THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2024/0030

BETWEEN:

THE BARBUDA COUNCIL

Appellant

and

PLH (BARBUDA) LIMITED

Respondent

Before:

The Hon. Mde. Vicki-Ann Ellis — Justice of Appeal
The Hon. Mr. Gerard St. C. Farara — Justice of Appeal [Ag.]
The Hon. Mde. Cadie St. Rose-Albertini — Justice of Appeal [Ag.]

Appearances:

Ms. E. Ann Henry, KC with her Mr. Lenworth Johnson for the Appellant
Mr. Anthony Astaphan, SC with him Dr. Errol Cort, Ms. Claneisha Gumbs and Ms. Alketz Joseph for the Respondent

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2025: June 4;
September 16.

Civil appeal – Contract law − Interpretation of contractual provisions – Lease Agreement – Claim for arrears of rent – Memorandum of Agreement – Airport Escrow Agreement - Whether the learned judge erred in accepting the respondent's interpretation of the relevant provisions of the Memorandum of Agreement, the two leases and the Airport Escrow Agreement

The underlying dispute between the parties and principal issue in this appeal concerns the interpretation of contractual provisions contained in certain agreements and leases entered into during the period December 2016 to February 2017 between the Government of Antigua and Barbuda ("the Government") and the Barbuda Council ("the Council" or "the appellant") on the one hand, and PLH (Barbuda) Limited ("PLH" or "the respondent") on the other. These agreements provided for and were entered into to facilitate the undertaking by PLH of a major tourism and hotel development on two parcels of land situated at Low Bay and Pink

Sands on the island of Barbuda leased separately by PLH from the Government, with the agreement and consent of the Council.

The 425 Lease was entered into on 22nd February 2017 by and between the Council a statutory body corporate established pursuant to The Barbuda Local Government Act, as lessor, Doctor the Honourable Sir Rodney Williams Governor General of Antigua and Barbuda for and on behalf of the Government and PLH, the respondent - a company incorporated and existing under the Laws of Antigua and Barbuda as lessee. By the 425 Lease, the Government demised on to PLH 425 acres of land situated at Low Bay and Pink Sands in Barbuda for the initial term of 99 years from the effective date of the Lease, at the annual rent of US$150,000.

The 425 Lease expressly incorporated the covenants in the prior Memorandum of Agreement ("MOA") entered into by the same parties on 6th December 2016. The MOA sets out the terms and conditions under which the Government and the Council agreed to collaborate to support the proposed development of certain lands in Barbuda more particularly described at clause 1.1 of the MOA as "the Property". This includes but is not limited to clause 5.8 which provided for a US$5 million contribution to be made by PLH and paid into an escrow fund to be set up at a bank to assist in financing the budgeted cost of US$14 million for the construction of a new airport on Barbuda, and for this sum paid into the escrow account to be credited to PLH "*as prepayment of rent due under the Lease*" to be granted to PLH by the Government and the Council.

The parties to the 425 Lease executed and entered into on the same day, (22nd February 2017) a second lease, referred to as "the 174 Lease". By this second lease the Government and the Council demised onto PLH 174.83 acres of land at Low Bay and Pink Sands on Barbuda for the initial term of 99 years at an annual rent of US$62,938, totalling US$6,230,941.20 for the term of the said Lease. Clause A.1 of the 174 Lease is an express and detailed provision for the application and credit of the sum of US$5 million contribution by PLH toward the airport construction budget, to the annual rents to be paid under clause A.1 of the said Lease, as stipulated by clause 5.8 of the MOA. No such detailed provision appears in the 425 Lease. However, both the 425 Lease and the 174 Lease by their respective clause A.2 were made expressly subject to and includes the covenants contained in the MOA by and between the Government, the Council and PLH.

Also, on 22nd February 2017 the Government, the Council and PLH entered into the Airport Escrow Agreement ("AEA") (originally titled 'Proposed Airport Escrow Agreement') as contemplated and provided for under clause 5.8 of the MOA. Clause 1 of the AEA stipulated that PLH shall within 3 business days of the date of said agreement, deposit the sum of US$5 million with Global Bank of Commerce Ltd. ("the Bank") which Bank will hold the funds in a segregated account at its branch at St. John's, the capital of Antigua and Barbuda. It is not in dispute that the full amount of US$5 million was in fact paid or transferred by PLH into the said escrow bank account on 14th March 2017.

On 1st December 2021, the Council's lawyers sent two letters to PLH's legal team. One letter demanded payment by PLH of arrears of rent at US$150,000 per annum under the 425 Lease for the years 2017 to 2021 (inclusive) totalling US$750,000 plus $2,127.50 legal

costs, and gave notice that failure to make payment of the sum demanded within 15 days could result in the Council exercising its remedies under the said lease. The second letter was in relation to the 174 Lease, and specifically clause 5.8 dealing with the obligation on the part of PLH to pay the sum of US$5 million into an escrow account at Global Bank of Commerce. The Council requested confirmation that PLH had paid the said sum into said bank account since it had no record of this having been done. The Council also gave notice pursuant to clause A.4(1)(a) of the 174 Lease of its intention to exercise its remedies under said Lease if it did not receive appropriate evidence that the US$5 million sum has been paid into the said bank by PLH.

PLH's lawyers, in their written response to both letters, confirmed that the said sum of US$5 million had in fact been paid by it and deposited into the escrow account at the said bank. In the said response letter, PLH also disputed the claim for arrears of rent asserting that pursuant to clause 5.8 of the MOA which was expressly incorporated as a covenant under both the 425 and 174 Leases, the claim for arrears of rent under the 425 Lease was misconceived.

No payment having been made by PLH in satisfaction of the alleged arrears of annual rent under the 425 Lease, the Council commenced legal proceedings in the High Court of Justice by way of Claim Form and statement of claim filed 15th February 2023 (approximately 14 months later). It claimed arrears of rent under the 425 Lease in the sum of US$900,000 equating to EC$2,445,210 plus court fees and legal costs. In its statement of claim, the Council having pleaded and summarised the salient terms of the MOA, the two Leases and the AEA, accepted that clause A2 of both Leases provided that the covenants therein shall be made subject to and include those contained in the MOA which shall be incorporated therein and made a part of the Leases, and where there is a conflict between the terms of these documents that terms of the MOA shall prevail.

In the defence filed 13th March 2023, PLH denied the claim and relied on the express terms of clause 5.8 of the MOA which provided that the sum of US$5 million which it had paid into the escrow account at the bank "*shall be treated as an advance payment on rents due under the respective leases in respect of the development property*." PLH also pleaded and relied on clause 1.1(a) of the MOA and the definition of the term "property" therein as including both the 174.83 acres and the 425 acres each of which formed the subject matter of the respective leases dated 22nd February 2017. It is also pleaded that by clause 5.8 of the MOA it was agreed by the parties that PLH "*is permitted to set off all payments under the ninety-nine year leases for 174.83 acres and 425 acres of land against the US$5,000,000 which was transferred into the Government of Antigua and Barbuda Airport Project Account at the Global Bank of Commerce*". Accordingly, PLH contended that it is entitled by virtue of clause 5.8 of the MOA and clause 5 of the AEA to withhold or set off any and all rents due under the respective leases against the US$5 million paid by it into the escrow account under the AEA for the purposes of the construction of the airport on the island of Barbuda.

After a trial on 2nd July 2024 the judge, in a written judgment delivered 26th September 2024 ("the judgment"), found for PLH on its interpretation of the various agreements and leases executed by the Government, the Council and PLH as to the correct meaning and effect of clause A.2 of the 425 Lease, as modified by clause 5.8 of the MOA. Accordingly, the judge dismissed the Council's claim for arrears of rent payable under clause A.1 of the 425 Lease

and ordered the Council to pay prescribed costs to PLH on the claim pursuant to Part 65 of Civil Procedure Rules (Revised Edition) 2023.

The appellant, being dissatisfied with the lower court's decision, filed its notice of appeal on 5th November 2024. In its notice of appeal, the appellant relied on four grounds of appeal: -

(i) The judge erred in finding that the testimony given on behalf of the claimants was of no assistance in the analysis of the evidence in consequence of which she failed to reach a proper interpretation of the meaning of the covenant to pay rent in the 425 Lease.

(ii)The judge erred in finding that there was a conflict between the covenant to pay rent in the 425 Lease and the terms of clause 5.8 of the MOA, having due regard to the terms of the 174 Lease which was executed simultaneously with the 425 Lease.

(iii)The judge failed to recognize the applicability of the principle in *Rainy Sky SA and others v Kookmin Bank* taking into account the whole course of dealings between the parties in relation to both the MOA and the 174 Lease and the 425 Lease both of which were executed on the same day between the same parties.
(iv)The judge erred in failing to interpret the 425 Lease having regard to the principles applicable to commercial contracts as the 425 Lease was such a contract.

Held: dismissing the appeal with costs in the appeal to the respondent to be paid by the appellant in a sum to be assessed by a judge or master of the High Court, if not agreed by the parties within 21 days of the date of delivery of this judgment, that:

1. The Court should refrain from accepting or considering evidence regarding negotiations and a party's intentions at the time of entering into a contract or agreement. Instead, the evidence should be confined to the factual background known to the parties at or prior to the contract's execution, including the origins of the transaction and its objective purpose. This principle was cited and relied on by the learned judge and in doing so, she committed no error of law or principle. Evidence as to the intentions or knowledge of one party to a contract which is between two parties (at least) cannot be used to interpret the language actually used in that contract by the parties, unless there is evidence that the other party held the same intentions or had the same knowledge.

   Prenn v Simmonds [1971] 1 WLR 1381 considered; **Hvalfangerselskapet Polaris Aktieselskap v Unilever** considered**; Arnold v Britton** [2015] UKSC 36 applied.

2. Neither party to these proceedings have asserted any ambiguity in the actual words used in the MOA and in the 425 Lease. Absent such ambiguity, it would not be open for the court as part of its interpretive exercise to receive and to consider extrinsic evidence of the negotiations leading to the parties entering into the two Leases and the AEA or evidence as to what was the intention of one party or the other. The evidence of the appellant's witness at trial, Mr. Walker, was of no assistance and

the learned judge was correct to discount it in its entirety. Mr. Walker's evidence, albeit not directly contradicted by the evidence of any other witness, was in any event wholly unreliable and unsupported by any independent fact or document. It amounted to a bare assertion of a fact made in the absence of any relevant documentary evidence, the absence of which was only partially explained by him, and unsupported by any provision of the MOA, the two Leases or the AEA, except to the extent that the Council's counsel argued based upon the provisions of clause A.1 of the 174 Lease.

Grenada Technical and Allied Workers Union v St. George's University Limited GDAHCVAP2014/0008 (delivered 13th February, 2017, unreported) applied; **Kenneth Krys and Anr. V New World and ors** BVIHCMAP2013/0017 (delivered 26th May 2014, unreported) considered.

3. The provisions of clause A.2 of the 425 Lease when read with the provisions of clause 5.8 and the definition of the term "Property" at clause 1.1 of the MOA are clear and unambiguous. The contractual set off provision in clause 5.8 of the MOA was made expressly applicable to the 425 acre property which subsequently was demised by virtue of the 425 Lease to PLH. By clause A.2 of the 425 Lease the terms of the MOA were made expressly applicable to the 425 Lease and to the extent that there was any inconsistency between them, it was agreed by the parties thereto that the terms of the MOA were to prevail. Thus, the covenant to pay the rent stipulated under clause A.1 of the 425 Lease was thereby modified not to the extent that the annual rent falling due was not to be paid by PLH, but only to the extent that such rents were to be deemed to have been paid by PLH by way of set off or credit against the US$5 million contribution by PLH under the AEA to the cost of construction of the Airport on Barbuda. Consequently, there is no conflict or inconsistency between clause 5.8 of the MOA and clause A.2(1) 'covenant to pay rent' in the 425 Lease.

4. While it is correct that clause A.1 of the 174 Lease does contain a detailed provision for the set off or drawing down of the escrow sum of US$5 million against rents payable under that lease, each lease must be considered and interpreted within its four corners and within the overall context of the transaction. This provision in A.1 of the 174 Lease does not render the interpretation advanced by the respondent and accepted as correct by the learned judge an absurdity, as contended by counsel for the appellant. There is nothing in the language of either the 174 Lease or the 425 Lease which makes clear that the thinking or intentions of the parties had moved on since they had executed the MOA such that the set off under clause 5.8 of the MOA made clearly applicable to the 425 acre development land (i.e. the 425 Lease of that land) had been changed to only apply to the additional land demised under the 174 Lease. If that were indeed the 'changed' position or intention of the parties, this could easily have been made clear or manifest by the addition of a few clarifying words to either lease. This was not done. Instead, both leases in clause A.2, which deals with the lessee's covenants including the covenant to pay rent, expressly incorporated the provision/covenants of the MOA into and made them a part of the respective Leases.

5. With regards to the agreement in the MOA that the US$5 million contribution by PLH shall be credited as prepaid rent under the lease, the corresponding provision in clause 5 of the AEA is somewhat wider in scope. It expressly provides for PLH's contribution paid into the escrow account at the Bank to be credited towards any sums due from PLH to the Government. Thus, clause 5 of the AEA is significant since it has a bearing not just on the question of interpretation or the intention of the parties as ascertained from the natural and ordinary meaning of the words which they chose to use in their various agreements and leases but, importantly, to the question or dispute over the obligation by PLH to pay the rent under the 425 Lease, notwithstanding the provision at clause A.1 of the 174 Lease addressing in detail the setting off of the escrow sum of US$5 million.

JUDGMENT

[1] **FARARA JA [AG.]:** The underlying dispute between the parties and principal issue in this appeal concerns the interpretation of contractual provisions contained in certain agreements and leases entered into during the period December 2016 to February 2017 between the Government of Antigua and Barbuda ("the Government") and the Barbuda Council ("the Council" or "the appellant") on the one hand, and PLH (Barbuda) Limited ("PLH" or "the respondent") on the other. These agreements provided for and were entered into to facilitate the undertaking by PLH of a major tourism and hotel development on two parcels of land situated at Low Bay and Pink Sands on the island of Barbuda leased separately by PLH from the Government, with the agreement and consent of the Council.

[2] More specifically, this appeal concerns the interpretation, meaning and effect of clause A.2 of instrument of lease registered as No. 62 of 2017 ("the 425 Lease"). Clause A.2 explicitly made the lessee's covenants thereunder subject to and expressly incorporated into the 425 Lease the covenants contained in a prior Memorandum of Agreement dated 6th December 2016 ("the MOA") entered into between the same parties to the 425 Lease. This included, in particular, clause 5.8 thereof which provided for the Government, the Council and PLH to negotiate and enter into an '*Airport Development and Escrow Disbursement Agreement*'. This latter agreement would provide for the planning, costing, financing, construction and

development of an airport on the island of Barbuda, as an accepted essential infrastructural component to facilitate the tourism development project to be undertaken on the said leased parcels of land by PLH. In doing so, it would make provision for PLH to contribute and pay into an escrow account at Global Bank of Commerce the sum of US$5 million toward the budgeted costs of the airport development; and expressly for the said sum of US$5 million to be contributed by PLH to be credited as pre-paid rent by PLH as lessee under the lease of the real property on Barbuda to be granted by the Government and the Council to the respondent, PLH, to carry out at the latter's expense the major tourism development project consisting of hotels and a golf course etc.

[3] Accordingly, the learned judge in the court below was called upon to construe the provisions of the MOA, the two leases and the Airport Escrow Agreement ("AEA"). The sole question for determination in this appeal is whether in doing so the learned judge was correct in accepting the respondent's interpretation of the relevant provisions of each of these documents and in dismissing the appellant's claim for arrears of rent under clause A.1 of the 425 Lease, or whether she erred in doing so and ought to have accepted the interpretation contended for by the Council and given judgment on the Claim in its favour.

The 425 Lease

[4] The 425 Lease was entered into on 22nd February 2017 by and between the Council a statutory body corporate established pursuant to the **Barbuda Local Government Act**[1], as Lessor; Doctor the Honourable Sir Rodney Williams Governor General of Antigua and Barbuda for and on behalf of the Government of Antigua and Barbuda ("the Government") and PLH, the respondent - a company incorporated and existing under the Laws of Antigua and Barbuda as Lessee. By the 425 Lease, the Government demised unto PLH 425 acres of land situate at Low

[1] Cap. 44 of the Laws of the State of Antigua and Barbuda.

Bay and Pink Sands in Barbuda for the initial term of 99 years from the effective date of the Lease, at the annual rent of US$150,000, "*the first payment to be made within thirty (30) days of the execution of the Lease subject to the issuance of the Non-citizens Licence and successive annual payments payable in one (1) lump sum payment at the commencement of the year provided that there shall be a rent review every twenty (20) years during the term of the Lease.*"

[5] The 425 Lease expressly incorporates the covenants in the MOA entered into by the same parties on 6th December 2016. This includes but is not limited to clause 5.8 which provided for a US$5 million contribution to be made by PLH and paid into an escrow fund to be set up at a bank to assist in financing the budgeted cost of US$14 million for the construction of a new airport on Barbuda, and for this sum as paid into the escrow account to be credited to PLH "*as prepayment of rent due under the Lease*" to be granted to PLH by the Government and the Council of certain lands at Low Bay and Pink Sands on Barbuda for the construction and operation by PLH of a major tourism development for the benefit of the people of Barbuda.

[6] Accordingly, the dispute between the parties giving rise to the claim in the court below concerned the obligation on the part of PLH to pay the rent stipulated at clause A.1 of the 425 Lease and whether, as a result of its admitted failure to do so, the annual rents thereunder are in arrears. The judge below accepted the interpretation, meaning and effect of clause A.2 of the 425 Lease contended by the respondent and rejected the appellant's interpretation of clause A.2 and its claim for arrears of rent.

The 174 Lease

[7] The parties to the 425 Lease executed and entered into on the same day (22nd February 2017) a second lease, referred to as "the 174 Lease". By this second lease the Government and the Council demised onto PLH 174.83 acres of land at Low Bay and Pink Sands on Barbuda for the initial term of 99 years at an annual rent of

US$62,938, totalling US$6,230,941.20 for the duration of the said Lease. The 174 Lease provided at clause A.1 an express and detailed provision for the application and credit of the sum of US$5 million contribution by PLH toward the airport construction budget to the annual rents to be paid under clause A.1 of the said Lease as stipulated by clause 5.8 of the MOA. No such detailed provision appears in the 425 Lease and it is the appellant's case that this makes clear what was the intention of the parties when they executed and entered into these two Lease and the MOA, that is, the US$5 million was only to be credited against payments of rent due under the 174 Lease and not rents due or falling due under the 425 Lease.

[8] However, both the 425 Lease and the 174 Lease by their respective clause A.2 were made expressly subject to and includes the covenants contained in the MOA made as of 6th December 2016 by and between the Government, the Council and PLH. The relevant portion of clause A.2 stipulates:

> "The Lessee to the intent that the obligations hereby created shall continue throughout the Term hereby covenants with the Lessor as set forth below; **provided that** such covenants shall be made subject to and include those contained [sic] the Memorandum of Agreement which shall be incorporated herein and made a part of this Lease. Where there is conflict between the terms of this Lease and the terms of the Memorandum of Agreement, the terms in the Memorandum of Agreement shall prevail."

[9] One such covenant under both leases at A.2(1) is to pay the said rent (stipulated in clause A.1) in the manner aforesaid. On a proper analysis of the opposing positions (at first instance and on appeal) it would seem on its face that there would be no real point of difference between the parties that the provision in the MOA at clause 5.8 that the US$5 million paid by PLH under the AEA is to be credited against rents is, like the other covenants of the MOA, incorporated by virtue of clause A.2 as a covenant under both Leases. However, the appellant did not contend for such a 'common' interpretation. The main point of difference between the parties and the central question before the learned judge below and in this appeal is whether, on the factual evidence as to the negotiations and intentions of the parties and on a proper construction of the various agreements including the two leases and, in

particular, the detailed provisions at clause A.1 of the 174 Lease as to how the crediting of the said $5 million is to be applied in full to the rents due or falling due under the 174 Lease, the said express incorporation provision in both Lease does not apply to that extent to the 425 Lease rent payments from PLH, but applies only to rent payments under the 174 Lease. This, they say is the correct interpretation and one which accords with the evidence before the judge below and with a proper construction of the documentary evidence and is the only interpretation which makes sense in the context and circumstances of the negotiations and agreements entered into by the Government, the Council and PLH. Accordingly, PLH's admitted failure to pay the rents due under the 425 Lease resulted in it being in arrears thereunder and the judge ought to have so found and given judgment in favour of the Council.

The Memorandum of Agreement

[10] The MOA set out the terms and conditions under which the Government and the Council agreed to collaborate to support the proposed development of certain lands in Barbuda more particularly described at clause 1.1 of the MOA as "the Property". The development project is therein referred to as the "Project". The Project is described as consisting of "*a low density, mixed-use luxury resort, and the development of Boutique lodges, hotels, residential villas, compatible commercial, office, and retail centers, infrastructure, moorings around the island of Barbuda, beach clubs, spas, restaurants, a golf course, and a variety of other world class amenities and improvements to complement the island of Barbuda's extraordinary natural features*".

[11] Pursuant to the terms of the MOA, the Government agreed to lease to PLH and PLH agreed to lease as the Developer the "Property". This term is defined in clause 1.1(a) as including the 425 aces and any additional parcels of land acquired or leased by PLH from time to time and incorporated into or used with respect to the Project, including any additional lands acquired by PLH by way of exchange of land under a

lease with the Government, and all buildings, structures, improvements, fixtures and other items of personal property located on the said lands. The precise wording in clause 1.1(a) of these various categories of "property" is as follows:

> "(i) all of the parcels of land being approximately net of setbacks 425 (subject to survey) acres, more or less, as depicted on the site plans set firth an Exhibits A and B attached hereto and incorporated herein (the "Development Parcels;
>
> (ii) any additional parcels of land (regardless of contiguity or proximity to the Development Parcels) acquired or leased from time to time (including pursuant to Crown leases (as defined below), by the Developer incorporated into or utilized with respect to the Project, shall be subject to the terms and conditions of this agreement and to the extent approved by Government, which approval shall not be unreasonably withheld; or
>
> (iii) any additional parcels of land (regardless of contiguity or proximity to the Development Parcels) the Developer may acquire via an exchange of land under lease for other lands controlled by the Government of Antigua and Barbuda;
>
> (iv) all buildings, structures, improvements, fixtures, and other items of personal property located on the foregoing lands;
>
> (v) all easements, covenants, agreements, rights, privileges, tenements, hereditaments, and appurtenances thereunto now and hereafter belonging or appertaining thereto."

[12] It is not in dispute and both parties accept that the lands or parcels of land described at clause 1.1(a) (i) of the MOA as Property subject to the terms and conditions of the MOA is the approximately 425 acres demised to PLH by virtue of the 425 Lease; and that the additional 174 acres (approximately) of land demised by the 174 Lease is additional land provided for lease to PLH at clause 1.1(a)(ii) of the MOA. Clause 1.2 of the MOA provided for PLH to acquire a leasehold interest in "the Development Parcels", that is, the 425 acre site, Government's consent to and confirmation that said lease would be valid and enforceable under the laws of the State of Antigua and Barbuda. The Government also warranted or guaranteed PLH's quiet enjoyment in and to all lands "demised pursuant to said Lease" and shall take all necessary steps to protect the safety and security of the Project, all as expressly necessary to induce PLH to enter into the MOA and *'expend the funds necessary to develop the Project*.'

[13] Under the terms of the MOA, the Government agreed with the Council that the Project will cost in excess of US$200 million or will have a significant impact on the economy, environment or infrastructure of Barbuda, and thus it satisfies the definition of a "major development" under section 17 of the **Barbuda Land Act**.[2] Accordingly, the Government represented and warranted that there has been full compliance with section 17, "*including, but not limited to, the attainment of all necessary consents of the people of Barbuda, the Council and the Cabinet of Antigua and Barbuda*." (cl. 2.3)

[14] PLH's obligations under the MOA were expressly made contingent upon a number of matters set out at clause 2.5. For present purposes two such contingencies are of importance. These are contingencies (a) and (d) –

> "(a) execution of the leases that comprise the "Lease" for the Development Parcels (as defined below);
>
> (d) commencement of construction of a new airport terminal and a runway of six thousand linear feet as soon as practicable given the various approvals required, the tender process, design, and construction specifications needed but before December 31, 2018."

[15] Regarding contingency (d), the parties agreed to negotiate an *'Airport Development and Escrow Disbursement Agreement*' that will provide for a number of rights and obligations of the parties thereto relating to the design, financing, development and construction of the new airport on Barbuda. Clause 5.8 of the MOA states (in material part):

> "Airport. The parties hereto recognize and agree that a first class airport is essential to the success of the Project. Accordingly, all contributing parties agree to negotiate in good faith an Airport Development and Escrow Disbursement Agreement that will provide for, among other things,: (i) the parties to mutually agree upon an airport design, development budget, construction schedule, general contractor, and airport management structure; and (ii) the Developer [PLH] shall deposit in the Global Bank of Commerce US$5,000,000 contribution towards the airport construction

[2] Act No. 23 of 2007, Laws of Antigua and Barbuda.

budget of US$14,000,000 to be set forth in said Airport Development and Escrow Disbursement Agreement, **and said US$5,000,000 shall be credited to Developer [PLH] as a prepayment of rent due under the Lease with respect to the Development Property**; and (iii) that Developer shall have the right to build at Developer's expense and operate a fixed base operation at the Airport, on land to be leased to Developer by Government, and (iv) that the airport construction budget of US$14,000,000 is to be entirely funded by private sources (of which, the Developer is to fund US$5,000,000) and Government's sole cost responsibility with respect to the Airport shall be to pay for any cost overruns in excess of the US$14,000,000 Airport construction budget, and in no event shall Developer ever be required to pay any monies in excess of US$5,000,000 towards the construction of the Airport. …" (emphasis added)

Airport Escrow Agreement

[16] On 22nd February 2017 the Government, the Council and PLH entered into the AEA (originally titled 'Proposed Airport Escrow Agreement') as contemplated and provided for under clause 5.8 of the MOA. This was the third agreement entered into by the said parties on that day, the other two being the 425 Lease and the 174 Lease. Clause 1 of the AEA stipulated that PLH shall within 3 business days of the date of said agreement, deposit the sum of US$5 million with Global Bank of Commerce Ltd ("the Bank") which Bank will hold the funds in a segregated account at its branch at St. John's, the capital of Antigua and Barbuda. It is not in dispute that the full amount of US$5 million was in fact paid or transferred by PLH into the said escrow bank account on 14th March 2017.[3]

[17] Clause 2 of the AEA stipulated certain conditions precedent to the release of funds held in the escrow account. These conditions precedent included, importantly, the execution by the parties of the MOA, the signing of the 425 Lease and the 174 Lease and these Leases being in full force and effect with no existing defaults thereunder by the Government or the Council, and the issuance to PLH of a Non-Citizen's Land Holding License and a license to conduct business in Antigua and Barbuda.

[3] (See letter dated 22nd December 2021 from PLH's legal practitioners, Cort & Cort, to Johnson Gardiner, legal practitioners for the Council in response to two letters dated 1st December 2021 from Johnson Gardiner).

[18] Clause 5 of the AEA, repeats the provision of clause 5.8 of the MOA that PLH's obligation to contribute the sum of US$5 million towards the construction budget for the airport on Barbuda and that in no event can the Government 'ever, by any means and/or under any circumstances, seek to cause [PLH] to contribute any funds in excess of [US% million]'. However, as regards the provision that the US$5 million contribution by PLH shall be credited as prepaid rent under the Lease, the corresponding provision in clause 5 is somewhat wider in scope. It expressly provides for PLH's contribution paid into the escrow account at the Bank to be credited towards any sums due from PLH to the Government. It reads, in material part –

> "Furthermore, the parties hereto agree and acknowledge that any Funds disbursed to the Government pursuant to this Agreement shall be credited to Developer [PLH] as prepaid rent **credited against any other sums that may be due from Developer [to] the Government**." (emphasis added)

[19] Before leaving (for now) these agreements, I note that each of them are to be construed and interpreted in accordance with the laws of Antigua and Barbuda. I would note that while they each provide for the amendment or modification of its terms, there is no evidence or suggestion that any of these agreements, including the two Leases, have been amended or changed by the parties. The relevant clause in each agreement provides that its terms can be waived, altered, or amended only by an instrument in writing signed by the parties. Needless to say, no such writing has been tendered or produced into evidence either at the trial or before this Court. I raise this matter to say simply that we must, when construing the various agreements and provisions, take them as they were originally when executed by the parties. I also refer to this partly because the copy of the AEA provided to this Court with the Record of Appeal contains what appears to be two handwritten annotations to clause 5. For the avoidance of doubt, neither these or any other annotations be taken into account when construing the said clause or any of the documents.

[20] More importantly, however, clause 7.2 of the AEA sets out the agreed upon approach by the parties to the issue of 'Construction' of the AEA. None of the other agreements, including the MOA and the two Leases, contain any similar provision. Clause 7.2 of the AEA states: -

> "7.2 **Construction**: This Agreement shall be fairly interpreted in accordance with its terms and without any strict construction against either party. All headings contained in this Agreement are for reference purposes only and shall not be deemed to be any indication of the meaning of the sections to which they relate. Unless the context of this Agreement otherwise clearly requires, the term "Developer" shall be deemed to be followed by the words "and its assigns", and the words "include", "including", and "includes" do not limit the preceding terms or words and shall be deemed to be followed by the words "without limitation".

Pre-Claim Correspondence

[21] The filing by the appellant of the Claim in this matter on 15th February 2023 in the High Court had been preceded by a letter from the Council's secretary, Paul Nedd, dated 28th February 2020 which, inter alia, referenced the 'outstanding balance still owed from initial ESCROW PAYMENTS and how PLH intends to honour its rental commitments to the Barbuda Council as Lessor – 1.2 million lease payment'. Accompanying that letter was a "list of points" which the Council proposed for discussion at a meeting between the parties to be held on 20th March 2020. This list included, inter alia, as item 4: '*Payment of initial requirement towards ESCROW PAYMENTS*'; and as item 5 'All outstanding balance still owed from initial ESCROW PAYMENTS and how PLH intends to honour its rental commitments to the Barbuda Council as lessor'.

[22] The filing of the Claim was also preceded by an exchange of letters between the parties' respective legal practitioners on their behalf. On 1st December 2021, the legal practitioners for the Council issued two letters to PHL at its registered office with Cort & Cort, its legal practitioners of record. One such letter demanded payment by PLH of arrears of rent at US$150,000 per annum under the 425 Lease for the years 2017 to 2021 (inclusive) totalling US$750,000 plus $2,127.50 legal costs and

gave notice that failure to make payment within 15 days could result in the Council exercising its remedies under the said lease. The second letter of even date from Johnson Gardiner legal practitioners for the Council, was in relation to the 174 Lease, and specifically clause 5.8 dealing with the obligation on the part of PLH to pay the sum of US$5 million into an escrow account at Global Bank of Commerce. The Council requested confirmation that PHL had paid the said sum into said bank account since it had no record of this having been done. The Council also gave notice pursuant to clause A.4(1)(a) of the 174 Lease of its intention to exercise its remedies under said Lease if it did not receive appropriate evidence that the US$5 million sum has been paid into the said bank by PLH.

[23] These two letters were responded to on behalf of PLH by a letter dated 22nd December 2021 from Cort & Cort to Johnson Gardiner. In said letter PLH confirmed that it had paid the $5 million "as prepaid rent" into the account at Global Bank of Commerce on 14th March 2017, and enclosed supporting documentary evidence of this having been done. It was stressed in the said letter that this payment was prepaid rent "in respect of both Leases of land in Barbuda for 174.83 and 425 acres". Reference was made to the AEA dated 22nd February 2017 and to clause 5 thereof. Reference was also made specifically to clause A.1 of the 174 Lease and clause A.2 of the 425 Lease together with clauses 1.1(a) and 5.8 of the MOA. PLH's concluding position or stance on the demand for payment of arrears of rent under the 425 Lease was that the '*combined effect of the aforementioned clauses provides the legal basis upon which our client has been off setting the rents in respect of the aforesaid Leases against the prepayment of US$5,000,000*.' This letter also made clear that PLH was up to date on all payments of rents in respect of other leases of land in Barbuda under the control of PLH, such rents having been paid to the Accountant General of the Government pursuant to section 58 of the Barbuda (Amendment) Act 2018. In support of this, a copy of a letter from the Attorney General of Antigua and Barbuda was attached.

The Claim

[24] No payment having been made by PLH in satisfaction of the alleged arrears of annual rent under the 425 Lease, the Council commenced legal proceedings in the High Court of Justice by way of Claim Form and Statement of Claim filed 15th February 2023 (approximately 14 months later). It claimed arrears of rent under the 425 Lease in the sum of US$900,000 equating to EC$2,445,210 plus court fees and legal costs. In its Statement of Claim, the Council having pleaded and summarised the salient terms of the MOA, the two Leases and the AEA, accepted that clause A.2 of both Leases provided that the covenants therein shall be made subject to and include those contained in the MOA which shall be incorporated therein and made a part of the Leases, and where there is a conflict between the terms of these documents that terms of the MOA shall prevail.[4]

[25] The gravamen of the dispute and main point of difference interpretively between the Council and PLH is captured by paragraph 5 of the Statement of Claim :-

> "5. Despite clauses A.2 of the Leases, clause 5.8 of the MOA and clause 5 of the [AEA], the documents disclose that it was the unequivocal intention of the Defendant [PLH] that the rent for the 174.83 acre lease would go on a monthly basis towards offsetting the US$5,000,000 deposit for construction of the Airport, and US$150,000.00 would be separately paid to the Claimant [the Council] Lessor as rent for the 425 acre lease. The MOA was signed on 6th December 2016, whereupon the parties to the lease continued hammering out details of the [AEA] and the two Leases (these latter three documents were signed on the same day). Further, there are clear and detailed specifics relating to the rents and how the prepayment of US$5,000,000 is to be applied. In terms of rent the Defendant [PLH] cannot now be allowed, as it has sought to do, to rely on the general terms of clause 5.8 of the MOA, Clause 5 of the [AEA] and clause A.2 of the 425 acre lease to escape the fulfillment of specific terms in Clause a.1 (rent to be paid) in the 425 acre lease. The Defendant [PLH] is obligated to pay the rent for this lease directly to the Claimant Lessor [the Council]."

The Defence

[26] In denying the claim, PLH in its Defence filed 13th March 2023 placed much reliance on the provisions of clause 5.8 of the MOA and that it provided for the sum of US$5

[4] Paragraph 4 of the statement of claim filed 15th February 2023.

million which it paid into the escrow account at the bank "shall be treated as an advance payment on rents due under the respective leases in respect of the development property.'[5] (PLH also pleaded and relied on clause 1.1(a) of the MOA and the definition of the term "property" therein as including both the 174.83 acres and the 425 acres each of which formed the subject matter of the respective leases dated 22nd February 2017. It is also pleaded that by clause 5.8 of the MOA it was agreed by the parties that PLH 'is permitted to set off all payments under the ninety-nine year leases for 174.83 acres and 425 acres of land against the US$5,000,000 which was transferred into the Government of Antigua and Barbuda Airport Project Account at the Global Bank of Commerce. This was further confirmed and agreed by clause 5 of Airport Escrow Agreement.'[6] Accordingly, PLH contended that it is entitled by virtue of clause 5.8 of the MOA and clause 5 of the AEA to withhold or set off any and all rents due under the respective leases against the US$5 million paid by it into the escrow account under the AEA for the purposes of the construction of the airport on the island of Barbuda.[7]

[27] PLH pleaded that the US$5 million 'has been fully drawn down and utilised for the purposes' which it had already pleaded in accordance with clause 3 of the AEA. It is also pleaded that the Council knew or ought to have known that the sum of US$5 million was being used, and in fact was used, for the purposes of the construction of the airport on the island of Barbuda, and the Council has had the full benefit and use of the said sum of money, 'and is estopped from preventing PLH from withholding or setting off any and all rents due under the respective leases for 174.83 acres and 425 acres of land.' Furthermore, it was entitled to and has in fact set off all rents due under the two leases from the said US$5 million paid into the escrow account pursuant to the terms of the AEA. It therefore denied it was in breach of the rent payment provision A.1 of the 425 Lease.

[5] Ibid at paragraph 7.
[6] Ibid at paragraph 9.
[7] Ibid at paragraph 11.

The Judgment below

[28] After a trial on 2nd July 2024 the judge, in a written judgment delivered 26th September 2024 ("the judgment"), found for PLH on its interpretation of the various agreements and leases executed by the Government, the Council and PLH as to the correct meaning and effect of clause A.2 of the 425 Lease as modified by clause 5.8 of the MOA and, accordingly, dismissed the Council's claim for arrears of rent payable under clause A.1 of the 425 Lease and ordered the Council to pay prescribed costs to PLH on the claim pursuant to Part 65 of **Civil Procedure Rules (Revised Edition) 2023 ("CPR").**

[29] The trial judge identified as the sole issue for determination by the court was whether the Council is entitled to the sums claimed as arrears of rental income.[8] In determining this issue, the judge considered it clear that she would be required to make a determination as to the proper interpretation to be given to the 425 Lease and, more specifically, the effect of clause 5.8 of the MOA on the covenant at clause A.2 of the 425 Lease to pay the rent specified at clause A.1.

[30] At the outset of her analysis of the issues and the arguments of the parties, the trial judge stated that she 'did not consider that the evidence led in this matter was of any assistance to the court in the analysis that has to be undertaken'. She found that none of the witnesses who gave evidence at the trial (3 from the Council and 1 from PLH) were party to the negotiations leading to the execution of the MOA, the 425 Lease or the 174 Lease.[9] Specifically, regarding the appellant's witnesses Trevor Walker and Wade Burton, both of whom were members of the Council at the relevant time and participated as such in that capacity in approving the MOA and the two Leases, the judge found that they had only reviewed the documents after negotiations leading to them being formalisede and executed had been concluded.

[8] Ibid at paragraph 5.
[9] Ibid at paragraph 11.

[31] With this finding the appellant takes issue. As to Mr. Walker's evidence in particular, the appellant argued that the learned judge was wrong not to have accepted and relied on his evidence as what was the intention of the parties when they entered into the said agreements and leases as to the crediting of the sum of US$5 million paid by PLH into the escrow account under the terms of both the MOA and the AEA and, had she done so, she would have found that the said sum was only applicable as a set off to the annual rent payable by PLH under the 174 Lease.

[32] Relying on the dicta of Lord Wilberforce in **Prenn v Simmonds**[10] and of Lord Hoffman in **Chartbrook Ltd v Persimmon Homes Ltd and others**[11], the judge, at paragraph [12] of the judgment, considered it to be a sound guiding principle that "evidence of negotiations or of the parties' intentions and a fortiori of [one party's] intentions, ought not to be received and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction. The judge held that none of the witnesses called to give evidence at the trial was able to provide either the genesis or the aim of the relevant transaction.

[33] Having found no assistance in the evidence of the witnesses on either side, the judge considered that she was left with one important and salutary aid of construction, that is, the actual terms of the contract documents, in ascertaining the objective meaning of the language used by the parties in the 425 Lease. However, she accepted that the 425 Lease cannot be considered in isolation but must be read together with the MOA, in particular, clause 5.8 thereof.[12]

[34] The trial judge then considered clause A.1 of the 425 Lease. She did not accept the Council's argument that this cause is unambiguous and clear in mandating PLH unconditionally to pay the annual rent of US$150,000. In rejecting this argument,

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[10] [1971] 1 WLR 1381.
[11] [2009] AC 1101.
[12] See paragraph 13 of the judgment in the court below.

the judge held that by clause A.2 the covenants in the 425 Lease, including the covenant to pay the rent, are expressly made subject to the covenants in the MOA and, accordingly, it is clear that the MOA and the 425 Lease must be read as one document. This means, as the judge reasoned, that the provisions of the MOA must be read as being applicable to the 425 Lease and in particular, the reference in the MOA to property, the definition of that term, and the provision for the payment by PLH into the escrow bank account of a contribution of US$5 million to the budgeted cost of the airport project.[13]

[35] The trial judge having considered the definition of 'Property' in clause 1.1 of the MOA, concluded that it encompassed and applied to both the 425 Lease and 174 Lease of additional land to PLH, which leases were executed after the MOA had been entered into by the relevant parties. She concluded at paragraph [21] that there was a 'conflict' between the provision in the MOA specifically clause 5.8 and the apparent clear wording of the obligation under clause A.1 of the 425 Lease to pay the annual rent: -

> "On the face of it, there therefore seems to be a conflict as to the MOA and the use of the US$5,000,000 and the seemingly clear wording of the payment of the [rent] in the 425 Lease. This is especially glaring when the court considering the 174 Leas under section A.1 notes that the rent payable was stated specifically to be payable as to set off against the escrow sum."

[36] At paragraph [22] the learned judge summarised the position the court is faced with in this way:

> "So in summary, the court is faced with this: a) the 425 Lease makes no mention of how the rent reserved is to be paid; b) the 425 Lease expressly incorporates the terms of the MOA to make it as the entire agreement and where there is any conflict with the covenants the MOA is to prevail; c) the escrow sum is to be used as pre-payment for rental sums under the terms of the MOA and expressly under the 174 Lease; and d) the escrow sum has been paid by the defendant [PLH] and sums have been debited against it by the defendant."

[13] Ibid at paragraph 17.

[37] Next the judge considered the legal principles applicable to construing commercial contracts. She accepted as correct the principles distilled from the cases relied on by the Council. These included the case of **Wood v Capita Insurance Services Ltd.** [14] where it was accepted that the court must have regard to both the language used and the commercial context in which the agreement was drafted in ascertaining the objective meaning of the words under consideration. However, she considered that all those cases dealt with matters where ambiguity was found in the clause or words under consideration, whereas in the instant matter, each side considers that their interpretation is the correct one. In this context reliance was placed by the learned judge on the dicta of Pereira CJ in **Kenneth Krys and Anr v New World and ors**[15]: 'where the parties have used unambiguous language, the court must apply it; and a court can only consider the commercial purpose where the language used is ambiguous. Further, a court can only justify departing from the plain meaning of the words used if they lead to absurdity.'

[38] In short, the learned judge held that the words which fall to be construed when the terms of the MOA are incorporated into the covenants in the 425 Lease by virtue of clause A.2, that is the covenant to pay the annual rent at clause A.2(a), are unambiguous and clear, and fall to be construed according to their plain meaning. Furthermore, they do not lead to an interpretation which commercially or otherwise is an absurdity. Accordingly, the judge was 'satisfied that the 425 Lease was expressly made subject to the use of the escrow sum as incorporated with the MOA and as such the rental sums due were to be set off as against the escrow sum and have been so set off.'[16]

The Appeal

[39] The appellant being dissatisfied with the lower court's decision, filed its notice of appeal on 5th November 2024. In its notice of appeal, the Council challenges one

[14] [2017] UKSC 24.
[15] BVIHCMAP2013/0017 (delivered 26th May 2014, unreported) at paragraph 26.
[16] Paragraph 29 of the judgment in the Court below.

finding of fact and two findings of law. The finding of fact is as to the judge's assessment that it was only after the negotiations for the leases had been concluded that the members of the Council (who gave evidence on its behalf at the trial) reviewed the documents. The issues or points of law challenged on appeal are that: (i) the evidence led at trial was of no assistance to the court in the analysis to be undertaken in determining the correct meaning and effect of the relevant clauses of the MOA and the 425 and 174 Leases; and (ii) there was no conflict between the terms of the 425 Lease regarding the payment of rent.

[40] In the appeal the appellant seeks orders setting aside the order of the court below dismissing its Claim and for this Court to enter judgment for it on the Claim. The appellant relies on four grounds of appeal. They are:

(1) The judge erred in finding that the testimony given on behalf of the claimants was of no assistance in the analysis of the evidence in consequence of which she failed to reach a proper interpretation of the meaning of the covenant to pay rent in the 425 Lease.

(2) The judge erred in finding that there was a conflict between the covenant to pay rent in the 425 Lease and the terms of clause 5.8 of the MOA, having due regard to the terms of the 174 Lease which was executed simultaneously with the 425 Lease.

(3) The judge failed to recognize the applicability of the principle in **Rainy Sky SA and others v Kookmin Bank**[17] taking into account the whole course of dealings between the parties in relation to both the MOA and the 174 Lease and the 425 Lease both of which were executed on the same day between the same parties.

(4) The judge erred in failing to interpret the 425 Lease having regard to the principles applicable to commercial contracts as the 425 Lease was such a contract.

[17] [2011] UKSC 50.

Ground 1 – Mr. Walker's Evidence

[41] Learned counsel for the appellant, Ms. Ann Henry KC, argued strenuously that the learned judge erred when she concluded that the evidence given at trial by the various witnesses was of no assistance to the court in construing the proper meaning and effect of the relevant clause of the MOA, the two leases and the AEA. It is submitted that the judge erred in not relying, in particular, on the uncontroverted evidence of the appellant's witness Mr. Trevor Walker, who served as a member of the Council for 17 years before giving his witness statement in this matter on 2nd October 2023. During this 17 year period Mr. Walker served as Parliamentary Representative for Barbuda for the years 2004 to 2014 and an elected member of the Council for the years 2016 to 2017, during which latter period the relevant agreements and leases were negotiated and entered into between the Government and the Council and PLH.

[42] It is submitted by the appellant that the evidence of Mr. Walker both in his witness statement and cross-examination during the trial are relevant to the finding of fact to be made by the judge. At paragraph 2 of his witness statement, Mr. Walker averred that he is familiar with the two Leases granted to PLH on 22nd February 2017 for the development of a resort on Barbuda, that is, 174.83 acres at Low Bay and 425 at Pink Sands. The appellant placed much reliance on paragraphs 5 to 8 (inclusive) of Mr. Walker's witness statement. These paragraphs are therefore reproduced here in full:

> "5. The arrangements for satisfaction of the rent for Low Bay differed from that for Pink Sands. The annual rent for the 174.83 acre lease at Low Bay was to be offset from the Escrow amount of US$5,000,000 paid by PLH to assist with the building of the airport. This arrangement was clearly set out in the 174.83 acre lease.
> 6. The annual rent for the 425 acre lease at Pink Sands was to be paid directly to the Council. Again this arrangement was clearly set out in the 425 acre lease. The intention as discussed and agreed at Council meetings was that the funds from the Pink Sands lease, among others, would assist with the running of the island.
> 7. I do not have copies of the Minutes of Council when these leases were discussed. Hurricane Irma, which passed through Barbuda in September

> 2017 destroyed the premises where the minutes for the year 2017 (and prior years) were kept. However, my recollection of these arrangements is clear.
> 8. In my capacity as Chairman of the Finance Committee since 2018 I have enquired of PLH principals on a number of occasions as to the outstanding rent for the 425 acre lease. I received a number of responses and held related discussions. One such response is contained in an email conversation between John Turbidy of PLH and myself commencing 26 January, 2019 and ending 9 February, 2019. In sum, PLH has never paid any rent for the 425 acre lease."

[43] To buttress this point, counsel also pointed to the first recital to each of the two Leases where it is recorded that each lease was being entered into with the approval and advice of both the Cabinet of the Government and the Council '*and the consent of a majority of the people of Barbuda in accordance with section 6 and Part VI of the Barbuda Land Act 2007 and the Barbuda Land Regulations 2010 made thereunder to grant this lease, copies of which approvals, agreements and consents are annexed hereto as Appendix 1*.'

[44] In my view, this first recital does not assist with, nor does it shed any light on the interpretative exercise which the court had to undertake, as do any of the approvals, agreements and consents annexed to both the 425 Lease and the 174 Lease. As to the recitals, the language of these do not speak to which of the two leases the set off or pre-rent credit provision of clause 5.8 of the MOA (or clause 2 of the AEA) applies or whether to one or both rent payment clauses. Likewise, none of the documents at Appendix 1 do so either. They do not serve to buttress or to elucidate and confirm the interpretation contended by Mr. Walker as a matter of fact, at paragraphs 5 and 6 of his witness statement. Moreover, it is not disputed that, as a matter of fact and as a legal requirement under the relevant statute, the agreement to enter into each of the two leases of property to PLH had received the prior approval and consent of the Government, the Council, and the majority of the People of the island of Barbuda. However, this does not serve to advance the interpretative exercise nor does it support the interpretation contended for by the appellant, both in the court below and in this Court, that the set off or pre-rent

payment provision in the MOA was only applicable to the annual rent falling due under the 174 Lease and not the annual rent falling due under the 425 Lease.

[45] Counsel also took the Court to certain passages from the transcript of the cross-examination of Mr. Walker in attempting to buttress the Council's argument that his evidence was of relevance to the interpretative exercise which the learned judge had to undertake, and she erred in holding that his evidence was of no assistance in that exercise. In particular, counsel took the Court to page 209 line 10 and page 210 line 3 of the transcript. The gist of Mr. Walker's response evidence to the questions posed to him by counsel for PLH at the trial is that during the relevant period when the MOA and the two Leases were being negotiated the chairman of the Council was one Arthur Nibbs, the then elected representative for Barbuda to whom Mr. Walker had lost his seat in the General Elections. It was Mr. Nibbs who would have been involved directly in the negotiations leading to the Council being one of the parties entering into the MOA and the two Leases. Mr. Walker admitted that he did not participate in the actual negotiations, but these were in fact carried out by a 'team' of which he was not a part and did not participate.

[46] At page 210 lines 13 to 25 and 211 lines 1 and 5 to 14 is this illuminating exchange from Mr. Walker's cross-examination on this important issue:

> "Q. Can I suggest then your involvement though would have been by virtue of the fact that you were a member of the Council?
> A. Yes, My Lady.
> Q. But you had no direct involvement in the negotiations with PLH (Barbuda) Limited on these matters?
> A. No, My Lady.
> Q. That would have been done by Mr. Arthur Nibbs. Do you know?
> A. I an not sure who actually did the initial negotiations but the final approval for the documents before the Court was approved by the Council which I was a part of.
> Q. But in terms of the actual negotiations you were not a part of that team.
>
> A. The team, when the proposal came to the Council I was a part so they presented a proposal to the Council proposing what's before us; and I was a part of that accepting or rejecting of that proposal.
> Q. So in other words, your involvement was as part of the Council what was presented to Council for discussions.

A. Yes, My Lady."

[47] Counsel took aim at what the learned judge concluded at paragraphs 11 and 12 of the judgment. In summary, the judge stated clearly that she had found no assistance in the evidence led by the witnesses for both parties to the interpretative analysis to be undertaken by the court. With regard to the two witnesses of fact for the Council, Mr. Walker and Mr. Wayde Burton, she observed that they were members of the Council '*who reviewed the documents after negotiations were concluded*'. The judge, in reliance on the dicta of Lord Wilberforce in **Prenn v Simmonds**, concluded that, in any event, evidence of negotiations and of the parties' intentions or one party's intentions ought not to be received, but only evidence of the factual background known to the parties at or before the date of the contract including evidence of the "genesis" and objectively the "aim" of the transaction ought to be considered. Also, at paragraph 13 the judge found that none of the witnesses (including Mr. Walker) was able to provide evidence as to either the "genesis" or the "aim" of the transaction.

[48] It is the appellant's case that the learned judge ought to have taken into account and accepted the uncontroverted evidence of Mr. Walker to the effect that the US$5 million escrow payment by PLH under the MOA and the AEA was intended by the parties (or by the Council) should only be set off as pre-payment of rent under the 174 Lease and not the pre-payment of rent under the 425 Lease. This argument seemed to be based on a false premise, that is, that the evidence of Mr. Walker including his evidence in cross-examination shows or supports the fact that he was involved in the negotiations leading to the Council (and other parties) entered into the MOA and the two Leases. In fact, as observed above, his evidence was to the contrary. He admitted to not being part of the Council's negotiating team which, apparently was headed by his political opponent and then current elected representative for Barbuda in the Parliament of Antigua and Barbuda, and who was the then chairman of the Council.

[49] The respondent stoutly resists the appellant's contention that Mr. Walker's evidence was to the effect that he participated in the negotiations leading to the Council entering into the agreements and Leases. In this respect, they point to his answers to questions in cross-examination as admissions on his part that he did not and that his involvement was limited to him agreeing or consenting as a member of the Council to the Council entering into the documents as finally negotiated by the team representing the Council. The respondent also submitted that in any event there is no question that the Council agreed to and executed the respective leases and agreements, including the AEA, the MOA and the 425 Lease. It is the respondent's position that, as the learned judge observed at paragraph 13, the court below was left to construe the language and terms of the relevant documents and not allow herself to be distracted by wholly irrelevant and inadmissible evidence of Mr. Walker who was not involved in the negotiations[18]. Accordingly, it is submitted that ground 1 is without any merit and there is no basis on which this Court ought to set aside the findings of fact made by the learned judge at paragraphs 11 to 13 of the judgment.

[50] There is not a scintilla of evidence produced by Mr. Walker or the Council during the trial to buttress Mr. Walker's contention at paragraphs 5 and 6 of his witness statement. His mere say-so is not sufficient, especially in circumstances where he admitted under cross-examination that he took no part in the actual negotiations leading to the finalisation and execution of the MOA, the two Leases and the AEA. Furthermore, neither Mr. Walker or the Council was able to produce or was unable to produce any documentary evidence in the form of minutes of meetings of the Council or drafts of the MOA or the 425 Lease or the 174 Lease or of the AEA to buttress or to provide some bases upon which to breathe some life into his bare statements at paragraphs 5 and 6 of his witness statement.

.[51] Even accepting his evidence that the documents had been destroyed during the passage of hurricane Irma in September 2017 which destroyed the premises (of the

[18] See paragraph 16 of the respondent's skeleton argument filed on 15th February 2025.

Council) where the minutes were kept, it is passing strange and remains unexplained why he, a then member of the Council with presumably copies of the minutes of such meetings at which this issue was considered, did not or was unable to produce into evidence his own copy of said minutes purportedly to lend credence and credibility to his contentions, and some light into the context and intentions of the parties or of the Council itself. Finally, not one single person who admittedly was involved on behalf of the Council or the Government in the said negotiations was produced or called as a witness during the trial. It is not sufficient, and it is not evidence of the negotiations to merely attest to being a member of the Council when each of these documents in final form were approved or consented to as a prerequisite to them being executed on behalf of the Council by those authorities under the relevant statute to do so on its behalf.

[52] Counsel for the appellant took this Court to the decision of the House of Lords in **Prenn v Simmonds** in submitting that the judge erred in not taking the evidence of Mr. Walker into account. In my judgment, the appellant can find no support in the dicta of Lord Wilberforce or Lord Diplock in that decision. In fact, the opposite is correct. Lord Wilberforce pointedly discounted reliance on the prior negotiations leading to an agreement being finalised and signed by the parties. In **Prenn v Simmonds** Lord Wilberforce first concluded that the question of construction posed was '*a simple one of construction of the agreement which was capable of resolution shortly and cheaply*.' It is only because on the alternative claim by Dr. Simmonds that if the agreement did not bear the meaning which he contended for, it should be rectified so as to do so, which led to '*a mass of evidence, oral and documentary, as to the parties intentions, which would not be admissible on construction*'. This led to an inquiry '*beyond the language*' and '*to see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view*.'

[53] Addressing specifically the respondent's contention for an even greater extension of the court's interpretive power to allow 'prior negotiations' to be received and

considered in aid of the construction of a written document, Lord Wilberforce pointedly denounced this as being correct as a matter of principle or of construction of commercial agreements: '*In my opinion, they did not make good their contention*.' After referring to a then modern authority of the House **Hvalfangerselskapet Polaris Aktieselskap v Unilever**[19] Lord Wilberforce opined: -

> "But the speeches give no support for a contention that negotiations leading up to the contract can be taken into account: at most they support the admission of evidence to establish a trade or technical meaning (not in question here) and, of course, they recognize the admissibility of evidence of surrounding circumstances. But they contain little to encourage, and much to discourage, evidence of negotiation or of the parties' subjective intentions."

[54] These guiding principles accord with what the learned judge said, correctly, at paragraph [12] of the judgment relying on **Prenn v Simmonds** as the applicable principles regarding a court not receiving and considering evidence of negotiations and of a party's intentions when entering into a transaction.

[55] The expression "genesis and aim" of the transaction used by the learned judge in the said paragraph was in fact taken by Lord Wilberforce from the decision of Cardozo J of the New York Court of Appeal in **Utica City National Bank v Gunn**[20] citing of following extracts from *Stephen's Digest of the Law of Evidence* and *Wigmore on Evidence*, both English law texts. Lord Wilberforce goes on to reference the dangers of 'departing from established doctrine' and the 'virtue' of the latter. The Law Lord also dealt with the question of admitting evidence of a party's '*objective*' in entering into a transaction or contract This he described as '*indeed totally dangerous*' . At page 1385 he concluded in these terms:

> "In my opinion, then, evidence of negotiations, or of the parties' intentions, and *a fortiori* of Dr. Simmonds' intentions, ought not to be received and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction."

[19] (1933) 39 Com. Cases 1.
[20] (1918) 118 N.E. 607 .

[56] The above guiding principles are precisely what the learned judge cited and relied on at paragraph 12 of the judgment. In doing so, she committed no error of law or principle. Moreover, it is beyond any reasonable argument that Mr. Walker's evidence, in chief and in cross-examination, amounts to evidence demonstrative of his involvement in the actual negotiations after they were concluded, leading to the Council entering into any of the pertinent agreements, including the MOA, the 425 Lease, the 174 Lease or the AEA. Further, the learned judge was correct in concluding at paragraph 13 that neither Mr. Walker or any other factual witness gave any evidence of the "genesis" or the "aim" of the transaction, albeit this can, to a large, be gleamed from the actual agreements and leases themselves, in particular, from the MOA. For these reasons there is no merit in ground 1 of the notice of appeal.

Ground 2: Is there a conflict between the covenant to pay rent and clause 5.8 of MOA; and

Ground 3: Did the judge fail to apply principle in Rainy Sky SA v Kookmin Bank

Appellant's Submissions

[57] In approaching the interpretative issue, the appellant argued that the correct approach which the court below ought to have adopted but did not, is to first consider that the MOA entered into by the parties in December 2016 sets out the broad parameters of the agreement between the parties with regard to the development project to be undertaken by PLH, the intended leases of land or property on Barbuda to be granted by the Government and the Council to PLH for the purpose of carrying out the development project, the respective rights and obligations of the parties and, in particular, the obligation on the part of PLH to contribute a sum of US$5 million towards the budgeted cost of the airport and how that sum is to be applied or credited as a prepayment of rent under the lease of the property. It is submitted that after the MOA was executed the parties' negotiations progressed and the details of the arrangements reached were spelt out in the 425 Lease and the 174 Lease, and

in the AEA, none of which documents were in existence at the time of executing the MOA.

[58] Counsel for the appellant considered the definition of the term "Property" at clause 1.1 of the MOA. It was accepted that this definition encompassed both the subsequent 425 Lease and 174 Lease land to PLH. Reference was also made to the use of the singular "Lease" in clause 5 of the MOA whereas by February 2017 there were two Leases in existence executed by the parties. It is also submitted that clause 5 of the AEA essentially repeats the agreement at clause 5.8 of the MOA with regard to the contribution of US$5 million by PLH and how that sum is to be applied or treated as pre-payment of rent under the Lease. Again, as the argument goes, these were general provisions the details of which were subsequently negotiated and reflected in the way in which the said sum is treated as prepayment of rent in clause A.1 of the 174 Lease, and not as such in clause A.1 of the 425 Lease.

[59] In my view, while this line of argument and approach to the interpretive issue commends itself, the difficulty faced by the appellant is that it is not supported by evidence of the surrounding facts leading to the negotiation and finalisation of the two Leases and the AEA. The appellant relies first on the evidence of Mr. Walker as to what he stated was the intention or objective of the Council (not of the Council and PLH) to substantiate its approach to the interpretive issue and, secondly, on the provision at clause A.1 of the 174 Lease detailing the way in which the escrow sum of US$5 million contributed by PLH to the development of the Airport on Barbuda is to be credited in full in payment of the rents falling due under the 174 Lease. I have already addressed substantively and discounted the use and evidential value and cogency of Mr. Walker's evidence in both his witness statement and in cross-examination at the trial. More will be said of this later in addressing these two grounds of appeal.

[60] However, it is more so with respect to the provisions of clause A.1 in the 174 Lease that the appellant staked it's case on appeal. It is submitted that clause A.1 of the 174 Lease is the only provision in either of the two leases which provides for the set off of the US$5 million escrow payment under the AEA against the prepayment of rent under a covenant in any of the two leases. No similar provision is to be found in the 425 Lease or in any other agreement between the parties under consideration in these proceedings. More importantly, submitted the appellant, by the terms of clause A.1 of the 174 Lease, PLH got the full benefit of the credit for the pre-payment of US$5 million, which is all that was required by clause 5.8 of the MOA. No similar provision is to be found in the 425 Lease or in any other agreement. Accordingly, the full set off amount having been provided for and detailed at clause A.1 of the 174 Lease, it would be a strained interpretation or an absurdity to accept the interpretation contended for by the respondent and accepted by the learned judge and to conclude that, by virtue of the express incorporation of clause 5.8 of the MOA into the covenants of the 425 Lease the clear and unequivocal covenant to pay the annual rent at clause A.2 (1) was thereby modified leading to a co-existing or co-equal right and obligation to set off the said escrow sum against the rent payments falling due under the 425 Lease.

[61] Furthermore, argued the appellant, it is clear from the detailed breakdown in clause A.1 of the 174 Lease of the set off of the US$5 million that the parties meticulously accounted for the entire amount of the escrow contribution of PLH while leaving free of such set off the rents payable under the 425 Lease so as to meet the ongoing objective of the Council to have some revenue source going forward, as stated by Mr. Walker in his evidence at paragraph 6 of his witness statement: '*The intention as discussed and agreed at Council meetings was that the funds from the Pink Sands lease [the 425 Lease], among others, would assist with the running of the island.*'

[62] It is for these reasons that the appellant submitted that there was no inconsistency between the MOA and the two Leases and that the learned judge erred in so holding

as a bases upon which to accept the respondent's interpretative argument and to dismiss the Claim. The appellant argued that the MOA was complied with in *toto* and, in particular, the provisions of clause 5.8 with regard to the obligation to set off or credit the escrow US$5 million contribution by PLH. Furthermore, the absence of a reference to a credit in the 425 Lease is not inconsistent with the MOA, including clause 5.8 thereof. This is because the credit therein provided for was fully addressed by the parties and stipulated as an obligation in clause A.1 of the 174 Lease, which is what the parties to the MOA, both leases, and the AEA intended when executing these three documents on 22nd February 2017, approximately 3 months after they had entered into the MOA setting out the general framework for the development and the rights and obligations of the parties going forward.

[63] Accordingly, it is the appellant's case that the learned judge erred when she held at paragraph 21 of the judgment that there was a : -

> *conflict as to the MOA and the use of the US$5,000,000 and the seemingly clear wording of the payment of the [sic.rent] in the 425 Lease*'; and at paragraph [25]
>
> "[25]: '*There is a definite conflict between what appears to be the terms of the 425 Lease regarding the payment of the rent while the MOA speaks to the ability of the defendant [PLH] to offset such payments from the escrow sum*'; and at paragraph [27] : *'In the court's mind, this [clause 5 of the AEA] stands in direct contrast to the interpretation sought by the claimants [the Council] who this court noted were a party to the 425 Lease and the 174 Lease*."

[64] Additionally, the appellant submitted that the learned judge failed to apply the principle in **Rainy Sky SA and others v Kookmin Bank** to take into account the whole course of dealings between the parties in relation to the MOA executed in December 2016 and the 174 Lease, the 425 Lease and the AEA on the same day 22nd February 2017. Had she done so the judge would have concluded that the parties had clearly addressed their minds to the way in which the US$5 million escrow payment would be applied under clause 5.8 of the MOA which decision or intention was reflected in the way in which the rent payment clauses in the respective leases were drafted. These two varying provisions reflect the way in

which the treatment of the escrow amount had actually changed or progressed from the signing of the MOU in December 2016 to when the leases were entered into in February 2017.

[65] In this respect, counsel for the appellant submitted that the evidence of Mr. Walker as to why the Council had taken the position that it did when approving and consenting to the Leases (that the escrow amount would only be set off against the rent payment under the 174 Lease leaving the rent payment under the 425 Lease to be paid by PLH so as to provide some revenue to the Council on an annual basis to meet its other obligations), is of importance.

[66] Accordingly, the appellant contended that the learned judge erred and asks this Court to set aside the judgment and order in the court below, and find for the appellant on its Claim with costs in the court below and in the appeal.

Respondent's Submissions

[67] Learned counsel for the respondent, Mr. Astaphan SC, took issue with each and every point relied on by the appellant in its written and oral argument. In relation to the alleged importance or significance of the evidence of Mr. Walker and whether the judge had erred in not relying on it either as evidence of the negotiations or of the intention of the parties to the MOA, the two Leases, and the AEA, counsel submitted that the judge was correct to so conclude and that she adopted the correct approach by considering the provisions of all three documents and the AEA in seeking to ascertain the intention of the parties from the language used by construing their natural and ordinary meaning.

[68] It is submitted that it is clear from Mr. Walker's responses to questions posed during his cross-examination that he did not participate in and was not part of the team conducting negotiations on behalf of the Council leading to the finalisation and execution of these key documents. This much it is contended, has been admitted

by Mr. Walker during cross-examination. In support of this submission, the respondent took the Court to a few extracts from the transcript of Mr. Walker's cross-examination, each of which have already been referred to and analysed above. Accordingly, at this juncture, it is enough to simply state that we accept Mr. Astaphan's characterisation of Mr. Walker's evidence. We repeat our prior analysis of his evidence, including the passages relied on by counsel for the appellant, and our prior conclusion that he took no part in the negotiations, and has not produced any documentary evidence to buttress his bare assertion as to the intention of the Council in entering into the MOA, and the subsequent two Leases and the AEA.

[69] On the issue of whether the learned judge erred in concluding that there was a conflict between the provision at clause 5.8 of the MOA and its express incorporation into the 425 Lease by clause A.2 thereof, and the covenant to pay the rent at clause A.1, counsel for the respondent relied first on the definition of the term "Property" at clause 1.1 of the MOA. It is submitted that this definition is a broad one and includes both the land demised by the 174 Lease and that which was demised by the 425 Lease. It is clear that the MOA applied and was intended by the parties to apply to both pieces of land and hence both leases. This included the set off provision in clause 5.8 of the MOA relating to the escrow sum of US$5 million contributed by PLH, which sum is to be treated as pre-payment of rent with respect to both leases, the said covenant having been expressly incorporated into the 425 Lease by clause A.2 thereof. This, the respondent argued is borne out by these words at clause 1.1 of the MOA: '*shall be subject to the terms and conditions of this agreement*'.

[70] Much reliance is placed by the respondent on clause 5.8 of the MOA. More specifically, on the stipulation that the US$5 million escrow payment which '*shall be credited to Developer [PLH] as a prepayment of rent due under the Lease*', that is, the 425 acre site which was later demised to PLH by the 425 Lease. In my judgment there is much force in this submission. The above language in clause 5.8 is a clear and direct reference to the 425 acres and the lease thereof to PLH.

[71] Clause 1.2 of the MOA makes provision for PLH to acquire a leasehold interest in the "*Development Parcels*". By definition of the term 'Property' in clause 1,1 (i), there is a direct reference to and specification of the 425 acres (more or less) '*depicted on the site plans set forth in Exhibits A and B attached hereto and incorporated herein (the "Development Parcels*'. It is therefore incontrovertible that the use of the singular "Lease" in clause 5.8 of the MOA with respect to the credit of the US$5 million towards pre-payment of rent '*due under the Lease*' is, first and foremost, a reference to the 425 acre sites and the 425 Lease thereof. Moreover, the 174 Lease is of "additional" parcels/property (other than the 425 acres) and is covered under sub-category (ii) of the definition of "Property" at clause 1.1 of the MOA. Thus, the clear and incontrovertible interpretative conclusion is that when the MOA provided for the set off in clause 5.8 of the escrow sum of US$5 million to be contributed by PLH toward meeting the budgeted cost of the airport on Barbuda against payment of rents to be due and owing by PLH under the "Lease" of development property, that obligation was made specifically applicable to the rents to be due and owing under the lease of the 425 acres ("the Development Property"), that is, the 425 Lease.

[72] Counsel for the respondent also sought to counter the appellant's submission that things had progressed after the parties had entered into the MOA, such that the set off provision at paragraph 5.8 of the MOA was only enshrined in the 174 Lease and, by extension, not in the 425 Lease, as originally contemplated by clause 5.8. Mr. Astaphan SC submitted that the Council, including apparently Mr. Walker, had agreed to the terms of the MOA, the two Leases, and the AEA and consented to the Council entering into and executing said documents. They cannot now, some years later after the execution of the two Leases and the AEA and the offsetting of the rents under the 425 Lease against the escrow sum of US$5 million, be heard to say that the stipulation at clause 5.8 of the MOA as expressly incorporated into the covenants of the 425 Lease, was a mistake, as it was only intended that the escrow

sum be applied as pre-payment of the rents falling due under the 174 Lease and not the 425 Lease.

[73] I would merely observe at this juncture, that my understanding of Ms. Henry's submission was not a reliance on some "mistake" but that matters had progressed in a somewhat different way between the parties to the MOA after it had been entered into leading to an agreement which, albeit giving full effect to the intention of the parties as manifest by clause 5.8 but only with respect to the lease of additional land at Pink Sands under the 174 Lease, but not made applicable to the lease of the 425 acre sites under the 425 Lease, as was the original stipulated intention of the parties when entering into the MOA.

[74] The respondents submit further that Mr. Walker's evidence as to the objective of the Council to limit the set off to only the rents falling due under the 174 Lease and not both leases, so that the Council would receive as income or revenue the annual rent from the 425 Lease to help to defray its recurrent expenses, was inadmissible as a matter of principle as a means of interpreting the relevant provisions of the MOA, the two Leases and the AEA. It is also submitted that likewise such evidence is inadmissible as a matter of law to determine what was the objective intention of the Council, much less of both the Council and PLH. This principle is known as the "exclusionary principle".

[75] In support of this submission, Mr. Astaphan relied on the decision of this Court in **Grenada Technical and Allied Workers Union v St. George's University Limited**[21]**.** There, Baptiste JA (as he then was) in giving the unanimous judgment of the Court, undertook an extensive and thorough review of the leading authorities from the English courts and this Court at the time, dealing with the interpretation of contracts, including commercial agreements. This review included authoritative and highly persuasive statements of the principles applicable to a court construing the language of a contract as espoused by highly respected judges in cases such as

[21] GDAHCVAP2014/0008 (delivered 13th February 2017, unreported).

Arnold v Britton;[22] **Rainy Sky SA v Kookmin Bank**; **Charterbrook Ltd v Persimmon Homes Ltd,**[23] **Oceanbulk Shipping & Trading SA v TMT Asia Limited and others,**[24] **Antaios Compania Naviera S.A. v Salen Rederierna A.B.**[25] and the decision of this Court in **Yang Hsueh Chi Serena et al v Equity Trustee Limited et al.**[26]

[76] It is not necessary to undertake here another extensive review of the relevant case law and dicta from these and other pertinent. In my considered view it is sufficient for present purposes to simply quote a few pertinent extracts at paragraphs 23 and 25 of the judgment of Baptiste JA. These statements neatly encapsulate the law and principles applicable to the exclusionary rule and the type of evidence which can and which ought not to be taken into consideration by a court when conducting the interpretative exercise to ascertain the intention of the parties and where there is found to be no ambiguity or absurdity, to apply the natural and ordinary meaning of the words of the contract. At paragraphs 23 and 25 Baptiste JA summarised the exclusionary rule and the legal principles underpinning it in this way: -

> "[23] The case law clearly demonstrates that the admissible background includes anything known or reasonably available to the parties, which would have affected the way in which a reasonable man understood the language of the document. However, the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. As Lord Hoffman put it in paragraph 42 of his speech in **Charterbrook Ltd v Persimmon Homes Ltd**:
>
> > 'The [exclusionary] rule excludes evidence of what was said or done in the course of negotiating an agreement for the purpose of drawing inferences about what the contract meant.'
>
> [25] The distinction between relevant admissible background and other statements made in the course of negotiations was stated by Lord Hoffman in paragraph 38 of **Charterbrook**:

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[22] [2015] UKSC 36.
[23] [2009] UKHL 38.
[24] 2010] UKSC 44.
[25] [1985] A.C. 181.
[26] BVIHCMAP2013/0012 (delivered 29th September 2014, unreported).

> "Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute."

[77] Counsel for the respondent also considered clauses 1,2 and 5 of the AEA. Clause 5 reads:-

> "5. **No Additional Funding/Prepaid Rent**: The parties hereby expressly agree that the Funds [the US$5 million PLH deposit in escrow bank account -clause 1] shall constitute all of the monies that Government shall ever ask Developer [PLH] to pay towards construction of the Airport, and in no event shall Government ever, by any means and/or under any circumstances, seek to cause Developer to contribute any funds in excess of **Five Million United Stated Dollars** (US$5,000,000.00) towards the construction of the Airport. Furthermore, the parties hereto agree and acknowledge that any Funds disbursed to the Government pursuant to this Agreement **shall be credited to Developer as prepaid rent credited against any other sums that may be due from Developer [sic to] Government**." (emphasis added)

[78] I make a few observations at this point about the AEA. First, the AEA was one of the three agreements entered into after the MOA in December 2016, that is, after matters purportedly would have progressed as the appellant submitted. Second, the parties to the AEA are the same three parties to the MOA and the two Leases, that is, the Government, the Council and PLH. Third, the AEA is a free-standing agreement binding on all three parties, including, importantly, the Council and PLH. It is not expressed to be subject to either the MOA or the 174 Lease or the 425 Lease. Fourth, the AEA and its terms are therefore enforceable as a separate binding contract with its own contractual obligations and covenants. Fifth, these covenants or provisions include, importantly, clause 5, which must be construed according to its language or the natural and ordinary meaning of the words used. Sixth, the language used in clause 5 is somewhat wider in scope (as seemingly admitted by counsel for the appellant in her reply) than the words used to flesh out a similar set-off provision in clause 5.8 of the MOA. This is so as clause 5 of the AEA provides for the escrow Fund to be '**credited as prepaid rent**' 'credited against

any other sums *that may be due from Developer to the Government*.' (emphasis added)

[79] This sixth point is of significance in relation to the overarching question of the terms, applicability and scope of the agreement for a set off of the escrow sum of US$5 million against rents payable under the leases entered into by the parties after the MOA. It is in this sense that it may be seen that to some extent matters between the parties had progressed since the execution of the MOA as clause 5 of the AEA is of a wider scope than clause 5.8 of the MOA in terms of the monetary debts of PLH to which the set off is to be applicable and, importantly, whether irrespective of the respective interpretative contentions advanced by both parties, clause 5 of the AEA would also be applicable to the rents falling due under both the 174 Lease and the 425 Lease.

[80] In her reply counsel for the appellant cautioned the Court against using clause 5 of the AEA when seeking to construe clause 5.8 of the MOA and clause A.1 of the 174 Lease. In her view, it does not assist the Court as it applies to or includes in the set off scope of the provision, monies other than rent payments. In my judgment clause 5 of the AEA is significant. It has a bearing not just on the question of interpretation or the intention of the parties as ascertained from the natural and ordinary meaning of the words which they chose to use in their various agreements and leases but, importantly, to the question or dispute over the obligation by PLH to pay the rent under the 425 Lease, notwithstanding the provision at clause A.1 of the 174 Lease addressing in detail the offsetting of the escrow sum of US$5 million.

[81] Counsel for the respondent also referred to clause 2 of the AEA, which lists certain conditions precedent to the release of funds held in the escrow account. These include sub-paragraph c providing for the 425 Lease to be in full force and effect. It states:

> "c. the lease for 425 acres and 174.83 acres respectively to the Developer have been signed and are in **full force and effect** and no defaults exist on

> the part of Government or the Barbuda Council under either of the said leases." (emphasis added)

[82] Counsel also stressed that from the evidence at the trial it is clear that rent payable under both the 174 Lease and the 425 Lease were being deducted from the escrow sum of US$5 million[27] (and the Government had already started drawing down from the escrow account funds. The first of these two factual assertions is a reference to two letters dated respectively 8th and 14th February 2022 from Mr. Muller Kotze, Vice President of Finance of PLH to the Accountant General of the Treasury Department of the Government of Antigua and Barbuda. By both letters PLH submitted certain payments to the Government in settlement of "land fees" for, respectively, the years, 2022 and 2023. In both letters, it is stated that "*no amount is payable [with respect to the Low Bay and Pink Sands Parcels Leases – 174.83 acres and 425 acres] per Lease Agreement (section A.1) and per Memorandum of Agreement (dated the 6th of December, 2016 -section 5.8)*", for each of the said two years. Each letter continues-

> "US$5,000,000 was contributed by [PLH] towards the airport construction in Barbuda, as set forth in the Airport Development and Escrow Disbursement Agreement (dated the 22nd of February 2017 -section 5), and the said US$5,000,000 shall be credited to [PLH] and a prepayment of rent due under the lease agreements held by [PLH]."

[83] I merely observe that these two letters demonstrate that PLH understood the provisions of clause 5.8 of the MOA and clause A.2 of each lease to mean that the escrow sum of US$5 million, which it deposited pursuant to clause 1 of the AEA, would be applied as a credit against the annual rents payable under both Leases and not just the 174 Lease; and that PLH acted upon this understanding of the said provisions when corresponding with the Accountant General of the Government. I am not aware of, and we have not been provided with any correspondence from either the Accountant General or the Attorney General on behalf of the Government, disputing or disagreeing with what PLH stated in these two letters was the correct

[27] Record of Appeal pp. 181 -182.

interpretation of the relevant provisions of the said documents. However, in reply learned counsel for the appellant indicated that the trial judge had disregarded any evidence from the Accountant General. If this is correct, there has been no appeal from that ruling and no ground of appeal advanced by the appellant against such ruling.

[84] In response to a question from the Court concerning the appellant's submission that the interpretation contended for by the respondent and accepted by the learned judge would, in light of clause A.1 of the 174 Lease, lead to an absurdity, counsel for the respondent manifestly disagreed. He submitted that the interpretation contended for by the respondent (and accepted by the judge as correct) is clearly and distinctly what the relevant documents say or provide for when the language used, and the relevant provisions are understood according to their natural and ordinary meaning. Furthermore, it is what makes commercial sense and does not lead to an absurdity or render the transaction commercially unworkable.

[85] Specifically on the question of a conflict between the provision at clause 5.8 of the MOA and clause A.2 of the 425 Lease, the respondent argued that –

> "the legal effect of the entire agreement clauses, along with the explicit incorporation of the MOA in clause A.2 of the subject leases, renders any difference in wording between clause A.1 of the 425 acre lease and clause A.1 of the 175.83 acre lease wholly immaterial. What is significant is that clause A.1 of the 425 acre lease conflicts wit the provisions of the MOA. Consequently, the terms of the MOA, particularly clause 5.8, take precedence. Therefore, rent payments must be made in accordance with the MOA, which includes the right to offset rent obligations under the leases with the Government until the respondent's USD 5,000,000.00 advance for the airport construction is fully liquidated." [28]

[86] The issue of what was the 'commercial purpose' of the transaction is ground 4 of the appeal. However, this ground was not addressed by the appellant in its written submissions filed 23rd April 2025 or in the oral submissions of Ms. Henry KC in the appeal. Likewise, it was not addressed directly by the respondent in its written

[28] Paragraph 27 of the respondent's skeleton arguments.

submissions filed in the appeal on 15th May 2025, albeit ground 4 was identified and there was at paragraph 31 of the said submissions a reliance on paragraphs 26 to 29 of the judgment of Pereira CJ (as she then was) in **Kenneth Krys and Anr. v New World and ors**. It was, however, referenced by the learned judge at paragraph 24 of the judgment when addressing the principles to be gleamed from this Court's decision in **New World** as to when a court can consider evidence of the commercial purpose of the transaction. Suffice it to be said that it is settled law that where the language used by the parties is unambiguous the court must apply it, and a court will only consider the 'commercial purpose' of the transaction where the language is ambiguous. In **St. George's University Limited** Baptiste JA relying on the extensive statements of principles in the speech of Lord Neuberger in **Arnold v Britton** at paras. 16 to 20 opined –

> "[29] However, commercial common sense and surrounding circumstances do not represent a licence to deviate from what is expressed in the contract so as to essentially rewrite the parties' contract. Effect must be given to the words used by the parties. The principles relating to the natural and ordinary meaning of words are well-known and need not be repeated."

[87] In any event, the appellant does not argue that there was a mistake in the words used or that the words used were ambiguous such that the court ought to consider evidence as to the commercial sense or purpose of the transaction. Likewise, the respondent argued for an interpretation which is clear from the natural and ordinary meaning of the words used in Clause A.2 of the 425 Lease incorporating the provisions of the MOA, in particular clause 5.8 which provision by virtue of the terms of clause A.2 of the said Lease is to prevail. Moreover, it is the respondent's case that these documents provide significant financial benefits to the Government and the Council alike, and the interpretation advanced by the respondents as the correct one, and accepted by the judge, simply means that the escrow sum of US$5 million is being applied and reduced at a much faster pace leading, inevitably, to the Council beginning to be paid at a significantly earlier date, the rents under both Leases. In light of the almost total absence of any argument by the appellant in relation to ground 4 I do not intend to give it and the question or issue of the

'commercial purpose' of the transaction as a tool for its interpretation of the rental obligation and set off provision incorporated directly into clause A.2 of the 425 Lease.

Conclusion on grounds 2 and 3

[88] As can be gleamed from the analysis above of the respective submissions of the appellant and the respondent in relation to grounds 2 and 3 of the notice of appeal, I do not favour the interpretation and hence the case contended for by the appellant. Accordingly, I would dismiss the appeal having earlier also dismissed ground 1. I am persuaded that the interpretation contended for by the respondent before the learned judge and in the appeal is the correct one, applying the natural and ordinary meaning of the words used in the various agreements and leases.

[89] In my judgment, the provisions of clause A.2 of the 425 Lease when read with the provisions of clause 5.8 and the definition of the term "Property" at clause 1.1 of the MOA are clear and unambiguous. The contractual set off provision/obligation in clause 5.8 of the MOA was made expressly applicable to the 425 acre property which subsequently was demised by virtue of the 425 Lease to PLH. By clause A.2 of the 425 Lease the terms of the MOA were made expressly applicable to the 425 Lease and to that extent that there was any inconsistency between them the terms of the MOA was agreed by the parties to prevail. In my view, the effect of this is that the covenant to pay the rent stipulated under clause A.1 of the 425 Lease was thereby modified to the extent, not that the annual rent falling due was not to be paid by PLH, but only to the extent that such rents were to be deemed to have been paid by PLH by way of set off or credit against the US$5 million contribution by PLH under the AEA to the cost of construction of the Airport on Barbuda. Viewed in this way there is no conflict or inconsistency between clause 5.8 of the MOA and clause A.2(1) 'covenant to pay rent' in the 425 Lease.

[90] Neither party to these proceedings have asserted any ambiguity in the actual words used in the MOA and in the 425 Lease. Absent such ambiguity, it would not be open for the Court as part of its interpretive exercise to receive and to consider extrinsic evidence of the negotiations leading to the parties entering into the two leases and the AEA or evidence as to what was the intention of a party or the other. Mr. Walker's evidence was of no assistance, and the learned judge was correct to discount it in its entirety. His evidence was in fact caught by the exclusionary rule as formulated in the cases reviewed by Baptiste JA in **St. George's University**. Mr. Walker's evidence, albeit not directly contradicted by the evidence of any other witness, was in any event wholly unreliable and unsupported by any independent fact or document. It amounted to a bare assertion of a fact made in the absence of any relevant documentary evidence, the absence of which was only partially explained by him, and unsupported by any provision of the MOA, the two Leases or the AEA, except to the extent that the Council's counsel argued based upon the provisions of clause A.1 of the 174 Lease.

[91] Furthermore, at best Mr. Walker's evidence goes only to what were the intentions of the Council when it approved and consented to the various agreements and Leases. He gave no evidence as to whether those alleged intentions or objective were known to or shared or agreed upon by PLH. The total absence of such evidence is fatal to any reliance upon such evidence when construing a contractual provision. The reason and rationale for this is manifestly obvious. It is because evidence as to the intentions or knowledge of one party to a contract which is between two parties (at least) cannot be used to interpret the language actually used in that contract by the parties, unless there is evidence that the other party held the same intentions or had the same knowledge. This principle was made pellucid by Lord Neuberger in **Arnold v Britton** at paragraph 21:-

> "When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties."

[92] While it is correct that clause A.1 of the 174 Lease does contain a detailed provision for the set off or drawing down of the escrow sum against rents payable under that lease, each lease must be considered and interpreted within its four corners and within the overall context of the transaction. This provision in A.1 of the 174 Lease does not render the interpretation advanced by the respondent and accepted as correct by the learned judge an absurdity, as contended by counsel for the appellant. The simple fact is that there is nothing in the language of either the 174 Lease or the 425 Lease which makes clear that the thinking and intentions of the parties had moved on since they had executed the MOA such that the set off under clause 5.8 of the MOA made clearly applicable to the 425 acre development land (i.e. the 425 Lease of that land) had been changed to only apply to the additional land demised under the 174 Lease. If that were indeed the 'changed' position or intention of the parties, this could easily have been made clear or manifest by the addition of a few clarifying words to either lease. This was not done. Instead, both leases in clause A.2, which deals to the Lessee's covenants including the covenant to pay rent, expressly incorporated the provision/covenants of the MOA into and made them a part of the respective lease. Additionally, the clause in both leases expressly provided that –

> '[w]here there is a conflict between the terms of the Lease and the terms of the Memorandum of Agreement, the terms of the Memorandum of Agreement **shall prevail**.' (emphasis added)

[93] Finally, and in any event, in my judgment the appellant's claim may also fail by virtue of the provisions of clause 5 of the AEA. This matter has already been addressed above. The said provision may be sufficiently wide in its scope and application to cover the rents payable under the 425 Lease when it uses the words '*shall be credited to the Developer as prepaid rent'*. This provision was relied on by counsel for the respondent in his oral submissions. However, counsel for the appellant in her reply sought to disabuse the Court of any reliance on it since it is also sought to address '*any other sums*' that may be due from the Developer to the Government, not to the Council. However, I do not decide this appeal purely on the basis of clause

5 of the AEA being applicable to the rents payable by PLH under the 425 Lease, but on the several other bases covered above.

Disposition

[94] For the several reasons given and conclusions reached above, all grounds of appeal having failed, I would dismiss this appeal. The respondent being the victorious party is entitled to its costs of the appeal, there being no exceptional circumstances to warrant this court deviating from the general rule and making a different costs order.

[95] I would therefore order that the appeal is dismissed with costs to the respondent to be paid by the appellant in a sum to be assessed by a judge or Master of the High Court, if not agreed by the parties within 21 days of the date of delivery of this judgment.

[96] It is just left for me to thank learned lead counsel for each of the parties for their helpful submissions, both written and oral.

I concur.
Vicki-Ann Ellis
Justice of Appeal

I concur.
Cadie St. Rose- Albertini
Justice of Appeal [Ag.]

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

By the Court

Chief Registrar