereby grants to RIVER DOREE HOLDINGS LIMITED a licence to hold as Lessee the immovable property described in the First Schedule hereto upon the terms and conditions set out in the Second Schedule."

The Second Schedule provides as follows:

> "The terms and conditions referred to above are:-
>
> > (a) the Lessee shall develop the property in the First Schedule in accordance with the lease made between Her Majesty Queen Elizabeth the Second and River Doree Holdings Limited dated 20th day of February One thousand nine hundred and eighty-seven and
> >
> > (b) if after ten years of the lease the Lessee has complied with (a) the Government of Saint Lucia will sell to the Lessee such of the property in the First Schedule as has not been disposed of in accordance with the terms of the lease for a sum of $10.00 and will grant the Lessee an Aliens Licence to own the said property sold."

24. There are, however, difficulties about the dating of this Licence. It is dated "this 12th day of January one thousand nine hundred and eighty-seven", but it refers in its Second Schedule to the Lease dated 20 February 1987 (as cited above). Moreover, there are other dates stamped or written on the document. One stamp of the "Attorney General's Chambers" is dated 10 December 1986. Another (indecipherable) stamp is dated 30 December 1986. And a third stamp of the Office of Deeds & Mortgages is dated 5 March 1987. In the circumstances, and in the absence of any evidence concerning this Licence, it is not possible to say on what day it was made, and in particular whether it was made before or after the Lease, nor whether or not it was shared with River Dorée at any time before it was recorded at the Office of Deeds & Mortgages. The Lease itself is stamped as having been recorded in the Office of Deeds & Mortgages on 18 March 1987. The Licence in itself is a unilateral document of the Government.

25. In the circumstances, Mr Dowding submitted that it could throw no useful light on the issue of interpretation. He also made submissions concerning inconsistencies between the wording of the Licence and the two letters, on the one hand, and the Lease on the other, to which the Board will refer below, after setting out the relevant terms of the Lease.

The Lease

26. The Lease begins with a preamble of five paragraphs, lettered A to E, following the word "WHEREAS". Recital A states that the Government is the owner of the land

and agrees to lease the land for 50 years with an option to renew for a further 25 years "and subject to the terms and conditions hereinafter mentioned". Recital B states that the Lessee "will develop the land in accordance with a Development Program … set out in Schedule 6". Recital C states that the Lessee shall pay to the Government a Lease Rent of US$1,400,000 as provided in Schedule 2. Recital D is concerned with certain sales which may be made from the land.

27. Recital E states as follows:

> "E. THE LESSEE at the end of the first ten (10) year period of this Lease will be permitted by THE GOVERNMENT to purchase the then remainder of the land and buildings in Schedule 5 provided THE LESSEE has satisfactorily carried out the terms and conditions of this Lease including the Development Program for the sum of East Caribbean Currency TEN DOLLARS (EC$10.00) and THE GOVERNMENT will grant to THE LESSEE a licence under the Aliens (Landholding Regulation) Laws of Saint Lucia to hold as owner such lands and buildings."

28. The substantive terms of the Lease are then set out following the words "WITNESSETH AS FOLLOWS".

29. Clause 1 is a definitions clause. It defines "Development Program" in terms of the programme "set out in Schedule 6 as modified by this Lease and as updated from time to time by THE GOVERNMENT and THE LESSEE"; and defines "River Doree Holdings Limited Development" as "the project being undertaken by THE LESSEE and THE GOVERNMENT for the agricultural development of the lands in Schedule 5 …"

30. Clause 5 is concerned with the period of the Lease and the option to extend it for a further 25 years. It provides:

> "Unless terminated by THE GOVERNMENT pursuant to Sub-Clauses 9(1) or 9(4) this Lease shall be for a term of fifty (50) years commencing on the 24 October, 1986 and THE LESSEE shall have the option of renewing this Lease for a further period of twenty-five (25) years on making written application in the forty-ninth year to THE GOVERNMENT - all relevant terms and conditions of this Lease having been satisfactorily performed."

31. Clause 6 is concerned with the payment of the rent. It has been partly omitted in the copy of the Lease in the record, but concludes with the words "the basic rent as set

out in Schedule 2 hereof". Schedule 2 (which refers in its heading back to clause 6) provides that "The Basic rent is US$1,400,000" payable in eight instalments of which the first had been $125,000 (already paid on 24 October 1986) and seven more instalments were of $182,142.86 payable in each year starting with 15 October 1987 and concluding on 15 October 1993. Those eight instalments amount to $1,400,000.02. There was also provision for 10% interest per annum to be paid on the outstanding balance (in quarterly instalments throughout the year). In any event, it is common ground that the basic rent had been paid in full, and early, together with all interest due, by May 1989. It is also common ground that the basic rent equated to the purchase price of the land, so that, as will appear, the option to purchase the land only involved the nominal further payment of EC$10.

32. Clause 8 provides that the Lessee covenants that during the Lease it "will perform and observe the obligations set out in Schedule 3". Schedule 3 has three Parts, I, II and III. Part I is a further covenant to pay the basic rent. Part II contains a variety of covenants, of which the most significant is that set out in para 3 (inter alia "to submit to and comply at all times with the Development Program"), but others cover such matters as the maintenance of buildings, water tanks, sewers, drains, water courses, cables, pipes and wires, trenches, gullies, roadways and footpaths. Part III is concerned with obligations to supply water for and to maintain the irrigation system. Further provisions concerning the irrigation system are contained in clause 10.

33. The obligation to comply at all times with the Development Program, defined in clause 1 as the programme set out in Schedule 6, takes the reader to Schedule 6. That is a lengthy Schedule in which the programme's objects and implementation are spelled out in detail. For instance, acreage under cultivation for various types of fruit and other produce are projected for each year from 1987 to 1991. There might however be debate about what is aspirational and what is stipulated.

34. Clause 9 is a lengthy clause with 14 sub-clauses. Clause 9(1) permitted the Government to re-enter on the land and determine the Lease in the event of the basic rent being in arrears or breach of any of the obligations imposed by the Lease. Sub-clauses 9(9), (10), (11) and (12) are concerned with the option to purchase the land and need to be set out in full:

> "(9) At any time after the end of the tenth year of the term hereby created and prior to the expiration of such term THE LESSEE may give notice in writing to THE GOVERNMENT of its desire to purchase the absolute ownership of the lands and buildings then subject to this Lease in which event subject to sub-clauses (10), (11) and (12) below THE GOVERNMENT will forthwith execute in favour of THE LESSEE a Deed of Sale of the lands and buildings then subject to this Lease in a form to be settled by

> Lawyers for THE GOVERNMENT and THE LESSEE so as to be consistent with the obligations of THE LESSEE in this Lease and to enable restrictions and positive obligations for the benefit of the River Doree Holdings Limited Development to be imposed and enforced by THE GOVERNMENT and THE LESSEE.
>
> (10) THE LESSEE shall pay to THE GOVERNMENT EC$10.00 by way of the purchase price.
>
> (11) THE GOVERNMENT shall grant to THE LESSEE a Licence under the Aliens (Landholding Regulation) Laws free of charge for THE LESSEE to hold as owner the land and buildings then subject to this Lease and transferred in accordance with Sub-clauses (9) and (11) hereof. Such Licence to contain conditions designed to ensure that in so far as practical the Development Program, on pain of forfeiture of the said land and buildings, shall be carried out in accordance with its terms and this Lease.
>
> (12) THE LESSEE shall be liable only for the cost of registration of the Deed of Sale and Notarial fees. No other taxes, duties or fees shall be payable to THE GOVERNMENT."

35. In sum, so far as the option to purchase is concerned, the following matters may be observed. The only pre-conditions for the exercise of the option expressly set out in clause 9(9) are (i) the expiry of "the tenth year of the term hereby created", (ii) the service of a written notice on the Government, and (iii) the payment of EC$10 (under clause 9(10), to which clause 9(9) is expressly made subject). The option may be exercised "at any time" after the end of the tenth year of the term. There is no express provision requiring the payment of the basic rent of US$1.4m (plus interest), but if it had not been paid in full in accordance with clauses 6 and 8 and Schedules 2 and 3 (Part I), ie within seven years at the outside, then clause 9(1) would fully protect the Government by entitling it to determine the Lease. Therefore, in practice, River Dorée could not exercise its option to purchase without paying the basic rent. As for compliance with the Development Program, there is no express proviso in clause 9(9) requiring such compliance as a condition of the ability to exercise the option to buy, but the Government is protected in two ways: as long as River Dorée is a lessee, it runs the risk that non-compliance will render it liable to lose its Lease under the provisions of clause 9(1); and after the option to buy is exercised, when River Dorée is an owner, it continues to run the risk that non-compliance will render it liable to forfeiture of the land under the conditions of the Licence which clause 9(11) mandates.

36. These express provisions of the substantive clauses of the Lease may be contrasted with the wording of recital E. Thus, first, there is no express language of option at all. Secondly, there is no express requirement for any written notice on the part of River Dorée. Thirdly, although at most some request on the part of River Dorée might be implied, subject to that the powers seem to rest in the Government, for the language of the recital is that River Dorée "will be permitted by THE GOVERNMENT to purchase". It is unclear, however, what if any obligation on the Government is suggested or embraced by such language. Fourthly, it is an express proviso of such permission that River Dorée "has satisfactorily carried out the terms and conditions of this Lease including the Development Program". That express proviso is not found in clause 9(9) (or in sub-clauses (10), (11) and (12)). Fifthly, that express proviso goes well beyond a requirement of compliance with the Development Program and extends to all "the terms and conditions of the Lease". Sixthly, whatever is to happen is to do so only "at the end of the first ten (10) year period of the Lease". This suggests that, whether the trigger is a request from River Dorée or an initiative from the Government, what happens is to happen within a reasonable time of the end of those ten years, whereas under clause 9(9) the option can be exercised "at any time" over at least the next 40 years.

37. The terms of recital E and clause 9(9) may also, if necessary, be contrasted with the terms of the letters from the permanent secretary dated 20 June 1986 and from the Prime Minister dated 24 June 1986, and of the Licence dated 12 January 1987. Thus, the language of the first letter speaks of "after ten (10) years of the lease", which is not clear as to when the ten years commence and end or for how long the opportunity is to last; moreover there is no reference to an option to buy being given to River Dorée, rather the letter states that "Government will sell the property"; and there is no mention of recital E's reference to the proviso of compliance with terms and conditions of a lease outside a development programme, and the language "if … (the Danes) have developed the property" suggests an uncertain relationship between development and the Government's sale of the property. As for the letter dated 24 June 1986, that speaks of "after a period of ten years", introduces the concept of an "option to purchase", requires that the lessee "carry out an agreed development programme", which suggests the need for its completion, but again says nothing about requiring compliance with all the terms and conditions of a lease as a pre-condition to the exercise of the option. As for the Licence, that again does not speak of an option to purchase, but states that the Government "will sell" the land "after ten years of the lease" if at that time (whatever it might be) the Lessee "has complied" with the obligation set out in the Licence to "develop the property", but again without reference to the need for compliance with all other terms and conditions of the Lease.

The submissions

38. On behalf of the Government, Mr Guthrie submits that the construction of the Lease found by Master Cottle and Georges J is correct, and that the Court of Appeal

was in error. In particular he submits that it is important to approach the question of construction against the background to the creation of the Lease, which he contends is to be found in the letters from the permanent secretary dated 20 June 1986 and from the Prime Minister dated 24 June 1986, as well as in the Licence dated 12 January 1987, cited above. In this connection he prays in aid the evidence of Mr Soeren Hofdahl, who took part in initial discussions with the Government, was involved in instructing Faelleseje's attorneys, McNamara & Co, executed the Lease on behalf of River Dorée, of which he was a director and shareholder, and was the manager of the Farm on the land, and a principal witness for River Dorée at trial. Thus Mr Guthrie notes that Mr Hofdahl said in his witness statement and in his evidence at trial that, although Faelleseje had wanted to purchase the land outright, the Government wanted to control development. Mr Guthrie also relies on the facts given in evidence by Mr Hofdahl that McNamara & Co had submitted a draft of the Lease to the Government; and that he linked Lease and Licence ("I signed the lease document on 20 February 1987 … the Licence having been issued on 12 January 1987": para 3.1 of his witness statement).

39. In this connection, Mr Guthrie submits that Georges J was right to rely on such background facts, and cites the statement of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912H that -

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

40. Mr Guthrie also repeats submissions made to the Court of Appeal in reliance on St Lucia's hybrid legal system whereby it retains features and content of the civil law in its Civil Code, closely based on the Quebec Civil Code: see *Prospere (nee Madore) v Prospere* [2007] UKPC 2, at paras 13ff and *Commonwealth Caribbean Law and Legal Systems*, by Rose-Marie Belle Antoine, 2nd ed (2008), at 63-72. In particular, he relies on a provision in St Lucia's Civil Code concerning the interpretation of contracts at article 945, and a further provision concerning evidence at article 1141.

41. Article 945 provides as follows:

> "When the meaning of any part of a contract is doubtful, its interpretation is to be sought rather through the common intent of the parties than from a literal construction of the words."

42. Article 1141 provides:

> "An authentic writing is complete proof between the parties to it and their heirs and legal representatives.
>
> 1. Of the obligation expressed in it;
>
> 2. Of what is expressed in it by way of recital, if the recital have a direct reference to the obligation or to the subject of the instrument. If the recital be foreign to such obligation and to the subject of the instrument, it can serve only as a commencement of proof."

43. In sum, Mr Guthrie submits that when recital E is read together with clause 9(9), against the background of the letters and the Licence, the proviso of recital E concerning satisfactory performance of the Development Program has to be read into clause 9(9). In any event, article 945, to which the Court of Appeal did not refer, relieves the court of pursuing a literal construction of the words of clause 9(9), and article 1141(2) justifies paying as much regard at least to the words of the recital as to clause 9(9). Both articles displace the common law learning to be derived from *Mackenzie v The Duke of Devonshire*.

44. On behalf of River Dorée, on the other hand, Mr Dowding submits that the Court of Appeal came to the right conclusion, for the right reasons. As for the St Lucia Civil Code, he refers to article 917A, under the heading of Book Third, Obligations, General Provisions, the general tenor of which is that the law of England prevails in St Lucia subject only to a conflict between that law and the express provisions of the Code, in which case the provisions of the Code shall prevail. In those circumstances, article 945 is irrelevant unless clause 9(9) is ambiguous (since article 945 begins "When the meaning of any part of a contract is doubtful …"), which clause 9(9) is not. In any event, article 945 is not inconsistent with the common law of England. As for article 1141, that is concerned not with interpretation but with evidence, and the Court of Appeal was right to say that article 1141(2) "constitutes a rule of evidence with regard to proof of the content of recitals in deeds and [is] not a rule of law that recitals are to control the construction of the operative part of deeds" (para 47).

45. As for the letters relied on by Mr Guthrie, they were inadmissible as being part of the negotiations between the parties (see Lord Hoffmann's third principle in *Investors Compensation Scheme* at 913B, re-affirmed by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101). And as for the Licence, that was a unilateral document of uncertain date and uncertain knowledge on the part of River Dorée as at the date of the Lease, and therefore of no utility. In any event,

letters and Licence were inconsistent each in their own way with the ultimate provisions of the Lease.

46. As for the Lease, therefore, clause 9(9) was clear and unambiguous. Its provisions could not be fitted with those of recital E, and, as the critical operative part of the lease, its provisions had to prevail.

Discussion and analysis

47. In the Board's opinion, the decision of the Court of Appeal is correct, and the submissions of Mr Dowding are to be preferred.

48. The Board is quite prepared to accept that a recital may in appropriate circumstances serve as background or as introduction informing or assisting the interpretation of a substantive provision in the Lease. But the two must at least be capable of being read consistently with each other, which is not the case here. Clause 9(9) is clear as to the conditions under which the option to purchase is to be exercised. No ambiguity can be created from a mere recital which cannot consistently be read together with the substantive and operative parts of the contract concerned. The Board has set out the inconsistencies between recital E and clause 9(9) above (at paras 35-36), and needs not repeat them. In the circumstances, preference has to be given to one or the other, and high authority dictates that in such circumstances preference must be given to a substantive provision over a recital.

49. Thus in *Mackenzie v The Duke of Devonshire* [1896] AC 400 a trust disposition referred in its narrative to "other heirs of entail" and in the dispositive portion of the deed to "heirs female". It was held that the narrative section could not control the operative part of the deed. Lord Halsbury LC said (at 405-406):

> "… it seems to me to be absolutely unarguable that the true meaning of those words, and the purposes of the trust so set forth, can be in any way controlled, qualified or modified by the initial statement of what the motive of the author of the deed was."

Lord Watson said (at 407):

> "The narrative words come to no more than this: 'My intention is to do' so and so, and you may add this, 'and I have accomplished that purpose by the provisions which follow.' In such a case the safer and only legitimate course is to look to the provisions which

> follow, and to read them according to their natural and just construction."

And Lord Davey said (at 408):

> "I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention."

50. So in the present case, recital E, quite apart from being inconsistent with clause 9(9) and thus unable to be read together with it, speaks of a future intention on the part of the Government in the language of permission ("will be permitted"), rather than in the language of contract. It is true that the language of the proviso (following the words "provided that") have more of the ring of contract about them, but they do no more than state what the Government will at some future time deem to be necessary to the exercise of their permission. As in *Mackenzie*, however, the operative and substantive terms of the contract set out in detail how these intentions will be arranged as a matter of contract between the parties. Thus, detailed provision is made for the earlier payment of the basic rent and thus what is in truth the price for the land (other than the nominal EC$10), together with provisions that if that price is not paid, the Government can determine the Lease. Moreover, detailed provision is made for the grant to River Dorée of an option to purchase and for the means by which that option is to be exercised, none of which can be found in recital E. And, most importantly for the issue in this appeal, detailed provision is made concerning the protection which is to be given to the Government concerning the satisfactory performance of the contract by River Dorée, both *before* and *after* the exercise of the option. Thus, if before the option is exercised, when River Dorée is a mere lessee, it commits any breach of the Lease, the Government can re-enter and determine the Lease. Moreover, if after the option is exercised, River Dorée fails to carry out the Development Program "in accordance with its terms and this Lease", then again the Government will be in a position to exercise a new right to forfeiture of the land, despite the sale to River Dorée, by reason of the terms to be included in the Deed of Sale and the Licence under the Aliens (Landholding Regulation) Laws: see sub-clauses 9(9) and (11).

51. It is not for any court or for this Board, following English law, to remake the contract of the parties under the guise of interpretation. It is common ground that the most modern restatement of the principles of contractual interpretation is to be found in the recent cases in the Supreme Court of *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] 2 WLR 1095. It is settled doctrine that negotiations are not admissible for the purpose of interpretation: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101. The Board therefore agrees with Mr Dowding's submission that the permanent secretary's letter

dated 20 June 1986 and the Prime Minister's letter dated 24 June 1986 are not admissible for the purpose of construing the Lease. They represent part of the negotiations of the parties towards their Lease, preceded by Faelleseje's still earlier proposal of an outright purchase (see, for instance, Georges J's account of such negotiations at paras 48-49 of his judgment).

52. But even if account were to be taken of such letters, they represent but a stage in the negotiations a full eight or so months before execution of the Lease. It is clear from the ultimate terms of the Lease that the parties in the end agreed that the best way of achieving the Government's ambition of supervising River Dorée's performance of the Development Program was not to make it a specific condition of the exercise of the option to purchase, but rather to make its satisfactory performance a condition at all times of the continuing security of River Dorée's position as either Lessee or owner of the land. It is entirely understandable that, with that power over River Dorée's tenure of the land, it was unnecessary to introduce the question of satisfactory performance of the Development Program into the exercise of the option to buy.

53. As for the Licence, this is not a document of negotiation and thus is not rendered inadmissible. Nevertheless, it is a merely unilateral document, and because it has never been relied upon by the Government prior to this appeal it is not known when it was made, nor when it came to the knowledge of River Dorée or its lawyers. Prima facie it was made on 12 January 1987 and thus before the Lease, but there is the oddity that it refers in its Second Schedule to the Lease and its date of 20 February 1987. In the circumstances the mere reference to the Licence, or to its apparent date, by Mr Hofdahl in his witness statement is of no significance. The matter was never in issue. In sum, the Licence does not assist the Government in its submissions.

54. Considerations such as these are, in the Board's opinion, further confirmed by one other aspect of the contrast between recital E and the substantive provisions of the Lease. Thus, the Lease contains two options, one to purchase the land, and the other to extend the original 50-year tenure for a further 25 years. The former option is dealt with in clause 9(9). The latter option is dealt with in clause 5. It is striking that the clause 5 option is expressly subject to the condition that "all relevant terms and conditions of this Lease having been satisfactorily performed". The absence of the same condition from clause 9(9) is striking.

55. In this connection, it is also significant that there is no claim for rectification, as there might have been if there had been good evidence available that the interpretation which the Government seeks to impose on the Lease had in fact been the prior agreement of the parties during negotiations and that such agreement had been in existence down to the execution of the Lease. Therefore nothing can be ascribed to a prior agreement which had by mistake been omitted from the terms of the Lease. Nor has any submission been addressed relating to any form of implied term.

56. There remains the Government's submission, made to but rejected by the Court of Appeal, that the terms of the Civil Code of St Lucia make a critical difference.

57. First, Mr Guthrie relies on article 945. That is the first of a small series of articles concerned with "The interpretation of contracts", to be found in section III of Chapter Sixth, headed "Contracts", in Book Third of the Code, a Book headed "Obligations". Most of the articles on interpretation introduced by article 945 are concerned with cases of doubt or ambiguity. Article 945 itself, the only article on interpretation relied on by Mr Guthrie, can conveniently be cited here again:

> "When the meaning of any part of a contract is doubtful, its interpretation is to be sought rather through the common intent of the parties than from a literal construction of the words."

Apart from its opening words "When the meaning of any part of a contract is doubtful", this article appears to owe its origin, at least indirectly, to the well-known article 1156 of the Code Napoléon of 1804, which has influenced so many similar provisions of the codes of civil law nations, and which prior to its recent amendment in 2016[1] used to read (in translation) as follows:

> "[In agreements] it is necessary to search into the mutual intention of the contracting parties, rather than to stop at the literal sense of the terms."

58. This is not the place or time to debate whether the wording of article 945 of the Civil Code of St Lucia, in a case of doubtful meaning, is the same as article 1156 of the Code Napoléon, nor even whether the wording of either, with their emphasis on the common intent of the parties and the warning against pure literalism, is the same or differs from the modern restatement of the English law of contract interpretation. What, however, is well known is that in the civil law in France and elsewhere the mutual intent of the parties can be sought in documents and evidence which the common law does not permit, such as in subjective intentions or negotiations: see *Chartbrook* at paras 39-42 per Lord Hoffmann.

59. This difference between English law and the civil law approach to contract interpretation is potentially relevant in the light of the overriding terms of article 917A of the Civil Code of St Lucia, which is to be found under the heading of "General

[1] On 11 February 2016, the French Ordinance No 2016-131 amended inter alia article 1156 of the French Civil Code (1804), with effect from 1 October 2016.

Provisions" at the beginning of the Code's Book Third, on Obligations. Article 917A reads as follows:

> (1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to this Colony, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris".
>
> (2) Paragraph (1) of this article shall not be construed as affecting the provisions of the Ninth Chapter of this Book (which relate to Proof of Obligations), or as affecting the provisions of the Fifth to Sixteenth Books of this Part or of any other statute relating to specific contracts save as in so far as the general rules relating to contracts are applicable to such contracts.
>
> (3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail.

60. It follows that the English common law principles of contract interpretation prevail save to the extent that they may find themselves ousted by the express provisions of the Code, and thus, in terms of the current issue, save to the extent that they may find themselves ousted by the express terms of article 945. However, article 945 can only apply "When the meaning of any part of a contract is doubtful". That does not apply here. The meaning of clause 9(9) is not doubtful, even when account is taken of recital E. An ambiguity cannot be created by reference to a recital which is inconsistent with a clear substantive part of a contract and thus cannot control that substantive part. Neither Master Cottle nor Georges J supported their conclusion with any reasoning which can bring this case within article 945. Indeed, the two reasons they gave have not been relied on by Mr Guthrie. Nor has Mr Guthrie been able to substitute for those reasons anything new which disturbs the clear provision of clause 9(9) or its clear inconsistency with recital E. Nothing therefore turns on article 945.

61. The other article of the St Lucia Code on which Mr Guthrie has relied is article 1141(2). However, the Board agrees with the Court of Appeal that this article is concerned with evidence concerning the proof of the contents of recitals, not with contract interpretation. It falls within Chapter Ninth of Book Third, a chapter headed "Proof". Article 1141 falls within Section I of that chapter, headed "General Provisions".

62. An argument was raised in the Court of Appeal that the Government was not permitted to bind itself to provide to River Dorée an aliens licence by the provision in the Lease for the future exercise of River Dorée's option. That argument, although formally raised again by the Government in its grounds of appeal, was not pursued.

Conclusion

63. In sum, the Board will humbly advise Her Majesty, in agreement with the Court of Appeal, that River Dorée was entitled to exercise its option to purchase the land, and that this appeal should accordingly be dismissed and the order of the Court of Appeal remain as pronounced by it. The parties will have 21 days from the handing down of this judgment to make any submissions in writing on costs, which should, prima facie, be paid by the Government.