

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA
IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2023/0043

BETWEEN:

THE BARBUDA COUNCIL

Claimant

and

PLH (BARBUDA) LTD.

Defendant

Appearances:

Ms. E. Ann Henry KC with her Mr. Lenworth Johnson for the Claimant

Mr. Anthony Astaphan SC with him Dr Errol Cort and Ms. Clanisha Gomes for the Defendant

2024: July 2nd

September 26th

JUDGMENT

- [1] **BYER, J.:** As development continues and expands on the idyllic island of Barbuda, so does the plethora of litigation. This matter before this court is just one of the matters that have detained the court in recent years from the often time unhappy consequences of development.
- [2] This claim is for breach of a lease agreement dated the 22nd February 2017 made between the Claimant, the Governor General (representing the Government of Antigua and Barbuda) and the Defendant for 425 acres of land in Barbuda for a period of 99 years (425 lease).
- [3] The claimant alleged that the defendant has failed and/or refused to pay the rent reserved under the 425 lease in the sum of USD\$150,000.00 per annum from the date of signing to the date of claim.¹
- [4] The defendant does not deny that the sums have not been paid but denies that they are liable to make any such payment under the provisions of the 425 lease having made provision for the payment of the sum of USD\$5,000.000.00 into an escrow account (escrow sum) for the construction of an airport and for the set off of all rental sums and any other sums due to the Government by the defendant.

¹ A period of 6 years to a total of USD \$900,000.00

- [5] The sole issue therefore for the court to determine is whether the claimants are entitled to the sums as claimed as arrears of rental income. In determining this issue, it was abundantly clear to the court that it would require the court to make a determination as to the proper interpretation to be given to the 425 lease.

Claimant's submissions

- [6] In summary, the submissions of the claimant are that there is only one relevant document which the court must consider when determining whether the defendant owes the sums as claimed. The 425 lease which clearly makes provision for the payment of the annual rental sum to the claimant.
- [7] The claimant contends that the words of the provision for the payment of the rental sum are clear and unequivocal. In those circumstances, the court must be guided by the authorities that the words of the clause to be interpreted must be done by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.²
- [8] Therefore once the court does so and considers that there was no ambiguity and that unlike the lease entered into by the same parties for an additional parcel of 174.83 acres(174 lease) that made specific mention of the payment of those rental sums being deducted from the escrow sum, the 425 lease made no such provision and as such all sums were immediately due and payable to the claimant.

The Defendant's submissions

- [9] On the contrary, the defendant contends that the 425 lease cannot be read in isolation. That in considering its provisions, the court has to be aware that the terms of the 425 lease made specific reference to a Memorandum of Agreement (MOA) entered into on the 6th December 2016 between the claimant, the defendant and the Government of Antigua and Barbuda setting the focus of the development to be undertaken by the defendant on Barbuda.
- [10] It is the contention of the defendant that the 425 lease having incorporated the terms of the MOA by specific reference and whereby the MOA made provision for the payment of rental sums by way of deductions from the escrow amount, it mattered not that there was no specific reference to that manner of payment in the 425 lease but that the two documents cannot be read independently. Further, the defendant submitted that in any event, the 425 leases having stated that if there was any

² **Chartbrook Ltd v Persimmon Homes Ltd** [2009] 1AC 1101 per Lord Hoffman

conflict between the covenants in the 425 lease and the MOA that the MOA would prevail and that it was a clear conflict that the 425 made provision for direct payment when the MOA made provision for set-off arrangements, as such the MOA's terms must stand and the provision for set-off must operate. There is therefore no monies due and owing to the claimant.

Court's consideration and analysis

- [11] As a preliminary matter, this court wishes to state clearly that it does not consider that the evidence led in this matter was of any assistance to the court in the analysis that has to be undertaken by the court in this matter. Apart from the documentary evidence, the three witnesses for the claimant and the one witness who attended for the defendant³, it was clear upon cross-examination of all the witnesses that none of them were party to the negotiations of the MOA, the 425 lease or the 174 lease.
- [12] Rather, the witnesses for the claimant Trevor Walker and Wayde Burton were members of the Barbuda Council who reviewed the documents after negotiations were concluded. In any event, it is clear that "evidence of negotiations or of the parties' intentions and a fortiori of [one party's] intentions ought not to be received and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract including evidence of the "genesis' and objectively the "aim" of the transaction."⁴
- [13] Not one witness presented to the court was able to provide either the genesis or the aim of the transaction. Thus, this court is left with the most important aid, the terms of the document itself. That is, this court must ascertain the objective meaning of the language which the parties chose to use⁵ in the 425 lease, but it is clear that the 425 lease cannot be considered alone but must be read with the document that is expressly incorporated within its terms the MOA.
- [14] There are therefore several provisions that this court must consider and take into account to determine what in fact was the objective meaning of the language. We first start with the clause A.1

This clause is entitled Demise Term, Rent :

"The lessor in consideration of the rents to be paid hereunderhereby demises unto the lessee ALL THAT piece or parcel of land situated at Barbuda located on Low Bay and

³ The defendant originally had another witness Ickford Roberts the Accountant General of Antigua and Barbuda but he did not attend at trial and the witness statement is disregarded in its entirety

⁴ **Prenn v Simmonds** [1971] 1 WLR 1381 per Lord Wilberforce. ; **Chartbrook** Supra at paragraph 38

⁵ **Kier Construction Limited v Sundry Workers and anr** ANUHCVP2022/0009 per Price Findlay JA

Pink Sands being in total 425 acres....UNTO the lessee from the effective date of the lease for the term of ninety-nine (99) years (the initial term) paying therefore during the said term the sum of One Hundred and Fifty Thousand United States Dollars (US\$150,000.00) per annum”

- [15] It is the terms of this clause that provide for the basis of the claim of the claimants. Their case is that this clause is unambiguous and clear that the defendant as lessee was mandated unconditionally to pay the rent reserved as stated. However, this court finds that this contention is faulty.
- [16] When the court considers two further clauses in the 425 lease it is also clear that this lease incorporated by specific reference to other documents, namely the MOA. By clause A.2 the 425 lease states that the covenants of the lessee which include the covenant to pay rent are made subject to the and include those contained in the MOA which shall be “incorporated herein and made part of the lease. Where there is conflict between the terms of the Lease and the terms of the MOA the terms of the MOA shall prevail. Secondly, by Section B.2 it is categorically stated that “this lease together with the MOA represents the entire agreement among the parties hereto with respect to the transactions contemplated hereby and supersedes all other prior agreements, whether oral or written, express or implied.”
- [17] So without more, it is clear to this court that the MOA and the 425 lease must be read as one document. If that is so, it therefore then means that the provisions of the MOA must be read as being applicable to the 425 lease and in particular this court accepts that the reference in the MOA to property and the payment of monies that became the escrow amount⁶.
- [18] In that regard, Section 1.1 (a) of the MOA sets out the following:

“(a) The Property as such term is used in this Agreement includes (i) all of the parcels of land approximately net of setbacks **425 (subject to survey) acres more or less**(ii) any additional parcels of land ...acquired or leased from time to time ...by the Developer incorporated into or utilized with respect to the Project **shall be subject to the terms and conditions of this Agreement** and to the extent approved by Government ...” (my emphasis)

⁶ Created by the Airport Escrow Agreement for Payment dated the 22nd February 2017

- [19] From this clause, it was therefore clear that even before the 425 lease was executed, the parties at the very minimum had identified that parcel of land and that any lease that was seen to be executed in the future were made expressly subject to the terms of the MOA. Thereafter the terms of the MOA proceeded to deal with the further intention of the parties as to how the development with the defendant would be governed including the funding of the airport that fell to be considered as integral to the success of the development project. By clause 5.8 of the MOA which among other things provided for the “(ii) the Developer [to] deposit in the Global Bank of Commerce US\$5,000,000.00 contribution towards the airport construction budget ...and **said US\$5,000,000.00 shall be credited to Developer as pre payment of rent due under the Lease with respect to the Development property...**” (my emphasis)
- [20] The court pauses here for a moment to consider this statement which seemed to have been lost on the claimants in their arguments. At the time of the MOA in December 2016, the 425 lease was not signed but it was certainly contemplated by the said terms of the MOA by reference to 425 acres to be called “the development property.” It was in February 2017 that the 425 lease and additional land(also considered by the MOA) forming the subject of the 174 lease came into effect.
- [21] On the face of it, there, therefore, seems to be a conflict as to the MOA and the use of the US\$5,000,000.00 and the seemingly clear wording of the payment of the money in the 425 lease. This is especially glaring when the court considering the 174 lease under section A.1 notes that the rent payable was stated specifically to be payable as to set off against the escrow sum.
- [22] So in summary, the court is faced with this: a) the 425 lease makes no mention of how the rent reserved is to be paid; b) the 425 lease expressly incorporates the terms of the MOA to make it as the entire agreement and where there is any conflict with the covenants the MOA is to prevail; c) the escrow sum is to be used as pre-payment for rental sums under the terms of the MOA and expressly under the 174 lease and d) the escrow sum has been paid by the defendant and sums have been debited against it by the defendant.
- [23] In considering the exercise to be undertaken, this court is cognizant of all the authorities referred to by the claimants as to what is required in commercial contractual interpretation and the court agrees that all of those tenets are indeed settled and nowhere more so than the case of **Wood v Capita Insurance**.⁷ There the court recognized that previous authorities established that the court must have

⁷ [2017] UKSC 24

regard to both the language used and the commercial context in which it was drafted in ascertaining the objective meaning of the words in question. The extent to which each is used will vary according to the circumstances.⁸

[24] However, what all of those cases dealt with was an interpretation of contractual clauses where there was ambiguity in the clause that needed to be determined. In the case at bar, like the parties in the case of **Kenneth Krys and Anr v New World and ors**⁹ each side considers that their interpretation is the correct one. Periera CJ determined in that case that “where the parties have used unambiguous language, the court must apply it. A court can only consider the commercial purpose where the language is ambiguous. Further, a court is only justified in departing from the plain meaning of words if it leads to an absurdity – that is where the court is satisfied that a mistake has been made and is satisfied as to what has to be done to correct it.” Thus the less clear the words the more ready will the court be to depart from the natural meaning. “ However that does not justify the court embarking on an exercise of searching for let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning.”¹⁰

[25] In this court’s mind, it is clear that the court cannot, however much it may appear to be tempting, to read the 425 lease in isolation. It is clear to the court that the terms of the 425 lease incorporated the terms of the MOA and the covenants and agreements therein, of which the obligation to pay rent is one. There is a definite conflict between what appears to be the terms of the 425 lease regarding the payment of the rent while the MOA speaks to the ability of the defendant to offset such payments from the escrow sum. The resolution of that conflict is provided for by the very terms of the document. This court must look at the MOA and what is stated therein. This is even more solidified when one considers the document that governed the deposit of the escrow sum which was also executed on the same day as the 425 lease and the 174 lease.

[26] By section 5 of the Airport Escrow Agreement, it is clearly stated that the escrow sum “ shall constitute all the monies the Government shall ever ask the Developer to pay towards the construction of the airport. Furthermore, the parties hereto agree and acknowledge that any funds disbursed to the Government pursuant to this Agreement shall be credited to the Developer as pre-paid rent **credited against any other sums that may be due from Developer to Government.**” (my emphasis)

⁸ Per Burgess JCCJ **Blairmont Rice Investment Incorporated v Kayman Sankar Investments and ors** 2021 CCJ 7 (AJ) GY at paragraph 70 and 71

⁹ BVIHCMAP2013/0017

¹⁰ **Arnold v Britton** [2015] UKSC 36

- [27] In this court's mind, this also stands in direct contrast to the interpretation sought by the claimants, who this court notes were a party to the 425 lease and the 174 lease. Indeed in hindsight, the claimants must realise that the terms they agreed to may not be perceived as fair or reasonable but this court must bear in mind that "it should be astute not to depart from the plain and ordinary meaning of the words used merely because it conflicts with the court's own notion of commercial purpose or business common sense."¹¹
- [28] Neuberger LJ in **Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Limited**¹² put it this way, "the contract will contain the words the parties have chosen to use in order to identify their contractual right and obligations. At least between them, they have control over the words they use and what they agree and in that respect, the words of the written contract are different from the surrounding circumstances or commercial common sense which the parties cannot control, at least to the same extent....[22] Judges are not always the most commercially -minded let alone the most commercially experienced of people and should I think avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood."
- [29] Taking that sage advice into consideration, this court can do no better than to say, the words being unambiguous, that the court will not re-write the bargain¹³. The court is therefore satisfied that the 425 lease was expressly made subject to the use of the escrow sum as incorporated with the MOA and as such the rental sums due were to be set off as against the escrow sum and have been so set off.

Order of the court:

1. The claim is dismissed in its entirety with Prescribed costs to the defendant on the sum as claimed pursuant to Part 65 CPR 2023



Nicola Byer
High Court Judge

By The Court

Registrar

¹¹ **Kenneth Krys** supra at paragraph 29

¹² [2006]EWCA Civ 1732

¹³ **Kenneth Krys** supra