

FBO 2000 (Antigua) Limited

Appellant

v.

**(1) Vere Cornwall Bird Jr
(2) Attorney General of Antigua and Barbuda
(3) Stanford Development Company**

Respondents

FROM

**THE COURT OF APPEAL OF
ANTIGUA AND BARBUDA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 12th November 2008

Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

[Delivered by Lord Carswell]

1. This matter came before the Board as an appeal from a decision of the Court of Appeal of Antigua and Barbuda (Alleyne CJ Ag, Gordon JA and Barrow JA Ag), affirming the award of the sum of US \$200,000 to the appellant company FBO 2000 (Antigua) Ltd (“FBO”). The Court of Appeal held the Government liable for payment of that sum rather than the third-named respondent Stanford Development Company (“SDC”), as the trial judge Mitchell J had ruled. FBO had claimed specific performance of an agreement for a lease for a plot of land at the VC Bird

International Airport in Antigua. Both the trial judge and the Court of Appeal rejected this claim, while ruling that FBO was entitled to compensation. In the appeal before the Board FBO renewed its claim for specific performance, while seeking to uphold its right to compensation in the alternative.

2. Antigua Airport, like all airports, requires the provision of ancillary services to support the handling of aircraft and the arrival and departure of passengers. Those which are known in the international travel trade as “fixed base operations” include such matters as servicing aircraft, diplomatic and VIP coordination, providing a crew rest lounge, immigration and customs clearance, FAA approved mechanics, car and limousine rentals, twenty-four hour security, gourmet catering, drive-up ramp access, weather briefings, charter and business flight brokerage, crew and passenger accommodation, commercial aircraft transfers, inter-island travel arrangements, villa rentals, yacht charters, and emergency medical evacuation. FBO forms part of an international group of providers of fixed base operations known as the UVglobal Network. FBO’s predecessor company Port Services Ltd had prior to the incorporation of FBO in 2001 provided services of this nature for private business jet aircraft at Antigua Airport, by agreement with the Government, which owns the airport.

3. In early 2001 Ms Makeda Mikael, then the controlling shareholder of Port Services Ltd and subsequently of FBO, approached the Government with a view to leasing a plot of land adjacent to a disused runway at the airport, as a base for the provision of future fixed base operations services. The Cabinet gave its approval to the request on 14 March 2001, the minute of decision reading:

“Cabinet revisited its decision on the above subject and decided that Ports Services Ltd., should be given permission for FBO 2000 (Antigua) Ltd, to lease an area of land (1/4 acre) at the V.C. Bird International Airport for development and operation of FBO service in Antigua.”

The location of the plot was not given in the minute, but the judge found that it formed an undemarcated part of Parcel 118 and was situated alongside disused Runway 10.

4. FBO was incorporated on 6 April 2001. The new company gave instructions in July 2001 to surveyors to carry out a survey of the area of the proposed development and prepare plans. The surveyors were a company known as DIWI Consult International GmbH (“DIWI”), which

had been acting for some time as airport planners for the Government. Some time before DIWI had prepared a Master Plan for the airport, which with revisions had received development control approval. It prepared a further revision, showing the location of FBO's proposed development, a quarter-acre plot in Parcel 118 being marked in a short distance back from the edge of the disused runway. An application for development permission, which appears to have been accompanied by a copy of this drawing, referred to in correspondence as an "outline plan", was lodged on 31 July 2001 and a development permit was issued on 4 September 2001.

5. Ms Mikael and the Minister of Agriculture, Lands and Fisheries had a meeting on 8 July 2002 and he wrote to her on 9 July 2002 in the following terms:

"I refer to our meeting held on 8th July, 2002, to implement the Cabinet Decision of March, 14th 2001 in regards to the lease of land at V.C. Bird International Airport to FBO 2000 Antigua Ltd.

The terms and conditions for the lease of the lands at the Airport will be extended to FBO 2000 Antigua Ltd. based on the area of ¼ acre as decided by the Cabinet. A lease period of fifty years is agreed upon, at a rate EC \$2000.00 per year, paid annually.

A draft lease accompanied by the survey is to be presented to the Ministry of Lands for execution."

6. Following this meeting FBO made arrangements in August 2002 for a survey to be prepared. Work appears to have been done on this, as the Aerodrome Superintendent wrote a letter on 8 August 2002, stating that he had seen a photocopy of the survey and asking the recipient to proceed with the final drawing "so that FBO can proceed with the lease arrangements for the area."

7. FBO went into occupation of a plot of land beside disused Runway 10 in July 2002 and spent a substantial sum on the erection of a building and the landscaping of the area. It commenced fixed base operations from these premises in October 2002.

8. Meanwhile SDC was in the process of preparing a plan, on the instructions of the Government, for the expansion and redevelopment of the airport and its surroundings. As part of the plan SDC intended to build and operate a fixed base operation at the airport. Its controlling

shareholder Alan Stanford entered into negotiations with the Government to take a lease of Parcel 118 from which to conduct this operation. As the judge found, this would have placed him in direct competition with FBO, and he appears to have intended to obtain the sole rights of conducting fixed base operations. This is confirmed by his approach to FBO with an offer to buy out its business at the airport and physical assets there. He and Ms Mikael discussed the purchase on 5 February 2003, but the parties subsequently disagreed on the result of the discussion and the formal terms put forward by Mr Stanford in a draft agreement in March 2003 were rejected by Ms Mikael.

9. At that meeting on 5 February 2003 Mr Stanford invited Ms Mikael to accompany him to a meeting with the Cabinet the following day, to discuss his role in the Master Plan. The judge held that he did not reveal to her the comprehensive nature of the proposal that he was making to Cabinet, which constituted the acquisition by SDC of a large amount of land, including the FBO plot, and the granting to SDC of the sole right to provide fixed base operations at the airport. This would inevitably involve the displacement of FBO as a provider of such operations, the termination of the lease arranged by it and the closing down of its business.

10. It is apparent that Mr Stanford deliberately did not disclose to Ms Mikael the nature of his plans and that he induced her to accompany him to the meeting with the Cabinet on false pretences, no doubt to give the impression that she supported those plans. Mitchell J made specific findings of fact in paragraph 22 of his judgment, which were not challenged before the Board:

“I am satisfied that Ms Mikael, when she accepted the invitation to accompany him to the meeting with Cabinet the following day, had no previous knowledge, nor was it brought to her attention at the meeting with Cabinet, that what was involved in Mr Stanford’s presentation to take over the development and management of the airport necessarily included the termination of her lease discussions and a revocation by Cabinet of her licence to operate her business from the airport premises. She became aware of these only subsequent to the meeting.”

In paragraph 48 he added:

“ ... Ms Mikael was essentially tricked into accompanying Mr Stanford to the Cabinet meeting intended in part no

doubt at least to persuade Cabinet to deprive her company of all its business prospects without telling her what was about to happen.”

11. The Cabinet accepted Mr Stanford’s proposals and its minute of 6 February 2003 sets out in detail the content of the agreement which it reached with him and decided to implement. Various tracts of land were to be transferred to SDC in freehold, including Parcel 118. SDC was to receive the right to operate and manage the existing and future terminals for a period of at least 25 years, and was given a number of concessions set out in the minute. By paragraph F SDC was given the exclusive right for not less than 25 years to build and operate a fixed base operation at the airport, and it was provided, in a term clearly aimed at the appellant FBO and its business, that

“all prior rights granted to any third party and any prior Executive Cabinet Decisions, agreements, orders granting rights to build and operate other FBO’s in Antigua and Barbuda are hereby terminated and revoked accordingly”

The consideration for the agreement was the payment by SDC of substantial sums to the Government, and it was also contemplated that SDC would invest a further large sum in the immediate improvement, maintenance and operation of the current airport terminal.

12. The very next day, 7 February 2003, the Governor-General executed the transfer forms vesting lands in SDC, including Parcel 118. The forms were registered in the Land Registry the same day. The judge found that such swiftness was “unusual if not unprecedented”.

13. Within a very few days after that SDC commenced building operations close to the plot being used by FBO and fenced off that plot from the runway. The dust and dislocation made it impossible for FBO to continue its business and it was forced to close for some three months, until it obtained an interlocutory injunction, as a result of which it was able to resume.

14. The present proceedings were commenced on 16 April 2003. The defendants were the Minister, the Attorney-General on behalf of the Government, and SDC. By the claim form, as amended, the appellant sought an injunction against SDC in respect of the claimed interference with FBO’s use of its lands and buildings, a declaration that it had an overriding interest in its premises, a declaration that the agreement with the Government for a lease of the premises was valid and specific

performance of the agreement, and declarations that the Cabinet decision of 6 February 2003 was in breach of the appellant's constitutional rights. By a counterclaim SDC sought an order for possession of the plot occupied by FBO and an injunction. Both parties claimed damages.

15. In the High Court Mitchell J rejected FBO's claim that there had been a binding agreement for a lease of the quarter-acre plot. He held that it was a precondition of a binding agreement that an approved survey of the plot be carried out and submitted to the Ministry of Lands. That had never been done – the Master Plan was not in his opinion the equivalent of a proper survey – and the location and extent of the plot remained insufficiently identified. The judge therefore rejected FBO's claim for specific performance and declarations of title. He held that SDC did not acquire Parcel 118 encumbered with an obligation to lease a portion of it to FBO and could claim possession of the plot. SDC was not, however, a purchaser without notice of the fact that FBO was in possession and had carried out expensive improvements. The Crown would have been liable on evicting FBO to compensate the company for those improvements. SDC was held liable for that compensation, which the judge assessed at US \$200,000.

16. The Court of Appeal affirmed the judge's decision on the issue of an agreement for a lease. They held that the requirement of a survey was a fatal obstacle to the claim that the parties had reached finality on the terms of the lease. In their opinion the nature of the lease of a plot on an airport was such that it would have required a number of matters stemming from security requirements to be agreed before it could be said that there was a complete and binding agreement. They went on to consider the appellant's claim based on proprietary estoppel, which was first fully argued before the Court of Appeal. They held that FBO was entitled to rely on this equitable doctrine, but that its claim was limited to compensation for loss of the improvements. They affirmed the amount at US \$200,000, but ordered that the liability should fall upon the Government and not on SDC.

17. Of the two issues argued before the Board their Lordships propose to focus on the appellant's claim that there was a sufficiently complete agreement to warrant a decree for specific performance. To be enforceable an agreement for a lease must contain at least the essential terms of the transaction, the parties, the land to be leased, the term and the rent. The appellant relies on the Minister's letter of 9 July 2002 as sufficient evidence that these terms had been orally agreed at the meeting between Ms Mikael and the Minister the previous day. The identity of the parties is clear, as is the amount of the rent. The term was agreed at 50 years, but it was argued on behalf of SDC that the commencement

date was too uncertain. Their Lordships consider, however, that there was a sufficiently clear inference that it was intended that it should run from 8 July 2002, the date of the oral agreement.

18. Most of the debate, both in the courts below and before the Board, centred round the identity of the land to be leased. Whatever may have been understood at the time when the Cabinet gave its first approval on 14 March 2001, there is insufficient evidence from that time which would identify the area of land to be leased. Matters became clearer, however, with the passage of time. By May 2001 DIWI, who were acting for the Government, had delineated on the Master Plan a plot of 0.25 acre adjacent to Runway 10. Its location is capable of ascertainment from this plan and that shows that the parties knew very well where it was. As the judge specifically found, FBO knew the location of the plot. The Government called no evidence about its knowledge of the location, which is capable of giving rise to an inference in favour of FBO. One can add to this the further fact that FBO was in actual occupation from before 8 July 2002, when its representatives met the Minister on that site. It follows that the Government knew quite clearly the location of the quarter-acre plot when oral agreement was reached on that date. It does appear from the cadastral map that FBO may have occupied rather more than the rectangular quarter-acre plot agreed, but the extent of the agreed plot is sufficiently clear and that forms the extent of its entitlement.

19. It was argued on behalf of SDC that the preparation and submission of a draft lease, together with a survey of the land, constituted a precondition of a binding agreement. This, it was submitted, was not only envisaged by the Minister's letter of 9 July 2002, but was a statutory requirement for the grant of a lease. It was no doubt contemplated by the parties that as part of the completion of the transaction the plot leased to FBO would have to be delineated on a plan and that a survey of some kind would be carried out to identify the plot and prepare the plan. But it was argued that it was a precondition of agreement that the land to be leased would have to be identified by survey. The judge accepted this argument (para.39 of his judgment) and appears also to have contemplated that the survey would have had to be authenticated by the Chief Surveyor.

20. Their Lordships consider that this argument is based on a misapprehension. Sections 44 and 46 of the Registered Land Act provide:

“44. Subject to the provisions of this Act and of any other law, the proprietor of land may lease the land or part of it to

any person for a definite period or for the life of the lessor or of the lessee or for a period which though indefinite may be terminated by the lessor or the lessee, and subject to such conditions as he may think fit:

Provided that, if only part is leased, the lease shall be accompanied by a plan or other description which the Registrar, in his absolute discretion, deems adequate to identify the part leased.

.....

“46. A lease for a specified period exceeding two years, or for the life of the lessor or of the lessee, or a lease which contains an option whereby the lessee may require the lessor to grant him a further term or terms which, together with the original term, exceed two years, shall be in the prescribed form, and shall be completed by -

- (a) Opening a register in respect of the lease in the name of the lessee; and
- (b) filing the lease; and
- (c) noting the lease in the incumbrances section of the lessor’s land or lease.”.

Under section 3 of the Land Surveyors Act the Chief Surveyor has to approve all plans before any registration of land is effected. But this relates to first registration of land and does not impose any requirement of approval of plans for leases of land, which are governed solely by the provisions of section 44 of the Registered Land Act.

21. It may be seen therefore that there is no requirement for either survey or plan in the case of the lease of the whole of a lessor’s land, for it would have been sufficiently identified when originally registered. In the case of a lease of part, a plan is required, and in some cases a survey of some nature may be required to prepare the plan. It was envisaged by the Minister’s letter of 9 July 2002 that a survey would be carried out, but that was not required by the Registered Land Act. Although a plan may have to be submitted to the Registrar to satisfy the requirements of the proviso to section 44, it does not follow that until that is done the boundaries will not have been known to the Government. Their agents knew the boundaries, and in the absence of any evidence suggesting that the Government did not know them, it would be wrong to infer that the Government did not in July 2002 know the location of the plot. Their Lordships do not consider that the judge was right to hold that identification of the land by survey was a precondition of agreement.

22. This question is linked to the issue on which the Court of Appeal found against the appellant, that a number of terms and conditions required to be settled before agreement was complete. In paragraph 12 of his judgment Barrow JA Ag, with whom the other members of the court agreed, expressed the view that it would have been necessary to agree terms on the special conditions necessitated by airport security considerations and future development of the airport over the 50-year term. It is undoubtedly true that when the terms and conditions of the lease were being settled such matters would have come into consideration and would very probably have formed the subject of more or less detailed provision in the final lease document. It does not necessarily follow, however, that a sufficiently binding agreement for a lease could not be reached without encompassing such terms.

23. The issue was posed by Parker J in *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284, 288-89:

“It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.”

Their Lordships consider that the present case falls into the latter category. The parties had agreed on the essential terms of the lease. FBO then went into occupation of the plot and expended substantial sums in development of the site. The judge took the view (paragraph 44 of his judgment) that in doing so FBO took a business risk of going into occupation “in the hope that the survey would be completed and authenticated and the lease instrument agreed, executed and registered in due course”. As against that, a company of the modest size of FBO would be unlikely to lay out such substantial sums unless it was satisfied that it had a firm agreement for the letting of the land. Their Lordships consider that FBO and the Government had reached a sufficiently firm agreement on the essential terms and that that agreement should be

upheld. They do not consider that the agreement was subject to a precondition of the submission of an approved survey.

24. FBO is accordingly entitled to specific performance of the agreement for a lease of the quarter-acre plot adjacent to runway 10 delineated on the Master Plan, of which they have been in occupation since July 2002. Its occupation was clearly well known to SDC at all material times, which attempted to reach agreement with FBO on buying out its business. FBO's rights constitute an overriding interest within section 28(g) of the Registered Land Act and by virtue of section 23(b) SDC took its title subject to those rights. Specific performance of the agreement will replace the order for compensation, which should be discharged.

25. The right to carry on its fixed base operations is of central importance to FBO, for that was the *raison d'être* of its negotiating the lease. By its decision of 6 February 2003 the Government granted exclusive rights to SDC to conduct a fixed base operation at the airport and revoked all prior rights granted to third parties. The Attorney-General stated to the Board, however, that the Government would not prevent FBO from carrying on its fixed base operation business on its site in the airport. He was correct to make this statement, for to prevent it would derogate from the grant of the lease. It would therefore be appropriate to grant a declaration that FBO is so entitled.

26. This conclusion makes it unnecessary for the Board to consider the alternative head of claim based on proprietary estoppel, and their Lordships do not propose to enter into discussion of that head.

27. Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the following relief granted:

- (a) a decree of specific performance of the agreement by the Government of Antigua and Barbuda to grant a lease for 50 years from 8 July 2002 of the quarter-acre plot of land occupied by FBO at the VC Bird International Airport and delineated in the Master Plan prepared by DIWI Consult International GmbH, at the rent of EC \$2000 per year, payable annually;
- (b) a declaration that FBO has the right during that period to carry on a business of fixed base operation on the demised premises;
- (c) a declaration that FBO's rights to a lease override SDC's title to the land comprised in the said lease;

(d) that paragraph 3 of the order of the Court of Appeal and the order for compensation in favour of FBO should be discharged. The parties should make submissions on costs within fourteen days.