COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 68 of 2023

BETWEEN

PARADISE ISLAND LIGHTHOUSE AND BEACH CLUB COMPANY LIMITED

Appellant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Respondent

Before:	**The Hon. Sir Michael Barnett, President** **The Hon. Mr. Justice Gregory Smith, JA** **The Hon. Mr. Justice Bernard Turner, JA**
Appearances:	**Mr. Damien Gomez, KC, with Mr. Sidney Cambridge, Counsel for the Appellant** **Mr. Kirkland Mackey, with Ms. Monique Meronard, Counsel for the Respondent**
Hearing Dates:	**16 November 2023, 13 December 2023, 14 March 2024**

Civil Appeal – Lease – Agreement for Lease – Acts of Part Performance – The Doctrine in Walsh v Lonsdale – Section 54 (1) of the Conveyancing and Law of Property Act – Signature of the Minister with Responsibility for Crown Lands – Lease for Crown Lands without the Minister's Signature

In 2012, the Appellant applied to the Minister responsible for Crown Lands to lease 17 acres of Crown Land on Paradise Island. In May 2018, the Bahamas Investment Authority (BIA) wrote the Appellant stating that 5, and not 17, acres of Crown Land in the vicinity of the Lighthouse was recommended.

In October 2018, a Memorandum of Understanding was signed between the Appellant and the Antiquities, Monuments and Museum Corporation of the Bahamas regarding the proposed development.

In January 2020, the Appellant received a letter entitled "APPROVAL FOR CROWN LEASE - FIVE (2+3) ACRES AT THE WEST END OF PARADISE ISLAND - PARADISE ISLAND LIGHTHOUSE AND BEACH CLUB COMPANY LIMITED" from the Department of Lands & Survey, which enclosed a lease for execution by him. The unexecuted lease provided for the payment of a yearly rent of ($5,224.00) per acre per annum or One Dollar ($1.00) per paying visitor. The Appellant executed the lease and returned it to the Department of Lands and Surveys on 9 January 2020 for execution by the Minister.

In February 2020, the Appellant wrote to the Minister, regarding his application for Crown Land and requested a Comfort Letter. He also expressed surprise that his lease was now commingled with a foreign party's expression of interest for the same Crown Land. He asked that the Minister remove ambiguity and that the Comfort Letter would enable the Appellant to have the certainty it needed.

The Minister did not execute the lease. In February 2020, the Government told the Appellant that there was no agreement between the Appellant and the Minister responsible for Crown Lands.

The Appellant commenced an action challenging the assertion as to the non-existence of an agreement. The Chief Justice heard the matter and held that there was no lease. The Appellant was dissatisfied and appealed that ruling.

Held (Barnett, President dissenting): Appeal dismissed by a majority. The Appellant is to pay the Respondent's costs of the appeal.

Per Smith JA, and Turner JA,

An agreement for a lease could, in equity, be as binding as a lease and, if necessary, could be enforced by a decree of specific performance.

In deciding whether the facts of a particular case prove the existence of a contract/lease, a court must perform an objective assessment of the words and conduct of the parties. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires, as essential for the formation of legally binding relations.

In this case, the following factors are conclusive that there was no valid lease: a. the lease was to be returned to the Minister for him to execute and a signed document would be sent to him, b. that had the Appellant's execution been expected to complete the transaction, the documents would have been forwarded as signed, c. had Paradise's execution been expected to complete the transaction, the letter would have spoken to the payment of the leasehold payments, and d. had the Appellant's execution been expected to complete the transaction, one would have expected a cheque for the payment of the initial year's rent, which was payable in advance, to have been furnished with the returned documents.

Further factors showing that there was no lease was the Appellant requesting a comfort letter and asking for an update regarding the Minister's signature. These factors show that, notwithstanding that the Appellant had executed the lease, even the Appellant believed that the document was subject to execution by the Minister.

This Court cannot interfere with the trial judge's holding that he did not accept the Appellant's view that there was a binding agreement for a lease, because it cannot be shown to be "plainly wrong.

The absence of words like "subject to contract" does not mean that there is no need for a formal contract/lease. It is a question of interpretation and construction in the circumstances of any specific case.

The parties' intentions ought to be disclosed by their language. If the agreement was subject to a formal lease, it means that there are terms to be agreed upon or conditions to be fulfilled; as such, there should be no contract until those things have been done.

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Where a proposal or agreement is "subject to contract", it means that it is subject to a formal contract being prepared. When not expressly stated to be so, then it is a matter of construction.

In this appeal, the absence of the words "subject to contract" does not mean that there was no need for a formal contract to have an agreement between the parties. Firstly, the words used and the conduct of the parties showed that both the Minister and the Appellant knew, and expected, that the Minister had to formally sign the contract before any agreement could be reached. Secondly, section 54 (1) of the Conveyancing and Law of Property Act, restricts the power of the Crown to divest itself of any Crown Lands other than by grant under seal.

It is untenable that the Crown could divest itself of limited Crown Lands other than by the deliberate and formal granting of a lease. The absence of the words "subject to contract" (or any similar wording) in the draft lease, or letters accompanying the draft lease, did not preclude the draft lease being subject to the preparation of a formal executed lease by the relevant Minister.

The Appellant cannot rely on the doctrine of part performance, to call for a decree of specific performance of the lease. This is because, as required by the doctrine in **Walsh v Lonsdale**, there were no sufficient acts by the Appellant that could be considered as part performance of any 'agreement', such as payment of the rent stipulated in the draft lease.

The Appellant could not rely on a cheque which was made payable to "The Public Treasury" purportedly as the yearly rent for the land in question because it was made *after* the Appellant had been expressly informed that there was no valid lease.

Beacon Insurance Co. Ltd. v Maharaj [2014] UKPC 21; applied
Brown t/a Natbros v. Smith and Ors [2014] 1 BHS J. No.67; applied
RTS Flexible Systems Ltd v Molkerei Alos Muller GmbH & Co KG (UK Production*)* (2010) UKSC 14; mentioned
Walsh v Lonsdale (1882) 21 Ch D 9; distinguished

Winn v Bull (1877) 7 Ch D 29; applied

Per Barnett, President, (dissenting)

In my view, there was a concluded agreement between the Appellant and the Government for the lease of the land in question. The lease had been prepared by the Respondent's lawyers on the Respondent's instructions. All of the prerequisites for a valid lease had been satisfied, namely (1) the identification of the landlord and tenant; (2) the premises to be leased; (3) the commencement and duration of the term; and (4) the rent or other consideration to be paid. The document reflecting the terms of the agreement was sent to the Appellant for signature. All that was left was for the Respondent to sign and seal the lease.

Whether or not a contract, such as a lease, has been formed requires an objective determination of the intention of the parties, which requires determination not only of the text but also of the surrounding circumstances known to the parties and the purpose and object of the transaction.

In this case, there is no suggestion that there were any terms not yet agreed or which required further discussions. The negotiations were complete and the terms of the agreement were incorporated in the lease prepared by the Respondent and sent by the Respondent to the Appellant for execution. If the lease did not represent the terms of the agreement, the Respondent would not have sent it to the Appellant for execution and state that, upon its return, it would be executed by the Minister and a counterpart sent by the Minister to the Appellant for safekeeping. These facts are inconsistent with a continuing or ongoing negotiation.

The fact that the Minister did not sign the lease did not prevent the lease and all of the terms which had been agreed upon from being enforceable. A contract may be made by letters and the mere reference in them to a future formal contract will not prevent their constituting a binding bargain.

Whether there was in law a binding agreement depends not on the credibility of the evidence of the Appellant but on the objective evaluation of the various letters.

Section 54 of the Conveyancing and Law of Property Act is completely irrelevant. All that section does is to vest in the Minister the power to make a lease of Crown Land which power was previously vested in the Governor prior to Independence. It does not affect in any way the law relating to the making of an agreement between a tenant and the Minister as to the grant of a lease of Crown Land.

Bonnewell v Jenkins [1876] 8 Ch.D. 70; considered
Brown t/a Natbros v. Smith and Ors [2014] 1 BHS J. No.67; distinguished
Buttle v Saunders [1950] 2 All E.R. 193; mentioned

RTS Flexible Systems Ltd v Molkerei Alos Muller GmbH & Co KG (UK Production) *(2010) UKSC 14*; mentioned
Stellard Pty Ltd and another v North Queensland Fuel Pty Ltd [2015] QSC 119; considered
Walsh v Lonsdale (1882) 21 Ch D 9; distinguished
Winn v Bull (1877) 7 Ch D 29; mentioned

JUDGMENT

Delivered by the Honourable Mr. Justice Smith, JA:

INTRODUCTION:

1. This action is founded upon an alleged breach of an agreement to grant a lease of 5 acres of land on Paradise Island. The Appellant (Paradise) alleges that after years of negotiations, the Minister responsible for Crown Lands agreed to grant it a 21-year lease of 5 acres of land on Paradise Island to develop for the operation of recreational and entertainment facilities. The Respondent denies that any such agreement had been made.

2. The action was heard before Winder C.J. He dismissed the claim of Paradise with costs to the Respondent.

3. Paradise now appeals the Order of Winder C.J.

4. For the reasons expressed in my analysis, I would dismiss this appeal and order the Appellant to pay the Respondent's costs.

THE FACTS:

5. The facts of this matter are well detailed in the judgment of Winder C.J. and I will repeat them here.

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

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

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

> **"Dear Mr. Smith,**
>
> **PARADISE ISLAND LIGHTHOUSE AND BEACH CLUB CO. LIMITED**
>
> **I am directed to advise that the National Economic (sic) ("NEC") has concluded on your application as follows:**
>
> **(i) Agreed to recommend to the Minister responsible for Lands to approve Paradise Island Lighthouse Inc. owned by Mr. Toby Smith to acquire a 21 year Crown Lease for five (5) acres of Crown Land immediately adjacent to the property on which is situate the Paradise Island Lighthouse and Keeper's Quarter and also comprising land in the vicinity of the Colonial Beach and to include a portion of the seabed situate at west Paradise Island, for the purposes of constructing and operating recreational and entertainment facilities offered to Bahamians and tourists;**
>
> **(ii) Approved Antiquities, Monuments and Museum Corporation ("AMMC") to negotiate with Mr. Toby Smith the terms and condition of a public private partnership ("PPP") arrangement for renovation, maintenance and operation of the Paradise Island Lighthouse and Keeper's Quarters and construction and operation of recreational and entertainment facilities at western Paradise Island, with the agreed PPP arrangement document returned to NEC for approval also reflecting that the management and operations of the Paradise Island Lighthouse is to be in collaboration with the Port Department;**
>
> **(iii) Approved Mr. Toby Smith to develop a $2 million project to comprise docking facilities, fresh water, power generation and sewer treatment plants, a central plant building, restaurants and bars, entertainment and dining facilities; shower and bathroom facilities, ten (10) ocean view cabanas; green area; and refurbishment of the Paradise Island Lighthouse and Lighthouse Keeper's Building; subject to meeting the requirements of all relevant Government agencies including the Ministry of Public Works, Ministry of Transport and Local Government, Ministry of Tourism and Aviation, the Antiquities Monuments and Museums Corporation, Department of Physical Planning, Department of Lands and Surveys, Port Department and the approval of the relevant environmental study by Bahamas Environmental Science and Technology (BEST) Commission <u>prior</u> to the start of project renovation and construction works; and**
>
> **(iv) Approved Paradise Island Lighthouse Inc. to obtain concessions pursuant to the Hotels Encouragement Act, as Amended.**

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

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

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

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

Dear Sir,

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

Reference is made to the above subject.

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

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

Please also note that the Lease Diagrams require signature.

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

Yours faithfully,

R.S. Hardy,

ACTING DIRECTOR"

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

"Dear Right Honourable Prime Minister Dr. Minnis,

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

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

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

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

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

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

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

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

Thank you.

Sincerely yours,

Capt. Toby C.S. Smith
Lighthouse Keeper." [Emphasis Added]

12. The unexecuted Lease delineated the two parcels of property to be leased by Paradise as follows:

> **"(i) ALL THAT certain lot piece of parcel of land containing by admeasurement Two (2.00) Acres of thereabouts shown on a Plan on record in the Department of Lands and Surveys as Plan numbered 5957NP situated West of lot No. 1 Colonial Heights formerly Hog Island Estates, beginning at a point ABUTTING AND ABOUNDING towards the NORTHEAST by Crown Land and running thereon for a distance of One Hundred and Sixty-three and Thirty Hundredths (163.30') Feet to a point. Thence towards SOUTHEAST by Crown Land and running thereon for a distance of Two Hundred and Thirteen and Ninety-three Hundredths (213.93) Feet to a point. Thence towards the South by Crown Land and running thereon for a distance of Two Hundred and Forty-two and Forty-eight Hundredths (242.48') Feet to a point. Thence towards the WEST by Crown Land and running thereon for a total distance of Four Hundred and Thirty-six Feet and Thirty-eight Hundredths (436.38') Feet to a point. Thence towards the NORTH by Crown Land and running thereon for a total distance of Four Hundred and Eight-six and Seventy-five Hundredths (486.75') Feet. To its point of origin. ("Parcel A"); and**
>
> **ii. ALL THAT certain lot piece of parcel of land containing by admeasurement Three (3.00) Acres of thereabouts shown on a Plan on record in the Department of Lands and Surveys as Plan numbered 5957NP situate WEST of Lot No. 1 Colonial Heights Subdivision formerly Hog Island Estates, beginning at a point ABUTTING AND ABOUNDING towards the EAST by Crown Land and running thereon for a distance of Three Hundred and Three and Eighty-nine Hundredths (303.89') Feet to a point. Thence towards the SOUTH by Crown Land and running thereon for a total distance of Three Hundred and Ninety-nine and Twenty-six Hundredths (399.26') Feet to a point. Thence towards the WEST by Crown Land and running thereon for a distance of Two Hundred and Ninety-eight and Forty-seven Hundredths (298.47') Feet to a point. Thence towards the NORTH by Crown Land and running thereon for a total distance of Four Hundred and Eighty-three and Sixty-nine Hundredths (483.69') Feet. To its point of origin. ("Parcel B")"**

13. The unexecuted lease also provided:

> **"In consideration of the rent hereinafter reserved and the covenants and conditions hereinafter contained and on the part of the Lessee to be paid performed and observed the Lessor hereby demises unto the Lessee ALL THAT certain lot piece or parcel of land and seabed hereinafter described in the Schedule hereto together with the appurtenances thereunto belonging (hereafter called "the Demised Premises") TO HOLD the same unto the Lessee from 1st day of January A.D. 2020 for a term of Twenty-one (21) years (hereinafter called "the said term") and paying therefore during the said term a yearly rent of Five Thousand Two Hundred and Twenty-four**

Dollars ($5,224.00) per acre per annum or One Dollar ($1.00) per paying visitor, whichever is greater, both in the currency of the said Commonwealth of The Bahamas (hereinafter called "the said currency") plus Value Added Tax (VAT) payable in advance each year on the anniversary of the commencement date, subject to review after ten (10) years and with the right of renewal.

14. Paragraph 4(i) of the unexecuted lease states:

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

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

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

17. Paradise commenced this action challenging the assertion as to the non-existence of an agreement.

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

ANALYSIS:

19. Like Winder C.J., I find that the central issue in this case is *"whether there was an agreement for a lease between Paradise and the Minister responsible for Crown Lands…"* This alleged agreement for a lease could on accepted principles of equity be as binding as a lease and, if necessary, could be enforced by a decree of specific performance.

20. The answer to this issue depends on whether the lease delivered to and signed by Paradise, but not signed by the relevant Minister, could be considered as a valid agreement for a lease.

21. In deciding whether the facts of a particular case prove any such agreement, a court must perform an objective assessment of the words and conduct of the parties. This is well expressed

in the case of **RTS Flexible Systems Ltd v Molkerei Alos Muller GmbH & Co KG (UK Production)** (2010) UKSC 14, where Lord Clarke stated:

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

22. In this case, Winder C.J. examined both the words used in the relevant documents and the conduct of the parties.

23. In relation to the words used, the learned C.J. examined both the letters of 7 January 2020 which accompanied the lease and the letter of Mr. Smith on behalf of Paradise dated 12 February 2020.

24. With respect to the letter of 7 January 2020, the learned C.J. made the following observations:

> **"33 (a). The document contemplated that it would be returned, if accepted, and forwarded to the Minister for execution to complete the process, as:**
> **i) Paradise was told not to date document as that would be done at the time of the Lessee's inserting his signature: - "The date at the top of page 1 should be left blank and it will be inserted at the time of Lessor signature."**
> **ii) All of the documents were to be returned to the Minister for him to execute and a signed document would be sent to him, - "After the above, please return both documents to the Department. Following Lessor execution, one document will be sent to you for safekeeping."**
> **iii) Had Paradise's execution been expected to complete the transaction, as Paradise asserts, the documents would have been forwarded as signed.**
> **iv) Had Paradise's execution been expected to complete the transaction, as Paradise asserts, the letter would have spoken to the payment of the leasehold payments, but it didn't.**
> **v) Had Paradise's execution been expected to complete the transaction, as Paradise asserts, one would have expected a check for the payment of the initial year's rent, which was payable in advance, to have been furnished with the returned documents."**

25. I find no fault with this objective analysis of the letter of 7 January 2020.

26. With respect to the letter of 12 February 2020 from Paradise, the learned C.J. made the following observations:

"33 (c) Paradise's own letter of 12 February 2020, discussing the arrangement, notwithstanding it had already been executed by it, betrays its own view that the document was subject to execution by the Minister. Just days after signing and returning the document he wrote to the Minister in these words:

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

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

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

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

27. Again, I find no fault with this objective analysis of the letter of 12 February 2020.

28. With respect to the conduct of the parties at or around the time of the letters, the learned C.J. set out the evidence and cases of the respective parties. The C.J. observed that the Minister's case had always been that there was no agreement until a formal lease was signed (see paragraphs 24-30 of the judgment). As for the case of Paradise, the C.J. examined the testimony and case presented by Mr. Smith. With respect to his expectation expressed in the letter of 7 February 2020 that Paradise had "a Binding Agreement" for a lease pending the receipt of a "Comfort Letter" from the Minister, the trial judge stated succinctly at paragraph 33 *"I did not accept Smith's explanation to the contrary"* (i.e. his expectations about "a Binding Agreement").

29. The trial judge heard the evidence presented by Mr. Smith and analyzed this evidence as against the documents before him. In doing so, I am of the view that his opinion on Mr. Smith's evidence ought not to be overturned as it cannot be shown to be "plainly wrong" (see **Beacon Insurance Co. Ltd. v Maharaj** [2014] UKPC 21 para 12.

30. I therefore am of the view that there was no agreement for a lease as between Paradise and the Minister responsible for Crown Lands.

31. The Appellant has argued that the absence of the words "subject to contract" (or words to a similar effect) in the draft lease signed by Paradise mean that the draft lease was never subject to the execution of a formal lease as provided for in statute. I disagree with this.

32. Ever since the case of **Winn v Bull** (1877) 7 Ch D 29, 32, it has been stated that the absence of the words like "subject to contract" does not mean that there is no need for a formal contract. It is still a question of interpretation and construction in the circumstances of any specific case.

33. This overall position was well expressed in a lead decision **Brown t/a Natbros v. Smith and Ors** [2014] 1 BHS J. No. 67, which was cited in paragraph 32 of the C.J.'s judgment:

> **"32. In *Brown t/a Natbros v Smith and others – [2014]1 BHS J. No.67*** the Supreme Court considered the status of an agreement for sale which was subject to contract and made the following comments:
> **The status of an agreement to contract was considered by Adderley, J. (as he then was) in the case of *Simon David Arnsby v. Gisela Kaiser 2007/CLE/gen/279 Sup. Ct.* (unreported). In that case Adderley, J, held that the issue was to be determined as a matter of construction. The parties' intentions ought to be disclosed by their language. If the agreement was subject to a formal lease it succinctly means that there are terms to be agreed upon or conditions to be fulfilled, as such there should be no contract until those things have been done. Adderley J relied on what he termed the modern principle as expounded by Lord Hoffman in *I.C.S. Ltd. v West Bromwich B.S. 1 WLR 896, 912* Lord Hoffman stated, "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all background knowledge which would reasonable have been available to the parties in the situation in which they were at the time of the contract."**
>
> > **Jessell MR, in the case of *Winn v Bull (1877) 7 Ch. D 29, 32* stated that "where a proposal or agreement is "subject to contract", it means what it says, that it is subject to a formal contract being prepared. When not expressly stated to be so, then it is a matter of construction. Whether the parties intended that the terms agreed upon should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."**
> > [Emphasis Added]

34. I am of the view that in this appeal, as a matter of construction and interpretation, the absence of the words "subject to contract" cannot be taken to mean that there was no need for a formal contract to have an agreement between the parties. I say so for the following 2 reasons.

35. Firstly, as I stated before, the words used and the conduct of the parties showed that both the Minister and Mr. Smith (on behalf of Paradise) knew and expected that the Minister had to formally sign the contract before any agreement could be reached.

36. Secondly, section 54 (1) of the Conveyancing and Law of Property Act, restricts the power of the Crown to divest itself of any Crown Lands (as is the land in question) other than by grant under seal.

Section 54 (1) provides: -

> **"DISPOSITION OF CROWN LANDS**
> **54. (1) Any power that immediately before the 10th day of July, 1973, was under section 24 of the Bahama Islands Constitution Order, 1969, vested in the Governor of the Bahama Islands –**
>
> **(a) to make grants and dispositions of any lands or other immovable property in the said Islands or any interests in such property that were vested in Her Majesty or the Governor on behalf of Her Majesty as the property of the Crown for the beneficial interest of the said Islands, or**
>
> **(b) to exercise in relation to such property or interests any other powers lawfully exercisable by Her Majesty, shall be vested in the Minister, so however, that, wherever the employment of the Public Seal would have been required under that section, the official seal of the Minister shall be employed instead.**
>
> **(2) In this section "Minister" means the Minister responsible for Crown Lands."**

37. Mr. Smith and Paradise must be deemed to know the law. In any event, on the facts as found by the trial judge, Mr. Smith had no expectation that there was a binding agreement until the Minister signed the documents (or at the very least gave him a 'Comfort Letter' as he requested).

38. It would, in my view, be untenable for the contrary to be true, especially in The Bahamas. Namely, that the Crown could divest itself of limited Crown Lands other than by the deliberate and formal granting of a lease.

39. From a government perspective, it could hardly be argued that a present or prior government should be bound by the acts of its alleged 'agents' when they may not have any knowledge of or control over the acts of such agents. The requirement of direct ministerial control over the disposition of scarce Crown Lands seems imperative in the context of The Bahamas.

40. I am therefore of the view that the absence of the words "subject to contract" (or any similar wording) in the draft lease, or letters accompanying the draft lease, did not preclude the draft lease being subject to the preparation of a formal executed lease by the relevant Minister.

41. The Appellant has also argued that based on the doctrine of part performance, he is entitled to call for a decree of specific performance of the lease. This principle is also known as the doctrine in **Walsh v Lonsdale** (1882) 21 Ch D 9 as Winder C.J. stated at paragraph 34 of his judgment,

> **"In Walsh v Lonsdale, Lonsdale agreed to lease Walsh a mill for seven years. The rent was to be paid quarterly with a year's rent to be paid on demand in addition to any rent due and unpaid for the period prior to the demand. The deed was executed for the tenancy and Walsh made quarterly payments. Lonsdale demanded a year's rent and Walsh refused to pay. The court held that the tenant could not 'complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted.'"**

42. However, as the trial judge found, the doctrine of part performance as expressed in the case law did not apply here since there were no sufficient acts on the part of Paradise that could be considered as part performance of any 'agreement'. In summary, (i) Paradise had not been let into occupation of the premises (ii) Paradise had not paid the rent as stipulated in the draft lease, and (iii) the pre-contractual efforts of Mr. Smith (though over an extended period) were not such that they could be viewed as part performance of any tenancy agreement. Paradise could only rely upon the letter of 7 January 2020 to raise any issue of an alleged agreement. Further, as the trial judge found at paragraph 36:

> **"Paradise claims to have been put to the expense of incorporation and the establishment of a website. Putting aside the question of whether Paradise can claim its own incorporation fees as a loss flowing for the Lease, Paradise was incorporated some two years before the purported offer. There is no evidence that the website was not likewise established in this period, considering it was just over a month after receiving the letter that Paradise was advised that no concluded agreement was being recognized by the Minister."**

43. I find no fault with the finding that the doctrine of part performance does not arise on the present facts.

44. In oral argument, Paradise sought to rely on a cheque dated 13 March 2020 in the sum of $29,254.00 which was made payable to "The Public Treasury" purportedly as the yearly rent for the land in question. However, this payment could take the case no further as it was made after Paradise (through Mr. Smith) had been expressly informed that there was no valid or binding lease (see the written statement of Mr. Smith at para 32). Further, this payment was not pleaded as payment of agreed rent nor was any evidence led on it so as to allow the Respondent the opportunity to refute any allegation of this payment being rent. It could not be contended that this 'payment' was intended or accepted as yearly rent for the land in question.

CONCLUSION:

45. For the reasons stated above, I am of the view that this appeal should be dismissed. The Appellant is ordered to pay the costs of the appeal to the Respondent, to be taxed by the Registrar in default of agreement.

The Honorable Mr. Justice Gregory Smith, JA

46. I agree with the disposition of this appeal.

The Honorable Mr. Justice Bernard Turner, JA

DISSENT

Delivered by the Honourable Sir Michael Barnett, President:

47. I have read in draft the judgment of Smith JA, with which Turner JA agrees, whereby they would dismiss the appeal in this matter. I must respectfully dissent from their judgment. I would have allowed the appeal and set aside the Chief Justice's decision.

48. This is an appeal against the judgment of the Chief Justice whereby he held that the Appellant did not have an enforceable agreement with the Respondent to lease 5 acres of Crown Land located on Paradise Island. In my judgment, the Appellant had an agreement with the Appellant on which the court should order specific performance.

49. For the purposes of my analysis, I primarily rely on the facts as set out in the majority judgment.

50. In April, 2012, the Appellant applied to the Minister responsible for Crown Lands to lease 17 acres of land on Paradise Island.

51. In May, 2018, the Bahamas Investment Authority advised the Appellant that it had recommended to the Minister to approve the grant of 5 acres of land instead of 17 acres. In my judgment, in principle, the Investment Authority agreed to recommend to the Minister the grant of a lease for 21 years of 5 acres of property on Paradise Island.

52. On 2 October 2018, a Memorandum of Understanding was signed by the Appellant and the Antiquities, Monument and Museum Corporation.

53. Then, on 7 January 2020, the Acting Director of the Department of Lands and Surveys sent a letter to the Appellant with a lease for execution by the Appellant. That letter is of major importance and I set it out. It said:

> **"Dear Sir,**
>
> **APPROVAL FOR CROWN LEASE - FIVE (2+3) ACRES AT THE WEST END OF PARADISE ISLAND - PARADISE ISLAND LIGHTHOUSE AND BEACH CLUB COMPANY LIMITED**
>
> **Reference is made to the above subject.**
>
> **Enclosed are the Lease and Counterpart for Lessee signing, dating, sealing, witnessing and notarizing.**
>
> **The date at the top of page 1 should be left blank and it will be inserted at the time of Lessor signature.**
>
> **Please also note that the Lease Diagrams require signature.**
>
> **After the above, please return both documents to the Department. Following Lessor execution, one document will be sent to you for safekeeping.**
>
> **Yours faithfully,**
>
> **R.S. Hardy,**
> **ACTING DIRECTOR"**

54. It is to be noted that nothing in that letter states that there was no agreement or that the agreement was "subject to contract". The letter did not state or suggest that there were other matters left outstanding to be agreed upon. Indeed, the letter stated in the heading "Approval for Crown Lease" and that it was enclosing "the lease" not "a draft lease".

55. The Appellant executed the lease and returned it to the Department of Lands and Surveys on 9 January 2020. The executed lease was not accompanied with a cheque for the payment of the requisite rent.

56. A month passed and the Appellant did not receive the lease from the Department of Lands and Surveys.

57. On 12 February 2020, the Appellant wrote to the Prime Minister, who was the Minister responsible for Crown Lands (the letter is set out at paragraph 11 of this judgment).

58. Following that letter, to which there was no written reply, the Appellant met with the Attorney General on 27 February 2020, at which time he was advised by the Attorney General that there was no agreement between the Appellant and the Minister.

59. I pause to note that on 19 March 2020, after that meeting with the Attorney General and shortly before this action was commenced in May 2020, the Appellant tendered to the Minister a cheque for $29,254.40 which was the rent which the Appellant was required to pay under the Lease Agreement.

60. Following the Minister's refusal to execute the lease, the Appellant commenced this action by writ issued on 18 May 2020. The material terms in the statement of claim were:

> **"4. On the 12th day of April, A.D, 2012, the Plaintiff applied to the Department of Lands and Surveys for 17 acres of Crown Land situated on Paradise Island, for the development of an attraction.**
> **5. On the 23rd May, 2018 Plaintiff received letter (sic) from Bahamas Investment Authority approving five acres of Crown Land "immediately adjacent to the property on which is situate the Paradise Island Lighthouse and Keeper's Quarters and also comprising land in the vicinity of the Colonial Beach and to include a portion of the seabed situate at west Paradise lsland, for the purposes of constructing and operating recreational and entertainment facilities offered to Bahamians and tourists.**
> **6. Subsequently, the Plaintiff entered into a Memorandum of Understanding ("the Memorandum") with the National Museum of The Bahamas on the 2nd day of October, A.D), 2018. The Memorandum outlined that the agreed intention of both parties, was the development, management and operation of the Paradise Island Lighthouse by the Plaintiff, subject to stipulations contained therein.**
> **7. The Plaintiff then received a letter dated the 7th day of January A.D., 2020 from the Actg. Director of Department of Lands & Surveys, captioned 'APPROVAL FOR CROWN LEASE — FIVE (2+3) ACRES AT THE WEST END OF PARADISE ISLAND- PARADISE ISLAND LIGHTHOUSE AND BEACH CLUB COMPANY LIMITED". Attached to the letter was a Crown Lease Agreement made between the Minister Responsible for Land and Surveys and the Plaintiff ("Crown Lease Agreement") that allowed for the Plaintiff to lease the following:**
> **(the parcels of land were then set out)**

8. The lease contained defined terms, conditions and consideration which the plaintiff accepted as evidenced by his signature and seal and on the 9" day of January, A.D. 2020, the Plaintiff returned the executed Crown Lease Agreement to the Department of Land & Surveys as directed which was received by Ms. Amanda Beckford.

9. On 27th February 2020, Toby Smith, the President of the Plaintiff's Company, met with the Attorney General, Mr. Carl Bethel, Mrs. Candia Ferguson, and Mr. Joshua Sears and during the course of the meeting Mr. Toby Smith was told that the Crown Lease and the Memorandum of Understanding and Bahamas Investment Authority (BIA 23rd May, 2018) approval letter were ineffective for the purposes stated therein.

10. In accordance with the above mentioned by letter dated 7th day of January A.D., 2020 there is a concluded Agreement for a lease between the Plaintiff and the Minister responsible for Land and Surveys. As a result of the Defendant's failure to execute and enforce the Crown Lease Agreement, the Plaintiff has suffered loss and damage arising from construction and re-development delays, which directly resulted and continues to result in a loss of profit.

PARTICULARS OFF BREACH OF CROWN LEASE AGREEMENT

1l. The Defendant, its representatives and/or agents are in breach of the Crown Lease Agreement by:

i Failing to execute the Crown Lease Agreement;

ii. Failing to recognize the Crown Lease Agreement is enforceable as an Agreement for a lease is as good as a lease;

iii. Failing to comply with the specified terms of the lease agreement; and

iv. Announcing its intention to lease land inclusive of Parcel A and Parcel B to a third party, namely Royal Caribbean Cruise Lines.

PARTICULARS OF EXEMPLARY DAMAGES

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

i. The Defendant's conduct has been calculated to make a profit which may well exceed the compensation payable to the plaintiff for its breach, in that the property inclusive of parcel A and B is intended to be leased to Royal Caribbean Cruise Lines, despite the Defendant having entered into an Agreement to Lease Parcel A and B to the Plaintiff;

ii. The Defendants and their agents can be said to have acted oppressively and/or arbitrary by:

a) failing to execute the said Crown Lease Agreement; and

b) failing to recognize that the Memorandum of Understanding and Crown Lease Agreement and Bahamas Investment Authority letter terms and conditions were valid and enforceable in the aforementioned meeting held 27th February 2020

13. As a result of the Breach of Contract the Plaintiff has incurred the following expenses: -

Special Damages

i. Incorporation Fees $5,524.98

ii. Website Fees $730.47"

14, The Plaintiff further claims interest on any sums found due at such rate and for such period as this Honourable Court would deem just pursuant to the Civil Procedure (Award of Interest) Act, Chapter 80, 1992.

AND THE PLAINTIFF CLAIMS:

1. A declaration that by letter dated 9th day of January A.D., 2020, there is a concluded Agreement for a Lease between the Plaintiff and the Minister responsible for Land and Surveys;

2. Alternatively Damages for breach of the Agreement for a Lease between the Plaintiff and the Minister responsible for Land and Surveys;

3. Exemplary Damages

4. Special Damages - $6,251.45

5. Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992

6. Such further or other relief as the Court deems just and fit; and

7. Costs"

61. The Respondent served a defence. It was in the following terms:

"5. Paragraph 4 of the Statement of Claim is denied. The Defendant further states that an application was made by Mr. Toby Smith (Mr. Smith) on 12th day of April A.D 2012, to the Department of Lands and Surveys for 17 acres of Crown Land situated on Paradise Island, for the purpose of a development of an attraction. At all times Mr. Smith was the party seeking to engage the relevant minister for permission to lease crown land.

6. Save and except that on 23rd May 2018 Mr. Smith received a letter from the Bahamas Investment Authority (BIA) advising him of conclusions and recommendations made on his application, paragraph 5 of the Statement of Claim is denied. The Defendant further states that the Plaintiff was advised that BIA agreed to recommend to the Minister responsible for lands to approve a lease for the Plaintiff for 5 acres of Crown Land.

7. Save and except that it is admitted that on the 2nd October 2018 a Memorandum of Understanding (MOU) was entered into between Antiquities, Monuments and Museum Corporation and the Plaintiff, paragraph 6 is not admitted. The Defendant states further that the MOU solely related to the management and operation of the Paradise Island Lighthouse to be done in collaboration with the Port Department.

8. Save and except that on 7th January 2020 as a part of the continued negotiation between the parties the Defendant sent to the Plaintiff a draft lease agreement, paragraph 7 of the Statement of Claim is denied.

9. Paragraph 8 of the Statement of Claim is denied and the Defendant states further:

a. At all relevant times all offers and proposals were being made by the Plaintiff for allocation of crown land;

b. As negotiations between the parties on proposals being made by the Plaintiff continued, the Plaintiff prepared and the parties signed a MOU;

c. As part of the ongoing negotiations and invitation to treat between the parties, the Defendant prepared the draft lease and sent to the Plaintiff to sign and formalize his offer to the Minister responsible for lands.

d. At no time did the Minister responsible for lands make an offer to the Plaintiff for the lease of Crown Land;

e. At no time was there an executed lease or an accepted lease agreement between the parties; and

f. At no time was there any consideration provided therefore by the Plaintiff,

10. Save and except that there was a without prejudice meeting held on 27th February 2020 between the Plaintiff and the Defendant paragraph 9 of the Statement of Claim 18 not admitted.

11. Paragraph 10 of the Statement of Claim, and the particulars thereto are denied and the Defendant repeats paragraph 9 of the Defence.

12. Save and except that it is agreed that there was never an executed lease agreement, paragraph 11 of the Statement of Claim, and the particulars thereto are denied. The Defendant states further:

a. The draft lease represented the ongoing negotiated position of the parties on the proposals put forward by the Plaintiff for a lease, and was an invitation to treat and for the formal offer to be made by the Plaintiff to the Minister responsible for land;

b. The Plaintiff's signed offer for a lease was subsequently not accepted by the Minister responsible for land.

13. The Defendant denies the contents of paragraph 12 of the Statement of Claim and the particulars thereto, and in reply say that the Plaintiff is not entitled to the relief claimed or any relief at all. The Plaintiff is put to strict proof thereof.

14. The Defendant denies the contents of paragraph 13 of the Statement of Claim and asserts that the Defendant never instructed Mr. Toby Smith to incorporate any company or to set up any internet website; and in reply further says that the Plaintiff is not entitled to the relief claimed or any relief at all. The Plaintiff is put to strict proof thereof.

15. The Defendant denies the contents of paragraph 14 of the Statement of Claim.

16. Save as herein before specifically admitted or not admitted the Defendant denies each and every allegation contained in the Statement of Claim as though the same were herein set out and traversed seriatim."

62. At the trial, only two persons gave evidence. They were Mr. Smith and Candia Ferguson of the Office of the Prime Minister. Mr. Hardy, who wrote the letter of 7 January 2020, was not called to give evidence. Nor was the Minister called to give any evidence.

63. After a trial, the judge delivered a judgment dismissing the Appellant's claim.

64. In his judgment, the judge said:

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

31. The communication of May 2018, in my view, is incapable of being considered an offer. That document merely set out broad terms of an arrangement with Smith which would straddle several agencies. More importantly it was a recommendation from the BIA and did not originate from the Minister. <u>The letter dated 7 January</u>

2020 was more akin to an offer as it contained proposed terms of the lease with some level of specificity including description of the property and the business terms such as payment. I am not satisfied however that it was an unconditional offer.

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

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

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

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

Having found that the written unexecuted lease was not applicable I must also find that the relationship which existed between the parties, based on the OTL and their course of conduct, was no more than a periodic (monthly) tenancy. The plaintiffs, having gone into possession under the terms of the OLT (sic) and remitting the monthly rental payments to the landlord, held the demised premises as monthly tenants.'

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

a) The document contemplated that it would be returned, if accepted, and forwarded to the Minister for execution to complete the process, as:

i. Paradise was told not to date document as that would be done at the time of the Lessee's (sic) inserting his signature. — "The date at the top of page [should be left blank and it will be inserted at the time of Lessor signature."

ii. All of the documents were to be returned to the Minister for him to execute and a signed document would be sent to him. — "After the above, please return both documents to the Department. Following Lessor execution, one document will be sent to you for safekeeping."

iii. Had Paradise's execution been expected to complete the transaction, as Paradise asserts, the documents would have been forwarded as signed.

iv. Had Paradise's execution been expected to complete the transaction, as Paradise asserts, the letter would have spoken to the payment of the leasehold payments, but it didn't.

v. Had Paradise's execution been expected to complete the transaction, as Paradise asserts, one would have expected a check for the payment of the initial year's rent, which was payable in advance, to have been furnished with the returned documents.

b) Legal strictures existed which prohibited the disposition of the property in the manner asserted by Paradise, without a properly executed deed:

i) The statute of frauds prohibits the enforcement of an unexecuted contract as it made all contracts creating an interest in land for more than three years from the time of execution unenforceable if the contract is not evidenced in writing. The Common Law does not countenance a claim based on such oral contracts to transfer interests in land as enjoined by the statute. (See Owusu: Commonwealth Caribbean Land Law p 167).

ii) The effect of Section 54(1) of the Conveyancing and Law of Property Act, as extracted above, would suggest the requirement that the seal of the Minister be placed to effect any transfer of Crown Lands.

c) Paradise's own letter of 12 February 2020, discussing the arrangement, notwithstanding it had already been executed by it, betrays its own view that the document was subject to execution by the Minister. Just days after signing and returning the document he wrote to the Minister in these words:

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

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

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

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

applied for and contained within the Crown Land Lease Agreement. This has me deeply concerned." [Emphasis Added]

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

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

35. The first point to note is that there is no written or oral agreement between the parties for the acquisition of the Property. Paradise contends, it would appear, that the receipt of the unexecuted document for signature from Hardy and its subsequent signing is, if not a completed contract reflects an agreement to contract in the nature of Walsh v Lonsdale. The facts of Paradise's case, however, is clearly distinguishable for the facts in Walsh v Lonsdale as: (1) Walsh was let into possession by Lonsdale; and (2) leasehold payments were being rendered by Walsh. Neither of these circumstances obtain for Paradise in this case.

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

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

65. In a nutshell, the trial judge held that the lease sent on 7 January 2020 was *"subject to execution by the Minister"* and therefore not evidence in writing of a binding agreement. He also held that the doctrine in **Walsh v Lonsdale** did not apply as there was no part performance either by the Appellant going into possession or by the payment of the rent.

66. The Appellant appeals the decision. The grounds of appeal are:

"1. The Learned Chief Justice at paragraph 15 erred in law and in fact in holding that "the central issue to be determined in this action was whether there was an Agreement for a lease." Instead, the primary issue he dealt with was whether there was a lease in fact.

2. The Learned Chief Justice erred in law and in fact by failing to consider that the Appellant did have a written lease which was engrossed by the Lessee and forwarded with consideration in full as provided for in the lease. In other words, the Appellant had fully satisfied all obligations expressly provided for in the lease, with nothing left for him to do.

3. The Learned Chief Justice erred in law and in fact by failing to consider that there was a contractual obligation against the Respondent to execute the Lessee Engrossed Lease in that it was the Respondent as Lessor who controlled the Lessor's execution and perfection/ settlement of The Lease which was approved for execution at every highest and final level.

4. The Learned Chief Justice erred in law and in fact by failing to consider that the Lessor (i.e. Office of the Prime Minister (OPM was in breach of their statutory duty by failing to follow the Conclusion of the Cabinet of The Bahamas and a specific directive to execute the lease after it was returned duly executed and sealed by the Appellant with a bank cheque for the requisite payment. Also, there was no explanation proffered as to why the Lessor (OPM delayed or refused to sign, until it was announced that RCI had been favoured for a lease of similar nature, terms and conditions over the subject property (le. the entire 17 acres as in the Appellant's Lease).

5. The Learned Chief Justice erred in law and in fact by failing to consider that the Lessor's only explanation and admitted motivation to breach the subject agreement to enter a lease with the Appellant was that it had procured a bigger deal for $100m as opposed to the Appellant's for $3M. Consequently, the Learned Chief Justice failed to consider exemplary damages against the Respondent.

6. The Learned Chief Justice erred in law and in fact by failing to consider that the "Appellant had engaged on the enterprise by i) commencing clearing and clean-up of the 2 leased parcels, ii) engaging firms of professionals to advise on preparation of fund raising prospectus, iii) engaging architects and engineers to complete drawings for support buildings and amenities, iv) expending sweat equity (i.e. - personally working fulltime) organizing and promoting the development locally and internationally.

7. The Learned Chief Justice erred in law in holding that Walsh v Lonsdale did not apply to matters herein as there was in fact consideration passing in full from the Appellant to the Respondent. There was in fact commencement of the enterprise. There was in fact a final partly executed lease. The parties were operating under the terms of the partly executed lease.

8. The Learned Chief Justice erred in fact in holding or considering that the Appellant's request for a Comfort Letter from the OPM was an attempt at continued negotiations for a lease or agreement for a lease.

9. The Appellant has recently discovered relevant correspondence for which it shall seek the Court's discretion to have considered in the interest of justice in this appeal."

67. In my judgment, the critical question in this appeal is whether the letter of January 2020 evidenced a binding agreement between the Appellant and the Minister for the lease of 5 acres of land on Paradise Island. This appeal raises a single issue. Was the Respondent under a binding legal obligation to grant a lease to the Appellant in the terms of the lease sent to the Appellant under cover of the letter dated 7 January 2020? If it was not, then the action by the Appellant must fail and the judgment of the Chief Justice must be upheld.

68. If the Respondent was under a binding obligation, then this Court must consider whether, in the circumstances of this case, it would be correct to order specific performance of the agreement to grant a lease or award damages for the breach of that agreement.

69. At the outset, it is important to note that this Court is not concerned with whether the behaviour of the Respondent was ethical, dishonourable or proper. If the Respondent had made a deal with the Appellant to grant a lease, which deal was not enforceable, that the Government reneged on that deal in favour of a deal which it considered more beneficial is of no concern to the Court. Gazumping is not illegal, and it has been held that persons who hold fiduciary responsibility have a duty to gazump (see **Buttle v Saunders** [1959] 2 All E.R. 193). The issue is whether there was an enforceable agreement.

70. In Woodfall, Landlord and Tenant, at para 4.001, the learned authors said this:

> **"An agreement for lease is a legally enforceable agreement by which one person agrees to grant, and another agrees to take a lease. The agreement may be immediately enforceable or may be enforceable only on the occurrence of some event, or the fulfilment of some conclusion. The phrases "contract for a lease" and "agreement for lease" are usually interchangeable, but in modern practice it is more common to speak of an agreement for lease …**
>
> **[T]he creation of an agreement for lease is itself the creation of an equitable interest in land, because the present right to call for a future grant is such an interest."**

71. In Halsbury's Laws of England (4th edn) Volume 27 at para 57, the learned authors stated the essential terms of an agreement for a lease, namely: "(1) the identification of the landlord and tenant; (2) the premises to be leased; (3) the commencement and duration of the term; and (4) the rent or other consideration to be paid"'.

72. The authors also stated that, if those *"matters are ascertained or agreed to be offered and accepted, it is sufficient".* If these essential terms are not mentioned by one side and accepted by the other, the matter rests in incomplete negotiation, and there is no concluded contract.

73. In **Walsh v Lonsdale (supra)**, Jessel MR, at pp 14 and 15, made the following statement which has withstood the test of time:

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

74. It is to be noted that in **Walsh v Lonsdale**, the tenant went into possession and paid some rent pursuant to the agreement. The court held that the agreement was enforceable although not signed and sealed. The Chief Justice held that there was no binding agreement for the reasons set out in paragraph 33 of his judgment, which is extracted earlier from this judgment at paragraph 17.

75. The Chief Justice formed the view that there was no concluded agreement.

76. It is difficult to see how it can be said that there was no concluded agreement. The lease sent on 7 January 2020 had been prepared by the Respondent's lawyers on the Respondent's instructions. There was nothing further to be negotiated and agreed. All of the matters referred to in Halsbury's cited above had been satisfied. The document reflecting the terms of the agreement was sent by the Respondent to the Appellant for signature. All that was left was for the Respondent to sign and seal the lease. He did not do so because the government determined that it had found a better deal.

77. The issue is, whether as a matter of law, he was entitled to do so.

78. In its submission, the Appellant said:

"The Appellant applied for a lease of a defined area of land in the vicinity of the Paradise Island Lighthouse on Paradise Island. The Crown Lands Department within the portfolio of the Office of the Prime Minister wrote to the Appellant informing him of the approval of his application subject to enumerated conditions for him to fulfill. He fulfilled each of the conditions. Subsequently, the Government reneged on the

grant of the lease to the Appellant. The Appellant sued for inter alia damages. The Supreme Court dismissed the Appellant's claim on the basis that there was no lease.

The appeal challenges the Order in the Court below on the following bases: -

1. There was a contract evidenced in writing and in the performance of the enumerated written conditions. See Carlill v. Carbolic Smoke Ball Co. [1893]1 QB 256.
2. The Appellant acquired an equitable lease based on the maxim that Equity looks on that as done which ought to be done; Banks v. Sutton (1732) 2 P Wms 700 at 715; 24 ER 922 at 927. So a contract for a lease may be treated as an equitable lease Walsh v Lonsdale (1882) 21 Ch. D. 9; Frederick v Frederick 24 ER 582; 93 ER 632 per Lord Macclesfield," Where one for valuable consideration agrees to do a thing, such executory contracts is to be taken as done, and the man who made the agreement shall not be in a better case than if he had fairly and honestly performed what he agreed to." Simultaneous Colour Printing Syndicate v Foweraker [1901] 1 QB 771; Re Lind [1915] 2 Ch 345 at 360; Re Gillott's Settlement [1934] Ch 97 at 108-109. Holroyd v. Marshall 11 ER 999; Tailby v. Official Receiver (1888) 13 App Cas 523 at 535, 547. See "Equity Doctrines and Remedies", 3d ed. Meagher Gummow Lehane paragraphs 647 to 665, 2036 to 2052.
3. The Respondents in breach of contract failed to execute a lease between the Appellant and it in respect of the identified area of land AND further breached the contract for a lease by purporting to threaten to dispose of the land to a third party.
4. The Appellant suffered damages by reason of the frustration of his intended project on the subject property. See Hadley v Baxendale [1854] EWHC 70
5. For the above stated reasons, the Learned Trial Judge's order should be set aside and substituted either with a Declaration of the Appellant's equitable lease over the subject property or an Order that the issue of damages be adjudicated by the Supreme Court."

79. The Respondent relies on the judge's analysis and reasoning which I have set out. It says:

"40. It is submitted that the learned judge entered into a detailed and logical legal analysis of both the law and the facts, in determining that the issue of whether there exists an agreement for a lease.
41. As such, in the present case it is submitted that the learned judge did not err in fact and/or law or in any way misdirect himself in relation to position stated at paragraph 15 of his ruling and his analysis consideration of the issue.
42. The Respondent therefore invites the Court to disallow this ground of appeal."

80. Both the trial judge and the Respondent rely on the decision in **Brown t/a Natbros v Smith** [2014] 1 BHSJ No. 67 where the court held that a concluded agreement for sale was not binding. In that case, the agreement was expressly made "subject to contract" and, on the authority of **Winn v Bull (supra),** it was not a binding agreement enforceable at law.

81. The letter of 7 January 2020 was not made subject to contract. I accept that the absence of the words "subject to contract" is not fatal. As was said in **Winn v Bull**,

> *"***where a proposal or agreement is "subject to contract", it means what it says, that it is subject to a formal contract being prepared. <u>When not expressly stated to be so, then it is a matter of construction. Whether the parties intended that the terms agreed upon should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail</u>.***"* [Emphasis added]

82. The principles to be applied in determining whether there was a binding contract are helpfully found in the decision of the Australian Court in **Stellard Pty Ltd and another v North Queensland Fuel Pty Ltd [2015] QSC 119**. In that case, North Queensland Fuel Pty Ltd (NQF) appointed agents to sell a service station on its behalf. Stellard Pty Ltd (Stellard) made a verbal offer to purchase the service station, subject to due diligence and various other conditions. At Stellard's request, the agents then emailed a representative of Stellard setting out the terms on which NQF would sign a contract (including the price, deposit, completion date and various other terms but made no mention of due diligence) and attaching a draft contract of sale which also included a director and shareholder guarantee.

83. After further negotiations, Stellard sent an email which confirmed its offer which was expressed to be *"subject to contract and due diligence as previously discussed"* and sought immediate confirmation that its offer was accepted so that exchange of contracts could take place by the following Monday. An authorised representative of NQF accepted the offer by email, noting that the offer was *"subject to execution of the contract provided (with agreed amendments) on Monday".* Stellard's solicitor then sought amendments to the contract including a 40-day due diligence period and removal of the guarantee. However, relying on the deletion of the guarantee, NQF's agents advised Stellard that NQF was terminating negotiations. In fact, NQF had at the same time been negotiating with another potential purchaser who had submitted a higher price. The court found that there was a binding agreement for sale.

84. At paragraphs 30 et seq, Martin J set out the principles to be applied when determining whether there is a binding agreement. He said:

> **"What are the principles to be applied?**
>
> **[30] The principles to be applied in circumstances such as these derive from the excursus on the subject in the joint decision of Dixon CJ, McTiernan and Kitto JJ in Masters v Cameron. An accurate summary of that consideration appears in Halsbury's Laws of Australia:**
>
> > **"Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the subject matter of their negotiation**

is to be dealt with by a formal contract, the case may belong to any of three classes.

> **(1) It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.**
>
> **(2) It may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.**
>
> **(3) The case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract."**

[31] Whether or not a contract has been formed requires an objective determination of the intention of the parties. The task was expressed in this way in Ermogenous v Greek Orthodox Community of SA Inc:

> **"[24] 'It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty.' To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet '[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts'.**
>
> **[25] Because the inquiry about this last aspect may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the 'intention to create contractual relations' requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties." (Emphasis added, references omitted)**

[32] To similar effect is the statement of a unanimous High Court in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd:

> **"[40] This Court, in Pacific Carriers Ltd v BNP Paribas, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."**

[33] A court must be astute not to be misled by the use of words by the parties which are usually associated with the creation of contracts. As Gleeson CJ said in Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd

"… the fact that parties to negotiations have agreed upon the major matter under discussion, confidently believing that the remaining matters to be decided will be sorted out later between them or their lawyers, without any difficulty, can sometimes create a misleading appearance of consensus. Such parties may well believe that they have a 'deal' or a 'bargain', and speak and act accordingly, whilst at the same time knowing and intending that further and more detailed agreement is necessary. For that reason, conduct such as shaking hands, or using the language of agreement, can be ambiguous. The resolution of the ambiguity may require more detailed factual and legal analysis."

[34] In the same case, Kirby P (as he then was) summarised the relevant principles in the following way:

> **"1. The mere fact that the parties contemplated the execution of a formal contract, subsequent to an informal agreement, does not mean that that informal agreement is not presently binding;**
>
> **2. The fact that the parties contemplated the drawing up and execution of a formal contract is a consideration which may point to the conclusion that no presently binding agreement was intended until that formal contract is executed;**
>
> **3. The existence of matters of importance in which the parties have not reached consensus in their informal agreement will render it less likely that they intended immediately to be bound before the execution of a formal document. Even where the parties have agreed on the 'major matters', their subsequent conduct may indicate that they did not intend to be bound until the other issues**

between them were resolved in a formal document (see in particular Masters v Cameron; Barrier Wharfs Ltd v W Scott Fell and Co Ltd; and Marek v Australian Conference Association Pty Ltd);

4. In order to determine in what areas the parties were, and were not, in agreement, and what matters they considered necessary in order for an agreement to exist, it is legitimate to examine their subsequent conduct. Where correspondence between the parties after an informal agreement refers to important terms and conditions not mentioned during that informal discussion, it may more readily be inferred that the earlier discussion was simply a preliminary negotiation and not a binding agreement;

5. Depending on the size, importance and complexity of the subject matter, the less formal th e initial agreement, the less likely it will be that it was intended to be legally binding and enforceable. Thus, an oral discussion which contemplates a subsequent formal written agreement is less likely to have been intended to have been immediately binding;

6. It is necessary in every case to consider the nature and importance of the transaction which the parties contemplate. Where the agreement concerns a large sum, or concerns a significant transaction, it is less likely to have been intended to be presently binding;

7. Depending on the subject matter, where the parties have not used solicitors but intended to do so for the drawing up of their formal agreement, that may also be a factor which will point to the nonexistence of a binding agreement until the contemplated formalities have been agreed; and

8. Where a binding agreement is said to have been formed as a result of correspondence, it is necessary to look at that correspondence as a whole. It is wrong to isolate any part of the correspondence from the rest in order to prove or disprove the existence of a binding agreement. The same approach should be taken to the analysis of words and phrases within the correspondence. Reference to an 'agreement' having been reached does not necessarily prove the existence of a presently binding contract. Conversely, references to a 'proposed' agreement, and similar expressions, will not necessarily mean that no agreement presently exists. It is a question of how the words are to be interpreted in their context, and in the light of the correspondence, viewed as a whole."

85. In summary, in finding that there was a binding contract for sale, the court said that whether or not a contract has been formed requires an objective determination of the intention of the parties, which requires determination not only of the text but also of the surrounding circumstances known to the parties and the purpose and object of the transaction. Notably, these are the same principles as outlined by the majority at paragraph 21 of their judgment, which referred to the earlier decision of **RTS Flexible Systems (supra)**, decided five years earlier.

86. In the present case, there is no suggestion that there were any terms not yet agreed or which required further discussions. The negotiations were complete and the terms of the agreement were incorporated in the lease prepared by the Respondent and sent by the Respondent to the Appellant for execution. If the lease did not represent the terms of the agreement, the Respondent would not have sent it to the Appellant for execution by it and state that upon its return it would be executed by the Minister and a counterpart sent by the Minister to the Appellant for safekeeping. That is completely inconsistent with a continuing or ongoing negotiation as pleaded in paragraph 12 of the Defence.

87. The fact that the Minister did not sign the lease did not prevent the lease, and all of the terms which had been agreed upon, being enforceable. As far back as **Bonnewell v Jenkins [1876] 8 Ch.D. 70 at page 773,** the courts have said: *"it is settled law that a contract may be made by letters and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain."*

88. With respect, I do not agree that whether there was in law a binding agreement depends on the credibility of the evidence of Mr. Smith. It depends on the objective evaluation of the letter of 7 January 2020, against the background of the undisputed correspondence that led up to that letter.

89. Section 54 is, in my judgment, completely irrelevant. The section provides:

> **"54. (1) Any power that immediately before the 10th day of July, 1973, was under section 24 of the Bahama Islands Constitution Order, 1969, vested in the Governor of the Bahama Islands —**
>
> > **(a) to make grants and dispositions of any lands or other immovable property in the said Islands or any interests in such property that were vested in Her Majesty or the Governor on behalf of Her Majesty as the property of the Crown for the beneficial interest of the said Islands, or**
> >
> > **(b) to exercise in relation to such property or interests any other powers lawfully exercisable by Her Majesty, shall be vested in the Minister, so however, that, wherever the employment of the Public Seal would have been required under that section, the official seal of the Minister shall be employed instead.**
>
> **(2) In this section "Minister" means the Minister responsible for Crown Lands"**

90. In my judgment, all that section does is to vest in the Minister the power to make a lease of Crown Land which power was previously vested in the Governor prior to Independence. It does not affect in any way the law relating to the making of an agreement between a tenant and the Minister as to the grant of a lease of Crown Land.

91. With respect, the suggestion that a government cannot be bound by actions of its alleged "agents" lacks credulity. It is inconceivable that the Director of Lands and Surveys would obtain a lease from the Attorney General's Office setting out the terms of a lease and send it to the Appellant, without the knowledge and consent of his Minister. This is against the background that the correspondence establishes that there was an agreement in principle to give a 5-year lease, as is evidenced from the Memorandum of Understanding.

92. In my judgment, there was a binding agreement and I would allow the appeal. I would order specific performance of the lease which was sent with the letter of 7 January 2020.

The Honourable Sir Michael Barnett, P