

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCMAP2023/0001

BETWEEN:

EXQUISITE HOMES LIMITED

Appellant/Counter-Respondent

and

GEEST INDUSTRIES (ESTATES) LIMITED

Respondent/Counter-Appellant

Before:

The Hon. Mde. Gertel Thom
The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Trevor Ward

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Horace Fraser for the Appellant/Counter-Respondent
Mrs. Cynthia Hinkson-Ouhla for the Respondent/Counter-Appellant

2023: June 19;
2024: February 28.

Commercial appeal – Frustration – Compulsory acquisition by the Crown – Whether the acquisition of the respondent’s lands before the completion of its agreement with the appellant amounted to a frustrating event – Breach of contract – Repudiatory breach – Whether the respondent breached its agreement with the appellant prior to the Crown’s acquisition of its lands – Pleadings – Pleading dishonesty offences – Whether the pleadings sufficiently particularised bribery or secret profit – Costs – Whether the judge was justified in not awarding the successful party their costs

On 16th December 2013, the appellant entered into an agreement to purchase land ("Parcel 314") from the respondent ("the 2013 agreement"). The appellant paid the deposit but failed to comply with their further payment obligations. They also failed to obtain the required approvals from the Development Control Authority ("DCA") before the completion date of the 2013 agreement. The events that followed were that in or around August 2014, the respondent's Managing Director, Mr. Maximilus Johannes informed the Board of Directors that there were nine occupiers on part of Parcel 314. The respondent decided some time after, that the Government should acquire all its lands. In furtherance of their decision, they submitted a proposal to the Government and on 29th March 2019, the Government agreed to acquire their lands.

On 27th June 2019, another agreement was executed between the parties ("the 2019 agreement"), similarly for the sale and purchase of Parcel 314. According to the 2019 agreement, the completion date was 27th July 2019. The appellant had paid the required deposit, however, on 16th July 2019, a declaration for the compulsory acquisition of the respondent's land was gazetted. Following a second publication in the Gazette on 22nd July 2019, the respondent returned the deposit to the appellant.

The appellant consequently commenced an action in breach of contract and unlawful interference with contractual relations. The respondent, who all the while disputed Mr. Johannes' authority to execute the 2019 agreement on their behalf, counterclaimed that Mr. Johannes and the respondent's legal advisor, Mr. George Charlemagne did not receive the required permission from the Board of Directors to contract on its behalf, and they were therefore conspiring to induce the respondent to contract with the intent to injure and cause loss to its business.

The judge found that the 2019 agreement superseded the 2013 agreement. However, even though the 2019 agreement was valid, it was frustrated by the Government's acquisition of Parcel 314 prior to that agreement's completion date, rendering the respondent unable to transfer title and vacant possession. On the counterclaim, the judge found that there was no evidence to support the respondent's assertions. Both the claim and counterclaim were dismissed, and each party was ordered to bear their own costs.

The issues for the Court's determination on appeal were whether the judge erred in finding that the 2019 agreement was frustrated, and whether the judge erred in failing to find that the respondent breached the 2019 agreement prior to the acquisition of Parcel 314. The respondent's counter-appeal concerned the validity of the 2019 agreement. The respondent contended that the judge erred in her treatment of a payment by the appellant of \$75,000.00 to Mr. Johannes, and the survey plan, which the respondent contended, should have been produced and registered by the appellant. The respondent also took issue with the judge's decision to not award them costs, having dismissed the appellant's claim.

Held: dismissing the appeal and directing that the appellant pay the respondent its costs on appeal and in the court below, to be assessed by a judge or master of the court below, such costs on appeal not exceeding two-thirds of the costs below; and dismissing the counter-

appeal save for the issue of costs, directing that the respondent pay the appellant 75% of the costs of the counter-appeal, such costs to be assessed by a judge or master of the High Court, that:

1. According to section 3(3) of the Land Acquisition Act, the procedure by which land is acquired by the Crown is through publication of a declaration to that effect in the Gazette. Upon the second publication of the said declaration, the land vests absolutely in the Crown. Therefore, the respondent's lands became vested absolutely in the Crown upon the second publication of the declaration of compulsory acquisition on 22nd July 2019. The second publication amounted to a frustrating event as it occurred on 22nd July 2019 which was prior to the completion date of the 2019 agreement. The respondent, upon the second publication, was rendered unable to perform its obligation under the 2019 agreement to convey the land to the appellant.

Sections 3 and 4 of the **Land Acquisition Act** Cap. 5.04 of the Revised Laws of Saint Lucia applied; Section 3 of the **Land Acquisition Act** Cap. 228 of the Revised Laws of Barbados considered; **E Johnson & Co (Barbados) Ltd v N S R Ltd** (1996) 49 WIR 27 distinguished.

2. It is settled law that a party to a contract may treat the contract as discharged where the other party has committed a fundamental or repudiatory breach. In the present case, the appellant failed to show evidence that there was such a breach of the 2019 agreement. Firstly, the appellant relied on a letter dated 24th July 2019, informing Mr. Charlemagne that the respondent would not proceed with the 2019 agreement. The Court found that the letter could not lead to a repudiatory breach of the 2019 agreement as it was sent after that agreement was frustrated. The appellant further submitted that since the notice to acquire was published after the 2019 agreement was executed, there must have been an agreement between the Government and the respondent between 27th June 2019 and 16th July 2019. However, the Court found that there was no evidence in support of that contention.

Blairmont Rice Investment Inc. v Kayman Sankar Investments Limited and Others [2021] CCJ 7 (AJ) GY applied; **Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 2 QB 26 applied; **Bunge Corporation (New York) v Tradex Export SA (Panama)** [1981] UKHL 11 applied.

3. The evidence showed that the discussions and proposal between the respondent and the Government happened before the execution of the 2019 agreement. However, the Government only took steps to acquire the lands after the 2019 agreement was executed. This was to no fault of the respondent, because the respondent did not have control over whether the Government would proceed with its decision to acquire its lands.
4. A party who wishes to rely on fraud or dishonest conduct must include such matters in their pleaded case, so that the opposing party would know the case they have to

meet at trial. On its pleaded case, the respondent was counterclaiming in conspiracy to interfere with its business relations; there was no allegation of a bribe or secret profit. Therefore, even though it is not disputed that the appellant paid to Mr. Johannes, \$75,000.00, the respondent led no evidence as to the purpose of that payment.

Three Rivers District Council v Governor and Company of the Bank of England [2001] UKHL 16 applied; **Ramdass v Jairam and Others** [2008] CCJ 6 (AJ) applied; **Joseph v Mangal** [2016] CCJ 22 (AJ).

5. The Court did not find reason to interfere with the judge's finding that, a mutation was completed and a land register was issued for Parcel 314 which reflects a survey plan and that as the vendor, it was primarily the respondent's responsibility to ensure that the land it agreed to sell was with vacant possession. Furthermore, the Court found that in any event the absence of a survey plan in relation to Parcel 314 did not in any way nullify the 2019 agreement. The land to be sold was clearly identified in the schedule to the 2019 agreement.
6. The general rule is that the successful party is entitled to their costs. The Court may in the exercise of its discretion depart from that rule. However, in the instant case, the judge did not give a reason as to why the respondent, as the successful party on the claim, was not awarded their costs. The Court found that the judge erred in the manner in which the issue of costs was treated.

JUDGMENT

- [1] **THOM JA:** The appellant, Exquisite Homes Ltd. ("Exquisite Homes") appeals against the decision of the learned judge dated 29th December 2022 in which the learned judge dismissed its claim against Geest Industries (Estates) Limited ("Geest") for breach of contract and unlawful interference with contractual relations. Geest counter-appeals against the dismissal of its counterclaim against Exquisite Homes for conspiracy to injure and unlawful interference with its business.

Background

- [2] On 16th December 2013, Exquisite Homes and Geest entered into an agreement for the purchase of 52.6 acres of land ("Parcel 314") which was to be dismembered from a larger parcel of land registered as Block 0642 B Parcel 261 situate at Belair, Castries, Saint Lucia, for the sum of \$1,500,000.00 ("the 2013 Agreement"). The purpose for

purchasing the land was to construct a housing scheme for sale to low-income earners. The appellant paid the initial deposit of \$100,000.00 as required.

- [3] The appellant encountered difficulties with obtaining approval from the Development Control Authority (“DCA”) of its Environmental Impact Assessment Study and was also unable to fulfill its contractual obligations to make a further payment of \$100,000.00 within the time stipulated by the 2013 Agreement. By the time approval from the DCA had been resolved, the completion date for the 2013 Agreement had long passed.
- [4] In or about August 2014, Geest’s Managing Director, Mr. Maximilus Johannes (“Mr. Johannes”) informed the Board that he had discovered the presence of nine occupiers on part of Parcel 314. Subsequently, it became known to the parties that the extent of the occupation was much more significant than originally suggested. Notwithstanding the delay and the occupation of part of Parcel 314, Exquisite Homes held the view that the 2013 Agreement was still in force. This was evidenced by Exquisite Homes causing a caution referred to as 2067/2016, to be registered against Parcel 314 in 2016. Geest was however of the view that the 2013 Agreement had been terminated due to Exquisite Homes’ default in making the payments and obtaining the DCA approval timeously. Geest decided that the Government should acquire all of Geest’s lands including Parcel 314. By a letter dated 23rd March 2016, the Government notified Geest of its intention to acquire the remaining lands in Cul-de-Sac by Cabinet Conclusion No. 144 of 2016. This included Parcel 314. In August 2018 the Government invited Geest to submit a proposal to it for the acquisition of the property. On 29th March 2019, Geest was informed that Cabinet had agreed to acquire all of Geest’s lands which included Parcel 314.
- [5] On 27th June 2019, Exquisite Homes and Geest executed another agreement, on different terms, for the sale and purchase of Parcel 314 (“the 2019 Agreement”). Geest disputed Mr. Johannes’ authority to execute the 2019 Agreement on its behalf. The new purchase price was for the sum of \$1,150,000.00 and the completion date was 30 days

after, being 27th July 2019. The appellant paid a deposit of \$500,000.00 in accordance with the 2019 Agreement.

- [6] On 16th July 2019, the Governor General acting on the advice of Cabinet, caused a declaration for the compulsory acquisition of the said parcel of land to be published in the Gazette. The second publication was made on 22nd July 2019. This was before the completion date for the sale of Parcel 314 which was fixed for 27th July 2019.
- [7] Geest subsequently returned the deposit of \$500,000.00 to Exquisite Homes.
- [8] Exquisite Homes instituted proceedings against Geest for damages for breach of contract and unlawful interference with contractual relations. Exquisite Homes alleged that Geest committed a repudiatory breach of the agreement by entering into negotiations with the Government for the acquisition of the land which included Parcel 314 and Geest also caused the Government to interfere with the contract for sale of the land to them.
- [9] Geest in its defence and counterclaim contended that the parties were mistaken that Parcel 314 was available to be sold with vacant possession when the 2013 Agreement was executed; Geest denied that there were any existing contractual relations between it and Exquisite Homes in relation to the 2013 Agreement since the contract had been terminated due to the appellant's failure to fulfil its obligation to pay a deposit of \$100,000.00 by 31st January 2014 and further failed to pay the balance of the purchase price 3½ months after the execution of the Agreement. In relation to the 2019 Agreement, Geest contended that there could be no contractual relations between the parties because the Managing Director, Mr. Johannes and its Legal Advisor, Mr. George Charlemagne ("Mr. Charlemagne"), had no permission from the Board of Directors to enter into the 2019 Agreement.

- [10] Geest counterclaimed against the appellant for damages for conspiracy and unlawful interference with business. It claimed that Exquisite Homes together with Mr. Johannes and Mr. Charlemagne conspired to induce Geest to enter into an agreement which was not in its best interests and with intent to injure and cause loss to its business. Geest contended that Exquisite Homes was fully aware that Geest had no interest in engaging in any business relations with it as evidenced by Geest's letter dated 19th August 2015, where Geest refused an invitation from Exquisite Homes to participate in a joint venture scheme to develop the said Parcel 314. Geest claimed that it was Exquisite Homes who interfered with the business relations between Geest and the Government. Geest also claimed that Mr. Johannes executed the 2019 Agreement on its behalf without the Board's knowledge and consent and with full knowledge that the Cabinet had approved the acquisition of Parcel 314.
- [11] Geest further contended that Mr. Johannes and Mr. Charlemagne, at the time of executing the 2019 Agreement knew that there were nine persons in occupation of parts of Parcel 314 who held overriding interests. Despite being fully aware of this situation, Mr. Charlemagne added the vendor's warranty clause in the 2019 Agreement which provided that the land was being sold free and clear of encumbrances and 'other latent title defects'. This clause was substantially different from the clause in the 2013 Agreement and is alleged to have been added to protect the appellant. Therefore, the respondent contended that the inclusion of this clause in the 2019 Agreement did not adequately protect it against the rights of the occupiers but was included for the appellant's benefit. As this was carried out with the full knowledge of the appellant, this amounted to unlawful interference with the respondent's business interests. It was also stated that the reduction of the sale price from \$1,500,000.00 to \$1,150,000.00 was not in accordance with the best interests of the respondent. The respondent also alleged that it never received the deposit of \$500,000.00 which the appellant claimed to have paid in fulfillment of its deposit obligation and that Mr. Charlemagne had never provided proof of the payment.

- [12] Geest contended that all of this was done to induce Geest to enter into the 2019 Agreement, to deprive it of the business opportunity for the compulsory acquisition of Parcel 314 by the Government, with the intent to injure Geest and as a result Geest suffered loss and damage.

In the court below

- [13] The learned judge identified the following as the issues to be determined: (1) Was the 2013 Agreement still in effect at the time the 2019 Agreement was signed and if so, was it superseded by the 2019 Agreement?; (2) Were the agreements void ab initio on account of mutual mistake by the parties as to the availability of the Belair Lands for sale?; (3) If the agreements were valid, were they subsequently voided on account of impossibility of performance and/or frustration brought about by the acquisition of the lands by the Crown?; (4) If the agreements were valid has Geest caused a repudiatory breach of same?; and (5) Did the appellant conspire with Mr. Johannes and Mr. Charlemagne to interfere with Geest's business relations?
- [14] The learned judge having heard the evidence and submissions of both parties, found that the 2013 Agreement was superseded by the 2019 Agreement. The 2019 Agreement was valid and there was no mutual mistake as the parties were aware of the occupiers on the land prior to the signing of the 2019 Agreement. The learned judge further found that the 2019 Agreement was frustrated by the acquisition of Parcel 314 prior to the completion date of the 2019 Agreement and Geest could therefore not transfer title and vacant possession of Parcel 314 to Exquisite Homes. On Geest's counterclaim, the learned judge found that the evidence did not support Geest's claim of conspiracy by Exquisite Homes, Mr. Johannes and Mr. Charlemagne to interfere with Geest's business relations. Having made the above findings, the learned judge dismissed Exquisite Homes' claim and Geest's counterclaim and ordered each party to bear their own costs.

The appeal and counter-appeal

- [15] Both Exquisite Homes and Geest were dissatisfied with the judge's decision. Exquisite Homes outlined two grounds of appeal. Firstly, the learned judge erred in finding that the 2019 Agreement was frustrated by the acquisition of Parcel 314 by the Crown. Secondly, the learned judge erred in failing to find that Geest had breached the 2019 Agreement prior to the acquisition of Parcel 314 by the Crown.
- [16] Geest outlined nine grounds in its counter-appeal. At the hearing, learned counsel Mrs. Hinkson-Ouhla for Geest, informed the court that Geest would only pursue three issues, being: the learned judge's treatment of the \$75,000.00 paid to Mr. Johannes by Exquisite Homes; the survey plan in relation to Parcel 314 and whether the learned judge erred in failing to grant Geest its costs; and the learned judge having dismissed Exquisite Homes' claim.

Frustration

- [17] The learned judge having considered the cases of **Cook v Taylor**,¹ **Amalgamated Investment and Property Co. Ltd.**,² **James Macara Ltd v Barclay**,³ and **E Johnson & Co (Barbados) Ltd v NSR Ltd**,⁴ concluded that the 2019 Agreement was frustrated by the acquisition of Parcel 314 by the Crown. The learned judge's reasons for so finding are summarised at paragraph 84 of her judgment as follows:

"Applying these principles to the present case, the completion date in the 2019 Agreement was set for 30 days from the date of execution, being 27th July 2019. The compulsory acquisition became final and the land vested in the Crown on the date of the second publication of the Declaration in the Gazette on 22nd July 2019. On the completion date of 27th July 2019 Geest would no longer have been the proprietor of the property with valid title to transfer and could not give vacant possession of Parcel 314 to EHL. In the circumstances the 2019 Agreement was frustrated and would have come to an end. EHL would be entitled to the return of its deposit, which it was confirmed at trial has already been returned."⁵

¹ [1942] Ch. 349.

² [1977] 1 WLR 164.

³ [1945] K.B. 148.

⁴ (1996) 49 WIR 27.

⁵ See pp. 45-46 of the Hearing Bundle.

- [18] Mr. Fraser contended that in so finding the learned judge misinterpreted the above authorities in particular the Privy Council decision in **Johnson v NSR Ltd**.
- [19] Mr. Fraser submitted that the acquisition of Parcel 314 by the Crown after the agreement of sale was executed on 27th June 2019, but before the closing date of 27th July 2019, was not a frustrating event. Relying on paragraphs 6 and 7 of **Johnson v NSR Ltd**, Mr. Fraser argued that the contract for sale having preceded the publication of declaration to acquire, the equitable interest in the property and the risk of acquisition passed to Exquisite Homes. Exquisite Homes was therefore entitled to complete the contract and claim compensation from the Crown. Mr. Fraser also submits that this appeal must be distinguished from **Taylor v Caldwell**,⁶ because there, the parties knew from the beginning that the contract could not be fulfilled. However, in this appeal the acquisition was not a frustrating event, as it did not render performance of the contract radically different from what was undertaken by the parties.
- [20] Mrs. Hinkson-Ouhla, in response, also relied on **Johnson v NSR Ltd** and submitted that the learned judge was correct in finding that the contract was frustrated by the Crown's acquisition of the property prior to the completion date. The sequence of events resulted in Geest being unable to fulfil its obligation under the contract on the date of completion. The acquisition was therefore a frustrating event.

Discussion

- [21] The doctrine of frustration is well settled. Generally, a contract is frustrated where after its formation, events occur which render performance of the contract impossible or illegal.

⁶ [1861-73] All ER Rep 24.

[22] The question on this issue is whether the acquisition of Parcel 314 by the Crown after the contract for sale but before the completion date, frustrated the contract for sale. In other words: did the acquisition by the Crown make it impossible for Geest to perform its obligation under the 2019 Agreement to transfer title to Parcel 314 on 27th July 2019?

[23] Both parties and the learned judge having relied on the case of **Johnson v NSR Ltd**, it is necessary to briefly outline the facts. On 5th July 1989, NSR agreed to purchase a parcel of land from Johnson for \$570,000.00. Completion date was set for 30th September 1989. NSR paid a deposit of \$57,000.00. On 7th September, the Government gave notice under section 3 of the Barbados Land Acquisition Act (“BLA Act”) that the land was likely to be acquired for a public purpose. On 11th October 1989, NSR gave Johnson notice purporting to rescind the agreement on the following grounds:

- (a) Misrepresentation, and
- (b) Frustration due to section 3(1) Notice under the Land Acquisition Act.

[24] Before the Privy Council there were two issues, being:

- (1) Whether the initiation of compulsory purchase procedure after parties have exchanged contracts for sale of land but before the contractual date for completion has the effect of preventing completion of the sale.
- (2) If it does not, what remedies are open to the vendor where the purchaser has refused to complete and the land has subsequently become vested in the acquiring authority.

[25] In considering the first issue, the Privy Council examined sections 3, 4 and 5 of the BLA Act. They read as follows:

- “3(1) Whenever it appears to the Minister that any land is likely to be required for any purposes for which the Crown is authorised by any Act to acquire land or for any purposes which, in the opinion of the Minister, are public purposes, a notification to that effect shall be published in three successive issues of the Official Gazette and of a daily newspaper in this Island under the hand of the Permanent Secretary to the Minister.
- (2) Thereupon it shall be lawful for the Chief Surveyor to do all or any of the following things, that is to say – (a) to enter upon and survey and take levels of any land in any locality to which the public purposes relate; (b) to dig or bore into the sub-soil of such land; (c) to do all other acts necessary to ascertain

whether the land is adapted to such purposes; ... (h) to do all such other acts as may be incidental to or necessary for any of the purpose aforesaid.

(3) ...

(4)(1) When the notification mentioned in section 3 has been published in relation to any land it shall be lawful for the Governor-General to authorize the Chief Surveyor, without waiting for the formal vesting of the land in the Crown, to do any work on the land connected with the use to which the land is intended to be put on acquisition and thereupon the Chief Surveyor may proceed with such work accordingly...

(5)(1) Whenever the Minister has decided, with the approval of both Houses, that any land should be acquired it shall be lawful for the Governor-General whether all or any of the powers conferred by section 3 have been exercised or not, by notification published in the Official Gazette and in a daily newspaper in this Island to declare the land to have been acquired for any of the purposes mentioned in section 3.

5 (2) A notification published in the Official Gazette under subsection (1) shall describe the land with precision, either in words or by reference to a map or plan which shall be kept at the office of the Chief Surveyor and shall be open to inspection by the public, and shall be conclusive evidence that the land is required for the public purposes stated therein and upon the publication of the notice as aforesaid, the land shall vest absolutely in the Crown free from all estates, liens and encumbrances..."

[26] The Privy Council reasoned that the publication of a section 3 notice had a three-fold effect as follows:

"...(1) it is a warning that the land is likely to be required for Crown purposes; (2) it empowers the Chief Surveyor to enter on the land for certain limited purposes (none of which involves taking possession of the land or any part thereof); and (3) it enables the Governor-General to authorise, under section 4, the Chief Surveyor to do work on the land before it vests in the Crown by publication of a section 5 notice. However, it provides no certainty that the land will be acquired and section 9 makes provision for abandonment of the compulsory purchase procedure at any time before payment of compensation.

[27] Having considered the three-fold effect of the section 3 notice, the Privy Council found that a section 3 notice did not render the obligation to give vacant possession 'incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract'.

[28] The Privy Council identified the question at paragraph 8 of the judgment to be, 'whether the possession which Johnsons were able to give on 30th September 1989 was something other than 'vacant possession' within the meaning of the contract'.

[29] In answering the question, the Privy Council considered the cases of, **Cook v Taylor**,⁷ **James Macara Limited v Barclay**⁸ and **Re Winslow Hall Estates Company v United Glass Bottle Manufacturers, Limited's Contract**⁹ which are cases that involved requisition of land under regulation 51(1) of the Defence (General) Regulation's 1939.¹⁰ The Privy Council opined that '...the issue was whether the acquiring authority had possession or the right to immediate possession on the completion date. When it had, the vendor could not then give vacant possession.' Applying this principle, the Privy Council in **Johnson v NSR Ltd** found that the Crown had no right to immediate possession on 30th September 1989 and there was no certainty that at that date it would even seek to acquire such a right. Therefore, Johnson was in a position to give vacant possession of the land to NSR on 30th September 1989. The section 3 notice was not a frustrating event. Consequently, NSR was in breach when they purported to rescind the contract on 11th October 1989.

[30] I turn now to the relevant provisions in the **Land Acquisition Act**.¹¹ They are sections 3 and 4. They read as follows:

"3. Acquisition of Land

- (1) If the Governor General considers that any land should be acquired for a public purpose he or she may cause a declaration to that effect to be made in the manner provided by this section and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose.
- (2) Every declaration shall be published in 2 ordinary issues of the Gazette and copies thereof shall be posted on one of the buildings (if any) on the land or exhibited at suitable places in the locality in which

⁷ [1942] Ch. 349.

⁸ [1945] K.B. 148.

⁹ [1941] Ch. 503.

¹⁰ S.R. & O. 1939 No. 927.

¹¹ Cap. 5.04 of the Revised Laws of Saint Lucia.

the land is situate, and in the declaration shall be specified the following particulars in relation to the land which is to be acquired-

- (a) the parish or district in which the land is situate;
 - (b) a description of the land, giving the approximate area and such other particulars as are necessary to identify the land;
 - (c) in cases where a plan has been prepared, the place where, and the time when, a plan of the land can be inspected;
 - (d) the public purpose for which the land is required.
 - (e)
- (3) Upon the second publication of the declaration in the Gazette as aforesaid the land shall vest absolutely in the Crown.
- (4) This section does not prevent the acquisition of lands for public purposes by private treaty.

4. Preliminary notification and power to enter land.

If it appears to the Governor General that any land is likely to be required for any purpose which, in the opinion of the Governor General, is a public purpose and it is necessary to make a preliminary survey or other investigation of the land, he or she may cause a notification to that effect to be published in the Gazette and thereupon it shall be lawful for the authorised officer (and his or her agents, assistants and workmen) to do all or any of the following things, that is to say..."

[31] Section 3 of the **Land Acquisition Act** of Saint Lucia is the equivalent of section 5 of the BLA Act, while section 4 of the **Land Acquisition Act** of Saint Lucia is the equivalent of section 3 of the BLA Act.

[32] In this appeal, there were two publications pursuant to section 3 of the **Land Acquisition Act**. The first publication was on 16th July 2019 and the second publication was on 22nd July 2019. Upon the second publication, the land became vested absolutely in the Crown in accordance with section 3(3). This vesting of Parcel 314 in the Crown was prior to the completion date for the sale to Exquisite Homes, which was fixed for 27th July 2019. Thus, on the completion date, Geest was no longer the owner of Parcel 314, and therefore it became impossible for Geest to perform its obligations under the contract for sale to convey the land to Exquisite Homes.

[33] In **Johnson v NSR Ltd**, there was only publication under section 3 of the BLA Act. The Privy Council was therefore concerned with the effect of section 3 of the BLA Act. Indeed, at the commencement of the judgment, Lord Jauncey who delivered the decision of the Privy Council, in identifying the broad questions raised in the appeal, identified the first question as: 'whether the initiation (emphasis mine) of compulsory purchase procedure after parties have exchanged contracts for sale of land but before the contractual date for completion has the effect of preventing completion of the sale.' A section 3 notice under the BLA Act only initiated the acquisition process. In this appeal, there was publication of the notice pursuant to section 3 of the **Land Acquisition Act** which vested ownership of the land in the Crown. The acquisition of the land pursuant to section 3 of the Act prior to the completion date was a frustrating event as Geest became unable to perform its obligations under the contract to grant title with vacant possession.

[34] For these reasons, I agree with the finding of the learned judge in paragraph 84 of the judgment.

Repudiatory Breach

[35] The learned judge having found that the 2019 Agreement was frustrated, determined that whether Geest had repudiated the 2019 Agreement was moot.

[36] Mr. Fraser submitted that the learned judge fell into error in treating the issue in the way she did. He contended that Geest breached the 2019 Agreement in that: (a) Geest refused to honor the validity of the 2019 Agreement alleging that Mr. Johannes did not have authority to enter into the 2019 Agreement; (b) by entering into an agreement with the Government for Parcel 314 to be acquired by the Crown; (c) by entering into the 2019 Agreement when they were not in a position to perform their obligations; and (d) returning the deposit of \$500,000.00. Mr. Fraser submitted that the effect of these actions of Geest was a repudiatory breach of the 2019 Agreement.

- [37] In support of his contention that the actions of Geest amounted to a repudiatory breach, Mr. Fraser relied on the following passage in **Professor Treitel's: The Law of Contract**:¹² 'A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing...'.
- [38] Mrs. Hinkson-Ouhla in response submitted that Exquisite Homes's submission of repudiation is not supported by the evidence. Learned counsel referred to the evidence of Ms. Rapier where she testified that as far back as 2010, the Government had expressed interest in acquiring Geest's lands which included Parcel 314 and agreement for acquisition of the lands including Parcel 314 was reached prior to the 2019 Agreement.
- [39] Mrs. Hinkson-Ouhla further submitted that Exquisite Homes had not produced any evidence to support its allegations that after the execution of the 2019 Agreement on 27th June 2019, Ms. Rapier or any of Geest's officers agreed with the Government to acquire Geest's lands including Parcel 314.

Discussion

- [40] It is settled law that a party to a contract may treat the contract as discharged where the other party has committed a fundamental or repudiatory breach. The approach to determine whether a breach amounts to a repudiatory breach is also well settled. The principles were referred to by Lord Wilberforce in **Johnson v NSR Ltd** and more recently in the Caribbean Court of Justice decision in **Blairmont Rice Investment Inc. v Kayman Sankar Investments Limited and Others**.¹³

¹² 11th Edn, pp. 832.

¹³ [2021] CCJ 7 (AJ) GY.

[41] In **Blairmont Rice Investment**, Burgess JCCJ examined the two approaches – the traditional approach and the modern approach. Having considered several cases including the cases of: **Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd**,¹⁴ and **Bunge Corporation (New York) v Tradax Export SA (Panama)**¹⁵ Burgess JCCJ summarised the principles as follows:

“[41] In our judgment it is important to underline that the *Hong Kong Fir* principle is only applicable where the term in question is of a “complex” character, which cannot be categorised as being a “condition” or “warranty”. Such a term is one where it can be seen in advance that the breaches of that term that might occur may be various: they might be extremely trivial, or they might be extremely grave. Thus, it would be impossible to ascribe to such a term, in advance, the character of a condition or warranty.

[42] We agree with Lord Wilberforce’s statement in *Bunge Corporation* that the *Hong Kong Fir* principle does not apply by considering the breach actually committed, and then deciding whether that breach would substantially deprive the innocent party of substantially the whole of the benefit of the contract. In our view, the focus must be on whether the parties expressly or impliedly intended that the legal effect of the breach would depend on the gravity of the consequences of the breach. If the effect of the breach is so serious as to strike fundamentally at the purpose of the contract, then it will be treated as repudiatory, in the same way as if it were a breach of a condition; if it is less serious, it will give rise to a remedy for damages only, in the same way as a breach of warranty. This way, the *Hong Kong Fir* approach upholds the agreement of the parties without compromising certainty of outcome while allowing the court to have regard to the justice of the case.

[43] The *Hong Kong Fir* approach to determining repudiatory breaches has long passed into the *corpus* of contract law, as understood and practiced in the Commonwealth Caribbean. It was accepted and applied by the Barbados Court of Appeal in *System Sales Ltd v Oxley and Suttle* but has never been considered by this Court. In those circumstances, it behoves us to say that we accept the *Hong Kong Fir* approach. That approach faces off the traditional policy of the law which seeks to promote certainty of outcome through the classification of terms as either conditions or warranties, against an approach which encourages contractual performance, and which favours restriction of the right to repudiate to cases where the consequences of breach result in serious prejudice.”

¹⁴ [1962] 2 QB 26.

¹⁵ [1981] UKHL 11.

[42] There is no dispute as it relates to the above principles on repudiatory breach. The contention relates to the learned judge's application of the principles. In order to succeed, Exquisite Homes was first required to show that there was evidence of breach of the 2019 Agreement. This proved to be an insurmountable task for Exquisite Homes. I will deal with the issues in the same order in which they are outlined above.

A – Geest's refusal to honor the 2019 Agreement

[43] Mr. Fraser submitted that Geest refused to honor its obligations under the 2019 Agreement to complete the sale to Exquisite Homes, claiming that neither Mr. Johannes nor Mr. Charlemagne had authority to enter into any agreement on behalf of Geest. This was evidenced in Ms. Rapier's letter to Mr. Charlemagne.

[44] Indeed, Geest did contend as part of its defence that neither Mr. Johannes nor Mr. Charlemagne had authority to enter the 2019 Agreement on behalf of Geest. Ms Rapier testified that the Directors were not aware of the 2019 Agreement until around 2nd July when Mr. Charlemagne brought it to their attention. However, both Mr. Rapier and Ms. Rapier also testified that based on representation from Mr. Charlemagne, the Directors agreed that it was better to sell Parcel 314 to Exquisite Homes because of the availability of funds from Exquisite Homes in comparison to the likely delay from the Government.

[45] Mr. Fraser referred to the letter dated 24th July from Ms. Rapier to Mr. Charlemagne informing him that Geest would not proceed with the 2019 Agreement. This letter was after the 2019 Agreement was frustrated by the acquisition of Parcel 314 by the Crown. It therefore could not lead to a breach of the 2019 Agreement. The letter was of no moment.

B – Entering into agreement with the Government for the Crown to acquire Parcel 314

- [46] Mr. Fraser submitted that since the notice to acquire was published after the 2019 Agreement was executed on 27th July 2019, there must have been an agreement reached by the Government and Geest between 27th June 2019 and 16th July 2019 when the notice of acquisition was published. In paragraph 3.6 of Mr. Fraser's submissions, he stated '...[i]n the case at bar, it was the Respondent who approached the government to acquire the subject land with full knowledge that it was the subject of an agreement for sale – this was a repudiatory breach of the agreement. Further, at paragraph 4.1 he stated '...[t]hese are acts of bad faith suggestive of fault on the part of the Respondent in that (i) they rejected the contract (ii) negotiated with the Cabinet of Ministers for the land to be compulsory (sic) acquired. These were events which speak to a repudiatory breach of contract'.
- [47] There was no evidence before the learned judge in support of Mr. Fraser's submissions. Mr. Fraser was unable to refer this Court to any such evidence but urged the Court to so find based on the sequence of events. The sequence of events as borne out by the oral and documentary evidence do not support Mr. Fraser's submissions. The evidence is that in August 2018, telephone discussions were held between Ms. Rapier and Senator Isaacs of the Government's desire to acquire Parcel 314 and Ms. Rapier was invited to submit a proposal which she did requesting three million dollars (\$3,000,000.00) for the Geest lands including Parcel 314. Ms. Rapier confirmed Geest's proposal by letter dated 24th January 2019. On 11th March 2019, Ms. Rapier was notified of the decision of the Cabinet approving the acquisition of the Geest lands including Parcel 314. On 19th March 2019, Ms. Rapier was notified by letter that Geest's proposal was accepted by the Cabinet. All of these events occurred prior to the execution of the 2019 Agreement. The 2019 Agreement was not executed until 27th June 2019. I agree with Mrs. Hinkson-Ouhla's submission that there was no evidence before the learned judge that Ms. Rapier or any of Geest's officers approached the Government with a view for the Government to acquire Parcel 314 after the 2019 Agreement was executed. The

discussions and proposal were before the 2019 Agreement was executed. Mr. Fraser's submissions are based purely on speculation. They are not supported by the evidence.

C – Geest entered into the 2019 Agreement when they were not in a position to perform the obligation under the Agreement

[48] Mr. Fraser submitted that as a result of the arrangement that Geest had with the Government for the acquisition of Parcel 314, when Geest entered into the 2019 Agreement, they were not in a position to perform their obligation under the terms of the 2019 Agreement.

[49] In my view, the sequence of events in the evidence does not support Mr. Fraser's submissions. While the Cabinet had decided in March 2019 to acquire Geest's lands including Parcel 314, no steps were taken in accordance with the provisions of the **Land Acquisition Act** to acquire the lands. Indeed the first publication pursuant to section 3 was not made until 16th July 2019 and the second publication on 22nd July 2019. Both publications were after the 2019 Agreement was executed. Geest had no control over whether the Government would proceed with its decision made in March 2019. It must be borne in mind that the evidence shows that the discussion for Government to acquire Geest's lands date back to 2010.

D – Return of the \$500,000.00

[50] Mr. Fraser submitted that the effect of Geest returning the \$500,000.00 deposit, deprived Exquisite Homes of the right to seek compensation from the Crown. Learned counsel contended that the 2019 Agreement having been executed on 27th June 2019, the equitable interests in the property passed to Exquisite Homes. Therefore, had Geest completed the 2019 Agreement, Exquisite Homes would have been able to seek compensation from the Government. Geest, by returning the \$500,000.00 deposit to Exquisite Homes, deprived Exquisite Homes from seeking compensation from the Government.

- [51] The evidence shows that on 24th July 2019 Ms. Rapier instructed Mr. Charlemagne to return the deposit to Exquisite Homes. It must be noted that this was after the land was acquired and vested in the Crown. After 22nd July 2019 when the land was vested in the Crown, Geest could not complete the contract for sale. Geest not being able to complete the sale, was required to return the deposit. This ground of appeal also fails.

Counter-appeal

- [52] While Geest outlined nine grounds in its notice of counter-appeal, at the hearing Mrs. Hinkson-Ouhla pursued a single issue being the validity of the 2019 Agreement. Learned counsel submitted that the learned judge erred in two respects in finding the 2019 Agreement valid. Firstly, in her treatment of the payment of \$75,000.00 to Mr. Johannes, and secondly her treatment of the absence of a survey plan in relation to Parcel 314.

Payment of \$75,000

- [53] It is not disputed that Exquisite Homes paid \$75,000.00 to Mr. Johannes. At this time, Mr. Johannes was the Managing Director of Geest. It is also not disputed that Geest was not informed of the payment to Mr. Johannes. Payment of the \$75,000.00 is included in Exquisite Homes' accounts of expenditure for the purchase of Parcel 314. This document formed part of the exhibits adduced by Exquisite Homes before the learned judge.

- [54] The learned judge in her judgment at paragraph 88 found as follows:

"Mrs. Ouhla submits further that EHL committed the tort of conspiracy to interfere with Geest business relations. It is unclear which tort Counsel refers to, as the evidence has not established either the cause of action of inducing breach of contract, or unlawful interference with economic interest. In relation to the former, it is suggested that EHL induced Mr. Johannes to breach his employment contract, but it has not been stated what breach was committed of what provisions, or how EHL induced him to do so. It has not been shown that the monies paid were not legitimate sums and this cannot be assumed simply because Geest's Directors were

unaware of the sums paid, or did not consent to the payment, or that Mr. Johannes was employed by Geest and not EHL. Thus, this claim must fail.”¹⁶

- [55] Mrs. Hinkson-Ouhla submitted that based on the evidence that was before the learned judge, the learned judge should have found that the payment amounted to a bribe. Exquisite Homes gave no explanation for the payment. Mr. Johannes proceeded to execute the 2019 Agreement while being aware that the Government had by email dated 19th March 2019 accepted the Board’s proposal for the acquisition of Geest’s lands. This, Mrs. Hinkson-Ouhla submits was dishonest conduct by Mr. Johannes. Mr. Johannes as Director had a fiduciary duty of loyalty and confidentiality to Geest. Since an agent has a responsibility to act within his mandate and in the best interest of his principal this meant that Mr. Johannes had no authority to enter into the 2019 Agreement on behalf of Geest. Learned counsel relied on the following passage in the case of **Hovenden & Sons v Millhoff**¹⁷ where Romer LJ stated that:

“If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent’s principal and that gift is secret as between the donor and the agent - that is to say, without the knowledge and consent of the principal - then the gift is a bribe in the view of the law.”

Mrs. Hinkson-Ouhla also relied on the case of **Bristol and West Building Society v Mothew**.¹⁸

- [56] Mr. Fraser in response submitted that the issue of the \$75,000.00 being a secret profit was not one of the five issues the parties agreed to be determined by the judge and indeed it was not one of the issues identified by the learned judge in paragraph 17 of the judgment. Rather it arose during cross-examination. Critically, Geest did not lead any evidence to prove that Exquisite Homes paid Mr. Johannes a bribe or a secret profit in relation to the 2019 Agreement.

¹⁶ See p. 47 of the Hearing Bundle.

¹⁷ [1900-03] All ER Rep 848.

¹⁸ [1998] Ch. 1.

Discussion

[57] The record shows that this issue only arose during cross-examination. Geest did not lead any evidence on this issue. It was not part of Geest's pleaded case. Before the learned judge there was no evidence of the reason or purpose for the payment. The learned judge was being asked to draw an adverse inference on the fact that a payment was made to Mr. Johannes, the reason and purpose for the payment were not known and the terms in the 2019 Agreement were more favorable to Exquisite Homes than the terms in the 2013 Agreement. Geest's pleaded case was a claim for damages for conspiracy to interfere with Geest's business relations. There was no allegation of a bribe or secret profit. A party who wishes to rely on fraud or dishonest conduct must include such matters in their pleaded case, so that the opposing party would know the case they have to meet at trial. They must include the particulars of the dishonesty which will be relied upon at trial to justify an inference of dishonest conduct. This principle was outlined in several cases including: **Three Rivers District Council v Governor and Company of the Bank of England**,¹⁹ **Ramdass v Jairam and Others**,²⁰ and **Joseph v Mangal**.²¹ Geest not having included this issue in its pleaded case, it was not open to the learned judge to draw an adverse inference against Exquisite Homes when in fact Exquisite Homes did not have an opportunity to answer the allegation as it was not part of Geest's pleaded case. In **Hovenden & Sons** on which Geest relies, bribery was specifically pleaded in the claimant's pleaded case. This ground also fails.

Survey Plan

[58] Learned counsel Mrs. Hinkson-Ouhla submitted that during the trial it became evident from the evidence that there was no survey plan in relation to Parcel 314. It was the responsibility of Exquisite Homes to produce the survey plan. The survey plan of Parcel 314 was never registered. Exquisite Homes provided no reasons to the learned judge why it was unable to provide a copy of the survey. The inference is that there never was

¹⁹ [2001] UKHL 16.

²⁰ [2008] CCJ 6 (AJ).

²¹ [2016] CCJ 22 (AJ).

any survey conducted in relation to Parcel 314. If a survey was conducted it would have revealed that parts of the lands were occupied. Further, the DCA had already given approval for a subdivision in relation to the lands.

- [59] Mr. Fraser in response submitted it was not a term of the 2019 Agreement for Exquisite Homes to provide a survey plan. Such term was included in the 2013 Agreement. Further in the second schedule of the 2019 Agreement, Parcel 314 is given a full description with its boundaries clearly defined.

Discussion

- [60] The learned judge addressed this issue at paragraph 62 of her judgment as follows:

“In the circumstances I am unable to find on a balance of probabilities that the survey was not done, as a mutation was completed and a land register was issued for Parcel 314 which reflects survey plan No. C12512 R. In any event, both parties were fully aware at that time, of the presence of the occupiers. Mr. Rapier gave extensive evidence about the body of information and records kept by Geest, which was accessible to himself and Ms. Rapier as directors, and Mr. Johannes as the Managing Director who executed both agreements on Geest’s behalf. As the vendor, it was primarily Geest’s responsibility to ensure that the land it agreed to sell with vacant possession was in fact available to be sold and that it had and could transfer good title. Geest cannot now seek to cast blame, for overlooking the information that it always had. I therefore conclude that this complaint has no merit.”²²

- [61] I can find no fault with the judge’s reasoning. Mrs. Hinkson-Ouhla’s submission that the survey plan referenced by the learned judge was the survey plan of the larger portion of land which included Parcel 314 is of no moment. The absence of the survey plan did not in any way nullify the 2019 Agreement. The land to be sold was clearly identified in the schedule to the 2019 Agreement. The absence of a survey plan did not impact the validity of the 2019 Agreement.

²² See p. 36 of the Hearing Bundle.

Costs

- [62] The learned judge having dismissed the claim and counterclaim ordered that each party bear their own costs. Mrs. Hinkson-Ouhla contended that the learned judge, having dismissed the claim, should have awarded costs to Geest, Geest being the successful party.
- [63] Mr. Fraser submitted in response that both the claim, and the counterclaim having been dismissed, the learned judge properly exercised her discretion in ordering each party to bear their own costs.
- [64] There is no general rule that where a claim and counterclaim are dismissed each party must bear their own costs. The general rule is that the successful party is entitled to his or her costs. The Court may in the exercise of its discretion depart from the general rule.
- [65] The learned judge gave no reason why the successful party was not awarded its costs. The learned judge simply stated in paragraph 3 of her order that: '[t]he parties will each bear their own costs.' The learned judge erred in the manner in which she treated with the issue of costs.

Conclusion

- [66] For the reasons stated above, the appeal and the counter-appeal are unmeritorious save for the issue of costs in the counter-appeal and are accordingly dismissed.

Costs on Appeal

- [67] The appeal having been dismissed, Geest is entitled to its costs. Likewise, the counter-appeal having been dismissed save for the issue of costs, Exquisite Homes is entitled to 75% of its costs.

Order

[68] The order of the Court is as follows:

- (1) The appeal is dismissed.
- (2) The appellant shall pay the respondent its costs on the appeal and in the court below. The costs are to be assessed by a judge or master of the court below. The costs on appeal shall not exceed two-thirds of the costs below.
- (3) The counter-appeal is dismissed save for the issue of costs.
- (4) The respondent shall pay the appellant 75% of the costs of the counter-appeal, such costs to be assessed by a judge or master of the High Court.

I concur.
Vicki-Ann Ellis
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar