

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)**

SUPREME COURT CIVIL APPEAL NO 64/2018

**BETWEEN CARIBBEAN REAL ESTATE INVESTMENT FUND APPELLANT
AND VALRINE KING RESPONDENT**

Anthony Tharpe of the appellant appearing in person and without counsel

Alexander Williams, Odeanie Kerr and Mrs Sharon Usim instructed by Usim Williams & Co for the respondent

23 February 2021 and 31 March 2023

BROOKS P

[1] On 12 December 2017, Tie J (Ag) (as she then was) gave judgment for Mrs Valrine King in a claim brought against her by Caribbean Real Estate Investment Fund ('Careif'). The learned judge ruled that a joint venture agreement ('JV agreement') that Careif and Mrs King had signed, for the development of Mrs King's land, was unenforceable on the basis of illegality and uncertainty.

[2] In this appeal from that decision, Careif asserts, among other things, that Tie J (Ag) erred in her findings because she misinterpreted the provisions of the Real Estate (Dealers and Developers) Act ('the Act') as well as the terms of the JV agreement.

[3] The issues that arise from the appeal mainly turn on the interpretation and application of the Act, with greater emphasis on sections 3, 10 and 35 of the Act and the interpretation of the JV agreement.

The background to the appeal

[4] The parties signed the JV agreement on 13 November 2006. By its terms, Mrs King was to supply the land that she owned, and Careif was to supply the financing and logistics for developing the land to provide a mix of commercial and housing units. Mrs King was to be paid the value of the land and have a share in the profits from the sale of the units in the development.

[5] On 28 January 2007, Mrs King sent a letter to Careif terminating the contract. Apart from a tirade by telephone from Careif's principal, Mr Anthony Tharpe, on the day following the issue of the letter, Mrs King said she heard nothing from Careif until approximately four years later. On 11 January 2011, Careif wrote to her indicating that the development had stalled because it had not yet received the registered title for the land. Careif urged the production of the title. Mrs King did nothing about the matter, and on 28 January 2013 Careif filed the claim, on which Tie J (Ag) eventually ruled.

[6] The essence of the dispute between the parties is that Mrs King insisted that she was only interested in selling her land and that that was the verbal understanding between Careif's representative, Mr Donovan Gooden, and herself. She asserted that although she signed the JV agreement, she was not comfortable that it met her needs, and she later decided that she did not want to do business with Careif. In her defence to Careif's claim, she also contended that the agreement was unenforceable as being uncertain and in breach of the Act. Careif, on the other hand, contended that the JV agreement is clear in its terms and that it is not a sale agreement. Careif asserted that the JV agreement does not allow for unilateral withdrawal in the manner that Mrs King sought to do, and she is bound by its terms.

[7] The trial before Tie J (Ag) turned on Mrs King's contention that the JV agreement is unenforceable because it is illegal and uncertain. Mrs King's counsel, at the trial, argued that Careif acted in breach of sections 10(1) and 35 of the Act when, by the JV agreement, it sought to engage in real estate business without the requisite licence. Counsel also argued that when the JV agreement was read in its entirety, it was unclear in respect of essential matters. Tie J (Ag) ruled in favour of those submissions.

The appeal

[8] Mr Tharpe represented Careif in the trial before Tie J (Ag). Mr Tharpe also filed and argued Careif's grounds of appeal. Although Careif filed 10 grounds of appeal, the majority concern the overriding objective and the consequences of the appeal. They do not assist in the analysis of the issues between the parties. Only grounds i. and ii. merit comprehensive consideration. They are set out below:

- "i. The Learned Judge completely misinterpreted [s]ection 3 of the [Act]. As a direct result the judge was and is under the mistaken impression that [Careif] is a Real Estate Dealer or Real Estate sale [sic] person and therefore needs a Dealer's license [sic].
- ii. The Learned Judge admittedly did not examine [s]ection 35 of the [Act], which is the relevant part of the Act, that deals specifically with Real Estate Developers and the licensing of Real Estate Developers as opposed to Section 3 which deals with Licensing of Real Estate Dealers."

[9] In connection with grounds i. and ii. Careif has made other material challenges to the learned judge's findings of law and fact. The following are the relevant challenges:

- "a) The Honorable [sic] Judge failed to recognize that section 3 of the [Act] does not regulate the activities of a Real Estate Developer.
- b) The learned judge failed to recognize that [s]ection 3 of the Act specifically regulates Real Estate Dealers

and Real Estate sales persons and does not mention Real Estate Developers under that section of the Act.

...

- c) The Learned Justice [Tie J (Ag)] failed to recognize that [Careif] did not sign the [JV] agreement as a Real Estate Dealer but did sign as a Real Estate Developer.
- d) The Learned Judge erred when she determined that [Careif] needed a Real Estate Dealers [sic] [licence] before, [Careif] could sign the [JV agreement], subject of this Appeal.
- e) The Learned Judge Erred [sic] when she determined that [Careif] was doing Real Estate Business as defined Under [sic] the [Act].
- f) The Learned Judge failed to recognize that only Real Estate Dealers and Real Estate Sales Persons [not Real Estate Developers] [sic] are required under the [A]ct to first hold a Real Estate Dealers [Licence] before they can transact real estate business as defined under the Act.
- g) The learned judge erred in formulating her judgment against [Careif] because the judge, completely ignores [sic] Section 35 of the [Act], which deals specifically with Development schemes and Real Estate Developers
- h) The Learned [Tie J (Ag)] erred when she proclaimed that the [JV] agreement was an illegal Contract and as a result was unenforceable.
- i) The Learned judge erred when she judges [sic] that [Careif] was operating illegally when [Careif] signed the [JV] agreement.
- j) The Learned judge erred in her judgment because she failed to have regard for the fact that [Careif] was already a legally registered Real Estate Developer under the [A]ct and specifically as stipulated under Section 35 of the Act.

- k) The Learned judge erred by allowing [Mrs King] to plead a Defense [sic] at the Trial, of being confused as grounds for not honoring [sic] the [JV] agreement, when [Mrs King] did not plead that affirmative Defense [sic] in the Defense [sic] filed in the Court records pursuant to Part 10 of the CPR.
- a)[sic] Consequences of not setting out defense [sic] 10.7; The defendant may not rely on any allegation or factual argument which is not set out in the defense [sic], but which could have been set out there, unless the court gives permission[.]”

[10] Careif helpfully condensed those issues into five areas of argument:

- I. The Lower Tribunal/Trial Court Erred in not Ruling on the Claim.
- II. The Trial Court Erred when it Ruled that [Careif] needed a Real Estate Dealers License Before [Careif] could enter a [JV agreement] with [Mrs King].
- III. The Trial Court Erred when it Ruled the [JV agreement] an illegal Contract.
- IV. The Trial Court Erred when it ruled that there was uncertainty in the agreement.
- V. The Trial Court Erred when it ruled that [Careif] did not prove [damages].”

[11] Except for issue I, the issues which Careif raise, are similar to those that Tie J (Ag) addressed in the formulation of her written judgment. Issues II and III are closely linked and will be addressed together. It will be more convenient to assess issue I last.

Was the JV agreement illegal for Careif’s lack of a Real Estate Dealer’s Licence? (Issues II and III)

[12] The essence of the complaint that relates to these issues is that Tie J (Ag) failed to appreciate that the provisions of the Act that required a licence thereunder, applied

to real estate dealers and other persons carrying out real estate business, but did not apply to developers such as Careif. The learned judge, Careif argued, failed to recognise that, under the JV agreement, Careif was acting as a developer and not as a broker. It was this failure, the complaint continued, that led the learned judge to improperly hold that the JV agreement was illegal.

[13] Careif asserted that section 3 of the Act, on which the learned judge placed great emphasis, "is specific to individuals who offer contractual services to property owners as an agent or Broker [sic]" (page 16 of Careif's appeal brief). Careif further asserted that it is section 35 of the Act that is relevant to its position in the JV agreement. That section, Careif also asserted, only requires a developer to be registered with the Real Estate Board. Careif contended that it is a developer and, therefore, is not obliged to register pursuant to section 35 of the Act until it has identified a joint venture partner and has signed a joint venture agreement. In any event, Careif stated, it was registered pursuant to section 35 of the Act.

[14] Mr Williams, on behalf of Mrs King, supported the learned judge's finding. He argued that the circumstances required Careif to have a licence pursuant to section 10 of the Act. He submitted that Careif's failure to secure such a licence, before signing the JV agreement, meant that the agreement was illegal and unenforceable. Learned counsel relied on several cases including **Weekes v Gibbons** (1993) 45 WIR 142.

[15] In respect of Careif's assertion that it is registered under section 35 of the Act, Mr Williams submitted that Careif has provided no documentation to support its assertion that it was registered, as a developer, with the Real Estate Board.

[16] The principle guiding the assessment of these issues is that a court will not enforce an illegal contract. Parke B made this point in **Cope v Rowlands** 2 M & W 149; (1836) 150 ER 707 at page 710 of the latter as follows:

"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by

the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only because such a penalty implies a prohibition." (Emphasis supplied)"

[17] Additionally, in **In re An Arbitration Between Mahmoud and Ispahani** [1921] 2 KB 716, a government Order stipulated that both the buyer and seller of linseed oil needed licences to conduct that transaction. The plaintiff had the licence to sell linseed oil but the defendant did not have a licence to purchase it. The plaintiff sold linseed oil to the defendant. The Court of Appeal had to consider whether the contract was lawful where the defendant did not have a licence when the contract was made. Bankes LJ, at page 726, opined that such a contract could not be enforced. Scrutton LJ relied on the dictum in **Cope v Rowland** and ruled that if a statute forbids a conduct, the court cannot enforce an illegal contract. He said this at page 729 as follows:

"...If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.

...In my view the Court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract.

The other point is that, where a contract can be performed lawfully or unlawfully, and the defendant without the knowledge of the plaintiff elects to perform it unlawfully, he cannot plead its illegality. That in my view does not apply to a case where the contract sought to be enforced is altogether prohibited, and in this case to contract with a person who had no licence was altogether prohibited. It was not that the plaintiff might lawfully contract with the defendant and chance his getting the licence before the plaintiff delivered the goods. The contract was absolutely prohibited; and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition..."

[18] Satrohan Singh JA, in delivering his judgment in **Weekes v Gibbons**, cited, with approval, at page 145 of the report, a portion of that quote from **In re An Arbitration Between Mahmoud and Ispahani**.

[19] The learned editors of Cheshire Fifoot & Furmston's Law of Contract, 17th edition, page 454, made the point that a contract is illegal if the existence of the contract is prohibited and that contract is void from the moment it was created. They said:

"A contract is illegal as formed if its very creation is prohibited, as for example where one of the parties has neglected to take out a licence as required by statute. In such a case it is void *ab initio*. It is a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not." (Italics as in original)

[20] This court must therefore determine whether the Act prohibited Careif's conduct, thereby rendering the JV agreement illegal. In **Cope v Rowlands**, Parke B considered the question of whether a particular statute meant to prohibit a contract by a broker. He stated that the court must determine whether the statute only imposed the penalty to obtain revenue, and therefore only requires the person acting as a broker to pay a penalty, if he or she does not comply with the revenue requirement. He further stated that the court must consider whether the purpose of the legislation is to protect the public and prevent persons from acting as brokers without the necessary licence. Parke B went on to show that the requirements in that statute for particular standards and ethical behaviour demonstrated that the licence requirement was intended for the benefit of the public.

[21] Buckley J at page 630 of **Victorian Daylesford Syndicate Ltd v Dott** [1905] 2 Ch 624, determined that once the objective of the statute is to prohibit an act, so as to protect the public, that act is illegal. In the context of assessing a complaint against a moneylending contract, he said, on page 629 of the report:

"There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced."

He also highlighted, relying on authorities such as **Cope v Rowlands**, that statutes may impose a penalty for the protection of the revenue or it may impose a penalty for the additional purpose of protecting the public. He later said at page 630 that:

“If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal.”

[22] Satrohan Singh JA, at pages 146 to 147 of **Weekes v Gibbons**, considered the relevant portions of the Registration of Building and Civil Engineering Contracting Undertakings Ordinance 1968 which required the registration of building and civil engineering contracts. He determined, at page 147, that since contracts should only be registered if they exceeded \$10,000.00, as well as the fact that it did not apply to the Crown and the provision of additional penalties for continuing offences, the contract was not “absolutely prohibited”. He found that the contract could be performed without registration provided that the contractor is willing to pay the initial and continuing penalties or if the contractor, upon discovery of the breach, registers. He also added that the only remedy for the breach was the enforcement of the penalty. He concluded that the registration requirement was not for the protection of the public and it did not absolutely prohibit the performance if there was no registration.

[23] Those principles may be applied to this case. In addressing the issue of whether the Act is for the protection of the public or the garnering of revenue, it is important to highlight some relevant portions of the Act.

[24] Section 5 of the Act stipulates that the Real Estate Board, which is “to regulate and control the practice of real estate business” in Jamaica is empowered, among other things, to monitor the activities of developers, hold and conduct examinations for applicants for registration and take measures to protect “the mutual interests of persons entering into land transactions”. Section 15 of the Act allows for the cancellation, suspension or censure of a person who breaches the legal and ethical standards related to the practice of real estate business. These provisions reveal an

intention by the legislature to protect the public in the important and sometimes litigious area of conveyancing and land ownership.

[25] Section 10, which will also be relevant later in the analysis, is consistent with the Act's intent of protection of the public. It prohibits any person from engaging in the practice of real estate business without a valid licence. Importantly, for this aspect of the analysis, the section imposes a penalty for a breach of that prohibition. The penalty may include imprisonment. The seriousness indicates the emphasis that the legislature places on compliance with the Act. The section states, in part:

"10.-(1) Subject to subsection (3), a person shall not engage in the practice of real estate business or in any branch of such practice—

(a) in the capacity of a real estate dealer unless he is the holder of a valid licence issued under subsection (1) of section (20) [authorising] him so to do...

(2) Every person who contravenes subsection (1) shall be guilty of an offence and shall be liable—

(a) **on conviction on indictment in a Circuit Court to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment;**

(b) on summary conviction in a [Parish Court] to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment and in the case of a continuing offence to a further fine not exceeding one thousand dollars for each day during which the offence continues.

(3) **No person shall be deemed to have contravened subsection (1) by reason only of his having engaged in—**

(a) **a transaction involving the sale or exchange of land if he proves that—**

- (i) **the sale or exchange was an isolated transaction not undertaken in the course of, or in furtherance of, or with intent to carry on the practice of real estate business;**

...” (Emphasis supplied)

[26] The infrastructure created by the Act demonstrates that Parliament intended to protect the public by prohibiting the act of persons engaging in real estate business without the relevant licence, not solely to collect registration fees. In the context of this case, a contract which intends the commission of a breach of section 10 of the Act is implicitly prohibited and would be unenforceable according to the principle cited in **Weekes v Gibbons**.

[27] Other provisions of the Act must be considered in determining whether the JV agreement did intend a breach of section 10 of the Act.

[28] In this regard, section 2 of the Act provides some important definitions:

“‘developer’ means a person who carries on, whether in whole or in part, the business of **development of land**;

‘development’ means the carrying out of building, engineering, or other operations in, on, over or under land, or the making of any material change in its use or in the use of any buildings or other land for the purpose of disposal of such land or any part thereof in a **development scheme**;

‘development scheme’ means **a scheme or intended scheme for the development of land the sub-division or proposed sub-division of which is subject to the provisions of the *Local Improvements Act* or the *Town and Country Planning Act***;

‘the practice of real estate business’ [sic] has the meaning ascribed to that expression in section 3;

‘real estate dealer’ means—

- (a) a person who, on his own account, engages in the practice of real estate business; and

- (b) an individual who is–
 - (i) a member of a partnership or
 - (ii) a director or officer of a corporate body,

which itself engages, on its own account, in the practice of real estate business;

'real estate office' means any premises on or from which the practice of real estate business is carried on;" (Italics as in original; emphasis supplied)

[29] Section 3 of the Act explains the term "the practice of real estate business". The portion of section 3 that the learned judge relied upon is pertinent. It states:

"3.–(1)a person engages in the practice of real estate business, for the purposes of this Act, if, **on behalf of another person**, for compensation or valuable compensation directly or indirectly paid, or expressly or impliedly promised, or, with intent to collect or receive compensation or valuable consideration therefor, he–

- (a) appraises, auctions, sells, exchanges, buys, leases or rents or offers, attempts or agrees to appraise, auction or negotiate the sale, exchange, purchase, lease or rental of, any land or otherwise functions as a broker in relation to any land;
- (b) advertises or holds out to the public by any oral or printed representation that he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing or renting, land;
- (c) manages land or engages in any other business concerned with the management of land either in a consultative capacity or as an agent;
- (d) **takes any part in the procuring of sellers, purchasers, lessors, lessees, landlords or tenants of land;** or
- (e) **directs or assists in the procuring of prospects, or the negotiation** or closing of any transaction which results in a sale, exchange,

lease or rental of land of another **or is calculated to have that result.**" (Emphasis supplied)

[30] Section 35 of the Act requires a developer, before commencing any development, to apply to the Real Estate Board to be registered as a developer. Subsection (1) of the section states in part:

"Every person who proposes to carry out any development under a development scheme to which this section applies shall **before commencing such development** apply to the Board...for registration as a developer and lodge with the Board a statement showing [among other things] the location and area of the land to be used for the development scheme... and, in the case of a company, the address of its registered office and the names and addresses of all its directors." (Emphasis supplied)

[31] It is noted that the learned judge placed great emphasis on the definition of "the practice of real estate business" as defined in section 3(1) of the Act. She found, based on the evidence that had been led before her, including Mr Tharpe's evidence on Careif's behalf, that Careif's business model constituted "real estate business" as defined in section 3(1) of the Act. She said in para. [20] of her judgment:

"It is also clear from a perusal of the [JV] agreement in its entirety that the **intended activities of the claimant would amount to it acting as a real estate dealer.** The general tenor of the [JV] agreement and the addendum is one in which the claimant would take control of the land, construct units thereon by obtaining financing from investors, who, as per the addendum, as a result of the capital contributed would obtain ownership of a unit in the development. It is apparent that **the claimant's intended actions were tantamount to that of a broker** who sought to obtain money from individuals in exchange for an interest in the property. The claimant therefore intended to sell the units constructed, or, as the legislation states, the intended actions were 'calculated to have that result[.]'" (Emphasis supplied)

[32] Careif's complaint about the learned judge's reasoning in this regard must be resolved by examining the role that Careif is required, by the JV agreement, to perform. The learned judge carried out that examination between paras. [19] and [31] of her judgment. She stated in para. [19] of her judgment that Mr Tharpe had admitted that Careif was in the business of acquiring, developing and managing real estate. The activities that Tie J (Ag) categorised as being real estate business, are set out below. She particularised the breach of section 10 of the Act by pointing out that the JV agreement contemplated Careif:

- a. constructing units on Mrs King's land by obtaining financing from investors, who would obtain ownership of a unit in the development (as per the addendum to the JV agreement);
- b. acting as a broker, who would obtain money in exchange for an interest in the property (as per para. 4 of the recitals);
- c. selling the constructed units (as per para. K));
- d. along with Mrs King, acquiring and developing the property and managing the unsold units for long-term income (as per para. C));
- e. promoting the development (as per para. 3 of the recitals);
- f. applying for subdivision of the property (as per para. 7 of the recitals);
- g. allocating the funds due and payable under the various joint venture agreements that were contemplated (as per para. M));

- h. obtaining long-term financing for unsold units (as per para. N)); and
- i. signing agreements and instruments of transfer for the transfer of units to parties to whom units have been sold (as per para. O)).

[33] The learned judge, in para. [20] of her judgment, acknowledged that the JV agreement and its addendum outlined the “intended actions” which were “tantamount to that of a broker”. She mentioned in paras. [20] and [21] of the judgment that Careif’s duties under the JV agreement were “intended actions” or “intended activities”. These findings are supported in the indicated provisions of the JV agreement. Examples are, firstly, the JV agreement contemplates leasing and sales of real estate. This is highlighted at recital 3 as follows:

“WHEREAS [Careif] is desirous of promoting the development of an upscale Real Estate Development called the **PROJECT** for the maximum number of Commercial condominiums and or town homes, for the property that will be allowed by the Town Planning Department and the Clarendon Parish Council for lease or the transfer to individual Joint Venturer [sic] or for sale on the open market (hereinafter calls the Development **PHENION PRESERVES[.]**” (Bold as in original)

The JV agreement, at recital 4, contemplates the use of the land to acquire funding:

“WHEREAS [Careif] and [Mrs King] desire that contributions shall be made in exchange for an interest in the property. Where upon [sic] signing and therefore the formation of the [JV] agreement, the property will become as well as listed as an asset of [Careif] to foster future funding of the project or the developer, whichever works to the advantage of the development.” (Bold as in original)

[34] Recitals 6 and 7 speak to Careif having the modification of restrictive covenants that affect Mrs King’s property, and securing the issue of the individual duplicate

certificates of title for the "lots or for the condominiums, town homes, homes or other applicable development under the Registration of Titles Act".

[35] By recital 8 Mrs King authorises Careif to "proceed with obtaining the necessary Architectural, Surveying and Engineering Drawings for construction of the development, **including pledging real estate for necessary funding**" (emphasis supplied). Recital 9 indicates that Careif will use its best endeavours to "complete the said Development" in a timely manner.

[36] Clause C) states the purpose of the JV agreement:

"The parties hereby enter into this agreement for the purpose of acquiring and developing and managing the property for long term income if not sold or it is determined by the developer that long term is the desired business and profit taking strategy."

[37] The addendum to the JV agreement also seems to suggest that Careif proposed to act as a broker. It states:

"This [JV] agreement is and will be amended in respect to current or future PROMOTIONS BY [sic] Developer. **Promotions may stipulate that additional Joint Venture [sic] will or may be assigned a percent (%) interest in the development as collateral for capital contributed** of US\$..... [sic] **The Capital contributed will result in the ownership of a condo or Town House unit or other benefits including but not limited to equity as stipulated in joint venture agreement.** VENTURER IS [sic] not obligated or required to make any further contributions unless collateralizing [sic] additional interest in the development. Any additional collateralizing [sic] will be done at a higher value to be determined by developer.

Developer is not obligated to assign any further units of equity or condominium or Town Home in the complex to any other person or entity beyond those with which agreements have already been signed. **Developer has the discretion to withdraw and or close offering without notice.** This

agreement and all agreements relating to this agreement is binding upon signing by both parties.” (Emphasis supplied)

[38] The JV agreement appears to contemplate that Careif would be obtaining financing for the development of Mrs King’s property and selling units in that development. To that extent, the learned judge was correct in finding that the JV agreement contemplated that Careif would be carrying out real estate business. This addendum will be discussed further in the context of whether it is certain.

[39] As indicated above, section 3 of the Act outlines what constitutes real estate business, notably sections 3(d) and (e) of the Act. These sections provide that if a person takes part in procuring sellers, purchasers among others or if a person directly or assists in the procuring of prospects, or the negotiation or closing of any transaction which results in a sale, exchange, lease or rental of land of another or is calculated to have that result, then that person engages in the practice of real estate business. The contract to carry out such activities, if that person does not possess the relevant licence, is, therefore, in breach of the statute and, based on the authorities set out above, is illegal and will not be enforced by a court.

[40] Additionally, it is accepted that, at the time that it entered into the JV agreement, Careif had no dealer’s licence under the Act. In acting for Mrs King in this way, Careif would satisfy the requirement of section 3 of the Act that the real estate transactions are being carried “on behalf of another person”. In the absence of a licence under section 10 of the Act, the JV agreement constituted an illegal and unenforceable contract.

[41] The scope of the JV agreement, and the numerous steps that Careif was required to take thereunder, would not qualify as an isolated transaction that would allow Careif to claim the benefit of section 10(3)(a)(i) of the Act.

[42] The learned judge was, therefore, correct in finding that the JV agreement was an illegal contract. She would also be correct in finding that Mrs King was not obliged to perform any obligations thereunder.

[43] Careif's stress on its description of its position as a "developer", cannot assist it in impugning the learned judge's reasoning. The various provisions of the JV agreement, which have been cited above, demonstrate that it contemplated, in addition to being a developer, being also involved in the practice of real estate business.

[44] Careif cannot succeed on these issues. That finding would be sufficient to dispose of this appeal, but the aspect of uncertainty will also be discussed.

Was the JV agreement unenforceable for uncertainty? (Issue IV)

[45] This issue turns on the learned judge's ruling that the JV agreement was "generally unclear" (see para. [35] of the learned judge's judgment). She specifically found uncertainty in respect of various aspects of the document. These are:

- a. the issue of whether, how and when Mrs King was to be paid for the value of her land;
- b. the entitlement of each party to the JV agreement, and the timing of the receipt of that entitlement;
- c. whether the sum to be paid represented the sum for the development right of the property or the "negotiated price for the property";
- d. the composition of the development in terms of the number and categories of units and how they would be sold; and
- e. the application of the term "joint venturer" and specifically whether it applied to Mrs King.

[46] Having identified those issues, the learned judge found, at para. [43] of her judgment, that the uncertainties could not be rectified by any of the avenues considered in **Western Broadcasting Services v Edward Seaga** (2007) 70 WIR

213. She found, because of those uncertainties, that the JV agreement was unenforceable.

[47] Careif's complaints, in respect of this issue, are that the learned judge erred in those findings as:

- a. prior to the trial, Mrs King did not express any uncertainty about any aspect of the JV agreement, although she had discussed the terms with Careif's employees, had it vetted by her attorney-at-law and had received a copy of the plans of the proposed development;
- b. the document is clear in its terms; and
- c. if Mrs King was unclear about any aspect of the JV agreement, her proper course was to have either asked Careif's employees for an explanation or seek arbitration as set out in the document.

[48] Mr Williams, in his written and oral submissions, supported the learned judge's findings. He pointed to para. "A)" of the JV agreement and argued that it was contradictory, in that, although it stipulated at one point that Mrs King would be paid US\$2,800,000.00 plus 5% of the net profits as "development rights", the same para., later suggested a negotiated payment. Learned counsel pointed to the evidence, on pages 118 and 119 of the supplemental record of appeal, that Mr Tharpe had admitted, in cross-examination at the trial, that the compensation for the exclusive right to develop the property could be less than the agreed sum of US\$2,800,000.00 if the property is valued less than that amount and the parties agreed and negotiated that it is to be less.

[49] Another area of uncertainty, learned counsel submitted, was the time for payment. At one point, Mr Williams contended, the JV agreement stipulated that payment to Mrs King would be made after profits are declared, while, at another point, it states that payment would be made 120 days after the receipt of final approvals.

[50] The third area of uncertainty, he contended, was whether Careif was acquiring Mrs King's property or only "development rights" over the property.

[51] Contractual terms must be certain. If a contract is vague or uncertain, it will not be binding (see Chitty on Contracts, 27th Edition, Volume 1, para. 2-099). The learned editors went further in paras. 2-100 to 2-104 to state that, in determining whether a contractual term is certain requires the court to engage in a balancing exercise. The court cannot take too strict an approach, which may result in terms being struck down as vague when businessmen intend the term to be binding. The court therefore must have regard to whether:

- a. a term that appears to be vague is governed by custom and trade usage;
- b. the vague term is reasonable;
- c. the agreement addresses which party should resolve uncertainties; and
- d. an apparently meaningless phrase can still be effected and make efforts to give meaning to it.

[52] Para. A) of the JV agreement is an appropriate place to start in analysing the contending positions of the parties. The paragraph states as follows:

"A) **CONTRIBUTIONS**

The Joint Venture [sic] shall except where special promotional events stipulate other wise [sic], (**see addendum attached**) contribute the sum of money or

Land or both: the Property/parcel of Land (**hereinafter called 'the investment'**). The Investment shall entitle the Joint Venturer to a certain percentage of the profits. The said returns or interest in the Investment shall be payable as follows: 100% the agreed value of the property as the cost for the exclusive development rights to the property and the development this been [sic] the amount of US\$2,800,000 (Two Million Eight Hundred Thousand US Dollars) plus 5% of the net profits made from sale of development, **all payable** once profits are declared. The Joint Venturer and the developer are required to sign all documents, other than this agreement, necessary to allow for the obtaining of all relevant governmental permits including but not limited to Developer's License [sic] application to effect the development. To effect speedy forward movement all parties must sign documents and applications within 24 (twenty[-]four) hours of receipt. The Developer will pay directly to Joint Venturer US\$2,800,000 (**Two Million Eight Hundred Thousand US Dollars**) for exclusive right to develop the property. This amount is to be equal to the value of the property or the agreed and accepted negotiated price of the property and payable 120 days or sooner of the receipt of final approvals from all government agencies including local government." (Emphasis and underlining as in original)

[53] An analysis of para. A) does suggest that it has an internal difference in the approach to the basis on which the compensation was to be paid. The first reference states that Mrs King was investing her property in the enterprise and that investment would entitle her to receive a return on her investment of US\$2,800,000.00 and 5% of the profits. The latter reference to her compensation is that Careif would pay her US\$2,800,000.00 for "exclusive right to develop the property". There is no reference to a percentage of the profits at that point. The former arrangement suggests that Mrs King is taking a risk. The latter arrangement suggests a sale of a right to develop the property and does not imply any risk. The difference amounts to an uncertainty in a material respect.

[54] The amount of the compensation is also the subject of uncertainty in that although the value of the property seems to be definite in the earlier part of the paragraph, the latter portion of the paragraph states that the calculation of the amount

that Careif should pay "is to be equal to the value of the property or the agreed and accepted negotiated price of the property". Although that amount is dependent upon agreement by the parties, there is some uncertainty as to compensation that Mrs King would be able to enforce. In that regard the JV agreement is also uncertain in a material respect.

[55] In the light of those findings, it is unnecessary to examine the other aspects that Mr Williams has highlighted. There is, however, one other aspect of the JV agreement that may be highlighted in this context. It is that the addendum to the JV agreement makes the whole agreement unclear. The addendum allows for amendment to the JV agreement without stipulating the terms of such amendments. The relevant portion is again quoted for convenience:

"This [JV] agreement is and will be amended in respect to current or future PROMOTIONS BY [sic] Developer. **Promotions may stipulate that additional Joint Venture [sic] will or may be assigned a percent (%) interest in the development as collateral for capital contributed** of US\$..... [sic]...." (Emphasis supplied)

[56] It is acceptable in some instances to have terms that are to be determined by further agreement. One such instance was in **Tomlin v Standard Telephones and Cables Ltd** [1969] 1 WLR 1378. Sir Gordon Willmer found that during negotiations, it is permissible to agree on one aspect while leaving another aspect for further negotiation (see page 1386). However, in the instant case, the addendum is such an open-ended arrangement that it may be rightly criticised as being uncertain.

[57] These uncertainties are sufficient for finding that the JV agreement is unenforceable on the basis of uncertainty. The decision of the Privy Council in **Western Broadcasting Services v Edward Seaga**, where their Lordships relied on **Tomlin v Standard Telephones and Cables Ltd** is applicable to these circumstances. Their Lordships stated in para. 19 of their judgment:

“It is trite law that although parties may reach agreement on essential matters of principle, **if important points are left unsettled their agreement will be incomplete**: *Chitty on Contracts* (29th edn, 2004) para 2–110. In some cases it can properly be said that the parties have reached an enforceable agreement on part of the matters in issue, leaving the rest to be determined by further agreement or the process of litigation: see such cases *as Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378. The present case does not come into that category. In others the remaining details can be supplied by the operation of law or by invoking the standard of reasonableness.” (Italics as in original, emphasis supplied)

[58] As in **Western Broadcasting Services v Edward Seaga** this is not a contract which is enforceable. The learned judge’s assessment that the JV agreement is uncertain is correct.

[59] Careif fails on this issue.

Was Careif required to prove damages at the trial? (Issue V)

[60] Considering the finding that the JV agreement was unenforceable on the grounds that it is illegal, it is unnecessary to address the issue of damages. This is because the contract was a nullity and the parties therefore cannot claim damages. It is noted that the learned judge only briefly considered damages and stated that she had already decided the matter on the basis that Mrs King was not liable to Careif. Her approach cannot be faulted. This court will adopt that wise approach.

Whether the learned judge ruled on the claim (Issue I)

[61] Careif’s complaint under this heading is that the learned judge did not rule on the issue of whether Mrs King violated the JV agreement. This complaint is unfounded. The fact that Tie J (Ag) ruled in favour of Mrs King does not mean that she did not rule on the claim. Careif asked for orders for specific performance, or alternatively, a power of attorney to carry out all the obligations that it said were imposed on Mrs King. As a further alternative, Careif claimed damages for breach of contract as well as costs.

[62] The learned judge ruled that Careif was not entitled to any of those reliefs. She found that the JV agreement was unenforceable because it was illegal and uncertain. Because the JV agreement was invalid, it was not necessary for the learned judge to rule whether Mrs King had violated it. Mrs King could not be found liable to Careif in respect of an invalid agreement. Apart from finding that the JV agreement was unenforceable because it was illegal and uncertain, Tie J (Ag) found that neither specific performance nor a power of attorney was available in the circumstances of this case (paras. [49] and [53] of the learned judge's judgment).

[63] Careif's appeal on this issue must also be dismissed.

Conclusion and disposal

[64] Careif has failed on the critical issue of whether the JV agreement is illegal. For that reason, as the learned judge found, is unenforceable. It contemplated Careif carrying out acts which required it to have had a licence under the Act. Careif did not have such a licence.

[65] The JV agreement is also uncertain in critical respects. It is inconsistent in its handling of the sums which were payable to Mrs King for her property. The JV agreement also allowed for Careif to amend it without stipulating or limiting the nature of the amendments that could be done. Those were critical areas in which certainty was required. The absence of certainty also rendered the JV agreement unenforceable.

[66] Based on those findings, Careif's appeal must be dismissed with costs.

EDWARDS JA (DISSENTING IN PART)

[67] I have read the draft judgment of the learned President and although I agree with his reasoning on the uncertainties in the joint venture agreement and his ultimate conclusion on the outcome of the appeal, regretfully, I find myself unable to agree with his reasoning and conclusion on the issue of the illegality of the contract.

[68] Whilst it is clear to me that under section 35(1) of the Real Estate (Dealers and Developers) Act ('the Act'), Careif requires a developer's licence before commencing any development, it is not so clear to me that it required a dealer's licence before entering into a joint venture agreement, which envisages a real estate development and the sale of real estate once developed. Section 10 of the Act provides that a person shall not engage in the practice of real estate business. Strikingly, however, unlike section 35 it does not require a licence "before commencing". So whilst section 35 requires a licence even at the point of contemplation and having the intention to be a developer, and so before even commencing, section 10 does not appear to me to be so restrictive. The language used in section 10 of "shall not engage in the practice" suggests to me that it is only at the point of engaging in the act of real estate sales and rentals, for instance, (that is real estate dealings) that a licence is required.

[69] Therefore, in my view, at the point of entry into a joint venture agreement where the development of units for sale is contemplated by the parties to the joint venture, no real estate dealer's licence is required. An intention to do something is not in my view, the same as engaging in something. I can but only assume that the draftsman was deliberate in the difference in language used in section 35 and that used in section 10. The prohibition in section 10 is in actually doing real estate (engaging in) without a license, not in having an intention to do or a contemplation of doing real estate dealings. A developer does not have to sell the units he develops himself but can contract a licensed dealer to sell on his behalf.

[70] The question is whether the contract was absolutely prohibited. Section 35 absolutely prohibits the commencement of any development, which would include any agreement involving a development, without having a licence first. Section 10(1) prohibits any engagement in the practice of real estate business in the capacity of a real estate dealer, without a licence, which would prohibit a person being paid by another to conduct any real estate deals or contracts in any of the ways set out in section 3. It makes no mention of commencement or having the intention to do something. So to my mind, the fact that the joint venture contemplates a real estate development of

units which are to be sold (which requires a developer's licence before it could commence, inclusive of the contract to do so), it does not on my reading of section 10, make the joint venture agreement illegal for want of a dealer's licence, as the joint venturers are not "engaging in the practice of real estate business", at that stage.

[71] I, therefore, take the view that the learned judge was wrong to find that the joint venture agreement was illegal and unenforceable because the "intended activities of the claimant would amount to it acting as a real estate dealer", and that "the claimant's intended actions were tantamount to that of a broker."

DUNBAR GREEN JA (AG)

[72] I too have read, in draft, the judgment of my learned brother Brooks P. I agree with his reasoning and conclusion on both the issues of illegality and uncertainty. Accordingly, I also agree that the appeal should be dismissed.

BROOKS P

ORDER

1. The appeal is dismissed (by majority on the issue of illegality).
2. The judgment and orders of the learned judge handed down on 12 December 2017 are affirmed.
3. Costs of the appeal to the respondent to be agreed or taxed.