EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2018/0015

BETWEEN:

[1] MALMAISON PROPERTIES LLC
[2] DRAKE INTERTRADE LIMITED
[3] DRAKE RESORT LIMITED
[4] DRAKE MARINA LIMITED
[5] DRAKE MARINA VILLAGE LIMITED

Appellants

and

[1] JEFFREY COYNE
[2] DOUBLOON HOTEL LIMITED (In Receivership)
[3] DOUBLOON MARINA (ST. LUCIA) LIMITED (In Receivership)
[4] THE BANK OF NOVA SCOTIA

Respondents

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Humphrey Stollmeyer	Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Prospere for the Appellants
Mr. Deale Lee for the Respondents

2019: July 2,
December 13.

Civil appeal – Interlocutory appeal – Preliminary issue – Sale of on-going business – Doctrine of merger – Interpretation of contractual documents – Intention of parties to contract - Whether learned judge erred in applying doctrine of merger in conveyancing law – Acquisition Agreement – Express survival clause in Acquisition Agreement – Execution of Deeds of Sale – Whether Acquisition Agreement merged by virtue of subsequent execution of Deeds of Sale – Whether Acquisition Agreement and Deeds of Sale substantially covered the same ground

The second and third named respondents, Doubloon Hotel Limited ("Doubloon Hotel") and Doubloon Marina (St. Lucia) Limited ("Doubloon Marina"), were indebted to the Bank of Nova Scotia (the "Bank") by virtue of a hypothec, mortgage debenture and floating charge. As a result of being unable to meet their debt repayments, the Bank, by deed of appointment made pursuant to the mortgage debenture, appointed the first named respondent Mr. Jeffrey Coyne ("Mr. Coyne") as Receiver and Manager of both Doubloon Hotel and Doubloon Marina.

The first named appellant Malmaison Properties LLC ("Malmaison") entered into negotiations with Mr. Jeffrey Coyne to purchase the assets of Doubloon Hotel and Doubloon Marina through the Acquisition Agreement which was executed by the parties on 16th March 2012 and subsequently amended on 25th May 2012 and 25th December 2012 (the "Agreement"). The Bank signed a letter of undertaking dated 16th March 2012 addressed to Malmaison that it would comply with the stipulations outlined therein. Both Doubloon Hotel and Doubloon Marina remained fully operational between the execution of the Agreement and the transfer of their assets to the appellants.

The appellants visited and inspected the property prior to the consummation of the sale. Following the closing, the appellants again inspected the property and determined that Doubloon Hotel and Doubloon Marina misrepresented the condition of the property and had not performed their covenant obligations during the period from 16th March 2012, through the closing, including the covenant obligation to "repair and maintain" the property.

The appellants filed a claim against the respondents for, *inter alia*, breach of contract arising under the terms of the Agreement. The appellants, with the respondents' agreement, applied to the High Court for the separate trial of a number of preliminary legal issues, one of which was, whether the Acquisition Agreement was merged and extinguished in two Deeds of Sale and Assignments of Lease ("the Deeds") executed on 31st July 2013.

The learned trial judge found that: (1) with respect to representations, warranties and covenants concerning unencumbered and good marketable title to the properties conveyed in the Deeds, the Deeds contain the completed contract; (2) in relation to those concerning assets that were not transferred in the Deeds and which had survival clauses, the parties must look to the Agreement; and (3) any matters which do not fall into either of the two categories are merged and extinguished.

The appellants, being dissatisfied with the finding of the learned judge that the doctrine of merger applied, appealed to this Court. The sole issue before this Court is whether the warranties, representations, covenants and agreements contained in clause 5 (bb) of the Agreement in relation to repair were merged in the Deeds.

Held: allowing the appeal, setting aside sub-paragraph 3 of the learned judge's order and awarding costs in the sum of $3,000.00 to the appellants to be paid within 21 days, that:

1. It is not automatic where there is a contract for sale which is followed by the execution of a deed that the doctrine of merger applies so that the provisions of the contract would be merged in the deed. The court must seek to determine what was the contract according to the true intention of the parties. In ascertaining this intention when dealing with the sale of property, the court is required to consider whether the deed covered the whole ground of the agreement and whether the agreement was intended to continue after the execution of the deed. Though the Agreement and the Deeds covered the same ground in relation to unencumbered good and marketable title, they did not cover the same ground in every respect. The Agreement is concerned with more than the sale of property and so contained a myriad of provisions not only related to the immovable properties but other assets as well. Therefore, it cannot be said that the Agreement and the Deeds covered the same matters at the same time. The representations, warranties, covenants and agreements in relation to repair were not covered in the Deeds. Accordingly, the parties did not intend that the Agreement as it relates to immovable property would be merged and extinguished.

   Knight Sugar Company v The Alberta Railway and Irrigation Company [1938] 1 All ER 266 applied; **Leggott v Barrett** (1880) 15 Ch D 306 applied; **Hissett et al v Reading Roofing Co. Ltd** [1970] 1 All ER 122 applied; **Benedict Montoute v Vitus Frederick** SLUHCVAP2014/0019 (delivered 16th January 2017, unreported) distinguished.

2. The doctrine of merger does not apply where the parties expressly state that the provisions would survive completion or where the nature of the provision, in its contractual and commercial sense, indicates that the provision is not merged into the later contract. The beginning of clause 5, in very clear language, preserves all the provisions which follow. There are also other provisions made throughout the Agreement beginning with the same express survival clause. The survival clauses clearly contemplate the continued existence of the Agreement after the freehold and leasehold interests were transferred. Therefore, the repetition of a particular sub-clause in the Deeds, which the parties knew would have had to be executed to transfer the freehold and leasehold interests, does not, in and of itself, nullify the express survival clauses in the Agreement.

   Knight Sugar Company v The Alberta Railway and Irrigation Company [1938] 1 All ER 266 applied; **Palmer v Johnson** (1883) 12 Q.B.D. 32 applied.

3. Contractual documents should be interpreted against the 'factual matrix' at the time the parties enter the contract. In this case, the appellants were purchasing businesses that were in a state of financial disarray. To safeguard their interests, the Agreement contains a number of representations, warranties, covenants and agreements made by the respondents and specifically, in relation to the real property, the purport of which is that they should survive the completion of the sale. Having regard to the factual background at the time of execution and the terms of the Agreement as a whole, it is difficult to clothe the parties, the appellants especially, with the intention to extinguish a clause which protects their financial and commercial interests. When viewed objectively, it would seem implausible to include said survival clauses and simultaneously intend that they should be extinguished by virtue of execution of the Deeds.

   Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 applied.

JUDGMENT

[1] **THOM JA:** This appeal concerns the application of the doctrine of merger to the area of conveyancing law.

Background

[2] The relevant factual background to this appeal is that the second and third respondents, Doubloon Hotel Limited ("Doubloon Hotel") and Doubloon Marina (St. Lucia) Limited ("Doubloon Marina"), were indebted to the Bank of Nova Scotia (the "Bank") by virtue of a Hypothec, Mortgage Debenture and Floating Charge.

[3] Doubloon Hotel and Doubloon Marina were unable to meet their debt repayments. The Bank therefore, by deed of appointment made pursuant to the Mortgage Debenture, appointed Mr. Jeffrey Coyne as Receiver and Manager of both Doubloon Hotel and Doubloon Marina. Mr. Jeffrey Coyne kept Doubloon Hotel and Doubloon Marina operating while seeking sale for the assets of the companies.

[4] The first named appellant, Malmaison Properties LLC, entered into negotiations with Mr. Jeffrey Coyne to purchase the assets of Doubloon Hotel and Doubloon

Marina. The parties entered into an Acquisition Agreement on 16th March 2012. This Agreement was subsequently amended on 25th May 2012 and 25th December 2012 (the Acquisition Agreement and the amendments are collectively referred to as the "Agreement"). The Bank was not a party to this Agreement or any of its amendments.

[5] The Bank, on 16th March 2012, signed a letter of undertaking (the "Undertaking") in favour of Malmaison Properties LLC (the "purchaser"). In the undertaking. the Bank agreed to issue ,at its own expense, a title insurance policy, to utilise Mr. Coyne as Receiver of the Claims Fund and to defer receipt of any portion of the purchase price until Doubloon Hotel and Doubloon Marina had fully satisfied their respective obligations under the Agreement. The appellants allege that the Bank was an active participant in the transaction and the Agreement, by virtue of the Undertaking and its financial control over Mr. Coyne,[1] Doubloon Hotel and Doubloon Marina.

[6] Both Doubloon Hotel and Doubloon Marina remained fully operational between the execution of the Agreement and the transfer of their assets to the appellants.

[7] The appellants visited and inspected the property on several occasions prior to the consummation of the sale, which took place more than a year after the execution of the Agreement. The date of consummation is an issue between the parties.

[8] Following the closing, the appellants inspected the property and determined that Doubloon Hotel and Doubloon Marina had misrepresented the condition of the property in the representations and had not performed their covenant obligations during the period from 16th March 2012 through the Closing including the covenant obligation to "repair and maintain" the property.[2]

The Proceedings Below

[1] The appellants allege that Mr. Coyne, acting as an agent of the Bank, breached his duties and obligations under clause 6 of the Agreement thereby making the Bank vicariously liable for his conduct and the damages caused by same.

[2] See para. 28 of the Statement of Claim; Appeal Bundle Two, Tab F, p. 394.

[9] The appellants, on 4th June 2014, filed a claim against the respondents in breach of contract arising under the terms of the Agreement, and for breach of fiduciary duty and the conversion of certain sums of money belonging to the appellants in the respondents' possession. They also sued the Bank for breach of the undertaking.

[10] Pursuant to an agreement between the parties, the appellants applied to the High Court for the separate trial of a number of preliminary legal issues,[3] one of which being, whether the Acquisition Agreement was merged and extinguished in two Deeds of Sale and Assignments of Lease ("the Deeds") executed on 31st July 2013.

[11] After reviewing the submissions of counsel for the parties, the learned judge at paragraph 72 of her judgment concluded:

> "[72] ...
>
> 1. With respect to the performance of the representations, warranties and covenants which concern unencumbered and good marketable title to the immovable and leaseholds properties conveyed in the Deeds, the parties must look to the Deeds for the completed contract.
>
> 2. With respect to the performance of the representations, warranties and covenants which concern assets not transferred in the Deeds and which were stated as surviving beyond closing the parties must look to the Acquisition Agreement for the terms of the contract.
>
> 3. Any other matters which do not fall within (i) and (ii) above are merged and extinguished in the Deeds..."

The Appeal

[12] The appellants, being dissatisfied with the decision of the learned judge at sub-paragraph 3 of the order, appealed to this Court. The notice of appeal, filed on 6th June 2018, contained four grounds of appeal. However, at the hearing, the parties agreed that the sole issue is whether the warranties, representations, covenants and agreements contained in clause 5 (bb) of the Agreement were merged in the

[3] This was done pursuant to Rule 26.1(2)(e) of the Civil Procedure Rules 2000.

Deeds.

Submissions

[13] The gravamen of the appellants' argument is that the learned judge misapplied the doctrine of merger as espoused in the seminal Privy Council decision of **Knight Sugar Company v The Alberta Railway and Irrigation Company**.[4] Learned counsel, Mr. Prospere, argued that the Privy Council made it clear that the operation of the doctrine of merger can be excluded where the provisions of a contract, by their very nature or from the express terms, are intended to survive the execution of the contract. Accordingly, he contended that since Clause 5 of the Agreement, in very pellucid terms, expressly provides at the commencement, that all clauses following were to survive the execution of the Deeds, Clause 5(bb) on which he relies to ground the cause of action[5] did not merge in the Deeds. Mr. Prospere relied on the case of **Palmer v Johnson**[6] to support this argument.

[14] Mr. Lee, in response, submitted that the learned judge correctly applied the doctrine of merger as stated in **Knight Sugar Company** and as applied by this court in **Benedict Montoute v Vitus Frederick.**[7] Learned Counsel acknowledged that there are exceptions to the doctrine of merger. However he contended that whether the parties intended to displace the doctrine of merger depended on the intention of the parties. The intention of the parties to a contract he argued referring to the dictum of Lord Hoffman in **Attorney-General of Belize v Belize Telecom**[8]**,** must be determined objectively by reference to the entire contextual framework of the transaction. This would involve considering not only the terms of the Agreement but also the terms of the Deeds. He further submitted that while the Agreement contains several warranties and representations, the Deeds contain some of the same warranties and representations thereby specifically

[4] [1938] 1 All ER 266.
[5] The appellants also sought to rely on Clause 9(j) to ground their cause of action. However, learned counsel accepted that Clause 9(j) was only applicable prior to or at completion. The defects were discovered after completion and so he could only rely on the protection afforded in Clause 5(bb).
[6] (1884) 13 QBD 351.
[7] SLUHCVAP2014/0019 (delivered 16th January 2017, unreported).
[8] [2009] UKPC 10.

making them to survive the closing. There was therefore an inconsistency between the Agreement and the Deeds as to what representations and warranties were to survive the Deeds.

[15] Mr. Lee further submitted that on these facts, the rebuttable presumption of merger was not displaced. In advancing this argument, Mr. Lee maintained that the Agreement gave the appellants the opportunity to inspect the property themselves, more so, as the authors of the Deeds, who were very alive to the issue of merger, the appellants were properly positioned to safeguard their interest with respect to Clause 5(bb). He contended that in failing to do so, and by preserving only the clause relating to unencumbered title and bearing the full contractual framework in mind, the appellants did not intend to exclude the operation of merger. Instead, when viewed objectively, their intention was to retain only those representations which were included in the Deeds. The learned judge was therefore correct in finding that the parties intended the doctrine of merger to apply. This finding, Mr. Lee contends, was a finding of fact by the trial judge and it is well settled that an appellate court will be reluctant to overturn such a finding, more so where the finding was based on an evaluation of facts. He referred to the well known decisions of the Privy Council in **Beacon Insurance Co. v Maharaj Bookstore Limited;**[9] **Central Bank of Equador v Conticorp;**[10] and the decision of the House of Lords in **Biogen Inc v Medeva plc**[11] and submitted that it was not shown by the appellants that the learned judge misapplied any principles of law, nor was it shown that no reasonable judge could have concluded as the learned judge did on the evidence that was before her.

Discussion

[16] In determining whether the provisions made for defects in the Agreement were merged in the Deeds in light of the "survival language" employed at the beginning

[9] [2014] UKPC 21.
[10] [2016] 1 BCLC 26.
[11] 38 BMLR 149.

of Clause 5, it is necessary to consider the authorities on the doctrine of merger in conveyancing law.

[17] The principle of merger can be traced as far back as 1880 in the case of **Leggott v Barrett**[12] where Lord Justice Brett stated that:

> "...where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document..."[13]

[18] The doctrine was further considered by the English Court of Appeal in **Palmer v Johnson.** There the court determined that the doctrine as stated in **Leggott v Barrett** was a general principle and it did not apply in every case where there was a subsequent contract. In **Palmer v Johnson**, the plaintiff purchased a parcel of land from the defendant at an auction. The property was described as having a net annual rental of £39, which was discovered to be substantially less after the conveyance was made. One of the conditions of the sale was that if any error, misstatement or omission in the particulars was discovered, the sale would not be annulled, but compensation would be allowed. In finding the claim for compensation successful, Bowen LJ at p. 357 said:

> "…Now it is commonly said, that where there is a preliminary contract for sale which has afterwards ended in the execution of a formal deed, you must look to the deed only for the terms of the contract, but it seems to me **one cannot lay down any rule which is to apply to all such cases, but must endeavour to see what was the contract according to the true intention of the parties…In the same way, when one is dealing with a deed by which the property has been conveyed, one must see if it covers the whole ground of the preliminary contract. One must construe the preliminary contract by itself, and see whether it was intended to go on to any, and what, extent after the formal deed had been executed**…" (Emphasis added)

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[12] (1880) 15 Ch D 306.
[13] Ibid p. 311.

[19] Fry LJ at p. 359 also reiterated that the principle as elucidated in **Leggott v Barrett** was a general principle, he stated that the learned judges in that case:

> "...laid down what is indubitably the law, that when a preliminary contract is afterwards reduced into a deed, and there is any difference between them, the mere written contract is entirely governed by the deed, but that has no application here, for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger, for the deed, in this case, was intended to cover only a portion of the ground covered by the contract of purchase."

[20] The principle has also been succinctly explained in the oft-cited statement of Lord Russell in **Knight Sugar Company**[14]:

> "...But it is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed: Leggott v Barrett. The most common instance, perhaps, of this merger is a contract for sale of land followed by conveyance on completion. **All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance**, and all the rights of the purchaser in relation thereto are thereby satisfied...." (Emphasis added)

[21] His Lordship went on to say that:

> "...**There may, no doubt, be provisions of the contract which, from their nature, or from the terms of the contract, survive after completion.** An instance may be found in Palmer v Johnson, in which it was held that a purchaser could, after conveyance, rely upon a provision of the contract and obtain compensation. The foundation of this decision was that, upon the construction of the contract, the provision for compensation applied after completion. In other words, the parties did not intend it to be performed by the subsequent deed, and it was therefore not satisfied by, or merged in, that deed." (Emphasis added)

[22] As this extract makes plain, circumstances where the doctrine would not apply include where the parties expressly state that the provisions would survive completion or the nature of the provision in its contractual and commercial sense clearly indicates that the provision is not supplanted by the latter contract, as was illustrated in **Palmer v Johnson.** The case of **Hissett et al v Reading Roofing**

[14] [1938] 1 All ER 266 at p. 269

Co. Ltd also provides a useful illustration**.** This case concerned a contract for the sale of property subject to a special condition that vacant possession would be given on completion. The plaintiffs, unable to get vacant possession, successfully claimed damages for breach of contract. In finding for the plaintiffs, the court held among other things that the provision in the agreement for sale regarding vacant possession on completion did not merge with the conveyance, as the conveyance only covered part of the contract for sale. Stamp J observed at p. 217 that:

> "It is of course the law of England that if two parties to a simple contract embody its terms in a deed in which they both execute, the simple contract is thereby discharged, just as a simple contract debt is merged in a judgment. **One cannot have two agreements covering the same matters at the same time.** Suppose, however, that there are matters dealt with in the contract which are not covered by the deed. Bowen LJ point out in **Palmer v Johnson (1884) 13 QBD 351 at 357, {1881-85} All ER Rep 719 at 722) that parties to a parol contract which has been reduced to writing might intend that there should be something in the contract which should exist notwithstanding that it was not put in the contract in writing…"** (Emphasis added)

[23] The common principle that these cases have elucidated is that there cannot be two contracts which cover the same matters at the same time. What also becomes evident from a review of these authorities, is that it is not automatic that where there is a contract for sale which is followed by the execution of a deed that the provisions of the contract would be merged in the deed. The court must seek to determine what was the contract according to the true intention of the parties. The parties' true intention can be gleaned from the contract read in its entirety, having regard to the background and circumstances of which the parties can be taken to have been aware at the time the contract was made.[15] In so doing, when dealing with sale of property, the court is required to take into consideration whether the deed covered the whole ground of the agreement and whether the agreement was intended to continue after the execution of the deed.

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[15]Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98; Reardon Smith Line Ltd v Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570.

[24] This is an appropriate point to turn to the Agreement. As stated by the learned judge at paragraph 23 of her judgment, the Agreement is concerned with more than the sale of property. The appellants were purchasing land, buildings and an on-going business carried on in the buildings on the land. Thus the Agreement contained provisions not only related to the immovable property but other assets such as notes receivable, intangible personal property, trademarks, franchises, domain names, utensils, furniture, and fixtures amongst others. The Agreement also contained a number of warranties and representations in relation to the immovable property including the warranties and representations in clause 5(bb)[16].

[25] Clause 5(bb) on which the appeal is based, reads as follows:

> "In order to induce the Purchaser(and its designees and assigns) to execute and perform this Agreement, each of DHL and DML (collectively the "First Sellers") and the BNS Receiver does hereby jointly and severally represent, warrant, covenant and agree (which representations, warranties, covenants and agreements shall be and be deemed to be continuing and survive the execution, delivery and performance of this Agreement and the Closing) as follows:
>
> ...
>
> (bb) Except as set forth on Schedule 5(bb), all of the buildings, other structures and other improvements made on, above or beneath the immovable property owned and/or leased by it (the "Improvements") are in good condition and repair. None of the First Sellers is aware of any latent or patent structural or other significant defect or deficiency in such improvements. Electrical and telephone facilities are available to the immovable property within the boundary lines of the immovable property, and potable water and sanitary sewer services are provided to the immovable property. The foregoing utility services are sufficient to meet the reasonable needs of the immovable property as now used, and no other utility facilities are necessary to meet the reasonable needs of the immovable property as now used. Design and as-built conditions of the immovable property are such that surface and storm water does not accumulate on the immovable property and does not drain from the immovable property across land of adjacent property owners. None of the improvements create an encroachment over, across or upon any of the immovable properties boundary lines, rights of way or easements and no building or other improvement on adjoining land create such an encroachment;"

[16] See Appeal Bundle Two, Tab F, p. 237.

[26] Clause 1(b)[17] of the Agreement reads as follows:

> "In furtherance and not in limitation of the foregoing, each of the Sellers acting through their agents, BNS Receiver and FCB Receiver, respectively, shall at the Closing (as defined) and thereafter execute, deliver and/or record such deeds and/or other instruments of transfer and/or conveyance, and take or cause to be taken, such other and further actions, as the case may be, as shall be reasonably requested by Purchaser, or its legal counsel, to vest, perfect, confirm, implement the transfer of, or establish, in the name, on behalf or for the account or benefit of Purchaser (and/or its designees), title and/or possession of any or all or the Property which were vested, or intended to be vested, in Purchaser (and/or its designees) pursuant to the provisions of this Agreement."

These provisions expressly contemplate the execution of the Deeds to transfer the freehold and leasehold interests to the appellants.

[27] The Deeds only contain representations, warranties and obligations in relation to the good and marketable title. The Deed recorded as Instrument No. 3502/2013[18] provided in clause 1 that:-

> " ...THE VENDOR does hereby represent, warrant, covenant and agree (which representations, warranties, covenants and agreements shall be and be deemed to be continuing and survive the execution, delivery and recordation of this instrument) that: (a) THE VENDOR owns and has good marketable title in and to THE FREEHOLD PROPERTY free and clear of all liens, claims and encumbrances and rights and options of others; and upon the execution and delivery of this instrument THE PURCHASER shall acquire good and marketable title in and to THE FREEHOLD PROPERTY free and clear of all liens, claims and encumbrances and rights and options of others; (b) the execution, delivery and performance of this instrument is within the power and authority of the of THE VENDOR, has been authorized by the taking of all required actions, does not violate the constitutional documents of THE VENDOR or any law or any agreement to which THE VENDOR is a party or by it or its assets are bound."

[28] Clause 2 reads:-

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[17] See Appeal Bundle Two, Tab F, p. 214.
[18] See Appeal Bundle Two, Tab F, pp. 361 - 369.

"…THE VENDOR does hereby represent, warrant, covenant and agree (which representations, warranties, covenants and agreements shall be and be deemed to be continuing and survive the execution, delivery and recording of this instrument) that:-

(a) THE VENDOR owns and has good and marketable title in and to THE EMPHYTEUTIC LEASES (the "Leases") with respect to **THE LEASEHOLD PROPERTY** free and clear of all liens, claims and encumbrances and rights and options of others; and upon the execution and delivery of this Assignment THE PURCHASER shall acquire good and marketable title in and to the Leases free and clear of all liens, claims and encumbrances and rights and options of others"

[29] The Deed recorded as Instrument No. 3503/2013[19] is worded in similar terms.

[30] The provisions in the Deeds mirror clause 5(gg)[20] of the Agreement which reads as follows:

"At the Closing and upon payment of the Purchase Price the Purchaser and/or its designee shall acquire good, valid and marketable title in and to the Property and each piece, part and portion thereof, free and clear of all liens, claims, charges, pledges, security interests, hypothecs, mortgages and encumbrances and rights and options of others except for the exceptions set forth on Schedule 5(gg) annexed hereto ("Permitted Exceptions")".

[31] The above provision shows that the Agreement and the Deeds do not cover the same ground in every respect. However, the Agreement and the Deeds do cover the same ground as it relates to the issue of "unencumbered good and marketable title". The learned judge's order, at sub-paragraph 1 of paragraph 72, that in relation to the warranties and representations concerning unencumbered and good and marketable title to the immovable property, the parties must look to the Deeds for the completed contract was therefore correct in keeping with the principle in **Knights Sugar Company.** However, the wide nature of the learned judge's order at sub-paragraph 3 of paragraph 72 encompassed all those representations, warranties, covenants and agreements in relation to the immovable property which were not covered in the Deeds. The Agreement

[19] See Appeal Bundle Two, Tab F, pp. 371 – 375.
[20] See Appeal Bundle Two, Tab F, p. 231.

covered a myriad of matters including several other matters relating to the immovable property other than "unencumbered good and marketable title." It cannot be said that the Agreement and the Deeds covered the same matters at the same time so that the only logical conclusion as to the intention of the parties was that they intended that the Agreement would be merged and extinguished. I therefore do not agree with Mr Lee's submission that there is an inconsistency between the Deeds and the Agreement which would, if the Court found that there was no merger, render the terms of the Deeds otiose.

[32] The principles on how contractual documents ought to be construed were aptly captured by Lord Hoffman in the case of **Investors Compensation Scheme Ltd v West Bromwich Building Society.**[21] Essentially, contractual documents should be interpreted against the "factual matrix" at the time the parties enter the contract. This principle has been approved by the English Courts in more recent cases such as **Wood v Capita Insurance Services Ltd**[22] and **Rainy Sky S.A. and others v Kookmin Bank.**[23] The 'factual matrix' in which the Agreement was executed was that the appellants were purchasing businesses that were in 'a state of financial disarray'. In an effort to safeguard their interests, the Agreement contains a number of representations, warranties, covenants and agreements made by the respondents and specifically in relation to the real property. The purport of these representations, warranties, covenants and agreements is that they should survive the execution, delivery and performance of the terms of the Agreement and completion of the sale. This was expressly provided for at the beginning of clause 5. When the terms of the Agreement are considered as a whole, it shows that the parties intended the execution of Deeds to transfer the freehold and leasehold interests to the appellant and that the appellants would receive unencumbered, good and marketable title to the freehold and leasehold properties, but the Agreement was also intended, having regard to the express provisions at the commencement of Clause 5, to provide for warranties and representations relating

[21] [1998] 1 All ER 98
[22] [2017] UKSC 24.
[23] [2011] UKSC 50.

to the immovable properties beyond the closing and for the transfer of other assets relating to the business being conducted on the immovable properties. It is difficult, against this background, to clothe the parties, the appellants especially, with the intention to extinguish a clause which protects their financial and commercial interests. When viewed objectively, it would seem completely implausible to go at such lengths to include survival clauses and simultaneously intend that they should be extinguished by virtue of execution of the Deeds.

[33] I also do not agree with Mr Lee's submission that since the appellants had the opportunity to inspect and investigate the property that shows that they did not intend for the provisions of clause 5(bb) to survive the closing. The provisions of clause 5(hh)[24] clearly provide that the ability to inspect does not in any way release the Sellers from their obligations under the Agreement. The clause reads as follows:

> "The representations, warranties, covenants and agreements of the First Sellers and the BNS Receiver contained in this Agreement, including without limitation, those contained in paragraph 5, are true, accurate and correct in all respects as of the date hereof and shall be true, accurate and correct and complete, in all respects, as of the Closing; and at the Closing each of the First Sellers shall deliver to the Purchaser a certificate remaking, each of the representations, warranties, covenants and agreements set forth in this Agreement, including without limitation, those set forth in this Paragraph 5 hereof. **All representations and warranties made herein or in any certificate or other document delivered to Purchaser by or on behalf of each of the First Sellers pursuant to or in connection with this Agreement shall be deemed to have been relied upon by Purchaser, notwithstanding any investigation heretofore or hereafter made by or on behalf of Purchaser."** (Emphasis added)

[34] I am further of the view that **Benedict Montoute** does not advance the respondent's case. Briefly, the facts are that the respondents instituted proceedings against the appellant claiming the market value of 10,670 square feet of land which they contend was the difference between the amount of land the appellant agreed to sell by virtue of a written agreement dated 6th June 2007 and the amount actually sold to them. This written agreement was followed by a deed

[24] See Appeal Bundle Two, Tab F, p. 231

of sale dated 5th October 2007 which conveyed the portion of land in dispute. This Court applied the principle in **Knight Sugar Company** and held that the agreement of sale had merged with the deed of transfer and therefore the terms of the contract were those contained in the deed and not the agreement. In so finding the Court was merely stating and applying the general principle. The Court was not, in that matter, laying down a new principle that in every case where there is an agreement of sale followed by deed the agreement would be merged with the deed. Nowhere in the judgment was the issue of exceptions to the principle, which was acknowledged by Lord Russell in **Knight Sugar Company**, discussed. Indeed the issue of exception to the principle did not arise in the case.

[35] In my view, the learned judge fell into error when she characterised the appellants' claim in the following manner at paragraph 24 of the judgment:

> "The claim is based largely on alleged breaches of the [Acquisition Agreement], with respect to clauses 5, 6, 9, and 11 which contain the plethora of representations, warranties, covenants and agreements to be performed by [Doubloon Hotel], [Doubloon Marina] and Mr. [Jeffrey] Coyne with respect to conveying marketable title in the immovable property, the assignment of leasehold interests as well as the transfer of several other assets in various forms, not covered by the Deeds."

[36] Clause 5 was not limited to providing representations, warranties, covenants and agreements with respect to conveying good and marketable title in the immovable property. Rather clause 5 (bb) specifically provides for, among other things, the "good condition and repair" of the buildings, other structures and improvements made on, above or beneath the immovable properties owned or leased by Doubloon Hotel and Doubloon Marina.

[37] The learned judge further erred in paragraph 35 of the judgment when she concluded as follows:

> "In my view there were **other warranties, representations and covenants unrelated to immovable and leasehold properties** which could not have been intended by the parties to be performed and satisfied in the Deeds and the performance of which were stated in the [Acquisition Agreement] to

survive beyond closing. **Some of them can be found at clause 5 (g) to (k) and clause 5 (bb)**…" (Emphasis added)

However, contrary to this finding by the learned judge, clause 5 (bb) dealt with warranties, representations, covenants and agreements in relation to the immovable property. The learned judge erred in limiting the wide ambit of clause 5 to title when it wasn't so limited.

[38] As stated earlier, the seminal decision of **Knight Sugar Company** acknowledges that the doctrine of merger would be inapplicable where the provisions of the contract, by their very nature, or the express terms, indicate that said provisions would survive after completion. The beginning of Clause 5, in very clear language, preserves all the provisions which follow. To my mind, this clearly points to an intention to preserve them beyond the execution of the Deeds. Furthermore, there are other provisions made throughout the Agreement which begin with the same express survival clause. Some of these may be found at the beginning of Clauses 6 and 7. Therefore, the repetition of a particular sub-clause in the Deeds, which the parties knew would have had to be executed to transfer the freehold and leasehold interests, does not, in and of itself, nullify the express survival clauses in the Agreement. Further, the nature of the representations, warranties, covenants and agreements in clause 5(bb) that the immovable properties were in good condition and repair, is such that the parties could not have intended that these obligations would have been performed by the conveyance. The purpose of the Deeds was to transfer title and therefore it is entirely reasonable that the appellants would repeat the sub-clause in relation to same. The survival clauses clearly contemplated the continued existence of the Agreement after the freehold and leasehold interests were transferred. Accordingly, the circumstances of this case do not compel me to conclude that the parties intended that the provisions of the Agreement in relation to all the warranties, representations and covenants concerning the immovable property would be extinguished after execution of the Deeds.

Conclusion

[39] On these facts, having regard to the express surviving language at the commencement of clause 5 and the nature of the provisions of clause 5(bb) and having applied the principles outlined in the authorities above, I do not find that the provisions made for defects in clause 5(bb) were merged and extinguished upon the execution of the Deeds.

[40] For the reasons set out above, the appeal is allowed, the order of the learned judge set out in sub-paragraph 3 of her order is set aside with costs assessed in the sum of $3,000.00 to the appellants to be paid within 21 days.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Humphrey Stollmeyer
Justice of Appeal [Ag.]

By the Court

Chief Registrar