Michaelmas Term
[2022] UKPC 40
Privy Council Appeal No 0075 of 2021

JUDGMENT

CMK BWI Ltd and 7 others (Appellants) *v* Attorney General of the Turks and Caicos Islands (on behalf of the Crown and Government of the Turks and Caicos Islands) (Respondent) (Turks and Caicos Islands)

From the Court of Appeal (Turks and Caicos Islands)

before

LORD BRIGGS
LORD KITCHIN
LORD LEGGATT
LORD BURROWS
DAME SARAH ASPLIN

JUDGMENT GIVEN ON
3 November 2022

Heard on 11 July 2022

Appellant
Ariel Misick KC
Deborah John-Woodruffe
(Instructed by Deborah John-Woodruffe)

Respondent
Helen Mountfield KC
Katy Sheridan
(Instructed by Charles Russell Speechlys LLP (London))

DAME SARAH ASPLIN (with whom Lord Briggs, Lord Kitchin, Lord Leggatt and Lord Burrows agree):

1. This appeal is concerned with whether the Crown Land Ordinance 2012 (the "CLO") precluded the Turks and Caicos Islands Government ("TCIG") from granting a lease of certain parcels of Crown land in South Caicos to the Appellants (together referred to as the "Developers") pursuant to an agreement dated 18 April 2008, made between the Developers and TCIG (the "2008 Agreement"), which was subsequently re-stated in an "Amended and Re-stated Development Agreement" dated 19 August 2013 (the "2013 Agreement").

Background

2. Under the 2008 Agreement the Developers agreed to carry out a US $100 million development of South Caicos which included the construction of a hotel, a condominium, a residential development project and a marina development at South Caicos and McCartney Cay. The proposed works included what was defined as "Downtown Restoration", being the restoration of certain Crown holdings in downtown Cockburn Harbour, South Caicos, and "Island Improvements", being the improvement of certain areas of Crown land and public areas of South Caicos. The 2008 Agreement provided, amongst other things, that in consideration of the Island Improvements, the Crown would grant a commercial lease of certain parcels of Crown land at a peppercorn rent, in the form contained in a schedule to the 2008 Agreement (the "Downtown Restoration Parcels Lease") on the delivery of satisfactory proof of the Developer's expenditure of not less than US $2 million on the Island Improvements. It was envisaged that the Island Improvements would be carried out at a maximum total cost of US $4 million which would be shared equally by the Developers and TCIG.

3. In or around 2010, the Developers claimed that TCIG had breached the 2008 Agreement and TCIG claimed that it had grounds for rescission. By that stage, the Developers had expended US $647,999.99 on the Island Improvements. The dispute included allegations in relation to the sale of land known as the Valhalla Parcel, which is not directly relevant for these purposes. The dispute was settled by a Deed of Settlement dated 19 August 2013. By clause 2 of that deed, the parties agreed to enter into the 2013 Agreement which was executed on the same date.

4. Under the 2013 Agreement, amongst other things, the Island Improvements ceased to be a mandatory part of the South Caicos development (clauses 1.1.22 and 4.13.1 and 4.13.2) and the provisions in relation to the grant of the Downtown Restoration Parcels Lease were altered. As soon as practicable after the Developers

had notified TCIG of their intention to commence the Downtown Restoration or portions of it, TCIG was required to use its best efforts to vacate the Downtown Restoration Parcels and, once that had taken place, the parties were required promptly to finalise and execute the Downtown Restoration Parcels Lease (clauses 4.14.1 and 4.14.2). The terms of the Downtown Restoration Parcels Lease had also been changed and were contained in Schedule 4 to the 2013 Agreement. Notification was given on 20 August 2013, the day after the execution of the 2013 Agreement and TCIG was requested to execute the Downtown Restoration Parcels Lease.

5. In the meantime, the CLO had come into force on 1 April 2012. It sets out, amongst other things, the powers of TCIG in disposing of Crown land including, by way of lease, for commercial purposes. In January 2015, TCIG gave formal notice that it would not grant the Downtown Restoration Parcels Lease, stating that it was precluded from doing so by section 34 and Part B of Schedule 2 of the CLO which prevented it from entering into any lease unless it was at market rent, having followed the process prescribed by the CLO.

Proceedings below

6. The Developers commenced proceedings in July 2016. They sought various declarations including a declaration that the CLO did not have retrospective effect and that TCIG was in breach of contract by failing to grant the Downtown Restoration Parcels Lease and transferring the Valhalla Parcel. In the alternative, the Developers sought a declaration that, if the CLO did have retrospective effect, it violated their constitutional right against deprivation of property.

7. In the Supreme Court of the Turks and Caicos Islands, the Chief Justice, the Honourable Mrs Justice Ramsay-Hale, dismissed the Developers' claim with costs. She held that: it was clear that in executing the 2013 Agreement, the parties had intended to extinguish the 2008 Agreement; that the 2013 Agreement fell within the ambit of the CLO; and that, accordingly, TCIG was "unable to perform the contract as agreed" (para 43). In particular, she held that:

> (a) " . . . the variation in the terms of the original agreement terms which are set out in the 2013 DA were not temporary or minor but fundamental; a variation going to the root of the contract and imposing a new obligation on TCIG and conferring a new benefit on the Developers" (para 39);

(b) The right which the Developers were seeking to enforce was a new right arising under the 2013 Agreement which did not depend upon any terms of the 2008 Agreement (para 41);

(c) The terms of the 2013 Agreement requiring TCIG to grant the Downtown Restoration Parcels Lease were contrary to the terms of the CLO and unenforceable (para 42); and

(d) The Developers had no accrued right under the 2008 Agreement to the grant of the Downtown Restoration Parcels Lease at a peppercorn rent and therefore, there could be no breach of the Developers' constitutional rights (paras 65 and 66). Under the 2008 Agreement, they had a contractual right to call for the grant of such a lease if they spent US $2 million (para 66) and the rights under the 2013 Agreement were new and "at the time the right arose, the Developers no longer had any right to insist upon the Lease being executed on the original terms and TCIG no longer had the power to grant a Lease on such terms" (para 67).

8. The Developers appealed to the Court of Appeal of the Turks and Caicos Islands. Despite deciding that the 2008 Agreement was varied by the 2013 Agreement rather than having been rescinded, the Court of Appeal affirmed the judge's decision and dismissed the appeal. In summary, Adderley JA, with whom Stollmeyer JA and Sir Elliott Mottley P (who demitted office before judgment was given) agreed, held that:

(a) The judge was wrong to decide that the variation of the terms concerning the grant of the Downtown Restoration Parcels Lease went to the root of the 2008 Agreement and made it manifest that there was an intention to abrogate that agreement. On the evidence and surrounding circumstances, it could not be said that there had been a fundamental change which indicated rescission of the whole of the 2008 Agreement but that there was a fundamental change to the provisions concerning the grant of the Downtown Restoration Parcels Lease only (para 54);

(b) Applying the correct test, the judge was in error to find that the 2008 Agreement had been rescinded by the 2013 Agreement (para 58);

(c) The only legitimate expectation which could arise from the 2008 Agreement in relation to the Downtown Restoration Parcels Lease was that, if

US $2 million was spent on the Island Improvements, the Developers would be granted the lease (para 65);

(d) The judge was right to hold that "because the payment as a precondition of US$2 million had not been made under the 2008 Agreement a legitimate expectation to obtain the Downtown Restoration Lease at a peppercorn rent never vested, and by the time the right was given in the 2013 Agreement without such a precondition the CLO had already come into force thereby making it impossible for him to have a legitimate expectation to obtain such a lease because it was unlawful under the CLO." (para 66)

(e) Accordingly, no such legitimate expectation arose (para 67).

Identifying the Issues

9. In the agreed Statement of Facts and Issues, the parties identified the sole issue in the appeal to the Board to be whether the Court of Appeal was wrong to conclude that the expenditure of US $2 million by the Developers was a precondition to TCIG's obligation to execute the Downtown Restoration Parcels Lease. In their written argument, on behalf of the Developers, Mr Misick KC and Miss John-Woodruffe described the questions for the Board as: (i) did the 2008 Agreement impose an immediate binding obligation on TCIG to grant the Downtown Restoration Parcels Lease (albeit the performance of that obligation was not required to take place until the Developers had fulfilled their promise to provide reasonably satisfactory proof of its expenditure of US $2 million); and (ii) was TCIG's obligation to grant the Downtown Restoration Parcels Lease at a rent of US $1.00 affected by the enactment of the CLO?

10. Much of the written argument on behalf of both the Developers and TCIG, therefore, was centred upon whether: (i) an obligation to grant the Downtown Restoration Parcels Lease under the 2008 Agreement, and clause 4.14.4 of that agreement in particular, was conditional upon US $2 million having been expended by the Developers; or (ii) whether clause 4.14.4 contains promissory conditions creating mutual obligations. In the first case, the question was posed in terms of whether the expenditure was a condition precedent and therefore, no right to or agreement for the Downtown Restoration Parcels Lease arose before the CLO was enacted in 2012. In the second case, the question was cast in terms of whether the clause contains promissory conditions creating mutual obligations preceding the enactment of the CLO, the expenditure of US $2 million being merely a condition of performance of that existing obligation to grant the Downtown Restoration Parcels

Lease. If that were the case, it was said that the 2008 Agreement was the source of the obligation to grant the lease which was unaffected by the CLO.

11. In oral submissions it became clear, however, that as there is no appeal from the decision of the Court of Appeal of the Turks and Caicos Islands that the 2008 Agreement has not been rescinded, we are only concerned with whether the provisions in relation to the grant of the Downtown Restoration Parcels Lease contained in the 2013 Agreement were sufficiently different from those in the 2008 Agreement to be caught by the CLO. The real issues for the Board are, therefore, : (i) the proper interpretation and ambit of the CLO; and (ii) whether it applies to those amendments to the 2008 Agreement made by the 2013 Agreement.

Terms relating to the Downtown Restoration Parcels Lease

(i) 2008 Agreement

12. Before turning to the CLO itself, it is important to have a more detailed understanding of the provisions relating to the grant of the Downtown Restoration Parcels Lease. The relevant terms of the 2008 Agreement are contained in clause 4. They are as follows:

> "…
>
> **Island Improvements**
>
> 4.13.1 As soon as is practicable after the date of this agreement, the Developer shall apply for such approval under the Physical Planning Ordinance (if any) as may be necessary for the Island Improvements.
>
> 4.13.2 The Developer shall in consultation with the Government prepare an implementation plan setting out the aspects of the Island Improvements are to be carried out first and in what order the Island Improvements shall be effected.
>
> 4.13.3 The parties shall share the cost of the Island Improvements to a maximum total cost of $4 million of

which the Developer shall contribute $2 million and the Government $2 million.

4.13.4 The Developer shall, at the end of each calendar month, provide a written report to the Government detailing the proportion of the Island Improvements carried out during that month and the total cost thereof along with reasonably satisfactory proof of that expenditure. Within thirty days of its receipt of that report, the Government shall reimburse the Developer 50% of the funds thus expended by it. For the purposes of this Clause the Developer shall allow the Government's auditors access to its financial records relating to the Island Improvements, upon reasonable request and notice.

4.13.5 The Developer shall use commercially reasonable endeavours to ensure that as much of the Island Improvements as possible can be carried out within the total budget of $4 million.

4.13.6 The Developer shall be entitled to suspend works on the Island Improvements if and for so long as any payments due or claimed by it from the Government in the manner contemplated in this clause has not been paid within thirty days of a request therefor.

4.13.7 In no event shall the expenditure obligations of the Developer or the Government pursuant to this clause exceed US$2 million each. . . .

Downtown Restoration

4.14.1 As soon as is practicable after the date of this agreement, the Developer shall apply for such approval under the Physical Planning Ordinance (if any) as may be necessary for the Downtown Restoration.

4.14.2 The Developer shall in consultation with the Government prepare an implementation plan setting out

the aspects of the Downtown Restoration that are to be carried out first and in what order the Island Improvements shall be effected.

4.14.3 The Developer shall use commercially reasonable endeavours to ensure that the Downtown Restoration is completed within 12 months of the date of this agreement.

4.14.4 In consideration of the Island Improvements, the Crown shall grant the Developer (or to such Affiliate as it may nominate) within 15 days of the delivery by the Developer to the Crown of reasonably satisfactory proof of the Developer's expenditure of not less than US$2 Million dollars in the Island Improvements, the Downtown Restoration Parcels Lease. Pending such grant, the Crown shall not transfer, lease, charge, contract to sell or grant an option in, over or to the Downtown Restoration Parcels or any of them to or with any party other than the Developer."

13. Downtown Restoration was defined as "the restoration of certain Crown holdings in downtown Cockburn Harbour, South Caicos, substantially in accordance with the Downtown Restoration Exhibit" (clause 1.1.12); "Downtown Restoration Parcels" was a reference to four numbered parcels of land in South Caicos (clause 1.1.13); the "Downtown Restoration Parcels Lease" was defined as "a 49-year lease over the Downtown Restoration Parcels, at a peppercorn rent, in the terms of that at annexed at (sic) Schedule 4A for the purpose of operating portions of the Development" (clause 1.1.15); and "Island Improvements" were defined as the improvement of certain areas of Crown land and public areas of South Caicos substantially in accordance with the Island Improvements Exhibit. They included improvements around the airport, the historical district and its buildings, including the Commissioner's mansion and the downtown waterfront. The Island Improvement Phase was described in Schedule 2 to the 2008 Agreement as "The carrying out of agreed improvements on Crown land and public areas of South Caicos at the joint expense of the Developer and the Crown/Government at a maximum cost of $4 million of which $2 million shall be contributed by the Developer and $2 million by the Government. To be complete by end Phase Three."

14. It was agreed that the obligations of TCIG extended only as far it might lawfully agree (clause 1.10) and that in the event that a provision was held for any reason to be illegal, invalid or unenforceable, the parties would negotiate in good

faith and endeavour to agree a mutually satisfactory provision in substitution (clause 1.5).

(ii) 2013 Agreement

15. The recitals to the 2013 Agreement provided amongst other things that: ". . . Whilst the terms of the 2008 Development Agreement remain substantially unaltered, the parties have now agreed to a revised set of terms in respect of the Development" (recital 3) and that the parties wish to enter into "this Amended and Re-stated Development Agreement to record these updated terms" (recital 4).

16. "Downtown Restoration Parcels" were defined by reference to five numbered parcels of land, one of which had not been included in the definition in the 2008 Agreement (clause 1.1.15). The "Downtown Restoration Parcels Lease" was defined by reference to those five numbered parcels and the terms annexed to the 2013 Agreement at schedule 4 (clause 1.1.17). The most relevant terms for these purposes are that the intended term of the Downtown Restoration Parcels Lease was 999 years rather than 49 years under schedule 4A to the 2008 Agreement and it included the additional parcel of land to which I have referred. The peppercorn rent remained the same. The commencement date under the 2013 Agreement was defined as the date of the execution of the lease as it had been under the 2008 Agreement. As a matter of practicality, however, the actual commencement date under the 2013 Agreement was likely to be later than that under the 2008 Agreement.

17. "Island Improvements" were defined as the "potential improvement of certain areas of Crown land and public areas of South Caicos as contemplated in the Island Improvements Exhibit" (clause 1.1.22) and clauses 4.13 and 4.14 were in the following form:

> "**4.13 Island Improvements**
>
> 4.13.1 The Parties acknowledge that South Caicos would benefit from improvements consistent with those shown in the Island Improvements Exhibit. The Parties also acknowledge that Developer may but shall have no obligation to complete any portion of the Island Improvements and such Island Improvements will only be completed if financing for such Island Improvements can be arranged by Developer and shall be at the sole and

absolute discretion of the Developer, save and except that the Developer shall use its best efforts to complete the following aspects of the Island Improvements:

i. Restoration of key historic buildings downtown.

ii. The creation of a promenade along the waterfront in front of the Queens Parade Ground.

iii. Rebuilding of historic walls in Cockburn Town.

iv. Installation of new signage in various locations.

v. The planting and maintenance of mahogany trees (West Indian variety) from the airport to the cricket field.

vi. Implementation of a landscaping program to provide local residents with native landscaping options in order to enhance their yards as well as public spaces.

4.13.2 In the event Developer chooses to complete some or all of the Island Improvements through financing arranged through Developer, it will, in consultation with the Government, prepare an implementation plan setting out the aspects of the Island Improvements to be effected.

4.13.3 The Developer shall, upon written request from the Government, provide a written report to the Government detailing the portion of the Island Improvements carried out during the requested time period.

4.13.4 The Developer shall use commercially reasonable endeavours to complete those portions, if any, of Island Improvements for which construction has commenced hitherto. The Developer shall have no further obligation to the Government in relation to those works.

4.13.5 The Government acknowledges that the Developer has already spent not less than the sum of USD$647,995.99 on Island Improvements.

4.14 Downtown Restoration

4.14.1 As soon as is practicable after the Developer provides notice to Government of Developer's intention to commence the Downtown Restoration, or portions thereof, Government will use best efforts to vacate the Downtown Restoration Parcels, or portions thereof, and to make those parcels available to the Developer for the purposes of carrying out the Downtown Restoration or portions thereof.

4.14.2 Once the Government and the Developer have complied with paragraph 4.14.1 above, the parties will promptly finalize and execute the Downtown Restoration Parcels Lease in the form annexed hereto as Schedule 4. The Developer shall in consultation with the Government prepare an implementation plan setting out the aspects of the Downtown Restoration that are to be carried out. The Government and the Crown acknowledge that Developer's notice that it intends to commence the Downtown Restoration Stabilization (as defined in the Downtown Restoration Parcels Lease) shall be acceptable notice required under section 4.14.1 hereof and shall constitute a valid implementation plan. In the event Developer subsequently notifies Government of Developer's intention to commence additional work beyond the Downtown Restoration Stabilization, and at all times subject to Planning Permission, Government will use best efforts to permit such work under the Downtown Restoration Parcels Lease provided such work is substantially consistent with the Island Improvements Exhibit. For the avoidance of doubt, the Developer shall have no obligation to carry out Downtown Restoration over and above Downtown Restoration Stabilization. Any works it chooses to carry out beyond that shall be at its sole option and discretion.

> 4.14.3 The Developer shall use commercially reasonable endeavours to ensure that the approved Downtown Restoration, or portions thereof, is completed within 24 months of the date of approval of the relevant implementation plan with respect to that portion of the Downtown Restoration.
>
> 4.14.4 Pending such grant of the Downtown Restoration Parcels Lease, the Crown shall not transfer, lease, charge, contract to sell or grant an option in, over or to the Downtown Restoration Parcels or any of them to or with any party other than the Developer."

18. The 2013 Agreement contained identical terms in relation to legality as those in the 2008 Agreement (clauses 1.5 and 1.10).

(iii) The CLO

19. The CLO is entitled "An Ordinance to govern the Acquisition, Management and Disposal of Crown Lane pursuant to section 107 of the Constitution". Its commencement date is 1 April 2012. It is concerned with the responsibilities and powers of TCIG with respect to Crown land management in the Turks and Caicos Islands. Save for section 8 which is concerned with a review of the processes and procedures adopted in relation to the allocation of Crown land both before and after 1 April 2012, its provisions are not stated to have retrospective effect. As I have already explained, the issue in this case is whether, and if so, to what extent it affects the provisions relating to the Downtown Restoration Parcels Lease in the 2008 Agreement as varied by the 2013 Agreement.

20. The objects of the CLO are set out at section 4. They are "to ensure that Crown land is managed for the benefit of all the people of the Turks and Caicos Islands" (section 4(1)) and in particular, amongst other things, to provide for the principles applicable to the acquisition, management and disposal of Crown land (section 4(2)(a)) and the regulation of the procedures in accordance with which, and the conditions under which, Crown land may be disposed of (section 4(2)(c)).

21. So far as relevant for these purposes:

(a) section 5 of the CLO provides that for the purposes of the Ordinance, the principles of Crown land management, amongst other things, are that "the allocation of Crown land must be in accordance with prescribed procedures and due process"((1)(b)); and section 5(3) provides that Crown land should be "occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the Government and people of the Turks and Caicos Islands" consistent with the principles set out in section 5;

(b) section 7 is concerned with the vesting and disposal of Crown land and provides at section 7(2) that Crown land must not be disposed of unless the disposal is authorised by the Ordinance or any other ordinance dealing with Crown land;

(c) section 7(5) provides that sections 32 to 38 and Schedule 2 govern the procedure for allocation of Crown land; and

(d) subject to a number of exceptions which are not relevant here, section 9(1) provides that Crown land must only be disposed of at the open market value of the Crown's interest in the land.

22. For the purposes of the CLO "allocation" in relation to Crown land "means a decision to dispose of the land, whether by way of sale or lease of the land, or the grant of a licence, easement or other right over the land; . . ."; "'Crown land' means any right or interest in land or other immovable property within the Islands that vests in and may be lawfully granted or disposed of by Her Majesty in right of the Turks and Caicos Islands …"; and "'disposal' means a disposition of land, following an allocation of it, in accordance with section 108 of the Constitution; …" (section 2).

23. Section 33(6) provides that: "An application for a lease of land for commercial purposes must be in accordance with Part B of Schedule 2 and be accompanied by a viable business plan that demonstrates the intended use of the land in question, and the extent to which it will be utilised by the enterprise." Section 34 which is headed "Allocation of commercial land" provides where relevant as follows:

> "(1) Crown land suitable for commercial use may not be sold, but the Governor may dispose of an interest in or over such land by means of a long lease, a licence or an easement.

. . .

(4) The following rules apply to the leasing of Crown land commercial purposes –

(a) the allocation must be undertaken through a transparent, public competitive tendering process or by any other open competitive process the Governor from time to time determines;

(b) a commercial lease must include conditions about the type of development to take place on the land, and the timing of it;

(c) unless there are compelling reasons in the public interest, a lease for a commercial development must not include concessions such as fee reductions or immunity from future liabilities;

(d) every lease of land for commercial use must contain conditions that ensure the appropriate future commercial use of that land, and such conditions may include the provision of a performance bond.

. . . ”

24. Section 45(1) provides that “The basis of valuation for Crown land, whether residential or commercial, must always be the market value of the land in an arm’s length sale between a willing seller and a willing buyer” and section 46 provides that the price for any allocation of Crown land should be set at market value unless the CLO provides for a discount. Schedule 2 Part B sets out the process which is necessary for the grant of a commercial lease of Crown land.

Relevant legal principles

25. There is no dispute about the legal principles to be applied when interpreting the 2008 Agreement. The proper approach to contractual interpretation is that set out in *Arnold v Britton & Ors* [2015] AC 1619, [2015] UKSC 36 and *Wood v Capita*

Insurance Services Ltd [2017] AC 1173, [2017] UKSC 24. The principles are well known and do not require repetition here. It is also agreed that the question of whether a clause contains a condition precedent is merely a question of construction to which the usual principles apply.

26. The principles which apply to whether an agreement has been rescinded or varied are not directly relevant here because there is no appeal from the decision of the Court of Appeal of the Turks and Caicos Islands that the 2008 Agreement was not rescinded by the 2013 Agreement.

27. What are the principles which apply to the interpretation of the CLO? Although the parties did not allude to them in their written or oral submissions, the relevant principles of statutory interpretation are equally well known. The starting point is that the language of an enactment is to be taken to bear its ordinary meaning read in the general context of the Act or Ordinance as a whole: *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, at 396, recently endorsed by the Supreme Court in *R (on the application of the Project for the Registration Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 at paras 29 to 31. The Supreme Court held as follows:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the

> assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> 30. External aids to interpretation therefore must play a secondary role. . .
>
> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> > 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

28. Further, the modern approach to statutory interpretation is to have regard to the purpose of a particular provision and interpret its language as far as possible in a way which best gives effect to that purpose: *Rossendale BC v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 at para 10, *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at para 70 and *R v Luckhurst* [2022] UKSC 23, [2022] 1 WLR 3818 at para 23.

29. There is also a well-known general presumption that statutes are not to be held to have retrospective effect unless a clear intention that they should do so is manifested: *Colonial Sugar Refining Company Ltd v Irving* [1905] AC 369, 372-373 per Lord MacNaghten. Staughton LJ addressed the matter in a more nuanced way in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, at 724:

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

Lord Mustill addressed the question of fairness in relation to retrospectivity further in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, at 525:

> "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

30. All of these principles apply equally to the proper interpretation of the CLO.

Conclusions

(i) The nature of clause 4.14.4 in the 2008 Agreement

31. Although it is not determinative of the issues the Board has to decide, as the parties devoted so much of their written submissions to the proper construction of clause 4.14.4 of the 2008 Agreement, I should mention that the Board agrees with Mr Misick that, when it is construed in accordance with the 2008 Agreement as a whole, it did not contain a true condition precedent. It is clear from the natural and ordinary meaning of the words used when read in the context of the 2008 Agreement as a whole and clauses 4.13.3 - 4.13.7 in particular, that it contained an obligation to grant the Downtown Restoration Parcels Lease subject to providing proof of expenditure of US $2 million. That proof of expenditure was a condition of performance of TCIG's obligation to grant the lease and not of the very existence of the obligation itself.

32. That construction is consistent not only with the remainder of the provisions in relation to the Island Improvements, but also with the final sentence of clause 4.14.4 itself. That provides that pending the grant of the Downtown Restoration Parcels Lease, the Crown shall not otherwise dispose of or deal with the Downtown Restoration Parcels other than to the Developers. Such a provision is consistent with the creation of mutual obligations in the earlier part of the clause. It is also consistent with the obligation to carry out the Island Improvements which is apparent from: the requirement that the Developers contribute US $2 million (clause 4.13.3); provide a written report each calendar month detailing the proportion of the Island Improvements carried out (clause 4.13.4); and the ability of the Developers to suspend works on the Island Improvements if and for so long as any payments due or claimed from TCIG had not been paid within 30 days of request (clause 4.13.6).

33. The Board's conclusion that proof of US $2 million expenditure was a condition of performance of TCIG's obligation to grant the Downtown Restoration Parcels Lease and not of the very existence of the obligation itself, however, is not the key to the real issues in this case. The Developers did not spend US $2 million on the Island Improvements and the obligations were amended in 2013. It is necessary, therefore, to consider the nature of those amendments.

(ii) The effect of the 2013 Agreement

34. Before turning to the question of the proper interpretation and ambit of the CLO and whether it affects the obligations in relation to the Downtown Restoration

Parcels Lease, as amended, it is important to be clear about those amendments contained in the 2013 Agreement. Mr Misick submits that: despite the amendments in the 2013 Agreement, clause 4.14.4 of the 2008 Agreement contained mutual promises and remained the source of the obligations in relation to the Downtown Restoration Parcels Lease; the parties, who should be taken to have had the terms of the CLO in mind, cannot have intended to rescind the 2008 obligations and create new ones post-dating the CLO which would be caught by it; and as a result, the source of the obligation to grant the Downtown Restoration Parcels Lease pre-dated the CLO and remains enforceable. He also submits that the repetition of clause 1.10 in the 2013 Agreement is an irrelevance. It was not an amendment and merely had the effect that it was agreed that TCIG's obligations extended only as far it might have lawfully agreed in 2008. It did not render the variation of the 2008 Agreement after the commencement of the CLO unlawful.

35. Mr Misick accepts that the more drastic the changes to the terms of an agreement, the more likely it is that they give rise to new obligations and that if, for example, the consideration for the grant of a lease had been varied from US $10 million to $10,000 it would be likely that new obligations had been created. He contends, however, that the changes in this case did not constitute a rescission but rather constituted a mere variation which cannot have been intended to be caught by the CLO and that the source of the obligations remained the 2008 Agreement.

36. As to the source of the obligations, Mr Misick relied upon the decision of the High Court of Australia *in Commissioner of Taxation of the Commonwealth of Australia v Sara Lee Household and Body Care (Australia) Pty Ltd* [2000] HCA 35, 201 CLR 520 and upon *Sookraj v Samaroo* [2004] UKPC 50. In the *Sara Lee* case the issue was the identification of the year in which certain capital gains arose for the purposes of Part IIIA of the Income Tax Assessment Act 1936. The legislation provided that where the disposal took place under a contract, the time of the disposal for the purposes of the Act was taken to be the time of the making of the contract (section 160U(3)). The purchase and sale agreement had been entered into on 31 May 1991 at a purchase price of US $61,461,000. The contract was amended on 30 August 1991 to increase the purchase price to US $62,461,000 and to make a number of other alterations including a reduction in the number of employees to whom the buyer was obliged to offer employment and the reimbursement of certain redundancy payments. The price allocation schedule was also amended and restated in its entirety.

37. It was held that: the words "under a contract" in section 160U(3) directed attention to the source of the obligation to transfer the assets which constituted the relevant disposal for the purposes of the incidence of tax and from May until August 1991 that obligation remained the same and only the price and certain other terms

were changed, para 42; and where there are two or more contracts which affect the rights and obligations of the parties to a disposal of assets, the identification of the contract under which they were disposed of for the purposes of section 160U(3) required a judgment as to which contract was the source of the obligation to effect the disposal, para 49. It was held to be the original contract of May 1991.

38. In *Sookraj* there were two contracts between the vendor and Mr Samaroo relating to the sale of the same land. The first was dated 3 November 1980 and the second 23 February 1981. After the first contract, the vendor entered into another agreement with Mr Sookraj on 8 January 1981 to sell the same land. The Privy Council held that Mr Samaroo's second contract was a variation of the first and not a rescission. The matter was decided, therefore, on the basis of Mr Samaroo's prior equitable interest in the land. Lord Scott of Foscote addressed that matter in the following way:

> "15. . . . A purchaser who enters into a specifically enforceable contract for the sale of land acquires an equitable interest in the land and retains that interest for as long as the contract remains enforceable. On making pre-completion payments on account of the price the purchaser acquires also an equitable lien on the land to secure their repayment (subject to any set-offs and the possible forfeiture of the deposit) if the contract goes off. Mr Samaroo's equitable interest in the present case arose on 3 November 1980, the date of the agreement. Mr Sookraj acquired an equitable interest on 8 January 1981, the date of his agreement, and further equitable interests when he made payments on account of the purchase price payable under his agreement. But Mr Samaroo's equitable interest, being earlier in time, has priority over all these equitable interests of Mr Sookraj. . . ."

39. The Board does not find either of these authorities particularly helpful. The first turns upon the application of section 160U(3) of the relevant statute the terms of which require one to focus upon the source of the obligation to dispose of assets. There are no similar statutory provisions here. Furthermore, as Miss Mountford KC, who appeared with Miss Sheridan on behalf of TCIG, pointed out, in that case the obligation to transfer the assets remained the same. The question here is whether the amended terms relating to the Downtown Restoration Parcels Lease were sufficiently different to be caught by the CLO. The central question in the second case was whether Mr Samaroo's first contract had been varied or rescinded and whether

he retained a prior equitable interest to that of Mr Sookraj. It turned on its own facts.

40. Mr Misick suggested that it was crucial to distinguish between a variation of obligations the source of which arose before the commencement of the CLO and a rescission (by agreement) followed by the creation of new obligations in a new agreement executed after the CLO had come into force. But the Board considers that the question it has to decide does not turn on whether there was a rescission or variation. It is more nuanced. The question is whether the terms have been altered so substantially that new obligations are created to which the CLO applies. That question cannot be affected by whether the parties intended to rescind or vary the terms in question. The answer must be arrived at objectively with reference to the terms themselves. If that were not the case, (and if the CLO applies to such new obligations), in effect, parties would be able to contract out of the CLO by varying rather than rescinding a pre-CLO agreement.

41. Before turning to the relevant alterations in this case, the Board agrees with Mr Misick that the repetition of clause 1.10 in the 2013 Agreement is not determinative in this case. It was a repetition of the same standard clause in the 2008 Agreement and was part of the re-statement of that agreement in 2013. As such, it adds nothing to the question whether the alterations to the 2008 Agreement are subject to the terms of the CLO.

42. The alterations to the provisions relating to the Downtown Restoration Parcels Lease and the Island Improvements in the 2013 Agreement were substantial and they created new obligations. The Developers were no longer under any obligation to carry out the Island Improvements or to spend US $2 million at all or as a condition for performance of the obligation to grant the Downtown Restoration Parcels Lease. Furthermore, TCIG were no longer required to match the Developers' spending up to US $2 million. The obligation to grant the lease was triggered merely by the service of the notice and the completion of the other matters referred to in clause 4.14.1 of the 2013 Agreement.

43. Furthermore, the terms of the Downtown Restoration Parcels Lease were also substantially different. First, there is a fundamental difference in the term of the lease. Instead of a medium-term commercial lease of 49 years, the term in the 2013 Agreement is extended to 999 years. Such a term is all but equivalent to a freehold disposition. Secondly, another fundamental element was changed. The demised premises to which the Downtown Restoration Parcels Lease is to apply was altered. An additional parcel was added. Thirdly, in practical terms, at least, the date from which the lease was intended to take effect was changed. These are all significant

and central provisions which lead one to the conclusion that TCIG entered into a new allocation of Crown land with a view to a different disposition as a result of the 2013 Agreement.

44. Unlike in the *Sara Lee* case, the central obligation did not remain the same. The terms in relation to the Downtown Restoration Parcels Lease and most importantly the terms of the lease itself were changed fundamentally. It is those terms which the Developers now seek to enforce. The original terms have been replaced and unlike in the *Sookraj* case, are no longer enforceable (see Lord Scott of Foscote at para 15 quoted at para 38 above).

(iii) What is the ambit of the CLO?

45. The real question for the Board is whether the changes to terms surrounding the grant of the Downtown Restoration Parcels Lease and the terms of the lease itself come within the scope of the CLO.

46. The purpose of the CLO is quite clear. Amongst other things, it prevents TCIG from granting leases of Crown land other than subject to a transparent process and at a market rent. Section 4 provides expressly that the objects of the CLO are, amongst other things: to ensure that Crown land is managed for the benefit of all the people of the Turks and Caicos Islands; to provide for the principles applicable to the acquisition, management and disposal of Crown land; and the regulation of the procedures in accordance with which, and the conditions under which, Crown land may be disposed of. The provisions apply in relation to a disposal of Crown land following a decision to do so whether by way of sale, lease etc.

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

48. There can be no doubt that the CLO would apply if the 2008 Agreement had been rescinded and replaced entirely by the 2013 Agreement. In those circumstances, the relevant contract amounting to an allocation and/or disposition of Crown land would post-date the CLO and be subject to it. Equally, it is easy to see that it would be unfair if the CLO applied where an agreement itself pre-dated the CLO and the terms remained unchanged but were not performed until after the CLO had come into force. It is not clear that the natural meaning of the CLO and section

34 in particular, are sufficiently wide to capture such a situation and, applying the presumption against retrospectivity, the legislature should be presumed not to have intended to alter the law in relation to what, for the most part, was a past transaction.

49. Further, if the amendments in question were minor in nature and had been made after April 2012, it would be unfair were the CLO to apply. As Lord Mustill explained in the *L'Office Cherifien* case (see para 29 above), in the absence of clear words, the unfairness of adversely affecting the parties' rights in those circumstances would be great and, therefore, it would be unlikely that the legislature intended the CLO to have such an effect.

50. In this case, however, the obligations under the 2013 Agreement in relation to the Downtown Restoration Parcels Lease are so substantially different from those under the 2008 Agreement that there is no unfairness if the CLO applies to them. It seems to the Board that the changes were sufficiently substantial to amount to a different allocation and disposition for the purposes of section 9 and 34 of the CLO. The parties entered into a new contractual commitment in relation to the grant of the Downtown Restoration Parcels Lease which post-dated the CLO. Those obligations create an allocation and a disposition which are of the very nature which it was the purpose of the CLO to prevent. The very purpose of the CLO would be undermined if it were not interpreted to apply to a contract for the allocation and disposition of Crown land which was entered into before 2012 but was substantially altered after that date in the manner which occurred here. If that were not the case, parties would be able effectively to avoid the purpose and effect of the CLO by entering into a variation of their original obligations, however radical.

51. The Board therefore concludes that a new allocation and disposition of Crown land arose under the 2013 Agreement which were caught by the CLO. In the circumstances of this case, therefore, the terms of the 2013 Agreement relating to the Downtown Restoration Parcels Lease did not meet the requirements of the CLO and were ultra vires TCIG's powers.

52. The Board will therefore humbly advise His Majesty that this appeal should be dismissed.