

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2020/CLE/gen/00463

BETWEEN

PARADISE ISLAND LIGHTHOUSE AND  
BEACH CLUB COMPANY LIMITED

Plaintiff

AND

THE ATTORNEY GENERAL OF THE  
COMMONWEALTH OF THE BAHAMAS

Defendant

**Before Hon. Chief Justice Sir Ian R. Winder**

Appearances: Palincia Hunter with Krystian Butler and Sidney Cambridge for the  
Plaintiff

Kirkland Mackey with Sophia Lockhart for the Defendant

30 March 2022, 7 May 2022 and 9 May 2022

JUDGMENT

## WINDER, CJ

1. This is a claim by Paradise Island Lighthouse and Beach Club Company Limited (Paradise) for breach of contract and for exemplary damages arising from a Crown Land Lease dispute with the Minister responsible for Crown Lands

### Background

2. In April 2012 Toby Smith (Smith) applied to the Minister responsible for Lands and Surveys to lease 17 acres of Crown land situate around and to include the Paradise Island Lighthouse, for the purposes of developing a beach club. The proposed development was to include the restoration and up-keep of the Lighthouse.

3. Paradise was incorporated in 2018 and would be the vehicle to receive this lease if granted.

4. On 23 May 2018 the Bahamas Investment Authority (BIA) wrote Paradise stating that the proposed development had been approved however 5 acres of Crown land in the vicinity of the Lighthouse was recommended instead of the 17 acres originally applied for. The letter of 23 May 2018 is settled in the following terms:

Dear Mr. Smith,

PARADISE ISLAND LIGHTHOUSE AND BEACH CLUB CO. LIMITED

I am directed to advise that the National Economic (sic) (“NEC”) has concluded on your application as follows:

- (i) **Agreed to recommend** to the Minister responsible for Lands to approve Paradise Island Lighthouse Inc. owned by Mr. Toby Smith to acquire a 21 year Crown Lease for five (5) acres of Crown Land immediately adjacent to the property on which is situate the Paradise Island Lighthouse and Keeper’s Quarter and also comprising land in the vicinity of the Colonial Beach and to include a portion of the seabed situate at west Paradise Island, for the purposes of constructing and operating recreational and entertainment facilities offered to Bahamians and tourists;
- (ii) **Approved** Antiquities, Monuments and Museum Corporation (“AMMC”) to negotiate with Mr. Toby Smith the terms and condition of a public private

partnership (“PPP”) arrangement for renovation, maintenance and operation of the Paradise Island Lighthouse and Keeper’s Quarters and construction and operation of recreational and entertainment facilities at western Paradise Island, with the agreed PPP arrangement document returned to NEC for approval also reflecting that the management and operations of the Paradise Island Lighthouse is to be in collaboration with the Port Department;

- (iii) **Approved** Mr. Toby Smith to develop a \$2 million project to comprise docking facilities, fresh water, power generation and sewer treatment plants, a central plant building, restaurants and bars, entertainment and dining facilities; shower and bathroom facilities, ten (10) ocean view cabanas; green area; and refurbishment of the Paradise Island Lighthouse and Lighthouse Keeper’s Building; subject to meeting the requirements of all relevant Government agencies including the Ministry of Public Works, Ministry of Transport and Local Government, Ministry of Tourism and Aviation, the Antiquities Monuments and Museums Corporation, Department of Physical Planning, Department of Lands and Surveys, Port Department and the approval of the relevant environmental study by Bahamas Environmental Science and Technology (BEST) Commission **prior** to the start of project renovation and construction works.
- (iv) **Approved** Paradise Island Lighthouse Inc. to obtain concessions pursuant to the Hotels Encouragement Act, as Amended.

In this regard, kindly provide a draft PPP agreement/Memorandum of Understanding for review by Government and two (2) proposed dates for a site visit to the project location by the relevant Government agencies, likely to be 8-10 technical officers.

...

5. On 2 October 2018 a Memorandum of Understanding was signed between the Paradise and the Antiquities, Monuments and Museum Corporation of the Bahamas with respect to the proposed development.

6. On 7 January 2020 Paradise received a letter from Mr. R. S. Hardy, Acting Director of The Department of Lands & Survey enclosing a Lease (the LA) for execution by him. The said letter is settled in the following terms:

Captain Toby C.S. Smith  
Paradise Island Lighthouse and  
Beach Club Company Limited  
P.O. Box EE-15718

Nassau, Bahamas

Dear Sir,

APPROVAL FOR CROWN LEASE – FIVE (2+3) ACRES AT THE WEST END OF PARADISE ISLAND – PARADISE ISLAND LIGHTHOUSE AND BEACH CLUB COMPANY LIMITED

Reference is made to the above subject.

Enclosed are the Lease and Counterpart for Lessee signing, dating, sealing witnessing and notarizing.

The date at the top of page 1 should be left blank and it will be inserted at the time of Lessor signature.

Please also note that the Lease Diagrams require signature.

After the above, please return both documents to the Department. Following Lessor execution, one document will be sent to you for safekeeping.

Yours faithfully,

R.S. Hardy,  
ACTING DIRECTOR

7. On 12 February 2020 Paradise wrote to the Minister, in the following terms:

Dear Right Honourable Prime Minister Dr. Minnis,

As the minister responsible for Crown Land leases, I am writing to you regarding my application for Crown Land for the Paradise Island Lighthouse & Beach Club Project dating back to 12<sup>th</sup> April, 2012.

As per our Memorandum of Understanding I have been approved for the lease of Crown Land in the proximity of the Lighthouse and Keeper's Quarters and also a parcel of land on Colonial Beach and for two docks.

As you are aware, I have been requesting a meeting with you for the past, more than, two years. Unfortunately, I have been reduced only being able to chat with you briefly on your way to the House of Assembly and Cabinet. I would appreciate to have a formal meeting with you as is afforded to others.

In such a chats (sic), in the past and today, you advised me that the land that I am asking for in the Crown Land Lease would not be compromised with "Carnival, Royal

Caribbean Cruise Lines or any other cruise company” You have also referred me to Mr. Joshua Sears on several occasions and in speaking with him to enquire if you have signed the Crown Land Lease, there is no update other than it awaits your signature.

I am writing to you today to request a Comfort Letter. You mentioned today that my “land matter will be dealt with at the same time that you deal with Royal Caribbean Cruise Line’s land matter on the 2<sup>nd</sup> March, 2020”.

As you are aware, my application is almost eight years in the making. I have patiently waited for a favorable outcome so I am rather surprised that my lease is now some how commingled with a foreign party’s expression of interest that is only recent. Further, I understand directly from Royal Caribbean Cruise Line’s legal counsel that they have applied for the whole area of Crown Land situated on the Western portion of Paradise Island, which wishes to encompass the land that I have applied for and contained within the Crown Land Lease Agreement. This has me deeply concerned.

Please be reminded that I have always acted in good faith, please be mindful of the fact that we have received, signed, witnessed, sealed and returned the Crown Land Lease Agreement prepared under your directive. We are pleased that we received the support of Cabinet behind Paradise Island Lighthouse & Beach Club and subsequent Cabinet Conclusions to receive the Crown Land, as described and mapped out in the legal description of the Crown Land Lease Agreement. We are not about to be marginalized by a large cruise ship company when we have invested eight years and are a one hundred percent Bahamian owned and operated company.

To remove ambiguity and receive the written position of the Government of the Bahamas we are requesting a Comfort Letter that asserts that in lieu of there being a temporary delay in receiving the Crown Land Lease Agreement all terms remain as a binding agreement. This letter of comfort will allow Paradise Island Lighthouse & Beach Club to have the certainty it needs.

Thank you.

Sincerely yours,

Capt. Toby C.S. Smith.  
Lighthouse Keeper.

8. The unexecuted lease agreement delineated the two parcels of property to be leased by Paradise as follows:
  - i. ALL THAT certain lot piece of parcel of land containing by admeasurement Two (2.00) Acres of thereabouts shown on a Plan on record in the Department of Lands and

Surveys as Plan numbered 5957NP situated West of lot No.1 Colonial Heights formerly Hog Island Estates, beginning at a point ABUTTING AND ABOUNDING towards the NORTHEAST by Crown Land and running thereon for a distance of One Hundred and Sixty-three and Thirty Hundredths (163.30') Feet to a point. Thence towards SOUTHEAST by Crown Land and running thereon for a distance of Two Hundred and Thirteen and Ninety-three Hundredths (213.93) Feet to a point. Thence towards the South by Crown Land and running thereon for a distance of Two Hundred and Forty-two and Forty-eight Hundredths (242.48') Feet to a point. Thence towards the WEST by Crown Land and running thereon for a total distance of Four Hundred and Thirty-six Feet and Thirty-eight Hundredths (436.38') Feet to a point. Thence towards the NORTH by Crown Land and running thereon for a total distance of Four Hundred and Eight-six and Seventy-five Hundredths (486.75') Feet. To its point of origin. ("Parcel A"); and

- ii. ALL THAT certain lot piece of parcel of land containing by admeasurement Three (3.00) Acres of thereabouts shown on a Plan on record in the Department of Lands and Surveys as Plan numbered 5957NP situate WEST of Lot No. 1 Colonial Heights Subdivision formerly Hog Island Estates, beginning at a point ABUTTING AND ABOUNDING towards the EAST by Crown Land and running thereon for a distance of Three Hundred and Three and Eighty-nine Hundredths (303.89') Feet to a point. Thence towards the SOUTH by Crown Land and running thereon for a total distance of Three Hundred and Ninety-nine and Twenty-six Hundredths (399.26') Feet to a point. Thence towards the WEST by Crown Land and running thereon for a distance of Two Hundred and Ninety-eight and Forty-seven Hundredths (298.47') Feet to a point. Thence towards the NORTH by Crown Land and running thereon for a total distance of Four Hundred and Eighty-three and Sixty-nine Hundredths (483.69') Feet. To its point of origin. ("Parcel B")

9. The unexecuted lease also provided:

"In consideration of the rent hereinafter reserved and the covenants and conditions hereinafter contained and on the part of the Lessee to be paid performed and observed the

Lessor hereby demises unto the Lessee ALL THAT certain lot piece or parcel of land and seabed hereinafter described in the Schedule hereto together with the appurtenances thereunto belonging (hereafter called “the Demised Premises”) TO HOLD the same unto the Lessee from 1<sup>st</sup> day of January A.D. 2020 for a term of Twenty-one (21) Years (hereinafter called “the said term) and paying therefore during the said term a yearly rent of Five Thousand Two Hundred and Twenty-four Dollars (\$5,224.00) per acre per annum or One Dollar (\$1.00) per paying visitor, whichever is greater, both in the currency of the said Commonwealth of The Bahamas (hereinafter called “the said currency”) plus Value Added Tax (VAT) payable in advance each year on the anniversary of the commencement date, subject to review after ten (10) years and with the right of renewal.

And at paragraph 4(i) of the unexecuted LA, it states:

“this Lease constitutes the entire agreement between the parties and contains all the agreements arrived at between the parties with respect to the subject matter hereof. This Lease superseded any and all other agreements, either oral or in writing, between the parties with respect to the subject matter of this Lease which shall not be modified or amended in any way except in writing executed by the parties; and...”

10. Smith executed the LA on behalf of Paradise and returned it to the Department of Lands and Surveys on 9 January 2020 for execution by the Minister.

11. The Minister did not execute the LA. On 27 February 2020 he meet with then Attorney General, Mr. Carl Bethel KC, Mrs. Candia Ferguson and Mr. Joshua Sears. During the meeting Smith was told that there was no agreement between Paradise and the Minister responsible for Crown Lands.

12. Paradise has commenced this action challenging the assertion as to the non-existence of an agreement. The Statement of Claim of Paradise states at paragraphs 10-14 as follows:

[10] In accordance with the above mentioned by letter dated 7<sup>th</sup> day of January A.D., 2020 there is a concluded Agreement for a lease between the Plaintiff and the Minister

responsible for Land (sic) and Surveys. As a result of the Defendant's failure to execute and enforce the Crown Lease Agreement, the Plaintiff has suffered loss and damage arising from construction and re-development delays, which directly resulted and continues to result in loss of profit.

#### PARTICULARS OF BREACH OF CROWN LEASE AGREEMENT

[11] The Defendant, its representatives and/or agents are in breach of the Crown Lease Agreement by:

- i. Failing to execute the Crown Lease Agreement;
- ii. Failing to recognize the Crown Lease Agreement is enforceable as an Agreement for a lease is as good as a lease;
- iii. Failing to comply with the specified terms of the lease agreement; and
- iv. Announcing its intention to lease inclusive of Parcel A and Parcel B to a third party, namely Royal Caribbean Cruise Lines.

#### PARTICULARS OF EXEMPLARY DAMAGES

[12] The Plaintiff also claims exemplary damages arising from the conduct of the Defendant in so far as the Defendant has done the following:

- i. The Defendant's conduct has been calculated to make a profit which may well exceed the compensation payable to the plaintiff for its breach, in that the property inclusive of parcel A and B is intended to be leased to Royal Caribbean Cruise Lines, despite the Defendant having entered into an Agreement to Lease Parcel A and B to the Plaintiff;
- ii. The Defendants and their agents can be said to have acted oppressively and/or arbitrary by:
  - a) Failing to execute the said Crown Lease Agreement; and
  - b) Failing to recognize that the Memorandum of Understanding and Crown Lease Agreement and Bahamas Investment Authority letter terms and conditions were valid and enforceable in the aforementioned meeting held 27<sup>th</sup> February 2020 (sic)

[13] As a result of the Breach of Contract the Plaintiff has incurred the following expenses:

#### Special Damages

i.	Incorporation Fees	\$5,524.98
ii.	Website Fees	\$730.47

[14] ...

#### AND THE PLAINTIFF CLAIMS

1. A declaration that by letter dated 9<sup>th</sup> day of January A.D., 2020, there is a concluded Agreement for a Lease between the Plaintiff and the Minister responsible for Land and Surveys;
2. Alternatively Damages for breach of the Agreement for a Lease between the Plaintiff and the Minister responsible for Lands and Surveys;



3. Exemplary Damages
4. Special Damages - \$6,251.45
5. Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992
6. Such further or other relief as the Court deems just and fit; and
7. Costs

13. The Defence of the Minister is settled, in part, as follows:

1. ...
2. ...
3. Paragraph 2 of the Statement of Claim is not admitted and the Plaintiff will be put to strict proof thereof.
4. ...
5. Paragraph 4 of the Statement of Claim is denied. The Defendant further states that an application was made by Mr. Toby Smith (Mr. Smith) on 12<sup>th</sup> day of April A.D. 2012, to Department of Lands and Surveys for 17 acres Crown Land situated on Paradise Island, for the purpose of a development of an attraction. At all times Mr. Smith was the party seeking to engage the relevant minister for permission to lease crown land.
6. Save and except that on 23<sup>rd</sup> May 2018 Mr. Smith received a letter from the Bahamas Investment Authority (BIA) advising him of conclusions and recommendations made on his application, paragraph 5 of the Statement of Claim is denied. The Defendant further states that the Plaintiff was advised that BIA agreed to recommend to the Minister responsible for lands to approve a lease for the Plaintiff for 5 acres of Crown Land.
7. Save and except that it is admitted that on the 2<sup>nd</sup> October 2018 a Memorandum of Understanding (MOU) was entered into between Antiquities, Monuments and Museum Corporation and the Plaintiff, paragraph 6 is not admitted. The Defendant states further that the MOU solely related to the management and operation of the Paradise Island Lighthouse to be done in collaboration with the Port Department.
8. Save and except that on 7<sup>th</sup> January 2020 as a part of the continued negotiation between the parties the Defendant sent to the Plaintiff a draft lease agreement, paragraph 7 of the Statement of Claim is denied.
9. Paragraph 8 of the Statement of Claim is denied and the Defendant states further:
  - a. At all relevant times all offers and proposals were being made by the Plaintiff for allocation of crown land;
  - b. As negotiations between the parties on proposals being made by the Plaintiff continued, the Plaintiff prepared and the parties signed a MOU;

- c. As part of the ongoing negotiations and invitation to treat between the parties, the Defendant prepared the draft lease and sent to the Plaintiff to sign and formalize his offer to the Minister responsible for lands.
  - d. At no time did the Minister responsible for lands make an offer to the Plaintiff for the lease of Crown land;
  - e. At no time was there an executed lease or an accepted lease agreement between the parties; and
  - f. At no time was there any consideration provided therefore by the Plaintiff.
10. Save and except that there was a without prejudice meeting held on 27<sup>th</sup> February 2020 between the Plaintiff and the Defendant paragraph 9 of the Statement of Claim is not admitted.
  11. Paragraph 10 of the Statement of Claim, and the particulars thereto are denied and the Defendant repeats paragraph 9 of the Defence.
  12. Save and except that it is agreed that there was never an executed lease agreement, paragraph 11 of the Statement of Claim, and the particulars thereto are denied. The Defendant states further:
    - a. The draft lease represented the ongoing negotiated position of the parties on the proposals put forward by the Plaintiff for a lease, and was an invitation to treat and for the formal offer made by the Plaintiff to the Minister responsible for land;
    - b. The Plaintiff's signed offer for a lease was subsequently not accepted by the Minister responsible for land.
  13. The Defendant denies the contents of paragraph 12 of the Statement of Claim and asserts that the Defendant never instructed Mr. Toby Smith to incorporate any company or to set up any internet website; and in reply further says that the Plaintiff is not entitled to the relief claimed or any relief at all. The Plaintiff is put to strict proof thereof.
  14. The Defendant denies the contents of paragraph 13 of the Statement of Claim and asserts that the Defendant never instructed Mr. Toby Smith to incorporate any company or to set up any internet website; and in reply further says that the Plaintiff is not entitled to the relief claimed or any relief at all. The Plaintiff is put to strict proof thereof.
  15. The Defendant denies the contents of paragraph 14 of the Statement of Claim.
  16. ...

### *The evidence*

14. At the trial, Smith testified on behalf of Paradise as its only witness and Mrs. Candia Ferguson testified on behalf of the AG. Both witnesses' evidence in chief by way of witness statements which were filed on 11 March 2022. They were both subject to cross examination.

15. The central issue to be determined in this action is whether there was an agreement for a lease between Paradise and the Minister responsible for Crown Lands and therefore an enforceable lease. This calls for a determination as to whether the lease delivered to Paradise, absent the signature and/or execution of the Minister constitutes a valid and/or enforceable lease agreement once signed by Paradise.

16. Smith's evidence was that in or about 2012 he noticed that the lighthouse at Paradise Island was "derelict and abandoned". He says he decided to save and preserve the lighthouse, considering it to be a cultural asset. His aspiration was to restore it along with the Keeper's Quarters. He also intended to install docks for ease of access, as well as develop and build a beach club for tourists and residents. In this vein, he carried out some research which revealed that the lighthouse and its surrounding land belonged to the Crown. He applied for a Crown Land Lease for the area surrounding the lighthouse on 12 April 2012 through the Department of Lands and Surveys.

17. Smith says he was provided with a letter dated 23 May 2018 from the BIA which recommended that the Paradise development be approved. Smith says that on 27 September 2018 Paradise sent a cover letter and a Memorandum of Understanding (MOU) on the proposed project. On 2 October 2018, the MOU was executed between Paradise and the AMMC for the renovation, maintenance and operation of the lighthouse. On 22 November 2018 Mrs. Candia Ferguson advised him that the government would draft their own Crown Lease Agreement with respect to the land. On 15 August 2019 Jacinda Butler (Butler), Chief Counsel at the Office of the AG emailed him and advised that the Crown Land Lease was being processed. On 22 August 2019 Butler emailed Paradise to say that the lease was being reviewed to ensure compliance with a standard Crown lease. On 15 October 2019 Butler advised him via email that the lease documents were sent to Richard Hardy (Acting Director) at the Department of Lands and Surveys.

18. On 17 October 2019 Smith says that he received an email from Carol Young of the BIA confirming that the "approved draft lease" was sent to Lands and Surveys and a copy of the draft lease would also be sent to the Office of the Prime Minister for approval. On 7 January 2020 he received the letter from Hardy enclosing the lease from the Department of Lands and Surveys with

draft lease enclosed for execution. On 9 January 2020 –Smith returned the draft lease, signed, sealed and notarized as instructed in the Hardy letter of 7 January 2020.

19. Smith says that on 12 February 2020 Paradise sent a letter to the Prime Minister requesting that the draft lease that Smith executed be considered a “binding Agreement” between the parties. He says that there was no response to his letter but that a meeting was held on 27 February 2020 between he and government representatives including Ferguson, former Attorney General Carl Bethel and Joshua Sears of the OPM. Smith says that at that meeting he was informed that the 7 January 2020 letter, MOU and draft LA that he received was of no effect and not valid.

20. Smith’s evidence is that the lease did not materialize as the land outlined in the lease provided to Paradise was instead promised to Royal Caribbean Cruise Lines for their development.

21. Mrs. Candia Ferguson’s witness statement was fairly brief and is set out in full below:

1. ...
2. I was the Director of Investments at the Bahamas Investment Authority at the Office of the Prime Minister from May 2014 to September 2022.
3. On or about 12<sup>th</sup> April 2012 an application was made by Mr. Toby Smith (Mr. Smith), to the Department of Lands and Survey for 17 acres of Crown Land situated on Paradise Island, for the purpose of developing a touristic attraction.
4. On or about the 23<sup>rd</sup> May 2018 Mr. Smith received a letter from the Bahamas Investment Authority (BIA) advising him of conclusions and recommendations made on his application, and was advised that BIA agreed to recommend to the Minister responsible for Crown Lands to approve a lease for the Plaintiff for 5 acres of Crown Land immediately adjacent to the Lighthouse.
5. On 2<sup>nd</sup> October 2018 the Plaintiff prepared a Memorandum of Understanding (MOU), and a MOU was entered into between the Plaintiff and the Antiquities, Monuments and Museum Corporation.
6. On 7<sup>th</sup> January, 2020 as a part of the continued negotiation between the parties the Defendant sent the Plaintiff a draft lease agreement.
7. To my knowledge, understanding and believe (sic) there was not a lease executed between both parties.

22. Under cross-examination, Candia Ferguson, when asked whether she could shed any light on any further requirements to be fulfilled between the parties following the letter of 23 May 2018, but was unable to do so.

## Paradise's case

23. Paradise's case is that the 7 January 2020 letter and the attached draft lease executed by Smith as President of Paradise proves that there was in fact an agreement between the parties for a lease. The argument advanced is that in the circumstances there is an equitable lease in place between Paradise and the Minister at paragraphs 40-41 of their submissions, in that :

“40. Although the Crown land lease may be void at law, due to the same not being executed by the Minister Responsible for Lands & Surveys, where the lease fails to meet the legal formalities the lease will take effect in equity as an agreement for a lease and should be considered binding between the parties where there is written evidence of the lease.

41. This is seen in the case of *Walsh v Lonsdale* [1882] 21 Ch. 9 (Tab 4 ) where Jessel, M.R. stated:

“Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months notice as a tenant from year to year. He has a right to say, “I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry.” That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.”

## The Minister's case

24. The Minister says that Paradise has no lease agreement for the Paradise Island land. They assert that the negotiations had not concluded and rely on paragraph 6 of the witness statement of Ferguson where she says that on 7 January 2020 as a part of the continued negotiations between the parties the Defendant sent the Plaintiff a draft lease agreement. Further, they say that the letter

sent from Hardy supports the position of the government that no lease was agreed as the letter clearly showed that it was a part of ‘an ongoing approval process’ since:

- (i) the letter did not express that a lease was approved; and
- (ii) the Minister’s signature was not on the document that Smith was to sign, seal and have notarized.

25. The 7 January 2020 letter, the Minister contends, was subject to the execution of a formal Lease Agreement, and an Agreement for Crown Lease. They rely on the Supreme Court decision of *Cleare et al (t/a Seago’s Sports Bar) v Caltiff Holdings Ltd and Morley Realty Ltd 2014/CLE/gen/00366*.

26. The Minister also relies on Section 54(1) of the Conveyancing and Law of Property Act, which provides:

#### DISPOSITION OF CROWN LANDS

54. (1) Any power that immediately before the 10th day of July, 1973, was under section 24 of the Bahama Islands Constitution Order, 1969, vested in the Governor of the Bahama Islands —

(a) to make grants and dispositions of any lands or other immovable property in the said Islands or any interests in such property that were vested in Her Majesty or the Governor on behalf of Her Majesty as the property of the Crown for the beneficial interest of the said Islands, or

(b) to exercise in relation to such property or interests any other powers lawfully exercisable by Her Majesty, shall be vested in the Minister, so however, that, wherever the employment of the Public Seal would have been required under that section, the official seal of the Minister shall be employed instead.

(2) In this section “Minister” means the Minister responsible for Crown Lands.

The Minister says that for there to be a valid offer for a lease or an agreement for a lease the document must bear the signature and seal of the Minister Responsible for Crown Land who is a party to the agreement. Because of the special restriction placed by the Statute of the disposition of crown land the Minister Responsible for Crown Land’s signature and seal cannot be delegated. They cite the Privy Council decision of *Save Guana Cay Reef Association Ltd and others v The Queen and other [2009] UKPC 44 Privy Council Appeal No 0013 of 2009*.

27. The Minister also argues that Paradise has not pleaded any consideration for the lease and submits and that no special damages pleaded by Paradise would amount to consideration. Finally, they say that Paradise has not alleged or proven that it has taken possession of, or improved the 5 acres on Paradise Island.

#### *Analysis and Disposition*

28. In the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14 the UK Supreme Court provides a useful reminder of the considerations in a breach of contract case, stating that there must be both subjective and objective analysis of the facts of each case. According to Lord Clarke:

“Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”

29. The essential elements of a binding contractual agreement are, as per Halsbury’s Laws of England, Contract (Volume 22 (2019)):

“To constitute a valid contract: (1) there must be an agreement between separate and existing parties; (2) those parties must intend to create legal relation as a consequence of their agreement; and (3) the promises made by each party must be supported by consideration, or by some other factor which the law considers sufficient.”

30. Having considered the evidence as a whole I am not satisfied there was a valid agreement entered in as I find that the Agreement was subject to execution; and/or there was no part performance. Regrettably for Paradise, there must be a meeting of the minds for there to be an agreement.

31. The communication of May 2018, in my view is incapable of being considered an offer. That document merely set out broad terms of an arrangement with Smith which would straddle

several agencies. More importantly it was a recommendation from the BIA and did not originate from the Minister. The letter dated 7 January 2020 was more akin to an offer as it contained proposed terms of the lease with some level of specificity including description of the property and the business terms such as payment. I am not satisfied however that it was an unconditional offer.

32. In *Brown t/a Natbros v Smith and others – [2014] 1 BHS J. No.67* the Supreme Court considered the status of an agreement for sale which was subject to contract and made the following comments:

The status of an agreement to contract was considered by Adderley, J. (as he then was) in the case of *Simon David Arnsby v. Gisela Kaiser 2007/CLE/gen/279* Sup. Ct. (unreported). In that case Adderley, J, held that the issue was to be determined as a matter of construction. The parties' intentions ought to be disclosed by their language. If the agreement was subject to a formal lease it succinctly means that there are terms to be agreed upon or conditions to be fulfilled, as such there should be no contract until those things have been done. Adderley J relied on what he termed the modern principle as expounded by Lord Hoffman in *I.C.S. Ltd. v West Bromwich B.S* 1 WLR 896, 912. Lord Hoffman stated, "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all background knowledge which would reasonable have been available to the parties in the situation in which they were at the time of contract."

Jessell MR, in the case of *Winn v Bull (1877) 7 Ch. D 29, 32* stated that "where a proposal or agreement is "subject to contract", it means what it says, that it is subject to a formal contract being prepared. When not expressly stated to be so, then it is a matter of construction. Whether the parties intended that the terms agreed upon should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

On any careful reading of the OTL it should become clear that the terms of the unexecuted written standard form lease were subject to and hinged upon the execution of the written lease. On the evidence, before me, I find that the unexecuted written lease, which the plaintiffs claim not to have received, could not be imposed upon them having regard to the simple fact that it is unexecuted. The terms of the draft lease had not been agreed. The witnesses, including those of the defendants, acknowledged, as does the OTL, that the terms had to be agreed upon between the tenant and landlord. The OTL has to mean what it says, it was subject to the parties entering into a formal lease.

Having found that the written unexecuted lease was not applicable I must also find that the relationship which existed between the parties, based on the OTL and their course of conduct, was no more than a periodic (monthly) tenancy. The plaintiffs, having gone into



possession under the terms of the OLT and remitting the monthly rental payments to the landlord, held the demised premises as monthly tenants.’

33. Whilst the letter dated 7 January 2020 is capable of being an offer to Smith it was conditional upon it being executed by the Minister. This is so because:

- a) The document contemplated that it would be returned, if accepted, and forwarded to the Minister for execution to complete the process, as:
  - i) Paradise was told not to date document as that would be done at the time of the Lessee’s inserting his signature. – “The date at the top of page 1 should be left blank and it will be inserted at the time of Lessor signature.”
  - ii) All of the documents were to be returned to the Minister for him to execute and a signed document would be sent to him. – “After the above, please return both documents to the Department. Following Lessor execution, one document will be sent to you for safekeeping.”
  - iii) Had Paradise’s execution been expected to complete the transaction, as Paradise asserts, the documents would have been forwarded as signed.
  - iv) Had Paradise’s execution been expected to complete the transaction, as Paradise asserts, the letter would have spoken to the payment of the leasehold payments, but it didn’t.
  - v) Had Paradise’s execution been expected to complete the transaction, as Paradise asserts, one would have expected a check for the payment of the initial year’s rent, which was payable in advance, to have been furnished with the returned documents.
- b) Legal strictures existed which prohibited the disposition of the property in the manner asserted by Paradise, without a properly executed deed:
  - i) The stature of frauds prohibits the enforcement of an unexecuted contract as it made all contracts creating an interest in land for more than three years from the time of execution unenforceable if the contract is not evidenced in writing. The Common Law does not countenance a claim based on such oral contracts to transfer interests in land as enjoined by the statute. (See Owusu: *Commonwealth Caribbean Land Law* p167).
  - ii) The effect of Section 54(1) of the Conveyancing and Law of Property Act, as extracted above, would suggest the requirement that the seal of the Minister be placed to effect any transfer of Crown lands.
- c) Paradise’s own letter of 12 February 2020, discussing the arrangement, notwithstanding it had already been executed by it, betrays its own view that the document was subject to

execution by the Minister. Just days after signing and returning the document he wrote to the Minister in these words:

As you are aware, I have been requesting a meeting with you for the past, more than, two years. Unfortunately, I have been reduced only being able to chat with you briefly on your way to the House of Assembly and Cabinet. I would appreciate to have a formal meeting with you as is afforded to others.

In such a chats (sic), in the past and today, you advised me that the land that I am asking for in the Crown Land Lease would not be compromised with "Carnival, Royal Caribbean Cruise Lines or any other cruise company" You have also referred me to Mr. Joshua Sears on several occasions and in speaking with him to enquire if you have signed the Crown Land Lease, there is no update other than it awaits your signature.

I am writing to you today to request a Comfort Letter. You mentioned today that my "land matter will be dealt with at the same time that you deal with Royal Caribbean Cruise Line's land matter on the 2<sup>nd</sup> March, 2020".

As you are aware, my application is almost eight years in the making. I have patiently waited for a favorable outcome so I am rather surprised that my lease is now some how commingled with a foreign party's expression of interest that is only recent. Further, I understand directly from Royal Caribbean Cruise Line's legal counsel that they have applied for the whole area of Crown Land situated on the Western portion of Paradise Island, which wishes to encompass the land that I have applied for and contained within the Crown Land Lease Agreement. This has me deeply concerned.

[Emphasis added]

I did not accept Smith's explanation to the contrary.

34. Paradise relies heavily on the notion of an agreement for a lease being as good as a lease. The *locus classicus* in this area is the case of *Walsh v Lonsdale (1882) 21 Ch D 9*. In *Walsh v Lonsdale* agreed to lease Walsh a mill for seven years. The rent was to be paid quarterly with a year's rent to be paid on demand in addition to any rent due and unpaid for the period prior to the demand. The deed was executed for the tenancy and Walsh made quarterly payments. Lonsdale demanded a year's rent and Walsh refused to pay. The court held that the tenant could not 'complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted.'

35. The first point to note is that there is no written or oral agreement between the parties for the acquisition of the Property. Paradise contends, it would appear, that the receipt of the

unexecuted document for signature from Hardy and its subsequent signing is, if not a completed contract reflects an agreement to contract in the nature of *Walsh v Lonsdale*. The facts of Paradise's case, however, is clearly distinguishable for the facts in *Walsh v Lonsdale* as: (1) Walsh was let into possession by Lonsdale; and (2) leasehold payments were being rendered by Walsh. Neither of these circumstances obtain for Paradise in this case.

36. The doctrine in *Walsh v Lonsdale*, put plainly, suggests that an agreement to lease is as good as a lease as the law of equity will, enabling either party to the agreement to call for specific performance if there is either written evidence of the lease or part performance. As indicated, I find that the written evidence of any agreement suggests that the agreement was subject to execution by the Minister. I also find that there has not been any performance (or part performance) of the lease, as in the case of *Walsh*. Paradise claims to have been put to the expense of incorporation and the establishment of a website. Putting aside the question of whether Paradise can claim its own incorporation fees as a loss flowing for the Lease, Paradise was incorporated some two years before the purported offer. There is no evidence that the website was not likewise established in this period, considering it was just over a month after receiving the letter that Paradise was advised that no concluded agreement was being recognized by the Minister.

37. In all the circumstances therefore, the claim of Paradise is dismissed. The Defendant shall have its reasonable costs to be taxed if not agreed.

Dated this 16<sup>th</sup> day of February 2023

A handwritten signature in black ink, appearing to read 'I. R. Winder', with a large, stylized flourish at the end.

Sir Ian R. Winder

Chief Justice