Easter Term
[2021] UKPC 9
Privy Council Appeal No 0012 of 2019

JUDGMENT

Silly Creek Estate and Marina Company Ltd (Respondent) *v* Attorney General of Turks and Caicos Islands (Appellant) (Turks and Caicos Islands)

From the Court of Appeal of the Turks and Caicos Islands

before

Lord Lloyd-Jones
Lady Arden
Lord Sales
Lord Stephens
Sir Keith Lindblom

JUDGMENT GIVEN ON

19 April 2021

Heard on 15 February 2021

Appellant
Helen Mountfield QC
Rowan Pennington-Benton

(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Ariel Misick QC
Deborah John-Woodruffe
Shantae Francis
(Instructed by Misick & Stanbrook)

SIR KEITH LINDBLOM:

Introduction

1. At Silly Creek on Providenciales in the Turks and Caicos archipelago, a narrow peninsula stretches from Sapodilla Bay to the western edge of the creek, with a small island, Silly Cay, at its tip. Silly Cay lies within the Chalk Sound National Land and Sea Park ("the National Park"). The National Park, which extends to some 3,600 acres of land and water, was designated in August 1992 under the National Parks Order 1992. Its environmental features, as described in Part 1 of the Schedule to the National Parks Order, are "scenic water; bone fishing; boating; picnic area". This case, which comes to the Board on appeal from the Court of Appeal of the Turks and Caicos Islands (Mottley JA, President, Adderley JA and Hamel-Smith JA), concerns a proposed development of dwelling-houses and guest-houses, a dock and a marina on the Silly Creek peninsula and Silly Cay.

2. A lease for development at Silly Creek was granted by the Turks and Caicos Islands Government in July 1995 ("the July 1995 Lease"). Proceedings for an alleged breach of the July 1995 Lease were settled by an agreement entered into on 10 October 2006 ("the Settlement Agreement"), and on the same day a 99-year lease was granted for development on Silly Cay ("the Silly Cay Lease"). A subsequent application for detailed development permission for the construction of a dwelling-house on a single plot on Silly Cay was refused in November 2009, and an appeal against that refusal was dismissed in March 2011.

3. The dispute in the proceedings is about the legal effect of the Settlement Agreement and the Silly Cay Lease. The appellant, the Attorney General of the Turks and Caicos Islands ("the Attorney General"), appeals against the order of the Court of Appeal, dated 5 February 2019, allowing the appeal of the respondent, Silly Creek Estate and Marina Company Ltd ("the company") against the dismissal by the Chief Justice (Ramsay-Hale J) of its claim for damages for an alleged breach of the Settlement Agreement and the Silly Cay Lease. The company contends that these documents constituted, in themselves, a "grant of development permission" for its proposed development on Silly Cay, namely a permission to subdivide land under section 29(c) of the Physical Planning Ordinance 1998 ("the Physical Planning Ordinance"), and in any event that they had the effect in law of precluding the refusal of detailed development permission in 2009, because they gave rise to a relevant legitimate expectation and a property right under the constitution of the Turks and Caicos Islands.

The issues in the appeal

4. Four main issues arise from the Attorney General's grounds of appeal. First, was the Court of Appeal wrong to conclude that the execution of the Settlement Agreement and the Silly Cay Lease represented the exercise by the Governor of his discretion under section 4(1)(a) of the National Parks Ordinance 1975 ("the National Parks Ordinance") to approve development of the type shown on the "Land Use Plan" that had been submitted with an application for development permission in November 1994? Secondly, was the Court of Appeal wrong to conclude that the Governor's discretion under section 4(1)(a) could lawfully be exercised to approve the proposed development? Thirdly, was the Court of Appeal wrong to entertain the question of whether, by failing to comply with its obligations under the Settlement Agreement and Silly Cay Lease, the Government had acted in breach of the company's constitutional rights to property? And fourthly, if the Court of Appeal was not wrong to entertain that question, did it err in concluding that the execution of the Settlement Agreement and the Silly Cay Lease gave rise to a legitimate expectation that the company would be able to carry out development of the type shown on the Land Use Plan annexed to the Silly Cay Lease, and in failing to apply the principle of proportionality correctly in light of the Board's decision in *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383?

The statutory scheme for development control

5. At the relevant time, the statutory scheme for development control in the Turks and Caicos Islands lay in the Physical Planning Ordinance and regulations made under it, including the Development Permission Regulations 1990 ("the Development Permission Regulations").

6. In Part V of the Physical Planning Ordinance, "Development Control", section 28(1), "Restriction on development", provided that "[no] person shall carry out any development unless, prior to the commencement of such development, approval therefor has been obtained under the provisions of this Ordinance …". The definition of "development", in section 2(1), was "the carrying out of building, engineering, mining or other operations in, on, over or under any land, the making of any material change in the use of any building or land or the subdivision of any land"; "parcel" meant "an area of land which is separately delineated and given a number on the Registry Map …"; and "subdivide" meant "… to divide a parcel of land into two or more parcels".

7. Section 29, "Types of development permission", provided:

> "29. A grant of development permission shall be one of the following –

(a) outline development permission, the effect of which is to give to the grantee, or his successor in title, approval in principle to the proposed development which is the subject of an application, but not to permit any actual development to take place until a grant of detailed development permission has been made in respect of the same development, or part thereof, for which outline development permission was given;

(b) detailed development permission, the effect of which is to permit the grantee, or his successor in title, to carry out the development, subject to the terms and conditions of the grant of detailed development permission;

(c) permission to subdivide land, the effect of which is to permit the grantee, or his successor in title, to subdivide, or to make an agreement to subdivide, land which is the subject of the application, subject to the terms and conditions of the permission to subdivide the land;

(d) permission to display an advertisement …"

8. Section 30, "Applications for development permission", provided:

"30. (1) An application for a grant of development permission shall be submitted to the Board through the Director, in accordance with the requirements of any regulations made with respect to such applications, and shall be accompanied by the fee prescribed therefor.

…

(3) The Director shall notify the applicant for development permission, in writing, of the decision on the application, giving –

(a) where the application is granted, the conditions (if any) subject to which the permission is granted and the reasons therefor; or

(b) where the permission is refused, a brief statement of the reasons for such refusal."

9. Section 35, "Development Agreements", provided:

> "35. (1) The Board may, on the advice of the Director, and with the consent of the Governor, enter into an agreement with any person as to the nature, scope, timing or any other aspect of any proposed or contemplated development.
>
> (2) Notwithstanding any other provision of this Ordinance, where an agreement to which subsection (1) relates, provides that the Board will grant an application for development permission subject to compliance with the provisions of that agreement, then on receipt of an application complying with such provisions for development permission, the Board shall grant that permission and may not impose on such grant, conditions other than those (if any) contemplated by that agreement."

10. Section 36(1), "Decision of the Board on applications", provided:

> "36. (1) The Board may grant an application for development permission either unconditionally or subject to such conditions as it may require or may think fit to impose, or may refuse an application."

11. Section 42(2)(b), "Reference of applications for a grant of development permission to the Governor", provided that "the Board shall … refer to the Governor for his decision any application for development permission to which section 4 of the National Parks Ordinance relates".

12. In Part VII, "Conservation of Natural Environment", section 63(1), "Commercial or industrial development in conservation areas", provided that "[any] person who proposes to submit an application for the grant of development permission … in respect of land situated in a conservation area shall, prior to submission of such application, have prepared … an environmental impact statement …".

13. The Development Permission Regulations apply to "all applications for … (a) a grant of development permission …" (regulation 3). Schedule 1 sets out "the forms to be used in respect of the various applications [and] decisions …" (regulation 4). Regulation 5(1) provides that "[an] application to which these Regulations apply shall be submitted to the Director on the application form set out in Schedule 1 …". Regulation 5(4) provides that "[the] Director shall not accept any application which …

does not conform to any other of the requirements of these Regulations". Regulation 22(1) provides that "[a] register of applications shall be kept by the Director …"

Section 4 of the National Parks Ordinance

14. Section 4 of the National Parks Ordinance, "Usage of national parks, etc", provides:

> "4. (1) Subject to any regulations relating to any particular national park or nature reserve –
>
> (a) An area which is designated as a national park shall be open to members of the public for recreational use, including camping, fishing and sailing, and the Governor may make a grant of development permission for the erection in the area of buildings, the construction of roads, marinas and such other development as may be considered to be desirable to facilitate enjoyment by the public of the natural setting of the area and any features of historical interest therein:
>
> Provided that in considering whether or not any such development as is mentioned in this paragraph as being permissible shall be authorised in any particular case, the paramount consideration shall be to limit such development to the minimum consistent with the reasonable access to and enjoyment of the area by members of the public;
>
> …
>
> (4) Sections 63, 64 and 65 of the Physical Planning Ordinance shall apply *mutatis mutandis* to applications for development permission in a national park … as they apply to applications for development permission in a conservation area made under the Physical Planning Ordinance:
>
> Provided that the Director of Planning appointed under the Physical Planning Ordinance shall make available to the Minister responsible for this Ordinance a copy of the environmental impact statement referred to in those sections before any application for development permission is approved. …

…"

15. "Development" is defined, in section 2, as including "any change in use, the erection of any structure and the carrying out of any drainage, dredging or sewerage scheme, and such other activities as may be prescribed by the Governor by order".

Crown leases under section 94 of the Turks and Caicos Constitution 2006

16. Under section 94 of the Turks and Caicos Islands Constitution Order 2006 ("the 2006 Constitution"), the Governor was empowered to execute leases on behalf of the Crown. Section 25 of the Registered Land Ordinance 1967 ("the Registered Land Ordinance") provides for a system of land registration. Section 159 of the Registered Land Ordinance states that "[nothing] in this Ordinance shall prejudice any of the interests, rights, powers and privileges conferred on the Crown or the Government by any other written law". Section 160 provides that "[subject] to section 159, this Ordinance binds the Crown and the Government".

Planning history

17. The relevant planning history of the land at Silly Creek and Silly Cay has not been easy to assemble. It was not set out in either of the judgments below. Some of the relevant documents were not included in the material the parties presented to the Board for the hearing of this appeal. After the hearing, at the Board's request, the parties submitted an agreed note, describing the relevant applications for, and grants of, development permission, and produced the additional documents still available.

The outline development permission granted on 29 November 1994

18. On 21 October 1994, the company submitted to the Physical Planning Board an application for outline development permission for development on the Silly Creek peninsula, on land owned by the Crown and comprised in parcel number 60400/58 (application no. PR 3213). The application was submitted on Form DOP 1. In the application form the proposed development was described as the construction of "homes, condominiums, villas, marinas etc.", and the location as "[the] peninsula of land on the seaward side of Silly Creek", which was "approximately 34 [acres]".

19. On 29 November 1994, outline development permission was granted, on Form DOP 10, as "approval in principle to undertake" development described as "ROAD AND SUBDIVISION". The grant was subject to four conditions. Condition 2 referred to "Notes 1 and 2". Note 2 stated that "[an] application for detailed development

permission must be submitted to the Director of Planning within one year of the date of notification of this Grant, failing which … this grant will lapse and cease to have any effect …".

The permission to subdivide granted on 14 December 1994

20. On 24 November 1994, the company submitted, on Form DOP 6, an application for permission to subdivide land at Silly Creek and Silly Cay (application no. PR 3228). According to the agreed post-hearing note (at para 4), this application sought permission "to subdivide 41 acres of Parcel 60400/58 (the Silly Creek Peninsula, being lands demised in the 1995 Lease) and 10.1 acres of Parcel 60400/04 on the southernmost tip of Silly Cay (being lands later demised to [the company] in the 2006 Lease)". The plans submitted with it included the "Master Plan Development Potential", the "Topographical Plan East", the "Lot Plan East", the "Site Analysis West Point & Silly Cay" and the "Lot Plan West".

21. The application was also accompanied by a document entitled "Environmental Impact Assessment for Silly Creek, Turks and Caicos Islands" ("the Environmental Impact Assessment"). The "Executive Summary" of the Environmental Impact Assessment described the project at Silly Creek as involving "two distinct developments". It said that the "major portion", on the peninsula, would comprise "the construction of residential units, villas in clusters of up to four units each, … low-rise (three-story) condominium complexes …", and "recreational support facilities, including a marina and docking facilities …". It then stated:

> "The minor portion involves the southernmost area of Silly Cay which is to be developed as a recreational centre to support National Park users. …"

22. As the agreed post-hearing note confirms (at para 7), "[permission] to subdivide parcels 60400/04 and 60400/58 was granted on 14 December 1994 … and the accompanying plans were marked "approved"". The grant was on Form DOP 12. It was described as a "permission to subdivide land", for "ROAD & SUBDIVISION", and was subject to three conditions. Condition 1 referred to Notes 2 and 3. Note 2 stated that "[this] grant of development permission is valid for three years from the date of notification", and that "[if], within that period of three years, you have not commenced the development for which you have obtained this grant of development permission, the grant lapses and ceases to have any effect …". Condition 2 stipulated that "[the] Development agreement shall be submitted to the Department of Planning when signed". Condition 3 stipulated that "[the] requirements for Outline Permission shall be carried out as the development proceeds", and that "[plans] shall be submitted to

indicate the phases of the subdivision and the proposed development that shall take place".

23. On 10 February 1995, the Director of Planning granted a building permit for "ROAD & SUBDIVISION" on parcel numbers 60400/58 and 60400/4, under the same application. The grant was subject to five conditions. Condition 1 stated that "[the] requirements of the Outline Permission shall be carried out before any further permission is granted for the development".

The July 1995 Lease

24. The July 1995 Lease was entered into between the Government and the company on 25 July 1995 for a term of 99 years with a commencement date of 24 January 1995. It was a commercial lease under the Registered Land Ordinance. It envisaged the development of "the Demised Premises", a site of approximately 41 acres on the Silly Creek peninsula.

25. In the "Mutual Obligations", clause 11.3 states:

> "11.3. The Crown and the Lessee agree that so soon as the development of the Demised Premises is 60% complete and provided that the Lessee has not offended any of the requirements of the Planning and Development Authority and have acted in accordance with the recommendations of the present or any subsequent Environmental Impact Assessment or of the Department of Environment and Coastal Resources then the Crown will give favourable consideration to any proposal submitted by or on behalf of the Lessee for a variation of this Lease to the extent that parcel 60400/4 is included in the Demised Premises and or for the development of parcel 60400/4 provided that the nature and scope of any such proposed development meets the approval of the Department of Environment and Coastal Resources."

There was no definition of "the present … Environmental Impact Assessment", but this appears to have been a reference to the Environmental Impact Assessment submitted to the Physical Planning Board in November 1994. The reference to "parcel 60400/4" was to the land intended for development at Silly Cay.

The Settlement Agreement

26. In 2000, once development of the Silly Creek peninsula was 60% complete, the company requested the variation of the July 1995 Lease provided for in clause 11.3, to include the land at Silly Cay. That request was refused by the Government, the Department of Planning having recommended against it. The company issued proceedings for breach of the July 1995 Lease. Those proceedings were ultimately settled in the terms of the Settlement Agreement.

27. The recital to the Settlement Agreement refers to clause 11.3 of the July 1995 Lease, which, it states, "provided that upon the development (as provided for in [the July 1995 Lease]) of the Demised Land being 60% complete, the Crown will subject to certain such conditions give favourable consideration to any proposal by Silly Creek to include parcel 60400/4 in [the July 1995 Lease] ("the Property")" (para 2). It confirms that "[the] Property is included in a Land Use Plan approved by the Physical Planning Board … on the 14th of December 1994 ("the Land Use Plan"), a copy of which is attached hereto as Schedule 1" (para 3); that "Silly Creek proposes to develop the Property in accordance with the Land Use Plan or any other land use approved by the Physical Planning Board" (para 4); and that "[the] Land Use Plan has been also approved by the Department of Environmental & Coastal Resources …" (para 5). The "Land Use Plan" is one of the drawings submitted with the November 1994 application for permission to subdivide, namely "Lot Plan West". It shows eight lots on Silly Cay, five of which are allocated for "Residences and Guest Houses". It is stamped "Grant of permission to sub-divide land conditional", signed by the Director of Planning and dated 14 December 1994.

28. Under the heading "Acknowledgment by Crown", clause 1 of the Settlement Agreement states:

> "1. The Crown acknowledges that Silly Creek has met all requirements stipulated under clause 11.3 of [the July 1995 Lease] for the inclusion of the Property in [the July 1995 Lease] and approves the Land Use Plan as it relates to the Property."

The Silly Cay Lease

29. The Silly Cay Lease was a commercial lease, under the Registered Land Ordinance, for a term of 99 years, with a commencement date of 10 October 2006. The "Demised Premises" was "Title Number 60400/4, Chalk Sound, Providenciales".

30. The "Permitted User" was "[the] establishment and operation of a community comprising one or more lots, one or more homes, and guest houses, with private beach club, pool house, and island marina facilities, and such other facilities, amenities and infrastructure which might be necessary to support the same including one or more docks for the island of Silly Cay, all in accordance with the Master Plan approved by the Physical Planning Board and attached hereto as Schedule 1 or any variation or addition thereto". The "Master Plan" is defined as "the plan submitted by the Lessee as part of its proposal and approved by the Physical Planning Board on 14/12/94 and exhibited herewith as Schedule 1", namely the "Master Plan Development Potential". The recital states in paragraph A that "[the] Lessee and the Government have agreed that the Lessee should develop the Demised Premises".

31. In the "Lessee's Covenants", clause 6.3 states:

> "6.3. At the Lessee's cost and within 12 months of the date of execution of this Lease to commence construction and thereafter within 5 years to complete the construction of the infrastructure as contemplated in the Master Plan and in a substantial and workmanlike manner and in substantial conformity in every respect with Approved Plans and any subsequent amendments thereto approved by the Physical Planning Board and in compliance with all building regulations and other applicable regulation [sic] and orders."

32. The "Approved Plans" are defined as meaning "plans, drawings, specifications, construction method, techniques and materials to be used for the construction of the Development together with such sewage and other facilities as are required for the operation of the Development as may be approved by the Physical Planning Board including the Lot Plan approved on 14/12/94, taking into account the requirement of chapter 14 of the Development Manual". The "Development" is defined as "the development comprised in the Permitted User".

33. Clause 6.5 contains this covenant:

> "6.5. Not to erect or cause to be erected any structure or carry out any works on the Demised Premises or adjoining water courses without the approvals or consents required by any applicable Ordinance or subsidiary legislation."

34. Clause 7 contains an "Option to Purchase". Clause 7.1 states:

> "7.1. The Crown hereby agrees that the Lessee, having performed all the covenants on the Lessee's part to be performed contained in this Lease and having substantially completed infrastructure up to the marina servicing the lot or lots being purchased and in such case where the Lessee has constructed on any part of the Demised Premises so much of the foundations and external walls of any building approved by the Physical Planning Board or other site improvements to the value of US$125,000 per acre … , shall have the option to purchase the freehold interest in that part of the Demised Premises … "

35. The "Crown's Covenants" in clause 8 include these, in clauses 8.5, 8.6 and 8.7:

> "8.5. Subject to the Lessee operating in a manner to safeguard the natural environment and in accordance with the recommendations and directions of all relevant authorities to permit the Lessee and all persons claiming under it to carry out the Development.
>
> 8.6. To support the carrying out of the Development.
>
> 8.7. Subject to the directions and approval of the Physical Planning Board and Department of Environment and Coastal Resources to grant to the Lessee the right to dredge the lagoon area and to use those areas made accessible due to dredging and to place moorings in the said areas by way of identification and demarcation."

36. The "Mutual Obligations" in clause 11 include this covenant, in clause 11.3:

> "11.3. The Crown and the Lessee agree that that Development requires that the Lessee engage in extensive subdivision of the Demised Premises and that the Lessee shall have the right to engage in such subdivision at the Lessee's expense and that the Crown shall do all acts and things as may be reasonably required to facilitate the subdivision of the Demised Premises."

The 2009 application for development permission

37. On 22 September 2009, the company submitted an application, on Form DOP 1, for detailed development permission to construct a "Private Residential Dwelling

house" on one of the lots within the land demised in the Silly Cay Lease (application no. PR 10358). That application was refused by the Physical Planning Board on 27 November 2009, for this reason:

> "1. The proposed development is located within the Chalk Sound National Park. In accordance with Section 4(1)(a) of the National Parks Ordinance 1998 the proposed development is of a type which cannot be allowed in a "National Park" and shall be deemed as refused."

38. On 22 December 2009, the company appealed against that decision, contending in its grounds of appeal that the decision "usurps the role of the Governor who, on behalf of the Crown/TCIG, acted effectively and lawfully over a lengthy period (1995-2006), and by various instruments and agreements, permitted just such a development as is proposed". The appeal was refused by the Planning Appeal Tribunal on 18 March 2011. No reasons were given for that decision.

The judgments in the courts below

39. The company issued proceedings on 9 June 2014, seeking damages for breach of several of the Government's covenants in the Silly Cay Lease and Settlement Agreement. The principal contention in the claim, as amended, was that the Government was in breach of the Settlement Agreement and the Silly Cay Lease by failing to permit, support or facilitate the proposed development for which those documents provided. Before the Chief Justice, the company maintained that the Government was bound by the terms of the Silly Cay Lease to permit the development on Silly Cay consistent with the Land Use Plan, which had been approved in the Settlement Agreement, and was liable in damages for refusing to do so.

40. The Chief Justice dismissed the claim on the basis that the Governor could not, by entering into the Settlement Agreement and the Silly Cay Lease, fetter his discretion in the future to refuse development permission relying on section 4(1)(a). She concluded (in para 17 of her judgment):

> "17. … [The] Governor had no power to bind himself to grant development permission as such permission depended on the statutory procedures being followed and discretions exercised, as for example the discretion exercised by the Director of Planning in 2000 which put paid to the proposed development, nor could he fetter his discretion to withdraw his support of a development in a National Park if he became satisfied at some later date that such use was not consistent with statute or in the public interest,

> consistent with the principle set out in [*Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500] as applied in [*Cudgen Rutile (No. 2) Pty Ltd v Chalk* [1975] AC 520]. Insofar as he purported to do so in [the Silly Cay Lease], such promise is invalid."

41. That analysis was rejected by the Court of Appeal. Giving the judgment of the court, Adderley JA said that by executing the Settlement Agreement and the Silly Cay Lease, the Governor had "exercised his discretion to approve the type of development that he did". It was a matter for the Governor's discretion to determine what was "the minimum [development] consistent with the reasonable access to and enjoyment by the public of the natural setting of the area …". The Chief Justice had "substituted her own discretion in relation to what development fell within [section 4(1) of the National Parks Ordinance]" (paras 72 and 73).

42. In the Court of Appeal's opinion, if the company were not allowed to proceed in accordance with the Settlement Agreement and the Silly Cay Lease, this would be "a clear breach of their terms". Resiling from them was "a failure to fulfil a legitimate expectation that [the Government] would take the necessary steps to ensure that the project could proceed (either by moving the development out of the National Park or by some other means)". Legitimate expectation applied "if there has been a breach of [the company's] property right under the constitution even if the Governor's actions were ultra vires". The Government was liable to pay compensation to the company "should it resile from its commitment and not allow the type of development as approved to proceed" (para 76).

43. The Court of Appeal held that the judge ought to have left open the possibility of "constitutional relief". The company's "property rights" had been infringed. On the reasoning in *Rowland v Environment Agency* [2002] EWHC 2785 (Ch), [2003] Ch 581, proportionality should be taken into account in assessing compensation for that infringement (para 77). The case was therefore remitted to the Supreme Court to assess what damages were payable as a result of the diminution in value of the demised premises by the restriction of its use (para 78).

The effect of the Settlement Agreement and the Silly Cay Lease

44. For the Attorney General, Ms Helen Mountfield QC submitted that the Court of Appeal was wrong to conclude that the execution of the Settlement Agreement and the Silly Cay Lease in October 2006 amounted to the Governor's exercise of his discretion under section 4 of the National Parks Ordinance. No relevant application for development permission, of any type, was extant at the time, so he could not determine any such application. The Settlement Agreement and the Silly Cay Lease were not

entered into under the statutory provisions for land use planning, but under a different statutory scheme in which the Crown was acting as landowner. They were not a grant of development permission of any kind under the statutory scheme for land use planning.

45. For the company, Mr Ariel Misick QC supported the Court of Appeal's reasoning. He contended that by approving the "Land Use Plan" in the Settlement Agreement, the Governor had lawfully exercised his discretion under section 4 of the National Parks Ordinance and had thus granted a development permission to subdivide land under section 29(c) of the Physical Planning Ordinance. The application for permission to subdivide made in November 1994 had remained live and valid for the Silly Cay land, having been deferred by the Director of Planning for the Governor's later consideration. It was now determined by the execution of the Settlement Agreement and the entering into of the Silly Cay Lease, and the relevant statutory requirements had thus been complied with. In the company's written submissions, though not at the hearing, it had also been contended the Settlement Agreement constituted a "development agreement" under section 35 of the Physical Planning Ordinance.

46. In the Board's view the company's argument suffers from a basic and fatal misconception. It confuses the statutory functions of the Governor in land use planning with his quite separate role in negotiating and agreeing the terms of a commercial lease on behalf of the Crown as landowner. It elides action within the territory of private law with decision-making subject to the principles of public law. Properly understood, the Settlement Agreement and the Silly Cay Lease did not belong to the statutory realm of land use planning. They did not represent a development control decision under the self-contained and comprehensive statutory code for planning in the Turks and Caicos Islands, with its panoply of procedures to ensure transparency and accountability in the making and recording of decisions taken in the public interest. They were not, and plainly were not intended to be, a grant of development permission under section 29 of the Physical Planning Ordinance. They did not amount to a determination by the Governor under section 4 of the National Parks Ordinance. They reflected a commercial transaction between the Crown as landowner and the company as intending developer of the Silly Cay land, which was embodied in a Crown lease. That was their only status.

47. The relevant planning history does not suggest any different understanding. The outline development permission granted on 29 November 1994 related to land on the Silly Creek peninsula, and not to any land on Silly Cay. The permission granted on 14 December 1994 did relate to land on Silly Creek peninsula and land on Silly Cay. But this was a development permission under section 29(c) of the Physical Planning Ordinance, not an outline permission under section 29(a), or a detailed development permission under section 29(b). It was a permission to subdivide land, not to construct the intended development. A permission under section 29(c) did not confer on the landowner the right to proceed with the construction of development on the land once

it has been subdivided. It did not predetermine the outcome of a future application for outline or detailed development permission. Its effect, which is clear from the provisions of section 29, was merely to permit the land to be divided into smaller parcels or lots.

48. None of the conditions attached to the December 1994 permission distinguished between the two parts of the site, dealing with the Silly Cay land differently from the Silly Creek peninsula. Whether the conditions were ever fully complied with is not clear, and whether the permission itself actually expired is a question we cannot, and need not, resolve.

49. Crucially, however, in view of the company's argument as presented to the Board, there is nothing on the face of the permission, or in any other contemporaneous document, to support the suggestion made by Mr Misick that the application for permission to subdivide remained extant for the Silly Cay land, deferred and awaiting determination by the Governor at some uncertain date in the future. No evidence has been produced to indicate that the Director of Planning or the Governor, or indeed the company itself, thought that there subsisted a partly undetermined application for development permission, which was held in abeyance for almost 12 years until the Settlement Agreement and the Silly Cay Lease were executed in 2006. In fact, the evidence suggests the opposite. In an email dated 2 October 2009 from Roger Lajoie, the company's architect, to the Director of Planning, Mr Lajoie asked for "a note confirming that the land use as described in the Master Plan (PR.3213 [the November 1994 application]) for the Silly Creek area (peninsula, creek and Cay) has been approved and remains in force". Mr Lajoie's first witness statement, dated 8 September 2015, states, under the heading "Resulting assurances, approval and agreements", that his negotiations with the Crown and Physical Planning Board had "resulted in … the approval by the Planning Board, on the 14th of December 1994, of lot plans indicating the uses permitted for the subject properties, including on Silly Cay…". This understanding is repeated in Mr Lajoie's second witness statement, dated 20 January 2017. And the parties' agreed note submitted after the hearing of this appeal states, unequivocally, that "[permission] to subdivide parcels 60400/04 [being land at the southernmost tip of Silly Cay] and 60400/58 was granted on 14 December 1994 …"

50. It seems clear, therefore, that the company has always understood the true position. The December 1994 permission determined the subdivision application as it related to the Silly Cay land. The idea that the application as it related to Silly Cay was left dormant until finally determined by the Settlement Agreement is false. The November 1994 application was completely dealt with by the determination of 14 December 1994. Nothing was left undetermined. And there was no evident misunderstanding about this at the time, or later.

51. The Settlement Agreement and the Silly Cay Lease came into existence as a means of settling the dispute that had arisen over the Crown's performance of its obligation under clause 11.3 of the July 1995 Lease. They were not the result of a process of decision-making on an application for development permission under the statutory scheme. No development permission had by then been granted for the construction of any development on the Silly Cay land. No relevant application was outstanding. No fresh application had been made since the December 1994 permission to subdivide was granted, nor any revision to the original Environmental Impact Assessment produced. And it was only some three years later, in 2009, that the company submitted such an application for a single plot on Silly Cay.

52. It is not arguable that the Settlement Agreement was a development agreement under section 35 of the Physical Planning Ordinance. It was not entered into, as section 35(1) provided, by the Physical Planning Board on the advice of the Director of Planning and with the consent of the Governor. It was entered into by the Governor himself, on behalf of the Crown as landowner. There is no evidence that the Director of Planning himself, or the Physical Planning Board, was involved in negotiating its terms. Nor did it state, as section 35(2) provided, that the Physical Planning Board would "grant an application for development permission subject to compliance with [its] provisions". There is nothing in the Settlement Agreement or in the Silly Cay Lease to identify either document as a development agreement under section 35. They lack the essential ingredients of such a document. And the Governor had no power under section 35, or any other provision of the Physical Planning Ordinance, to enter into a development agreement on his own, and without the involvement of the Director of Planning or the Physical Planning Board.

53. Neither of those documents was a development permission of any relevant kind under the statutory code in the Physical Planning Ordinance – outline development permission (section 29(a)), detailed development permission (section 29(b)), or permission to subdivide (section 29(c)). They were not the product of the Physical Planning Board's exercise of decision-making discretion on an application made under section 30 of the Physical Planning Ordinance, nor a decision by the Governor to permit development, in the exercise of his discretion under section 4(1)(a) of the National Parks Ordinance. Neither document purported to be such a determination.

54. The submission that the Settlement Agreement constituted a development permission to subdivide the land on Silly Cay is untenable. The fact that the Governor had responsibility for planning decision-making in a national park under section 4 of the National Parks Ordinance does not mean he was exercising that power when he entered into the Settlement Agreement and the Silly Cay Lease; nor was he.

55. Both in provenance and in form, those two documents are irreconcilable with the performance of any planning function. They were not produced in accordance with the

statutory process for development control, as a decision on a properly submitted application for development permission, supported by an environmental impact statement, with the payment of a fee, and in compliance with the other formalities in the Development Permission Regulations. Neither document remotely resembles a development permission granted under section 29 of the Physical Planning Ordinance. Neither is in, or accompanied by, or refers to, a Form DOP 12, for a grant of permission to subdivide. Neither refers to any application. Neither is subject to any conditions controlling or restricting development. Neither articulates any planning decision. Clause 1 of the Settlement Agreement does not do that. It simply recognises, as a matter of fact, the Crown's approval – as landowner – of a plan already formally considered by the Physical Planning Board when determining an application for a development permission to subdivide land. It could not sensibly be read as a decision on an application for development permission, even if such an application had been made – which it had not.

56. The Silly Cay Lease was a lease to enable the carrying out of development if and when the requisite development permission was obtained. Several of its provisions – for example, clauses 6.3, 6.5 and 7.1 – acknowledge the statutory planning process as a separate exercise from the settlement of legal proceedings and the granting of a commercial lease. They recognise the need for further approvals to be obtained, including decisions by the Physical Planning Board, and with no presumption on the outcome. Provision is made for the "construction of the infrastructure as contemplated in the Master Plan …" – not the development envisaged in the Land Use Plan – within the specified timescale of five years "in substantial conformity in every respect with Approved Plans … approved by the Physical Planning Board and in compliance with all building regulations and other applicable regulation [sic] and orders" (clause 6.3). "Approved Plans" are defined as including plans and drawings "as may be approved by the Physical Planning Board including the Lot Plan approved on 14/12/94 …". It is envisaged that, before the erection of any "structure" or the carrying out of any "works", the "approvals or consents required by any applicable Ordinance or subsidiary legislation" will be secured (clause 6.5). And as a pre-condition to the option to purchase, it is expected that the company will construct the foundations and external walls of "any building approved by the Physical Planning Board or other site improvements …" (clause 7.1).

57. In short, the Settlement Agreement and the Silly Cay Lease did not have the effect of granting development permission for development on Silly Cay. No development control discretion was in play when they were executed. The Governor was not exercising his power to grant permission under section 4(1) of the National Parks Ordinance. And his discretion to grant or refuse development permission under that provision was not and could not lawfully be fettered (see *R (Kilby) v Basildon District Council* [2007] EWCA Civ 479, [2007] HLR 39, at paras 32 and 34; *R v Hammersmith and Fulham London Borough Council, Ex p Beddowes* [1987] QB 1050, at p1065G; and *Cudgen Rutile (No 2) Pty Ltd,* at p533G). He remained free – subject to the relevant statutory constraints – to exercise that discretion appropriately as and when

a relevant application came before him. That did not happen in 2006. The Court of Appeal's analysis to the opposite effect was, with respect, wrong.

The restriction on development in section 4(1) of the National Parks Ordinance

58. Ms Mountfield submitted, again contrary to the Court of Appeal's conclusion, that in any event the Governor could not lawfully have exercised his discretion under section 4(1) of the National Parks Ordinance by granting development permission for the proposed development on Silly Cay. Section 4(1) specifies as "the paramount consideration" – not merely "a paramount consideration" – the principle of limiting development to the specified minimum for public access and enjoyment. The proposed development was plainly irreconcilable with that principle.

59. Mr Misick submitted that the Court of Appeal's understanding of section 4(1) was correct. The statutory context and wording of section 4 did not preclude the Governor from exercising his discretion in the way he did, by approving the "Land Use Plan" in the Settlement Agreement.

60. Here too the Attorney General's argument is well founded. It rests upon a well-established principle of public law: that statutory powers entrusted to the executive branch of government must be exercised within the four corners of the relevant statutory powers, and that when the executive acts outside these boundaries, its decision is ultra vires and unenforceable (see the speech of Lord Upjohn in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, at p1060). On that principle, in the Board's view, if the Governor had ostensibly granted development permission for the proposed development on Silly Cay in the Settlement Agreement and the Silly Cay Lease, he would have been exceeding the ambit of the decision-making discretion in section 4(1). The same would have been so if he had undertaken to grant permission for the development in the future.

61. Assuming – though it is unnecessary in this appeal to decide – that the power conferred on the Governor under section 4(1) extends to the granting of permission to subdivide land, and not merely permission for the erection of buildings and other structures, the Board cannot see how it could lawfully have been used to grant such permission for the company's proposed residential development on Silly Cay. The power to grant permission under section 4(1) is a classic example of a decision-maker's statutory discretion in the sphere of land use planning. It is, however, a tightly constrained discretion. Though it does not prevent development permission ever being granted for the erection of buildings in a national park, it carries three requirements whose effect is to limit the scope to approve such a proposal: first, that the development is "considered to be desirable to facilitate enjoyment by the public of the natural setting of the area and any features of historical interest therein"; second, that a national park

"shall be open to members of the public"; and third, as "the paramount consideration", that development is limited to the "minimum consistent with the reasonable access to and enjoyment of the area by members of the public". How the discretion is applied within those very tight constraints will clearly be a matter for the Governor.

62. In this case the company's claim is not concerned with the merits of the Physical Planning Board's decision to refuse detailed development permission on the application made in 2009, and its reason for making that decision. That was capable of being explored on appeal to the Planning Appeal Tribunal. It is not a matter for the Board in these proceedings. Nor is it open to the Board to go behind the decision of the Planning Appeal Tribunal dismissing the company's appeal against the Physical Planning Board's decision. No legal challenge, it seems, was ever made to that decision, and these proceedings do not directly impugn it.

63. But in any event it seems extremely unlikely, if conceivable at all, that the section 4(1) discretion could ever extend to issuing a development permission for the private residential development proposed by the company at Silly Cay. Such development seems entirely at odds with the explicit purpose of section 4(1). It would do nothing to further the aim of opening the National Park to members of the public for recreation and facilitating their enjoyment of the area, and it would surely be incompatible with "the paramount consideration" of keeping acceptable development to the "minimum" consistent with that aim. It would follow that a decision to grant permission for the company's proposal under section 4(1) would have been ultra vires. And if that were the effect of clause 1 of the Settlement Agreement, it would, in the Board's view, have been a void provision. And this would have been enough to render the Settlement Agreement itself void. The Board cannot see how it would be possible to take a "blue pencil" to clause 1, leaving the remainder of the Settlement Agreement intact (see *Parks v Esso Petroleum Co Ltd* [1999] 1 CMLR 455, paras 55 to 59).

64. To reach that conclusion it is not necessary, and it would clearly be inappropriate, for the Board to set about a shadow exercise of the decision-maker's discretion in this case. If the Chief Justice had attempted this – and the Board does not believe she did – she would have been wrong. But this has no bearing on the outcome of the appeal.

Should the Court of Appeal have entertained argument on constitutional rights to property?

65. Ms Mountfield sought to persuade the Board that the Court of Appeal lacked jurisdiction to decide the question of relief under the constitution in the absence of any consideration and conclusion by the Chief Justice at first instance. Under section 18(2) of the 2006 Constitution and the corresponding provision in the Turks and Caicos Islands Constitution Order 2011 ("the 2011 Constitution"), the Supreme Court had

original jurisdiction to entertain such issues, but did not do so. The Court of Appeal ought therefore to have refrained from entertaining the point as if it were a court of first instance.

66. Mr Misick resisted that contention. He submitted that the Court of Appeal had jurisdiction to deal with the company's claim for "constitutional relief", which was not abandoned before the Chief Justice. It did this without causing any prejudice to the Attorney General.

67. In the Board's view the contention that the company's right to property under the constitution had been breached was sufficiently pleaded – if succinctly – in the company's Re-Amended Statement of Claim, which asserted, in paragraph 111(i)(c), that the Government had breached "[the company's] property rights protected under sections 1 and 17 of the Turks and Caicos Islands Constitution Order 2011 and related legislation in force during the relevant periods". In the Court of Appeal it was submitted on behalf of the Attorney General that this part of the company's claim had not been argued before the judge. But the Court of Appeal regarded itself as being properly seized of the point. It observed that counsel for the Attorney General had dealt with it in her written submissions and in oral argument (para 59 of the judgment). And it went on to consider the issue on its merits.

68. In the circumstances the Board does not think it can be said that the Attorney General suffered any prejudice by the Court of Appeal entertaining argument on the point and determining it (see the speech of Lord Hoffmann in *Barclays Bank Plc v Boulter* [1999] 1 WLR 1919, at p1923). This conclusion is supported by the decision of the Board in *Bowe v The Queen* [2006] UKPC 10, [2006] 1 WLR 1623, where Lord Bingham of Cornhill observed (at para 10) that "the right of application to the Supreme Court for redress is 'without prejudice to any other action with respect to the same matter which is lawfully available'", and "the right of application to the Supreme Court is not provided as a unique or exclusive procedure …". Non-exclusionary language of the kind referred to by Lord Bingham appears in both the 2006 Constitution and 2011 Constitution. It seems to the Board, therefore, that in the interests of justice it should consider the submissions made by counsel on the substantive issue.

"Legitimate expectation" and breach of constitutional rights to property

69. Ms Mountfield submitted that no relevant "legitimate expectation" had been created by the Settlement Agreement or by the Silly Cay Lease. Even if it had, the Government would have been entitled to resile from it on proportionality grounds (see *United Policyholders Group*, at para 38). And in any case a breach of the "legitimate expectation" contended for by the company would not equate to a breach of property rights under the constitution, nor would it sound in damages. The 2011 Constitution

came into force on 15 October 2012, and so was not in force when detailed development permission was refused in 2009 and the appeal dismissed in 2011. But neither in that order nor in the 2006 Constitution did the right to property afford any help to the company. The alleged representation was not a "possession". None of the case law on article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms was of any assistance to the company.

70. Mr Misick sought to base his argument on the 2011 Constitution, because it was not until 2013 that the Governor had finally made clear his unwillingness to grant development permission for the proposed development on Silly Cay. The company enjoyed both a "legitimate expectation" under the Settlement Agreement and the Silly Cay Lease, and a "property right", which came into existence upon registration of the Silly Cay Lease. The representation inherent in the approval of the "Land Use Plan" in clause 1 of the Settlement Agreement was "clear, unambiguous and devoid of any relevant qualification". The Governor had no good reason to resile from it, and his refusal to honour it without payment of compensation was a violation of the company's property rights under the constitution.

71. In the Board's opinion the Attorney General's argument on this issue is cogent. As Ms Mountfield submitted, the Court of Appeal appears to have elided the concepts of "legitimate expectation" at common law and the "right to property" under the constitution. Neither concept assists the company here.

72. As for legitimate expectation, there are three basic points to be made. First, it is a misconception that any representation, or promise, made by the Governor on behalf of the Crown as landowner could ever bind himself, the Physical Planning Board or the Director of Planning in the discharge of development control functions under the statutory scheme for land use planning. That notion goes against the principle that a public authority acting in its capacity as landowner does not bind itself when making decisions as a planning authority (see, for example, the judgment of Lewison LJ in *Dudley Muslim Association v Dudley Metropolitan Borough Council* [2015] EWCA Civ 1123, [2016] 1 P&CR 10, at para 56).

73. Secondly, the Governor's execution of the Settlement Agreement and his entering into the Silly Cay Lease, whatever their terms, could never have provided a lawful representation of the relevant kind – "clear, unambiguous and devoid of relevant qualification" (see *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, at p1570) – on the outcome of a future application for development permission at Silly Creek or Silly Cay, whether for subdivision, outline or detailed development permission. Such a representation, or promise, would clearly have been ultra vires. The opposite conclusion would clash with established principle (see, for example, *R (Godfrey) v Southwark London Borough Council* [2012] EWCA Civ 500,

[2012] BLGR 683, at para 56; and *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, at p625).

74. Thirdly, on their proper construction, neither the Settlement Agreement nor the Silly Cay Lease created, or purported to create, a representation that any application for development permission would be dealt with otherwise than in accordance with the relevant statutory process. That was not the effect of clause 1 of the Settlement Agreement in stating that "[the] Crown acknowledges that Silly Creek has met all requirements stipulated under clause 11.3 of [the July 1995 Lease] for the inclusion of the Property in [the July 1995 Lease] and approves the Land Use Plan as it relates to the Property". Such approval did not constitute a representation, or promise, that any application for development permission for the proposed development, if and when it was submitted to the Director of Planning, would not be refused on the basis of the type of development proposed. And there are no provisions in the Silly Cay Lease that could properly be read in that way. None of its covenants suggest that the statutory role of the Physical Planning Board or of the Governor had already been discharged, or was superseded, by the terms of the Settlement Agreement and the Silly Cay Lease itself. On the contrary, as has been said, several clauses in the Silly Cay Lease demonstrate the parties' recognition of the need for the company to comply with the requirements of the statutory planning code, and with the statutory regime for the granting of building permits. In this sense, any representation given was far from being "devoid of relevant qualification".

75. Taken as a whole, therefore, the content of the Settlement Agreement and the Silly Cay Lease is far from being a clear and unambiguous representation of the kind upon which the company seeks to rely. Viewed in the context of the provisions of the Silly Cay Lease that refer to statutory processes requiring various steps to be taken for compliance, including the statutory planning process, the statement in clause 1 of the Settlement Agreement that "[the] Crown … approves the Land Use Plan as it relates to the Property" cannot be read as binding any future decision-making under the Physical Planning Ordinance. It is not expressed as a representation to that effect, or indeed as a representation of any sort. It does not commit the Physical Planning Board or the Director of Planning to any decision on an application for an approval. Nor does it commit the Governor to any future decision of his own under section 4(1) of the National Parks Ordinance. As the Chief Justice recognised, citing *Rederiaktiebolaget Amphitrite*, it could not have done that. It does not engender a legitimate expectation, or any expectation at all.

76. If this understanding of the provisions of the Settlement Agreement and the Silly Cay Lease were incorrect, the Board would have no hesitation in concluding that the Government would have been justified in departing from the representation it had made, on public interest grounds. To do so would have been reasonable and proportionate (see *United Policyholders Group*, at para 121). It would avoid an agreement by which the Government and the company had resolved a legal dispute between them over the

performance of an obligation in a previous lease from overriding the operation of the statutory planning system and displacing the decision-making discretion of the Governor and the Physical Planning Board in the performance of their statutory roles. As a matter of public policy, therefore, it would be wholly warranted (see *United Policyholders Group*, at para 38).

77. As for property rights, the Board would reject the argument that either the Settlement Agreement and the Silly Cay Lease in combination or specifically the statement in clause 1 of the Settlement Agreement gave rise to an expectation qualifying as a property right under the constitution.

78. Since the company maintains that the property rights in question accrued in the Settlement Agreement and the Silly Cay Lease, both of which came into existence in 2006, and that those rights were breached by the refusal of development permission in 2009 and the dismissal of the appeal against that refusal in 2011, it would be the 2006 Constitution, not the 2011 Constitution, to which one must look to establish the source of such rights. Whilst sections 1(c) and 16 of the 2006 Constitution also protect a person from being deprived of property, their provisions do not go as far as those in the 2011 Constitution. Section 17 of the 2011 Constitution, unlike section 16 of the 2006 Constitution, enshrines a general right to "the peaceful enjoyment of property". In the 2011 Constitution, section 21(7) states that the jurisprudence of the European Court of Human Rights should be taken into account whenever it is "relevant to the proceedings". Under the 2006 Constitution there was no provision to this effect, and thus no requirement that the European case law on the right to the protection of property in article 1 of the First Protocol be taken into account.

79. Even if the case law on article 1 of the First Protocol could be invoked here, it would not support the argument that there exists, for a landowner or developer, a constitutional right to a favourable outcome on an application for detailed development permission under section 29(b) of the Physical Planning Ordinance. Nor would it lend force to the submission that, in the circumstances of this case, a specific proprietary right to such a decision arose from the statement in clause 1 of the Settlement Agreement that "[the] Crown … approves the Land Use Plan as it relates to the Property", even if one were to ignore the qualifications and provisos relating to the planning process that are contained in the Silly Cay Lease – such as clause 6.5. As Ms Mountfield submitted, the Settlement Agreement and the Silly Cay Lease did not generate a protected "possession" (cf *Pine Valley Developments Ltd v Ireland* (1992) 14 EHRR 319, at para 51; and see *Kopecky v Slovakia* (2005) 41 EHRR 43, at paras 45 to 52). And no decision of the European Court of Human Rights has been brought to the Board's attention as authority for the proposition that the right in article 1 of the First Protocol excludes the right of the State to exercise lawful control over the use and development of property, under domestic legislation for the making of decisions on applications for development permission and appeals against the refusal of permission. Indeed, such a concept is inimical to the terms in which the right itself is qualified: "not

… in any way [to] impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest …" (see *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35, at para 61).

Damages

80. Within the domain of private law, the Board cannot discern any breach of the terms of the Settlement Agreement or the Crown's covenants in the Silly Cay Lease. The reality may just be this: that when the company agreed its settlement with the Crown in 2006 it made a deal whose outcome proved less advantageous than it hoped. Certainly, it is difficult to see how any claim for damages embraced in these proceedings – whether damages for "unjust enrichment", as pleaded, or a restitutionary remedy of some other kind – could survive the analysis on which, in the Board's view, the Attorney General's appeal must be upheld. However, as the parties agree, on the order made by the Chief Justice this question remains a matter for the Supreme Court, and must accordingly be remitted to that court for determination.

Conclusion

81. For those reasons, the Board will humbly advise Her Majesty that the appeal should be allowed.