

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/01650

BETWEEN

THE TREASURER OF THE COMMONWEALTH OF THE BAHAMAS

Plaintiff

AND

IMAGINE NATION COMPANY INC.

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Chizelle Cargill with McFalloughn Bowleg for the Plaintiff  
Gail Lockhart-Charles KC with Candice Knowles for the Defendant

12 and 13 October 2022, 16 and 17 January 2023

JUDGMENT

## **WINDER, CJ**

This is the Claim of the Treasurer for outstanding real property taxes, surcharges and penalties owed by the Defendant (Imagine) for Rudder Cut Cay and Little Lansing Cay from 2007-2014 in the amount of \$2,234,969.

[1.] Imagine is an International Business Company which owns and operates the hotel resort known as the Islands of Copperfield Bay located in the Exuma Cays. The Islands of Copperfield Bay Resort spans across the Exuma Cays of Rudder Cut Cay, Little Lansing Cay, Big Lansing Cay and Musha Cay.

[2.] The cays were all purchased from John James Melk and Janet Lorraine Melk (the Melks).

[3.] On 9 September 1996 the Melks entered into a Hotels Encouragement Act Agreement ("the Initial HEA") with the Government of The Bahamas. Under the Initial HEA the Melks obtained tax exemptions (including real property tax) pursuant to the Hotels Encouragement Act, for the construction and operation of the Musha Cay Resort.

[4.] The initial HEA only related to Musha Cay and did not include Rudder Cut Cay or Little Lansing Cay. The Melks duly paid the real property taxes on Rudder Cut Cay, Little Lansing Cay and the one-half interest in Big Lansing Cay as and when they became due, up to the sale of these properties to Imagine. On the purchase of Musha Cay, Imagine inherited the benefit of the real property tax exemptions which the Melks had secured for Musha Cay.

[5.] Following the acquisition of Rudder Cut Cay, Little Lansing Cay and the one-half interest in Big Lansing Cay the Treasurer wrote to Imagine requiring it to submit the real property tax declaration for these properties and to pay the taxes which became due.

Imagine was advised that the Initial HEA did not cover Rudder Cut Cay, Little Lansing Cay and the one-half interest in Big Lansing Cay (the Properties) on several occasions:

- (a) By letter dated 19 July 2007, the Director of Investments advised Mr Richard Lightbourne of McKinney Bancroft & Hughes, the then attorneys for Imagine that the National Economic Council (NEC) did not agree for exemption from real property tax for the Properties.
- (b) By letter dated 21 August 2007, the Director of Investments wrote to Richard Lightbourne, and re-affirmed the Government's previous decision not to allow the duty-free importation of fuel or exemption from real property taxes for Little Lansing and Rudder Cut Cay.
- (c) By letter dated 11 September 2007, the Director of Investments wrote to Richard Lightbourne, and re-affirmed that the Government was not minded to allow the duty free importation of fuel or exemption from real property taxes for Little Lansing and Rudder Cut Cay.

[6.] On 2 October 2015 the Treasurer issued two Certificates to Imagine: (1) certifying that as of 1 January 2015, \$1,935,275 was due in real property taxes for Rudder Cut Cay; and (2) certifying that as of 1 January 2015, \$96,515 was due in real property taxes for Little Lansing Cay.

[7.] This action was commenced by the Treasurer by generally indorsed Writ of Summons dated 16 October 2015 seeking the following relief:

- (a) The outstanding taxes and surcharges owed for Rudder Cut Cay and Little Lansing Cay from 2007-2014 in the amount of \$2,031,790.00;
- (b) A penalty of \$203,179.00, being 10% of the outstanding taxes and surcharges, pursuant to section 32 of the Real Property Tax Act;
- (c) Interest on any judgment amount pursuant to the Civil Procedure (Award of Interest) Act, 1992
- (d) Such further or other relief as the Court shall consider appropriate; and
- (e) Costs.

[8.] On 30 October 2015, shortly after the commencement of these proceedings, Imagine applied to the Bahamas Investment Authority, requesting that Musha Cay, Little Lansing Cay and Rudder Cut Cays be included under a new Hotels Encouragement Act Agreement made between the Government and Imagine, granting exemption of payment of real property tax and custom for further development. On 24 February 2016 Imagine and the Government entered into two agreements which had the effect of granting real property tax exemptions to the said Hotel which now included, in addition to Musha Cay, Rudder Cut Cay, Little Lansing Cay and Big Lansing Cay for a further 20 years.

[9.] On 13 June 2016, the Director of Investment, in a Memorandum to the Financial Secretary, confirmed that the agreement to extend the real property tax exemptions to Rudder Cut and Little Lansing Cays became effective on 24 February 2016 and that Imagine remained liable for payment of real property tax from the date of acquisition of Rudder Cut and Little Lansing Cay until 24th February 2016.

[10.] The Defence of Imagine is set out in its Amended Defence, which provides in part as follows:

7. At the time of the acquisition of these properties, it was understood by the Defendant that the Government would grant the entire resort concessions and exemptions pursuant to the Hotels Encouragement Act.

8. In reliance upon the said understanding the Defendant engaged in extensive discussions with the Government as to the investment and the extensive refurbishment, development and re-branding of the resort, including the addition of major new facilities to create this world class luxury resort.

9. Shortly after the Defendant purchased the said properties, the Defendant was advised by Government authorities that if it wished to include Rudder Cut Cay within the resort, extensive modifications would have to be undertaken, including the removal of many tons of waste and dangerous toxic debris, including chemicals, abandoned and corroded machinery and vehicles, and dilapidated, dangerous and uninhabitable buildings and other structures.

10. The Defendant agreed to undertake the considerable task of cleaning up Rudder Cut Cay and making it safe with the understanding that it would be eligible for the said concessions and exemptions as a part of the hotel resort. With that understanding, the Defendant cleared away and safely disposed of all of the hazardous debris, structures, and vehicles on Rudder Cut and made it habitable and usable for guests.

11. Additionally, the Government was excited by the idea of packaging and promoting the islands as a single resort and sought the Defendant's permission to make use of the name "the Islands of Copperfield Bay," the concept of the islands as a single resort, and proprietary photographs of the islands created by the Defendant in advertising materials that promote tourism in The Bahamas.

12. The Defendant's beneficial owner consented and also donated his name, his brand and his time to promoting The Bahamas via the Ministry of Tourism's "Behold" Campaign, a Superbowl campaign and numerous print campaigns and media appearances.

13. Since the purchase of the properties, the Defendant has invested in excess of \$20 million in upgrades. The Bahamas is the beneficiary of a constant stream of favourable publicity in the international media as a result of the spectacular resort that the Defendant has created.

14. In the premises, the Defendant has sought exemptions pursuant to the Hotels Encouragement Act and the Defendant asserts that it is inequitable for the Plaintiff to seek the relief claimed in the Statement of Claim. Alternatively, that is inequitable for the Plaintiff to seek the relief claimed in the Statement of Claim prior to the conclusion of the said Hotels Encouragement Act application.

15. By Amending Hotels Encouragement Act Agreement dated 24<sup>th</sup> February 2016 ("the Amending Agreement"), the pre-existing Hotels Encouragement Act Agreement dated 9<sup>th</sup> November 1996 ("the Principal Agreement"), which provides that the relevant hotel (and the buildings comprising the same and all additions thereto and the land upon which the same shall be situate) shall be exempt from real property taxes and any other taxes then or thereafter imposed on real property, was amended to reflect the Defendant as the owner of the relevant hotel and the Rudder Cut Cay and Little Lansing Cay as properties covered by the exemption from real property taxes.

16. Subsequently, a new Hotels Encouragement Act Agreement was entered into between the Government of The Bahamas and the Defendant also dated 24<sup>th</sup> February 2016 ("the New HEA Agreement") granting real property tax exemptions for the said hotel for a further period of 20 years.

17. The Amending Agreement and the New HEA Agreement are consistent with the understanding referred to herein that entire resort, including Rudder Cut Cay and Little Lansing Cay would be granted concessions and exemptions pursuant to the Hotels Encouragement Act.

18. The Defendant will refer to the Principal Agreement and the Amending Agreement at trial for their true meaning and effect.

19. In the premises the Plaintiff is not entitled to the relief claimed in the Statement of Claim as the properties concerned are from the date of the Principal Agreement exempt from real property taxes and any other taxes then or thereafter imposed on real property, alternatively it is inequitable for the Plaintiff to seek the relief claimed in the Statement of Claim.

[11.] At trial the Treasurer called Shunda Strachan, Acting Chief Valuation Officer and Controller of the Department of Inland Revenue, David Davis, Permanent Secretary in

the Office of The Prime Minister and Accountant, Anthony Kikivarakis, as witnesses in their case. They were subject to very minimal cross examination simply to establish that they were not personally involved with the transaction at the commencement of Imagine's acquisition of the Rudder Cut Cay and Little Lansing Cay.

[12.] At trial David Copperfield gave evidence for Imagine and was subject to cross examination.

### Analysis and Disposition

[13.] There is no real dispute as to the assessment of the taxes for the period 2007-2014. Imagine alleges however that it ought otherwise to be exempted from the payment of these sums. I accept the Treasurer's convenient summary<sup>1</sup> of Imagine's defence as outlined in its Amended Defence as follows:

- (a.) At the time that it acquired Musha Cay, Little Lansing Cay, Big Lansing Cay and Rudder Cut Cay, which comprise the Islands of Copperfield Bay Resort, it was understood by the Defendant that the Government would grant the entire resort concessions and exemptions pursuant to the Hotels Encouragement Act;
- (b.) In reliance on this understanding Imagine spent a significant sum of money developing and re-branding the now Islands of Copperfield Bay Resort and engaged in the considerable task of cleaning up Rudder Cut Cay.
- (c.) Pursuant to this understanding, Imagine entered into the Amending Agreement with the Government of The Bahamas, dated 24th February, 2016, which amended the Principle HEA Agreement to reflect Imagine as owner of the Musha Cay Resort (as defined in the Principle HEA Agreement) and further to include Rudder Cut Cay and Little Lansing Cay as properties covered by the exemption from real property taxes.
- (d.) Further pursuant to this understanding, Imagine entered into a New HEA Agreement with the Government of The Bahamas, dated 24th February 2016,

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<sup>1</sup> Outline submissions of the Treasurer

further granting real property tax exemptions for the Island of Copperfield Bay Resort, for a further period of 20 years.

- (e.) Based on the Amending Agreement and the New HEA Agreement, Rudder Cut Cay and Little Lansing Cay are exempt from Real property tax payment and payment of any other taxes from the date of the Principle Agreement.
- (f.) Alternatively, it would be inequitable for the Treasurer to be granted the relief sought in its Statement of Claim.

[14.] In as much as Imagine relies on an understanding by Mr Copperfield that the acquisition of Rudder Cut Cay and Little Lansing Cay would be afforded exemptions either at the time of the purchase or at the time of the amended HEA, I did not accept his evidence. Having seen and observed Mr Copperfield, I was not satisfied, on balance, that he properly recollected conversations on this issue but rather he perhaps perceived that he would receive the exemptions based on his plans for the islands. He admitted on oath that his recollection with respect to certain key dates and events were "foggy". When asked about certain key facts he became evasive and asked to rely on what was written in his witness statement.

[15.] When asked if Imagine was communicated to by the government in writing, that it had agreed to grant concessions with respect to Rudder Cut Cay and Little Lansing Cay, or agree to grant real property tax concessions, Copperfield responded that;

*I wish I could tell you for sure. My mind is kind of foggy. I think the purchase was made and then the meeting happened after that. I could be wrong about this.*

Later when asked whether Imagine had already bought the property or the deal was in the works at the time he developed this understanding, he responded;

*Again not clear, a little foggy about the date and times. I apologize for that.*

[16.] Copperfield maintained that he developed this understanding from former Prime Minister Hon. Perry Christie and the Deputy Prime Minister Hon. Philip Davis but made

no effort to call either of them as witnesses. It is also of note that in 2016 when the exemptions were eventually granted both men were in office, however the Government remained adamant that the exemptions would not extend retrospectively to the date of Imagine's acquisition of the cays.

[17.] In the documents exchanged at the time of the acquisition there was nothing to suggest that there was such an understanding and the same was never referred to or suggested by Imagine's attorney Richard Lightbourne. Mr Lightbourne was told on numerous occasions between 2007 and 2010 that there was no exemptions granted:

(a) By letter dated 19 July 2007, the Director of Investments advised Mr Richard Lightbourne that the NEC did not agree for exemption from real property tax for the Properties.

(b) By letter dated 21 August 2007, the Director of Investments wrote to Richard Lightbourne, and re-affirmed the Government's previous decision not to allow the duty-free importation of fuel or exemption from real property taxes for Little Lansing and Rudder Cut Cay.

(c) By letter dated 11 September 2007, the Director of Investments wrote to Richard Lightbourne, and re-affirmed that the Government was not minded to allow the duty free importation of fuel or exemption from real property taxes for Little Lansing and Rudder Cut Cay.

However, it would only be on 21 June 2010 (3 years later) that Imagine speaks about this understanding in a letter from Richard Lightbourne to BIA. In that letter Lightbourne wrote:

Dear Sirs,

Re: Rudder Cut Cay – Assessment No. 611814  
Little Lansing Cay – Assessment No. 611092  
Imagine Nation Company, Inc.

As you are aware, we represent Imagine Nation Company, Inc. and we refer to your letter dated 23<sup>rd</sup> July, 2009 concerning the alleged real property tax arrears for the above-referenced properties.

We have reviewed the matter fully with our clients and would advise that it is their belief that the Government had agreed to exempt the properties from real property taxes in that it was accepted that the properties comprised what is



referred to as the Islands of Copperfield Bay and they were all entitled to the benefits under the Heads of Agreement relating to Musha Cay.

We are proposing to have a meeting with the relevant authorities and the Ministry of Tourism in an effort to have the matter clarified. Our clients are anxious to resolve the apparent misunderstanding and are hopeful that a meeting can be arranged in the near future so that we can put the issue behind us.

We trust that in the interim, you will bear with us.

This represents the first time that Imagine says that it believed that Rudder Cut Cay and Little Lansing Cay had been granted an exemption.

[18.] On the question of retroactivity I accept the submission of the Treasurer that as a matter of law the Hotels Encouragement Act does not provide for retroactive tax concessions and exemptions. Section 4(1)(c) and (d) of the Hotels Encouragement Act provides as follows:

“The Minister may, if satisfied that the erection, repair or refurbishment of the premises for use as a new hotel will be in the best interests of The Bahamas, enter into an agreement with the promoter or owner providing for the following matters or any of them, namely —

...

(c) for the exemption of the new hotel (and all buildings comprising the same and all additions thereto and the parcel of land upon which the same shall be situate) from the payment of real property taxes and any other taxes now or hereafter imposed on real property for a period of ten years from the date on which the new hotel opens for business;

(d) for the exemption of the new hotel (and all buildings comprising the same and all additions thereto and the parcel of land upon which the same shall be situate) from the payment of real property taxes and any other taxes now or hereafter imposed on real property in excess of twenty dollars per annum for every bedroom therein for the further period of ten years commencing on the first day of the eleventh year after the date on which the new hotel opens for business;

It seems clear that the Hotels Encouragement Act contemplates that any agreements for exemptions under its terms must occur at the outset of the proposed development, as an incentive to those developments going forward.

[19.] In any event Imagine did not apply for retroactive treatment (assuming that it could be granted) in its Counsel's letter of dated 30 October 2015. That letter stated:

"We therefore propose that Musha Cay, Little Lansing Cay and Rudder Cut Cays be included under the new Hotels Encouragement Act Agreement made between the Government and the Company granting the exemption of payment of RPT and custom duties exemptions for further development."

(emphasis added)

[20.] Imagine also prays in aid the doctrine of equity in defending the claim by the Treasurer. At paragraphs 51-56 of its Closing Submissions Imagine states:

51. The principles of contractual estoppel have frequently been relied upon by the Court to prevent injustice. A clear explanation of contractual estoppel was set out in the often cited ruling of Moore-Bick LJ in *Peekay International v. Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386 at per held at paragraph 56 as follows:

[56] There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see *Colchester Borough Council v Smith* [1991] Ch 448, [1991] 2 All ER 29, [1991] 2 WLR 5, affirmed on appeal [1992] Ch 421. An explanation of contractual estoppel.

52. See also the case of *Wallis Trading Inc v Air Tanzania Company Limited* [2020] EWHC 339 (Comm) where the Court elucidated the effect of contractual estoppel as follows at paragraph 80:

The bases on which the Defendants contested the applicability of contractual estoppel were, in my judgment, ill-founded. One was the contention that there could be no estoppel if both parties had knowledge of the truth. I do not consider that that (sic) is an answer to a case of contractual estoppel, whose effect is that the parties have both accepted that a relevant state of affairs should be assumed to be true, whether it is or not.

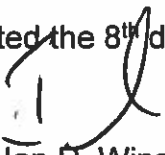
### ***Application of the Law to the Relevant Facts***

53. The Amending Agreement expressly states that the Properties “form part of the Hotel.” Both parties have accepted this in the Amending Agreement as the relevant state of affairs.
54. It is respectfully submitted applying the principles above that it would be inequitable to allow the Plaintiff to ignore the state of affairs and to treat the Properties as being added to the Hotel only from the date of the Amending Agreement.
55. The question must then be – since when did these properties form a part of the Hotel? It is respectfully submitted that the Plaintiff has adduced no evidence to rebut the Defendant’s case that these properties were purchased for the purpose of adding them to the Hotel and that they were added to the Hotel from the date that they were purchased and they were never used by the Defendant in any other way.
56. For the reasons set out above it is respectfully submitted, and the Court is invited to find as a fact, that the Properties were added to the Hotel from the date that they were purchased and were accordingly entitled from that date to be exempted from real property taxes by operation of the Principal Agreement.

[21.] In as much as this defence also relies on a state of affairs based upon Imagine’s understanding as to the inclusion of the new islands into the existing HEA arrangements for Musha Cay, the defence ought to fail. In any event I did not find that Imagine acted to its detriment in any way in cleaning up its own property, as it alleges.

[22.] In all the circumstances the Court finds for the Treasurer as prayed for in the Statement of Claim with interest. I will hear the parties, by written submission as to the appropriate order for costs and any submission as to the amount of such costs which will be fixed by the Court.

Dated the 8<sup>th</sup> day of June 2023

  
Sir Ian R. Winder  
Chief Justice