

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. #. 2007- 02154

BETWEEN

BR & S MARKETING LTD

CLAIMANT

AND

NATIONAL AGRICULTURAL MARKETING
AND DEVELOPMENT CORPORATION
(a body Corporate)

DEFENDANT

BEFORE THE HONOURABLE MADAME JUSTICE M. DEAN-ARMORER

JUDGMENT

APPEARANCES

Mr. Hendrickson Seunath S.C., Mr. Shastri Parsad instructed by Mr. Shastri Parsad Jr. for the Claimant.

Mr. Avory Sinanan S.C., Ms. Amina Hasnain and Mr. Sherwin Seenath for the Defendant.

Introduction

1. By this action, the claimant seeks damages for the alleged delay on the part of the defendant in granting a sub-lease of a parcel of land on the SS Erin Road, Debe. In the course of this decision, the Court considered whether the parties had ever arrived at an agreement for the grant of a sublease, whether time was of the essence and whether there was an enforceable agreement to forebear from instituting legal proceedings.

Evidence

2. The facts in this action were gleaned from witness statements filed on behalf of the parties, by cross-examination on the witness statements and by documents which had been tendered into evidence.
3. Three witness statements were filed on behalf of the claimant. They were the statements of:
 - Boysie Boodram, Managing Director of the claimant.
 - Trevor Sudama, former Minister of Government.
 - Samaroo Dowlath, former CEO of the defendant.
4. Both Mr. Sudama and Mr. Dowlath were absent from the trial. Their failure to submit to cross-examination resulted in the striking out of their witness statements from the Court's record. The defendant relied on the very brief witness statement of Ms. Maltie Narine, Corporate Secretary of the defendant. Both Mr. Boodram and Ms. Narine were cross-examined by learned Senior Counsel for the relevant opposing party.

Facts

5. It was common ground that the defendant was and continues to be a body corporate established under the *National Agricultural Marketing and Development Corporation Act*¹ and the claimant was at all material times a company registered and continued under the laws of Trinidad and Tobago and engaged in the business of the importation and distribution of packaging materials, tapes, corrugated boxes and polythene foam products.

¹ National Agricultural Marketing and Development Corporation Act, Act No. 16 of 1991. Laws of Trinidad and Tobago

6. In the year 2000, the claimant entered negotiations with the defendant with a view to obtaining a sub-lease in respect of the land situate at the SS Erin Road, Debe. It is undisputed that there never was a grant of the sub-lease.
7. The claimant contends that there was a completed agreement for the grant of the sub-lease. The defendant on the other hand denies that there was ever an agreement and contends that the claimant was well aware that the defendant was awaiting the grant of a lease by the State and was in law incapable of granting any sub-lease to the claimant.
8. The main issue which arises in this case is an issue of fact that is to say whether the parties ever arrived at an agreement for the grant of a sub-lease to the claimant.
9. A secondary issue which arises is whether the claimant incurred expenditure in developing the land with the acquiescence of the defendant and whether there was an agreement on the part of the claimant to forbear from instituting legal proceedings.
10. The parties have agreed however that the facts are to be culled from the documents which have been tendered in evidence. It is principally from the documentary evidence that the facts emerge. Accordingly, I have found it unavoidable in the course of deciding this case, to itemize each document and its corresponding effect.
11. In the table below, there are set out the documents which were tendered into evidence with their corresponding date and significance.

Date	Between	Effect of the Document
<ul style="list-style-type: none"> • 4th April, 2000 	Application of NAMDEVCO to subdivide.	Application by NAMDEVCO to Southern Wholesale Market to allow construction of cardboard box manufacturing plant.
<ul style="list-style-type: none"> • 6th June, 2000 	BR & S to the Chairman of NAMDEVCO.	Application of the claimant for a lease of thirty (30) years with an option to renew.
<ul style="list-style-type: none"> • 27th July, 2000 	Town & Country Planning to the CEO of NAMDEVCO	Grant of permission for the proposed development with conditions.
<ul style="list-style-type: none"> • 7th August, 2000 	From NAMDEVCO to Mr. Boysie Boodram	Acknowledging receipt of the claimant's application and indicating that NAMDEVCO is seeking to vest ownership in name of the corporation.
<ul style="list-style-type: none"> • 14th September, 2000 	Application to Ministry of Housing to develop the subject lands.	
<ul style="list-style-type: none"> • 18th October, 2000 	Letter from the Ministry of Housing to NAMDEVCO	Informing of Cabinet's agreement to lease the land in question.

12. The claimant has contended further that the defendant permitted its agents to enter and to perform developmental works. This allegation was stoutly denied by the defendants. The defendant admits however that it permitted the claimant to enter onto the smaller parcel to “facilitate filling the land and later to clear bushes”². The parties again rely on the documentary evidence for their true intendment and effect.

² See paragraph 5 of the Defence filed on 19th of September 2007

13. A table showing the relevant documentary evidence is continued below:

Date	Author and Recipient	Effect of the Document
<ul style="list-style-type: none"> • 27th August, 2001 	BR & S to the Chief Executive Officer of NAMDEVCO.	A letter confirming that agreement was reached with the Minister and NAMDEVCO to begin development "...during the waiting period for the lease to be finished."
<ul style="list-style-type: none"> • 29th August, 2001 	NAMDEVCO to BR & S	NAMDEVCO permitting BR & S to enter the land, the purpose of entry is to facilitate filling the land.
<ul style="list-style-type: none"> • 19th September, 2001 	BR & S to NAMDEVCO	The claimant agreed that it would adhere to requests before construction is carried out.
<ul style="list-style-type: none"> • 25th September, 2001 	BR & S to NAMDEVCO	In this letter, the claimant repeated its undertaking to adhere to requests and significantly confirmed: "the agreed lease agreement for the three acres for a period of ninety-nine years."
<ul style="list-style-type: none"> • 1st October, 2001 	T & TEC to BR & S	This letter was in response to a request for an electrical connection. One of the items required is a letter authorizing the opening of the account.

14. Late 2002 and 2003 saw the claimant initiating desperate attempts to obtain information and assistance with a view to procuring the lease. The claimant relied on the following documents:

Date	Author and Recipient of the Document	Effect of the Document
• 22 October, 2002	BR & S to NAMDEVCO	Informing of astonishment at Corporation's position.
• 7 th November, 2002	NAMDEVCO to BR & S	In response Corporation restates that it was not in possession of title of land to be leased.
• 2 nd December, 2002	BR & S to NAMDEVCO	Correcting typographical error.
• 20 th December, 2002	NAMDEVCO to BR & S	Ownership of land the same.
• 14 th January, 2003	BR & S to Prime Minister	
• 11 th March, 2003	BR & S to NAMDEVCO	Declining an offer made by the Minister. Referring to a meeting of 11 th March. Declining offer of land to the back of parcel.
• 1 st April, 2003	BR & S to NAMDEVCO	Statement of expenses, indicating expenditure in the sum of \$3.5M stating that it is impossible to delay the project any further.
• 4 th April, 2003	NAMDEVCO to BR & S	Advising that ownership remains same.
Date	Author and Recipient of the Document	Effect of the Document
• 11 th April, 2003	BR & S to Minister Rahael	BR & S accepting the offer of an alternative site.
• 22 nd April, 2003	BR & S to NAMDEVCO	re meeting to discuss issue of

		compensation.
<ul style="list-style-type: none"> • 2nd June, 2003 	BR & S to Minister Rahael, carbon copied to Defendant.	Referring to several meetings with CEO Dowlath, where proposal for alternative land not fulfilled. “The CEO conveyed that the original parcel would be leased to the claimant.” However, NAMDEVCO was awaiting the lease from Chief State Solicitor ...
<ul style="list-style-type: none"> • 9th July, 2003 	BR & S to NAMDEVCO	BR & S indicating intention to commence proceedings but also its willingness to await the outcome of defendant’s monthly meeting.
<ul style="list-style-type: none"> • 30th July, 2003 	NAMDEVCO to Claimant	Status of ownership remains the same.
<ul style="list-style-type: none"> • 5th September, 2003 	BR & S to NAMDEVCO	Expressing the hope that soon NAMDEVCO would be in a position to arrange the lease.
<ul style="list-style-type: none"> • 2004 	BR & S	Reminder letters
<ul style="list-style-type: none"> • 7th January, 2005 	BR & S v NAMDEVCO	Complaining that the matter persisted for five years. No recourse but to seek legal counsel ...
Date	Author and Recipient of the Document	Effect of the Document
<ul style="list-style-type: none"> • 27th January, 2005 	Letter of Trevor Sudama to Attorney General	

<ul style="list-style-type: none"> • 3rd March, 2005 	BR & S to CEO NAMDEVCO	Re: proposed highway through subject parcel. Be advised that company spent substantial monies and advised that the President in possession of relevant documents ... only awaiting his signature.
<ul style="list-style-type: none"> • 26th April, 2005 	NAMDEVCO TO BR & S	“You indicated that you were aware that the parcel ear marked for the highway ...” . Corporation not in a position to give an undertaking.
<ul style="list-style-type: none"> • 5th May, 2005 	BR & S to the Prime Minister	
<ul style="list-style-type: none"> • 19th May, 2005 	NAMDEVCO to BR & S	CEO indicating that he investigated and lands were being surveyed for Trintoplan and there was a proposal for the Point Fortin Highway to pass through that land.
<ul style="list-style-type: none"> • 20th May, 2005 	BR & S to NAMDEVCO	Reminding that Mr. Boodram was not aware that the parcel of land even being considered for highway expansion and spent considerable amount of monies.
<ul style="list-style-type: none"> • 20th May, 2005 	BR & S to Prime Minister	
Date	Author and Recipient of the Document	Effect of the Document
<ul style="list-style-type: none"> • 2nd June, 2005 	NAMDEVCO to BR & S	Corporation still awaiting information as to whether parcel intended for public use.

<ul style="list-style-type: none"> • 13th July, 2005 	Prime Minister to Minister of Agriculture	<u>Prime Minister advised:</u> <ul style="list-style-type: none"> • Cabinet granted a lease to NAMDEVCO and at the same time approved a sublease. • Possibility of an alternative parcel in the light of the proposed highway project.
<ul style="list-style-type: none"> • 18th July, 2005. 	Attorney General to the Claimant.	To advise that the Deed of Lease was registered.
<ul style="list-style-type: none"> • 10th August, 2005. 	BR & S to NAMDEVCO	Request for information.
<ul style="list-style-type: none"> • 12th August, 2005. 	BR & S to Minister	Request for assistance.
<ul style="list-style-type: none"> • 22nd August, 2005. 	NAMDEVCO to Claimant.	Advising Deed of Lease, registered “we thank you for your patience while the necessary legal stages in progress.”
<ul style="list-style-type: none"> • 7th September, 2005. 	BR & S to NAMDEVCO	<p>Because of five year delay, other investors withdrew their commitment.</p> <p>Deposit made to company in England forfeited “... in the absence of a firm commitment, BR&S unable to complete the transaction seeking to change the purpose of the lease from manufacture of cardboard to Fruit Packing House.”</p>
Date	Author and Recipient of the Document	Effect of the Document
<ul style="list-style-type: none"> • 16th September, 2005 	NAMDEVCO to BR & S	Refusing to permit land to be used for different purpose.
<ul style="list-style-type: none"> • 21st September, 2005 	BR & S to NAMDEVCO	Willing to pay the lump sum, but asking for three years to do so.

• 4 th October, 2005	BR & S to NAMDEVCO	Reminder letter.
• 31 st October, 2005	Claimant's Attorneys-at-law to Defendant.	
• 9 th November, 2005	NAMDEVCO to Dipnarine Rampersad	Denies that delay was due to fault on their part. Answer to attorney's letter.
• 15 th March, 2006	BR & S to NAMDEVCO	Undertaking to forgo legal proceedings.
• 23 rd March, 2006	BR & S to NAMDEVCO	Setting out terms of agreement.
• 4 th April, 2006	BR & S to NAMDEVCO	Seeking permission to clear the land.
• 12 th April, 2006	NAMDEVCO to BR & S	Permission granted to clear the land.
• 12 th May, 2006.	BR & S to NAMDEVCO	Complaints.
• 17 th May, 2006	BR & S to NAMDEVCO	Complaints.
• 18 th May, 2006	BR & S to NAMDEVCO	Reminding of meeting and agreement to accept the lease and stop legal proceedings.
• 27 th June, 2006		
• 10 th July, 2006	NAMDEVCO to BR & S	Draft lease prepared but outstanding conditions not met.
• 17 th July, 2006	BR & S to NAMDEVCO	Refuting suggestions that survey plan not done.
• 20 th July, 2006	NAMDEVCO to BR & S	Corporation taking steps to obtain plans approved by Director of Surveys.
Date	Author and Recipient of the Document	Effect of the Document
• 15 th August, 2006	NAMDEVCO to BR & S	Plans still with Director of Surveys the matter to be tabled before the Board at the next meeting.
• 3 rd October, 2006	NAMDEVCO to BR & S	Recording the Corporation's

		Agreement to grant the sublease to BR & S for thirty (30) years. The location and dimension in accordance with the survey plan prepared in April, 2000.
<ul style="list-style-type: none"> • 3rd October, 2006 	NAMDDEVCO to BR & S	Defendant advising that it would grant BR & S a sublease of 1.21 hectares for thirty (30) years with location and dimensions according to Survey Plan 2000.
<ul style="list-style-type: none"> • 6th October, 2006 	BR & S to NAMDEVCO	The claimant was not in agreement with the proposal contained in letter of October, 2006. Reference to the Cabinet decision and to the size of premises to be leased.
<ul style="list-style-type: none"> • 6th October, 2006. 	BR & S to NAMDEVCO	BR & S not in agreement with the proposals. Asking to meet and to be given compensation for expenses.
Date	Author and Recipient of the Document	Effect of the Document
<ul style="list-style-type: none"> • 18th October, 2006 	BR & S to NAMDEVCO	Reference to a meeting. Few concerns that have to be sorted out. BR & S willing to accept the original parcel, as per Cabinet Minute on the condition that certain terms

		are agreeable to BR & S: term, premium, rental.
• 3 rd November, 2006	BR & S to NAMDEVCO	Reminder by BR & S.
• 14 th November, 2006	NAMDEVCO to BR & S	Advising steps taken to commission re survey.
• 7 th December, 2006	BR & S to NAMDEVCO	BR & S seeking an earlier meeting and indicating a preparedness to accept compensation.
• 2 nd January, 2007		Indication of an intention to take legal action.
• 23 rd February, 2007	Dipnarine Rampersad to NAMDEVCO	“Because of the considerable lapse of time and the change in the economic landscape the original project will not be viable any more – calling for compensation.
• 13 th March, 2007	NAMDEVCO to BR & S	Seeking an extension of time.
• 26 th March, 2007	NAMDEVCO to Dipnarine Rampersad	Answer to lawyer’s letter.

15. A perusal of the agreed documents in these proceedings together with a study of the written and viva voce evidence, suggests a certain chronology of facts which are set out below.

16. In June, 2000, the claimant applied for a sub-lease of a three acre block near to the Southern Wholesale Market for the purpose of constructing a cardboard manufacturing factory and packing house for the export of fresh fruits and vegetables.

17. Earlier in the year 2000, the defendant had applied to the Town and Country Planning Division for the subdivision of a 13000m² parcel of land. The stated purpose of the subdivision was for light manufacturing and in particular cardboard box manufacturing. The defendant received the permission of the Town and Country Planning Division.
18. On 29th September, 2000 Cabinet approved the grant of a lease of the larger parcel to the defendant. Cabinet also agreed that a portion of the larger parcel be excised for the purpose of constructing a factory for the manufacture of corrugated cardboard cartons and that the leases be vetted by the Attorney General prior to execution.
19. It was not until July, 2005 that the head lease was registered. This was brought to the attention of the claimant by the July, 2005 letter of the incumbent Attorney General. In August of that year, the defendant invited the claimant to a meeting to discuss the terms and conditions of the lease.
20. In October, 2006, the defendant referred to Cabinet's agreement for the grant of a sub-lease at a premium of \$275,000.00 for a term of thirty (30) years. This offer was refused by letter dated 6th October, 2006 and the claimant indicated its willingness to accept compensation for expenses incurred.
21. The years that separated the claimant's first application and the claimant's ultimate refusal by letter dated 6th October, 2006 saw the claimant assiduously engaged in seeking the involvement of potential joint venture partners, seeking permission of the Ministry of Agriculture to enter the subject land for the purpose of development and engaging in business transactions with a view to procuring machinery for the proposed industry.
22. The intervening years also saw the claimant virtually begging for a response from the defendant and seeking the intervention of Ministers of different dispensations.

23. It has not been disputed that the claimant entered the land and did developmental works. The defendant contends however that the only work done with their permission was the filling of the land.
24. In my view the documentary evidence supports the contention of the defendant. Permission which was forthcoming from the defendant related to the filling of the land only. See the letter dated 12th April, 2006 from NAMDEVCO to the Claimant.

Issues

25. The issues which arise in these proceedings were succinctly set out in a Notice signed on behalf of both parties and filed herein on 17th April, 2008. The agreed issues were:
- *Was there, as pleaded in paragraph 3 of the statement of case, a valid and complete agreement between the claimant and the defendant (the sublease agreement) whereby the defendant agreed to sub-lease to the claimant the parcel of land (the land) therein referred to comprising 1.2147 hectares situate at S.S. Erin Road, Debe.*
 - *If there was the sub-lease agreement between the claimant and the defendant (which the defendant denies), was there an implied term therein, as pleaded in paragraph 5 of the statement of case. “that time was to be regarded as essential to the contract ...”*
 - *Did the defendant agree to permit the claimant to enter upon the land “to begin the development thereof in order to construct a Box Manufacturing Plant and Factory, during the waiting period for the lease to be completed and finalized” as pleaded in paragraph 4 of the statement of case;*

- *If there was the sublease agreement between the claimant and the defendant, was the defendant in breach of that agreement, and liable to the claimant in damages in respect of such breach or breaches;*
- *If the defendant permitted the claimant to enter upon the land for the purposes alleged in paragraph 4 of the Statement of Case, what liability (if any) did the defendant incur in consequence thereof;*
- *Was there a forbearance agreement between the claimant and the defendant, as pleaded in paragraph 16 of the statement of case; and if so,*
 - i. Was the defendant in breach of this agreement; and if so,*
 - ii. What damages (if any) the claimant is entitled to as a result of such breach;*
- *If the defendant was in breach of the sublease agreement, is the defendant liable at law and on the facts of the case for the loss of damage particularized under paragraph 22 of the statement of case (or for any part thereof) and/or for any other damages, as prayed in the relief clause, or for any of the other reliefs claimed therein.*

Law

Agreement to Lease

29. An agreement to lease can be described as “*a legally enforceable agreement whereby the parties bind themselves, one to grant and the other to accept, a lease.*”³ In the absence of a legally enforceable lease the parties may in equity be in much the same position as they would be if that relation had been created. This rule is commonly referred to as the

³ Hill and Redman’s Law of Landlord and Tenant, Issue 86, December 2012 paragraph 444

doctrine in *Walsh v Lonsdale*⁴ and is based on the equitable maxim that equity will consider as done what ought to be done.

30. *Hill and Redman's Law of Landlord and Tenant*⁵ at paragraphs 450-460 states:

“An agreement for a lease is an ordinary contract, and in accordance with the general principles of contract law it will not be binding on the parties until one is able to identify an offer by the lessor to let, and an unconditional assent by the lessee to take, the property to be demised or on certain terms. The essential terms of an agreement for a lease are:

- *(a) the identification of the lessor and lessee;*
- *(b) the premises to be leased;*
- *(c) the commencement and duration of the term; and*
- *(d) the rent or other consideration to be paid.”*⁶

The Necessity of a Commencement Date

31. Regarding the commencement date of a lease Lord Denning M.R. in *Harvey v Pratt*⁷ stated:

“It has been settled law for all my time that, in order to have a valid agreement for a lease, it is essential that it should appear, either in express

⁴ *Walsh v Lonsdale* [1881-5] All ER Rep Ext 1690

⁵ *Hill and Redman's Law of Landlord and Tenant*, Issue 86, December 2012

⁶ *Hill and Redman's Law of Landlord and Tenant*, Issue 86, December 2012 paragraphs 450-460

⁷ *Harvey v Pratt* [1965] 2 All ER 786

*terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence.*⁸”

Concluding a Binding Agreement

32. In *Pagnan v Feed Products*⁹, the court was required to decide whether a binding agreement had been concluded between the parties. In that case there was much correspondence via telexes between the parties during the course of their pre-contractual negotiations. There was also a draft of the formal written contract. However the written contract did not reflect changes that had been agreed by one of the parties. Correspondence continued but eventually one of the parties contended that there was no binding contract. Lord Justice Lloyd in considering whether there was a binding agreement summarised the law as follows:

1. *“In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole.(See Hussey v Horne-Payne).*
2. *Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary “subject to contract” case.*

⁸Ibid at page 787

⁹Pagnan v Feed Products [1987] 2 Lloyd's Rep 601

3. *Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see ... and Hussey v Horne-Payne, where Lord Selborne said at p 323:

...The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement or which the parties had no idea of concluding any agreement.*
4. *Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see Love and Stewart v Instone per Lord Loreburn a p. 476)*
5. *If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.*
6. *It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word “essential” in that context is ambiguous. If by “essential” one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete*

contract. If by “essential” one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by “essential” one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, “the masters of their contractual fate”. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called “heads of agreement”.¹⁰”

33. In addition, in ***Birse Construction Ltd. v St. David Ltd.***¹¹ there were extensive negotiations between a building company and property developers with a view to making a contract. The claimants contended that no formal contract was arrived at and the defendants contended that there was a contractual agreement. Mr. Colin Reese Q.C. sitting as deputy judge of the Technology and Construction Court in his decision stated:

“In my view the court must be careful to avoid making an agreement for the parties which the parties did not themselves make... In my view, not only are the parties 'masters of their contractual fate' they are also and

¹⁰ Pagnan v Feed Products [1987] 2 Lloyd's Rep 601 at page 619

¹¹ Birse Construction Ltd. v St. David Ltd. 78 ConLR 121

equally 'to be left to their non-contractual fate' in the event that negotiations are allowed to become protracted and they then fail to conclude a contract.¹²,

34. Mr. Reese went on to hold that there had never been any contract between the parties.

Forbearance to Sue

35. Consideration for a promise may be provided by forbearing, or promising to forbear, from pursuing a legal claim.¹³ A forbearance may, moreover constitute consideration even though the creditor has not made an express or implied promise to forbear¹⁴. Therefore, if a debtor indicates to his creditor that he will pay the debt and asks that the creditor not sue, whether or not the creditor agrees to sue so long as the creditor forbears to sue then there will be sufficient consideration. However, if the debtor makes no such request and the creditor forbears from suing there will be no consideration.
36. In *Miles v New Zealand Alford Estates Company*¹⁵, the articles of association of a company stated that the company should have a first and paramount lien on each member's shares for his liabilities to the company. Mr. G, a shareholder, mortgaged his shares to the plaintiff. The company and shareholders threatened legal action against Mr. G on alleged misrepresentations. Mr. G then signed a letter guaranteeing that certain dividends should be earned and would be paid by the company during a ninety year period or that he would pay the deficiency. The company and shareholders then abandoned their intention to sue. The plaintiff brought an action against the company and

¹² Ibid at page 6

¹³ Common Law Series Fourth Edition, October 2010 LexisNexis paragraph 2.44

¹⁴ Chitty on Contracts General Principles 24th edn Vol 1 paragraph 164

¹⁵ Miles v New Zealand Alford Estates Company [1886-90] All ER Rep Ext 1725

Mr. G. In considering whether the compromise not to sue was sufficient consideration Cotton LJ stated:

“In my opinion, to make a good consideration for this contract, it must be shown first that there was some contract, of something which would bind the company, not to institute proceedings; and to show, secondly, that in fact proceedings were intended on behalf of the company.”¹⁶ [Emphasis mine]

37. In *Combe v Combe*¹⁷ the husband promised his wife 100*l.* a year, tax free. Because of that promise the wife forbore from applying for maintenance. The husband however had not asked her to forbear from making the application. The husband did not make the payments and after seven years the wife brought an application to enforce the agreement.

The court held that there was no consideration. Denning LJ stated:

“I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance, or, in other words, any request by the husband, express or implied, that the wife should so forbear. He left her to apply if she wished to do so. She did not do so... Her forbearance was not intended by him, nor was it done at his request. It was therefore no consideration.”¹⁸

Time is of the Essence

38. ***Halsbury’s Laws of England***¹⁹ at paragraph 502 states:

¹⁶ *Miles v New Zealand Alford Estates Company* [1886-90] All ER Rep Ext 1725 at page 1730

¹⁷ *Combe v Combe* [1951] 2 K.B. 215

¹⁸ *Ibid* at page 221

¹⁹ *Halsbury’s Laws of England Contract* (Volume 22 (2012) 5th Edition)

“At common law stipulations as to time in a contract were as a general rule, and particularly in the case of contracts for the sale of land, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent. Therefore, one party could not insist on performance by the other unless he could show that he had performed, or was ready and willing to perform, his part of the contract within the stipulated time...The current law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

If time is not of the essence, a party who fails to perform within the stipulated time does not commit a repudiatory breach (unless the extent and effect of the delay causes serious prejudice) but will be liable in damages.”²⁰

Reasoning and Decision

39. At the outset the Court will consider whether there existed a valid agreement between the parties for the sub-lease of the subject lands.
40. Having heard the evidence and having studied the documentary evidence, it was clear that there was no concluded agreement for a sublease by the defendant to the claimant.

²⁰ Halsbury’s Laws of England Contract (Volume 22 (2012) 5th Edition) at paragraph 502

Throughout the years the defendant's consistent response to the claimant was that it was unable to provide the sublease for which an application had been made, because the defendant itself was awaiting the grant of the head lease. See for example the letter of 4th April, 2003 from the defendant to the claimant. Far from agreeing to grant the sublease, the defendant was consistent in declaring its inability so to do.

41. The parties fell short altogether of agreeing on a date of commencement of the proposed sublease. Throughout the five year waiting period, the claimant sought of assistance of a variety of agencies. The claimant persevered in complaining to the defendant as to the deleterious effects of delay on the proposed project. However the claimant never pointed to an agreed commencement date. The claimant never even pointed to a formula by which such a date could be ascertained. The conclusion is therefore inevitable that the parties never agreed on a date of commencement. In my view, the complete lack of agreement on a commencement date negates the possibility that any agreement could have been concluded for the grant of the sublease see *Harvey v Pratt*²¹
42. The claimant contends that time was of the essence of the alleged agreement to sublease. In my view there is nothing in the documentary evidence to suggest that time was of the essence. The claimant has given evidence of his understanding of the urgency of commencing the proposed project. There was nothing to suggest that this was a mutual understanding. On the contrary the claimant must have been aware that following the September, 2000 Cabinet decision, the defendant was itself depending on departments of the State to draft, vet and register the head lease by which the defendant would be invested with the capacity to grant a sublease to the claimant. This fact alone should have given the claimant pause and made the claimant aware that the finalizing of the sublease

²¹ Harvey v Pratt [1965] 2AllER 786

was out of the hands of the defendant, who itself was the victim of bureaucratic dilatory tendencies of state agencies.

43. In respect of the alleged agreement to forbear, in my view the evidence suggests that in March, 2006 the Managing Director of the claimant introduced the possibility of legal proceedings as a negotiating tool to bring about a desired result.
44. The responses of Mr. Boodram under cross-examination were unequivocal. Mr. Boodram states that he was only threatening “*to see if he got his lease ...*” In my view this falls short of the requirements of an agreement to forbear and that there was no evidence as in *Miles v New Zealand Alford Estate*²² of any intended legal claim by the claimant.
45. In my view, in these proceedings, issues which arise extend beyond those agreed in the joint notice filed by the parties.
46. On his pleaded case, the claimant seeks equitable relief, which would be available even if there was no concluded agreement for a sub-lease.
47. There was in the submissions filed on behalf of the claimant, a veiled reference to the doctrine in *Walsh v Lonsdale*²³. In my view however the claimant’s attorney was correct to abandon this submission, since this doctrine applies only to contracts which are specifically enforceable, which requires that there be written evidence of the agreement for the lease.
48. The claimant would also have been entitled to relief if it was able to demonstrate that there had been detrimental reliance on an undertaking to grant the sub-lease.

²² *Miles v New Zealand Alford Estates Company* [1886-90] All ER Rep Ext 1725

²³ *Walsh v Lonsdale* [1881-5] All ER Rep Ext 1690

49. The evidence suggests that the claimant acted to his detriment, that he suffered severe detriment by enlisting potential joint venture partners, procuring machinery and engaging in developmental works. In my view however, the evidence does not support the claimant's contention as to the existence of an undertaking.
50. Although there was no enforceable agreement, it would be quite cynical to find that there was no understanding between the parties. The undertaking was however that whenever the Government agencies granted the head lease to the defendant they in turn would grant a sub-lease to the claimant.
51. In my view, the evidence suggests the defendant complied with this undertaking by eventually offering to finalize the sub-lease in October, 2006. Regrettably by this time, according to Mr. Boodram the economic landscape has so changed as to prevent him from proceeding.
52. In both law and equity I am of the view that the claimant has fallen short of establishing his claim which ought to be and is hereby dismissed. It is further ordered that the claimant do pay costs to the defendant fit for two Counsels to be quantified by Registrar of Supreme Court in default of agreement.

Dated this 25th day of January, 2013.

M. Dean-Armorer²⁴
Judge

²⁴ JRA- Kendy Jean
Judicial Secretary- Irma Rampersad