

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2020/0006

BETWEEN:

EXQUISITE HOMES LIMITED

Claimant

And

GEEST INDUSTRIES (ESTATES) LIMITED

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mrs. Cynthia Hinkson-Ouhla with Ms Natalie DaBreo, for the Claimant
Mr. Horace Fraser, for the Defendant

2022: May 31;
June 1; 28;
December 29

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** This is a claim by Exquisite Homes Limited (“EHL”) against Geest Industries (Estates) Limited (“Geest”) for damages in the sum of \$14,148,747.00 for breach of contract and unlawful interference with contractual relations.

- [2] EHL claims that Geest committed a repudiatory breach of the contract between them for the sale of land by Geest to EHL, by entering negotiations with the Government of Saint Lucia (“the Government”) for the compulsory acquisition of the said land, which was subsequently acquired. Further, EHL alleged that Geest caused the Government to interfere with the said contract for sale of land between them.
- [3] Geest defended the claim alleging that the parties were of the mistaken view that the parcel of land was available to be sold with vacant possession. Further, Maximilus Johannes (“Mr. Johannes”) and George Charlemagne (“Mr. Charlemagne”) then its Managing Director and Attorney-at-Law respectively did not have permission or authority to enter into the agreement for sale and were aware of Geest’s ongoing negotiations with the Government for compulsory acquisition of all Geest’s lands. EHL was also fully aware of the said negotiations and wrongfully executed the agreement for sale. Geest’s position is that there are no contractual relations between itself and EHL, and as such there can be no repudiatory breach of contract.
- [4] The claim was originally filed against Geest and the Attorney General, but subsequently discontinued against the Attorney General. Geest had also filed an ancillary claim against Mr. Johannes and Mr. Charlemagne, for breach of fiduciary duty and wrongful interference with its business interests, however, the ancillary claim was dismissed as a nullity, due to the failure to properly file and commence the purported ancillary claim.

The Pleadings

EHL’s Claim

- [5] EHL’s case is that on 16th December 2013, an agreement was executed with Geest to purchase approximately 52.6 acres or 21.29 hectares of land, to be dismembered from the portion of land registered as Parcel No. 0642B 261 (“Parcel 261”) in Belair, Castries, for \$1,500,000.00 (“the 2013 Agreement”). The purpose was to construct a housing development with necessary infrastructure, for sale to low income earners. EHL encountered difficulty in obtaining approval of its Environmental Impact Assessment

("EIA"), with the result that it was unable to fulfill its contractual obligations under that agreement, within the stipulated time. On 27th June 2019, acting on the mistaken view that the 2013 Agreement was no longer in effect, the parties executed another agreement for EHL to purchase the said land, then registered as Parcel No. 0642B 314 ("Parcel 314" or "the Belair Lands"), for \$1,150,000.00 ("the 2019 Agreement"). EHL was required to pay a deposit of \$500,000.00, and complied. Thereafter a caution was registered against the land, as notice of EHL's interest, to the world at large.

- [6] EHL avers that it was required by law to seek approval from several governmental agencies as early as 2014, and did so, in order to obtain the approval of the Development Control Authority ("DCA") for construction of the development. It also applied for a change of land use from agricultural to residential in January 2015 and received that approval in 2018. Further, it incurred expenditure on the production of plans, designs, business planning consultancy, project planning constructability and analysis, and administrative and other costs in connection with the proposed development.
- [7] It is alleged that despite this, in July 2019 Geest approached the Cabinet of Ministers and commenced negotiations for the compulsory acquisition of all its lands, including Parcel 314. The Chief Surveyor, who was appointed as the authorized officer to advise the Cabinet of Ministers on all aspects of acquisitions had actual knowledge of the contractual relationship between EHL and Geest, therefore the Cabinet of Ministers are imputed with such knowledge. Nonetheless, on 8th July 2019 the Governor General, acting on the advice of the Cabinet of Ministers, issued a Declaration of Acquisition for the compulsory acquisition of all lands owned by Geest ("the Declaration").
- [8] EHL says that Geest caused the Cabinet of Ministers to interfere with their contractual relations, by advising the Governor General to issue the Declaration for compulsory acquisition of Parcel 314. Further, the acquisition was contrary to the Land Acquisition Act as it was done to bail Geest out of financial trouble, and has caused EHL to suffer economic loss. Further, the authorized officer has failed to recognize or engage EHL regarding its interest in Parcel 314. EHL states that Geest's actions in inviting and negotiating the compulsory acquisition amounts to a repudiatory breach of the contract.

Geest's Defence and Counterclaim

- [9] Geest admits that it entered into the 2013 Agreement and was aware that EHL intended to construct a housing development on the land. It is denied that there was any mistaken view concerning the status of the 2013 Agreement as EHL not only breached its obligation to pay \$100,000.00 on 31st January 2014 but further breached that agreement by failing to pay the balance of the purchase price three and a half months after execution, as stipulated therein. Further, securing planning permission was not a condition of the 2013 Agreement. Geest asserts that as a result EHL forfeited its deposit, and the contract was terminated. Alternatively, it is averred that the parties were of the mistaken view that the land was available to be sold with vacant possession, as it was subject to an approved subdivision, and the overriding interests of occupiers who had partly paid the purchase price for the occupied properties. The contract was therefore impossible to perform from the outset.
- [10] Regarding the 2019 Agreement, Geest alleges that Mr. Johannes, neither sought nor received permission from the Board before executing same. Further, Mr. Charlemagne sought to induce Geest to accept the terms of that agreement by representing to the Board that the 2019 Agreement was a *fait accompli*, that it had the approval and backing of the Government, and that EHL had paid him a deposit of \$500,000.00 towards the purchase price. Upon discovering that these statements were false, the Board refused to proceed with the 2019 Agreement.
- [11] Geest asserts that EHL, Mr. Johannes and Mr. Charlemagne, at all material times, knew or ought to have known that the Government had agreed to acquire Parcel 314, and that the negotiations with Government began as far back as 2010. In March 2016, the Permanent Secretary in the Ministry of Physical Development, by a letter erroneously dated 23rd March 2015 had informed Mr Johannes that by Cabinet Conclusion No. 144/2016, Cabinet had agreed to acquire in the public interest, all the remaining lands owned by Geest, situated at Cul-de-Sac. Also, by letter dated 24th January 2019, Geest confirmed its intention by proposing to the Government that all the lands be acquired, including Parcel 314. Cabinet approved the acquisition of the lands on 11th March 2019, and thereafter the

Governor General issued the Declaration dated 8th July 2019¹, which was published in the Gazette on 16th and 22nd July 2019. The final publication of the notice of acquisition on 22nd July 2019 would have served to frustrate any agreement for sale, and relieved EHL and Geest of any obligations which would have arisen under the 2019 Agreement.

[12] Additionally, Geest avers that it has no knowledge of the caution registered by EHL. If it was registered over Parcel 314 in 2016, there were no contractual relations between them, at that time, since the 2013 Agreement had elapsed. As Cabinet had already taken a decision to acquire the property in March 2016, placing of a caution over Parcel 314 was without legal authority, in bad faith, and interfered with Geest's business interests. Geest contends that EHL was fully aware of the ongoing negotiations with the Government and wrongfully executed the 2019 Agreement with Mr. Johannes. Further, EHL, Mr. Johannes and Mr. Charlemagne were all fully aware that the Board had not approved the 2019 Agreement, and there was no Board Resolution authorizing same, the absence of which is apparent from the document. Prior to this, by email dated 2nd August 2015, EHL had written to Geest's Managing Director extending an invitation to participate in a joint venture scheme to develop Parcel 314. The proposal was flatly refused, and thereafter EHL sought to enter a new agreement, knowing that the Government had already taken a decision on 11th March 2019, to acquire Parcel 314.

[13] Geest further says that when the 2019 Agreement was executed Mr. Johannes and Mr. Charlemagne were seemingly operating under the premise that nine people with overriding interests were in occupation of parts of Parcel 314. Further, EHL, through the conduct of its survey and EIA, ought to have known that Parcel 314 was already a DCA approved subdivision. It is for these reasons that Mr. Charlemagne added the vendor's warranty clause in the 2019 Agreement, which stated that the property is sold free and clear of encumbrances and "*other latent title defects*". This clause differed substantially from the vendor's warranty clause in the 2013 Agreement and was added to the 2019 Agreement to protect EHL. The Board expressed concern regarding whether this clause adequately protected Geest and Mr Charlemagne insisted that it would. However, upon obtaining

¹ Exhibited together as AS11

further legal advice, the Board understood that the clause did not offer Geest any legal protection against the rights of the occupiers. Geest asserts that the inclusion of the clause in these circumstances, amounts to a breach of Mr. Johannes and Mr. Charlemagne's fiduciary duty to act in Geest's best interest. As this was carried out with the knowledge of EHL, it amounts to unlawful interference with Geest's business interests.

- [14] Additionally, Geest says, the sale price in the 2019 Agreement was lower than the 2013 Agreement, which was reduced from \$1,500,000.00 to \$1,150,000.00. Geest avers that it never received the alleged deposit of \$500,000.00 which EHL claims to have paid in fulfillment of its obligation under the 2019 Agreement and Mr. Charlemagne has never provided proof of receipt of such payment. As there were no existing contractual relations, there could be no repudiatory breach of contract as alleged, and the compulsory acquisition has not caused EHL any economic loss. Further, that it was EHL, Mr. Johannes and Mr. Charlemagne who conspired with each other to induce Geest to enter the 2019 agreement to deprive it of the business opportunity for compulsory acquisition of Parcel 314, with intent to injure Geest, as a result of which Geest suffered loss and damage.

EHL's Reply to Defence and Defence to Counterclaim

- [15] EHL states that Geest entered into both agreements in bad faith knowing that it was also negotiating with the Government of Saint Lucia from 2010 to acquire the land. Further, that Geest waived its right to accept any breach of the 2013 Agreement and that no notice of acceptance of such breach or termination of the agreement was issued by Geest. EHL alleges that vacant possession of Parcel 314 was possible from inception of the 2013 agreement and remained throughout, as Geest had full knowledge of the interest of occupiers and the approved subdivision of the property, and gave its undertaking to have the occupants removed for the land. Therefore, Geest is barred from now raising impossibility as a defence.
- [16] With respect to the 2019 Agreement, the failure of the Board to approve same cannot be relied upon by Geest to negate the rights of EHL, as this is prohibited under the

Companies Act. EHL puts Geest to strict proof that it was aware of the negotiations with the Government, or that it was aware of Geest's internal decision-making process. EHL also avers that registration of a caution does not disturb title to land and could not interfere with Geest's business interest. Therefore, any claim for interference with its business relations with the Government is unmeritorious, since compulsory acquisition is a legislative and not a contractual process, which was completed when the acquisition was advertised in the Gazette, and resulted in no loss to Geest.

The Issues

[17] The issues to be determined are as follows: -

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?
5. Did EHL conspire with the Mr. Johannes and Mr. Charlemagne to interfere with Geest's business relations?

Issue 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?

[18] Mr. Akhnaton St. Rose and Ms. Kayannie Hippolyte testified on behalf of EHL that in December 2013, the 2013 Agreement was executed to purchase approximately 52.6 acres or 21.29 hectares of land, to be dismembered from Parcel 261 at Belair. Payments totaling \$260,000.00 were made toward the purchase price, however, EHL encountered difficulty in obtaining DCA approval of their EIA and by the time this was resolved in September 2017,

the closing date for the 2013 Agreement had passed. However, Geest had taken no action to end that agreement, and there were squatters on the land, whom Geest failed to remove in order to give EHL clear title, in accordance with the terms of the agreement. EHL was of the view that the 2013 Agreement was still in force, however, Mr. Johannes who represented Geest was of the opposing view and insisted that a new agreement be executed. Consequently, Geest executed the 2019 Agreement to purchase the said lands then registered as Parcel 314. Under the 2019 Agreement, the purchase price was \$1,150,000.00 and EHL was required to pay a deposit of \$500,000.00, and complied.

[19] Mr. Douglas Rapier and Ms. Valerie Rapier's evidence on behalf of Geest confirms that the parties executed the 2013 Agreement to purchase the Belair Lands for \$1,500,000.00. EHL paid the initial deposit of \$100,000.00 on the execution date, as required. However, EHL breached the agreement by failing to meet a further payment of \$100,000.00 which was due on 31st January 2014. Mr. Rapier states that this default terminated the agreement. However, Ms. Rapier's evidence is that on 22nd August 2014 she and Mr. Rapier convened a meeting with Mr. Charlemagne and Mr. Johannes to discuss the contractual position between Geest and EHL and whether they could proceed with the sale of the Belair Lands.

[20] In August 2015, Geest received a proposal from EHL to enter a joint venture in relation to the Belair lands, which Geest flatly rejected. Shortly thereafter, by email dated 30th August 2015, Mr. St Rose requested that they re-establish a formal agreement. This, she says, is an indication that he recognized that the 2013 Agreement was no longer valid. Nonetheless, on 22nd October 2015, Mr Charlemagne advised that Geest ought not to continue the 2013 Agreement unless the issue of squatters could be resolved. Therefore, she and Mr Johannes set about preparing an agreement for occupiers to sign, for relinquishing their rights of occupation with compensation, in the event of a sale. Both witnesses acknowledge that the 2019 Agreement was executed by Mr. Johannes on behalf of Geest, but they dispute its validity.

Analysis

[21] The issue of whether the 2013 Agreement was still in force, or had been terminated on account of EHL's failure to fulfil its obligations within the stipulated time, is moot. This is because in 2019 EHL entered into a new agreement for the sale of the same subject matter, Parcel 314 or the Belair Lands. Thus, the 2019 Agreement is inconsistent with the continued existence of the 2013 Agreement, and EHL essentially conceded that the 2013 Agreement was no longer in force, by virtue of entering into the 2019 Agreement. Counsel for EHL, Mr Horace Fraser admits this much, when he acknowledged that the 2019 Agreement eclipsed or superseded the 2013 Agreement.

[22] I find support for this conclusion in the dicta of Lord Sumner in **British Beningtons Ltd. v North West Cachar Tea Co. Ltd.**² wherein his Lordship stated that the central issue:

"is whether the common intention of the parties... was to "abrogate," "rescind", "supersede", or "extinguish" the old contracts by a "substitution" of a "completely new" and "self-contained" or "self-subsisting" agreement containing as an entirety the old terms, together with and as modified by the new terms incorporated."

[23] Both agreements are in respect of the same subject matter, and although containing different terms which make up a complete and entire contract, they are incapable of coexisting. Therefore the 2019 Agreement must be taken to have discharged and replaced the 2013 Agreement, and the effective agreement, if any, would have to be the 2019 Agreement.

[24] At this stage, it is fitting to address Geest's assertion that the 2019 Agreement is invalid because Mr. Johannes did not have the authority to enter or execute same. According to Geest, prior to executing the 2019 Agreement the directors had instructed him to cease all transactions as the Government would be acquiring all the lands. Further, he was not given any specific Board's approval to enter into the 2019 Agreement, and this was apparent from the face of the Agreement, which did not refer to any such approval.

² 1923 AC 48

[25] I agree with Mr. Fraser, that the fact that Mr. Johannes may not have had the Board's approval to enter into that agreement does not affect its efficacy, and it remains valid and binding as between the parties. Section 21 of the **Companies Act**³ provides:

"21. No disclaimer allowed

A company ... may not assert against a person dealing with the company or with any person who has acquired rights from the company—

(a) *that any of the articles, or bye-laws of the company or any unanimous shareholder agreement has not been complied with;*

...

(d) *that a person held out by a company as a director, an officer or an agent of the company has not been duly appointed or **had no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such a director, officer or agent;***

(e) *that a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or not genuine; or*

...

except where that person has, or ought to have by virtue of his or her position with or relationship to the company, knowledge to the contrary."

[26] **Halsbury's Laws of England** provides the following in relation to the common law on agency:

*"The relation of agency typically arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act. **Whether that relation exists in any situation depends** not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or **the exact circumstances of the relationship between the alleged principal and agent.**"⁴*

*The relation of agency is created by **implied agreement of principal and agent.** The relation can also be created by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal, or some person authorised by him, expressly appoints the agent, whether by deed, by*

³ Cap 13.01 of the Laws of Saint Lucia

⁴ Halsbury's Laws of England/Agency (Volume 1 (2017))/1. Nature and Formation/(1) The Relation of Agency/1. Nature of the relation of agency.

writing under hand, or orally. **Implied agency arises from the conduct or situation of the parties**, or by operation of law, for example from necessity.⁵

The doctrine of 'holding out', also known as apparent or ostensible authority, is based on estoppel. Such agency by estoppel arises where one person has acted so as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. In this case the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact, or merely acted in excess of his actual authority. The principal cannot set up a private limitation upon the agent's actual authority so as to reduce the ostensible authority, for, so far as third persons are concerned, the ostensible authority is the sole test of his liability. If, however, the agent is held out as having only a limited authority to do, on behalf of his principal, acts of a particular class, the principal is not bound by an act outside that authority even though it is an act of that particular class. The onus lies upon the person dealing with the agent to prove either real or ostensible authority, and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable. Holding out is something more than estoppel by negligence; it is necessary to prove affirmatively conduct amounting to holding out. No representation made solely by the agent as to the extent of his authority can amount to a holding out by the principal.⁶

The authority of an agent may be confined to a particular act or be general in its character. **It will extend not only to acts expressly authorised but also to subordinate acts which are necessary or ordinarily incidental to the exercise of the express authority and to acts within the agent's ostensible authority...** As between the agent and his principal, an agent's authority may be limited by agreement or special instructions, but, **as regards third persons, the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties.**"⁷ (my emphasis)

⁵ Halsbury's Laws of England/Agency (Volume 1 (2017))/1. Nature and Formation/(4) Formation of Agency/(i) Circumstances in which Agency may Arise/14. How agency is created.

⁶ Halsbury's Laws of England/Agency (Volume 1 (2017))/1. Nature and Formation/(4) Formation of Agency/(iv) Agency by Estoppel/25. Apparent authority.

⁷ Halsbury's Laws of England/Agency (Volume 1 (2017))/2. Authority of the Agent/(1) Derivation and Extent/30. Extent of agent's authority.

[27] Although no written or oral evidence has been adduced to show that Geest expressly appointed Mr. Johannes as its agent for this particular transaction, a relationship of agency can be implied from their relationship, and the nature of his employment as Managing Director, having been appointed as such from February 2012. His employment agreement states that he was accountable for *“the day-to-day management of the Company’s business operations”* and to *“make business decisions”*

[28] According to Ms. Rapier, at paragraphs 5-6 of her witness statement:-

“Mr Johannes was appointed Managing Director of the Company with a mandate to either sell the lands to a private company... Mr Johannes in the first year showed significant initiative in trying to turn the financial position of the Company around... and indeed appeared to be successful at selling land at the current market rate.”

[29] Mr. Rapier echoed the same at paragraph 10 of his supplemental witness statement where he said *“Mr Johannes was hired to identify opportunities for generating sales revenue”*; and in cross examination he admitted that he represented Geest in all such transactions and had the authority to do certain things including to sell and receive payments. In that regard, an agent’s authority extends not only to acts within the agent’s ostensible authority, but also to subordinate acts necessary or ordinarily incidental to the exercise of his ostensible authority. Therefore, if his ostensible authority extends to the sale of Geest’s lands, it would of necessity include executing agreements for sale.

[30] The relationship of agency can also be implied from conduct. Mr. Johannes executed the 2013 Agreement on Geest’s behalf, and no issue was raised about his authority. No reference to Board approval appears on the face of that agreement either, except that in the signature block of both agreements it states that the seal of Geest was affixed pursuant to a resolution of the Board. Mr. Johannes is the person who wrote to EHL on Geest’s behalf rejecting the offer to enter a joint venture for the Belair Lands, and it appears that it was not unusual for EHL to communicate or negotiate with him on matters regarding the nature of agreements for sale of land, or the conduct of other business, and to obtain such business decisions from him. Ms. Hippolyte in her evidence says Ms. Rapier

instructed EHL to negotiate with him in relation to any agreement for sale of the Belair Lands. By virtue of this conduct, it can be said that Geest held out that Mr. Johannes had authority to act on their behalf and execution of the 2019 Agreement was within the scope that ostensible authority.

- [31] As stated in the extracts of **Halsbury's Laws of England** cited above, the principal cannot set up a private limitation on the agent's authority so as to reduce his ostensible authority, and this is of similar effect to section 21 of the Companies Act. It is therefore inconsequential whether he in fact, had such authority, or that Geest sought to limit his authority to the 2013 Agreement and to agreements for sale to the occupiers of the lands, and to exclude from his authority the execution of the 2019 Agreement. Importantly, in cross examination, Mr Rapier admitted that in as much as Mr. Johannes was the Managing Director, if he made an error, it would be an error on the part of Geest.
- [32] Although Ms Rapier says that Mr. Johannes was instructed to cease all transactions from March 2019, she admitted in cross examination that no notice had been published anywhere that his authority, generally or in relation to particular acts was revoked. She says she did not think it necessary as Geest is a private company with two directors and shareholders. However, she overlooks the important fact that Geest is also a company which deal largely with selling vast areas of land to the public, over a long period of time, with numerous ongoing/outstanding transactions. Geest evidence is that there was also an internal process whereby Mr. Johannes was required to prepare documents on such matters, for presentation to the Board for approval. Little weight can be given to this evidence.
- [33] Based on the foregoing, I conclude that execution of the 2019 Agreement was within Mr. Johannes ostensible authority as Managing Director of Geest and by virtue of Geest's conduct in relation to him. Therefore, the 2019 Agreement is binding as between the parties, subject to my findings on the issues which follow.

Issue 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?

- [34] Counsel for Geest, Mrs. Cynthia Hinkson-Ouhla asserts that both agreements were void due to mistake, being the mistaken belief by both parties that the Belair Lands were unoccupied and therefore available to be sold with vacant possession. Mr. Fraser, in his written submissions, addressed common mistake under the common law whilst Mrs. Ouhla, in her written submissions, cited the **Civil Code** provision on error. Mr Fraser in oral closing submissions suggested that the two concepts are different and error was not pleaded by Geest and cannot now be relied upon. Mrs Ouhla insisted that Geest case is, and has always been based on the civil law defence of error as contained in article 926 of the **Civil Code** which states:

“Article 926. Error is also a cause of nullity only when it occurs in the nature of the contract itself, or respecting that which is the subject of the contract or the principle consideration for making it.”

- [35] I note that Counsels have not indicated how the defences of mistake and error differ. Mrs. Ouhla refers to the term “error” and the provisions of the Civil Code for the first time in her written submissions. At all times prior she had referred to “mistake”. Although she insists that she is relying on the defence of “error”, she cites in support a common law authority dealing with “common mistake”. I am of the view that Geest cannot now resile from “mistake” and seek to introduce “error” as a new defence. In any event, I do not see how the Civil Code provision concerning “error” can assist Geest’s case. Article 917A of the Civil Code states that the Law of England relating to contracts shall extend to Saint Lucia and the provisions of the Civil Code, articles 918-989 and 991-1132 shall be construed accordingly and not in accordance with the law of Lower Canada or the Coutume de Paris. Thus, it is the English law of contract which applies and article 926 must be construed according to English law. In the circumstances, the common law relating to common mistake will be considered and applied.

- [36] Mr Fraser relied on extracts from the text **Law of Contract**⁸ which states that mistake negatives or nullifies consent. It negatives consent where it puts the parties at cross purposes thereby preventing them from reaching agreement and nullifies consent where the parties reach an agreement based on a fundamental mistaken assumption made by both. The effect of mistake is to make a contract void, but is confined within very narrow limits because it is in the interest of commercial convenience that apparent contracts should be enforced. Mistake may be as to the possibility of performing the contract or as to quality.
- [37] The law recognizes physical impossibility, legal impossibility (illegality) and commercial impossibility. The latter, in some respect, depends upon a mistake as to quality, where the subject matter of the contract lacks some quality which it is believed to have. Where the quality forms part of the contractual description of the subject matter, and the item does not answer the description of that which is sold, the contract is valid and the party who gave the description is in breach. If there is no contractual misdescription, the general rule is that mistake as to quality does not nullify consent, whether the mistake prejudices the buyer so that he pays too much or the seller so that he charges too little. Pertinent cases include **Scott v Littledale**⁹ where a contract for the sale of tea was held valid despite a mistake as to its quality and hence value; and **Harrison & Jones v Bunten & Lancaster**¹⁰ where a contract was held valid even though the item sold, which was believed to be pure, was impure and therefore of no use to the buyer.
- [38] Mr. Rapier's evidence is that Geest had a computerized database of all occupiers, purchasers, and owners of its lands, which linked every receipt for payment to a named owner/occupier, and to a specific lot based on subdivision plans approved by the DCA between 1970 and 1994. The sub-division plans provided the location and approximate area for each lot. The true area of the individual lots would thereafter be ascertained by an actual survey and all contiguous lot owners had to be present to identify and agree with the surveyor on the placement of boundary pegs. The surveys would then be submitted to the

⁸ Sir Guenter Treitel (11th Edition) Sweet & Maxwell, pages 286-288

⁹ (1858) 8 E & B 815

¹⁰ (1953) 1 QB 646

Department of Land & Surveys for mutation of the lots. Deeds already executed were also included in the database to give a complete picture of all the occupied lands for which subdivisions had been undertaken. Each record held the complete history known for an occupier to which new information, particularly new payments were added. As Managing Director, Mr. Johannes had the responsibility of identifying opportunities for generating sales revenue and maintaining the databases, which could only be fully understood by reference to the DCA approved subdivision plans. The databases and the subdivision plans were kept at Geest office in Castries, under Mr. Johannes control.

[39] Mr. Rapier testified that Geest's properties were acquired in the 1950's and covered a very wide area of lands in the Roseau and Cul de Sac valleys, the extent of which was difficult to ascertain. As such, and knowing that the database contained all the relevant information pertaining to occupied lots, he did not find it unusual when, in 2013, Mr. Johannes discovered Parcel 314 or the Belair Lands, which he claimed was 52 acres of unoccupied land. Mr. Rapier says he was not involved in the day to day running of Geest and had no access to the database at that time. Then, in August 2014, after the 2013 Agreement was executed, Mr. Johannes informed the Board that he had discovered the presence of nine occupiers on the said lands. Mr Rapier says he retrieved a copy of the database at that time, but only conducted his own investigation sometime after July 2021 when it came to the Board's attention that Mr. Johannes had on several occasions, disregarded instances of overriding interests. Upon his investigation of the database and subdivision plans, all the information which indicated the presence of occupiers on the Belair Lands was contained therein prior to the 2013 Agreement and therefore ought to have been known to Mr. Johannes. Further, the extent of the occupation was much more significant than Mr. Johannes had suggested.

[40] When he investigated the names of the nine occupiers discovered by Mr Johannes, he found that they all had lots in the Belair Agricultural area with corresponding lot numbers and sizes. Two of these nine occupiers had lots which had been mutated and allocated parcel numbers and were fully paid for. As such, they could not be occupiers on the Belair Lands. This misinformation misled the Board on the extent of the occupation of the said

land. According to Mr Rapier, a survey plan shows that there are 23 contiguous lots described by lot numbers 22 to 55 that make up the Belair Lands. It includes lots corresponding to seven of the nine names provided by Mr. Johannes. As of 2014 none of the 23 contiguous lots had been assigned parcel numbers, and they are bounded on either side by lots with parcel numbers, which include the remaining two names provided by Mr. Johannes.

[41] Mr Rapier further testified that the Land Register for the Belair Lands includes a reference to a survey plan recorded as Drawing No. C.12512 R. This is the lodged survey plan for Lot 51, but this lot had not been mutated and therefore not given a parcel number. The information pertaining to Lot 51 is contained in Geest's database as one of the 23 contiguous lots making up the Belair Lands. The occupier of this lot who had paid \$5,000.00 towards his purchase, and his last payment was in March 2012, was not mentioned in the list of occupiers provided by Mr. Johannes. He states that Lot 51 could not be mutated, despite the survey plan, because it refers to DCA approved subdivision plan number 50/94 for the remainder of Parcel No. 0642B 298, which no longer exists because in 2014, the remainder of that parcel was converted into Parcel 314 to create the Belair Lands. To mutate the Belair Lands would require a further DCA approved subdivision plan to exclude Lot 51. He says it appears that the conversion from Parcel 298 to Parcel 314 was achieved without the benefit of a ground survey, but in any event, the survey plan of Lot 51 confirms that there were occupiers on the Belair Lands as the survey is stated as having occurred between 3rd June 1993 and 23rd July 2014. He says this is during the period when EHL should have commissioned a survey in accordance with the provisions of the 2013 Agreement.

[42] It is Geest evidence that its spreadsheet of the Belair Agricultural area dated August 2014 shows that 13 occupiers of the 23 contiguous lots had made payments toward the purchase of their lots. The value for these 23 lots totals \$263,815.00 and deposits received as of August 2014 totals \$65,804.00. Two of the occupiers had also signed formal payment contracts for monthly payments of \$300.00. At all times Mr. Johannes had access to the database. Two of the nine occupiers provided by him had placed cautions on the Belair Lands on 8th July 2019. Thus, Mr Rapier says, it is quite clear that the Belair Lands

were significantly occupied, and in order to be sold free and clear of all encumbrances, the occupiers who had made payments towards their purchase price would have to be paid off. This would have created additional expense to Geest, which was not anticipated, as Mr. Johannes had informed the Board prior to signing the 2013 Agreement that the Belair Lands were unoccupied, and later in 2014, that there were 9 occupiers. The liability which had arisen therefore meant that either the contract could not be performed, or that performance would be at a huge expense to Geest.

[43] Mr. Rapier further says although the Lands & Survey Department has not provided a complete copy of the DCA approved subdivision plan number 50/94, the section provided highlights several lot numbers included in the contiguous list of 23 lots making up the Belair Lands. Additionally, on 17th August 2021 he obtained an unregistered copy of a survey plan made in 2006 at the instance of Geest, and the lot numbers indicated thereon include lots comprising the Belair Lands. These two plans show the extent of the occupation of the Belair Lands and corresponds with the information contained in Geest's database. In the circumstances he finds it curious that EHL has never produced the survey plan required by the 2013 Agreement. In the 2019 Agreement, reference is made in the schedule to a "*subdivision plan incorporated herewith and endorsed on this agreement.*" but Geest has never seen this subdivision plan and it has not been submitted as part of that agreement.

[44] According to Geest, the last registered survey for the area is for Parcel 298, thus EHL, Mr. Charlemagne and Mr Johannes conspired with each other to sell the Belair Lands without conducting a ground survey, which would have revealed the extent of the occupation and the inability to sell the property. Nonetheless, it was clear that the Belair Lands were always subject to the rights of a significant number of owners and occupiers even before the execution of any of the agreements. Mr. Johannes misrepresented that the Belair Lands were unoccupied when according to the database, before 1994 there were in fact 23 identified occupiers. Therefore, Geest was never in a position to sell the Belair Lands free and clear of all encumbrances as its title was subject to the overriding interests of people who owned the lands, or who had made payments towards the purchase price. On that basis Geest says the sale of lands to EHL was an impossibility from the outset and the

contract should be declared invalid. Further, that EHL is responsible for the mistake and cannot hold Geest liable for any losses which may have arisen, since such losses stemmed from EHL's failure to carry out a ground survey.

[45] Ms. Rapier stated that on 16th January 2013, Mr Johannes engaged a land surveyor to value a large landholding at Belair identified as Parcel 261, which was valued at \$4,613,000.00. The 2013 Agreement required the dismemberment of the Belair Lands from Parcel 261. The arrangement was that EHL would pay \$60,000.00 towards the cost of the survey. It was said that the survey revealed the existence of nine occupiers, and as a result, on 22nd August 2014, she and Mr. Rapier convened a meeting with Mr. Charlemagne and Mr. Johannes to discuss the contractual position between Geest and EHL and whether Geest could proceed with the sale of the Belair lands. I note that the Minutes¹¹ of this meeting reveals that Mr. Charlemagne was to send a letter to EHL, confirming that EHL had breached the agreement and to give four weeks to finalize the sale, confirming Geest's best endeavour to conclude the sale. Ms Rapier then says that in August 2015, Geest received the proposal from EHL to enter a joint venture for the Belair Lands, which was flatly rejected. In the letter of rejection dated 19th August 2015¹², I note that Mr. Johannes wrote: "*At this time we are only interested in the closure of the sale agreement...*", referring to the 2013 Agreement.

[46] Ms. Rapier further states that EHL was still interested in pursuing the sale despite the presence of the nine occupiers as indicated in Mr. St. Rose's email of 30th August 2015 requesting that the agreement be re-established. However, on 22nd October 2015, Mr Charlemagne advised the Board that Geest ought not to continue the agreement unless the issue of the squatters could be resolved. Therefore, she and Mr Johannes, with Mr Charlemagne's approval, set about preparing an agreement for the occupiers to sign, relinquishing their rights of occupation with compensation in the event of a sale. I note that subsequent emails between Ms. Rapier and Mr. Charlemagne reveal that whilst they were pursuing the agreements with squatters to relinquish their rights, Ms. Rapier also decided

¹¹ See Exhibit DR3

¹² See Exhibit VR10

she wanted to terminate the 2013 Agreement in preference for listing the property with Sotheby for sale under the Citizenship by Investment Programme ("CIP"). As such, removal of the squatters was of high priority for her.

[47] Ms. Rapier also testified that the Board had concerns over whether EHL had the financial ability to carry out the development project, and this was the reason why the Board eventually felt that the only solution was for the Government to acquire all the lands. Then in October 2018, after negotiations with the Government resumed, Mr. Charlemagne and Mr. Johannes agreed that Geest was unable to sell to EHL because it would encounter problems with the occupiers, and Mr. Charlemagne advised that the Government should handle the issue of the occupiers after acquisition. Thereafter around 2nd July 2019, Mr. Charlemagne brought to their attention the existence of the 2019 Agreement, and they were completely taken aback. However, he persuaded them that this time EHL had the funds to purchase the lands, and that the agreement had the support of the Government.

[48] Both witnesses say Mr Charlemagne convincingly conveyed what appeared to be the benefits of accepting the agreement, which were: (1) the Government would take a long time to settle the agreed price for the acquisition; (2) Geest would be able to settle court judgments; and (3) that this time EHL was in a position to pay, as he had received a deposit of \$500,000.00 which he was holding in escrow. Ms. Rapier says they were persuaded, and she informed Mr. Charlemagne that they were willing to accept the offer, although they continued to hold misgivings about the issue of the nine occupiers as they were concerned that the latent title warranty clause contained in the 2019 Agreement would not protect Geest. Thereafter on 23rd July 2019, after the second publication of the Notice of Acquisition, Ms. Rapier says that Geest's new counsel warned against issuing the required Board resolution for the 2019 Agreement, as the latent warranty clause did not protect Geest and placed the onus on Geest to resolve the issue of the occupiers. Based on this advice Ms. Rapier says on 24th July 2019 she informed Mr. Charlemagne that Geest would not accept the offer from EHL, and instructed him to return the deposit of \$500,000.00.

Analysis

[49] The question here is whether there was a mutual mistake between the parties as to the occupation of the Belair Lands, and its availability to be sold with vacant possession. This must be answered in reference to the 2019 Agreement, which I have determined is the effective agreement for sale between the parties. What the evidence reveals is that Geest and EHL were aware that the Belair Lands were occupied from at least 2014 when Mr. Johannes discovered the nine occupiers and brought same to the attention of the Board. This was some 5 years before the 2019 Agreement was executed, wherein Geest warranted that *“it has and will provide at closing good, valid and marketable title and that the property is being sold free and clear of all privileges, liens, charges, pledges, security interests, rights of third parties, encroachments, hypothecs, mortgages, reserves, and encumbrances and other latent title defects of any sort whatsoever.”*¹³ As to title, it was also stated in the 2019 Agreement that Geest *“sells as absolute owner of the property. The property is sold with vacant possession on completion on the closing date. Title to the property is registered at the Land Registry with absolute title for the Registration Quarter of Castries.”*¹⁴

[50] As noted in the text **The Law of Contract**, where quality forms part of the contractual description of the subject matter, and the article sold does not answer the description, the contract is valid and the party who gave the description is in breach. As Geest agreed to sell Parcel 314 with good valid and marketable title, free and clear of all encumbrances, if at the date of completion, the lands do not match this description, Geest cannot claim that the 2019 Agreement is void for mistake. Rather, it is a case where Geest would be in breach of the Agreement.

[51] In the case **Amalgamated Investment Property Co Ltd. v Johnny Walker Sons Ltd.**¹⁵, it was held that *“for the application of the doctrine of mutual mistake as a ground for setting the contract aside, it is of course necessary to show that the mistake existed at the date of*

¹³ Clause 3.1

¹⁴ Clause 5.

¹⁵ [1977] 1 WLR 164

the contract."¹⁶ There, the purchasers agreed to purchase a warehouse from the vendors. It was advertised as being suitable for redevelopment and during negotiations, the vendors confirmed that the property had not been designated as a building of "special architectural or historic interest." On 25th September, the parties signed the contract and on the following day, 26th September, the Department of Environment wrote to the vendors informing them that the property had been selected as a building of "special architectural or historic interest." On 27th September, the list of such buildings was signed. The purchasers claimed rescission of the contract on the ground of mutual mistake in that both parties had wrongly believed at the date of the contract that the building was suitable for redevelopment.

- [52] The court held that since the building was not a listed building until two days after the date of the contract, there was no mutual mistake by the parties as to the surrounding circumstances at the time they entered into the contract. Buckley L.J. stated:

*"In my judgment, there was no mutual mistake as to the circumstances surrounding the contract at the time when the contract was entered into. The only mistake that there was, was one which related to the expectation of the parties. They expected that the building would be subject only to ordinary town planning consent procedures and that expectation has been disappointed. But at the date when the contract was entered into, I cannot see that there is any ground for saying that the parties were then subject to some mutual mistake of fact relating to the circumstances surrounding the contract."*¹⁷

- [53] From this, in respect of the 2019 Agreement, it cannot be said that there was any common mistake that Parcel 314 was unoccupied. To the contrary, the evidence clearly reveals that Geest and EHL were aware, at the time of that agreement, that the land was occupied by at least nine persons as was discovered some five years earlier in 2014. Thus, the defence of mistake must fail.

- [54] It appears on the evidence that one of Geest's contentions in relation to mistake is that the extent of occupation was more significant than appreciated at the time the agreement was

¹⁶ At page 171

¹⁷ At page 172

executed, making the contract more costly for Geest and that this frustrated the 2019 Agreement. However, as explained by Professor Treitel in **The Law of Contract** and demonstrated by the judicial authorities cited therein, hardship because the contract becomes more costly, or less beneficial, does not operate as a mistake capable of nullifying the contract.

- [55] In **Amalgamated Investment Property Co. Ltd.**, the court had considered the plaintiff's alternative argument that the contract was frustrated by the listing of the property as a building of "special architectural or historic interest." Buckley LJ referred to the case of **Davis Contractors Ltd. v. Fareham Urban District Council**¹⁸ where Lord Radcliffe said:

*"It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."*¹⁹

- [56] In the present case there were always occupiers on the lands before the 2019 Agreement, of which the parties were aware. The agreement is and always was to sell the Belair Lands with good and valid title, free from encumbrances, and with vacant possession. There has been no change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. This is unlike the situation in **Amalgamated Investments**, where subsequent to the execution of the contract, the property which was the subject of the sale was listed as a property of architectural or historical interest which affected how advantageously the property could be developed and planning permission obtained. Even in those circumstances, the court reached the conclusion that the necessary factual bases for holding that the contract has been frustrated were not present because the risk of property being listed as property of architectural or historical interest is a risk which is inherent in all ownership of buildings. Buckley L.J. commented:

¹⁸ [1956] A.C. 696 at page 729

¹⁹ At page 173

“The purchasers in the present case bought knowing that they would have to obtain planning permission in order to develop the property. The effect of listing under the sections of the Act to which I have referred makes the obtaining of planning permission, it may be, more difficult, and it may also make it a longer and more complicated process. But still, in essence, the position is that the would-be developer has to obtain the appropriate planning permissions, one form of permission being the “listed building permission.”²⁰

[57] Whether there were nine or twenty-three occupiers on the Belair Lands, Geest’s obligation was to give good title and with vacant possession. This would have necessitated, as Mr. Rapier indicated, paying off those occupiers who had paid towards their properties, which Geest was prepared to do. Even after the nine occupiers were discovered in 2014, Geest confirmed its intention on several occasions to proceed with the sale. In 2014 at a meeting of the Board it was agreed that EHL be granted an extension of time to complete the 2013 Agreement and in 2015 Geest indicated to EHL the desire to close the sale. In October 2015, Geest also prepared agreements for occupiers to relinquish their rights upon payment of compensation in the event of a sale, and while pursuing the removal of the occupiers, Ms. Rapier considered listing the property for sale under the CIP. This evidence reveals that the sale was abandoned in 2015 because of the Board’s concerns over EHL’s financial position and because the Government had resumed negotiations for acquisition of the lands, and not the presence of the occupiers. Even after the 2019 Agreement was executed and the acquisition process was well underway, Geest briefly considered accepting and continue with that agreement despite the continued occupation of the land. As it turns out, the lingering concern was not that the sale was impossible but that the warranty did not sufficiently protect Geest, which suggests that the sale was certainly not impossible because of the presence of occupiers.

[58] Mr. Rapier admitted that the occupiers who had made payments would have to be paid off in order for the Belair Lands to be sold free and clear of all encumbrances. It is true that paying off twenty-three as opposed to nine persons would be more costly, however, such hardship because of additional cost does not operate to frustrate a contract. Therefore,

²⁰ At page 173

any suggestion that the 2019 Agreement was frustrated by the presence of twenty-three occupiers as opposed to nine must also fail.

[59] Before concluding this issue, it is appropriate to address Geest's assertion that the common mistake and frustration of the contract is EHL's fault because EHL was required to produce a survey which it failed to do and which, had it done, would have revealed the true extent of occupation of the lands. It has already been determined that there was no mistake in respect of the 2019 Agreement and that the presence of the occupiers did not serve to frustrate that agreement. It is important to remember that the requirement of a survey was contained in the 2013 Agreement, which was superseded by the 2019 Agreement, and the latter did not contain any requirement for EHL to produce a survey. The 2013 Agreement contained several preconditions including that "*The purchaser agreed to use its best endeavours to provide the vendor with a copy of the lodged Survey Plan, the Land Register, and the Land Registry Map Sheet within 42 days of execution of the agreement.*"²¹ In contrast, the 2019 Agreement contained no preconditions, and simply stated that the vendor warrants that it has and will provide at closing good, valid, and marketable title and that the property is being sold free and clear of all privileges, liens, charges, pledges, security interests, rights of third parties, encroachments, hypothecs, mortgages, reserves and encumbrances and other latent title defects of any sort whatsoever.

[60] It is the case that when the 2019 Agreement was executed Parcel 261 had already been mutated, which produced Parcel 314, the subject of the 2019 Agreement. It can be gleaned from the 2013 Agreement that the purpose of the survey was to facilitate the dismemberment of the portion of land to be sold to EHL. As Parcel 261 was already mutated, it can be assumed this was the reason for the omission of the requirement for a survey in the 2019 Agreement. Mr. St. Rose was adamant in cross examination that EHL paid for and conduct a survey and produced a survey plan as required, although it was not produced in evidence. In any event, producing a survey was not a condition imposed on EHL in the 2019 Agreement, and both of Geest witnesses seem to suggest in their

²¹ Clauses 1.6, 1.8, and 3.1-3.6

evidence that a survey was done pursuant to the 2013 Agreement, which is what revealed the presence of the nine occupiers. In that regard paragraph 15 of Ms. Rapier's witness statement is as follows:

"The First Agreement required the dismemberment of the Belair lands from the original parcel Block 0642B 261. The arrangement was that Exquisite Homes would pay \$60,000 towards the cost of the survey work. The survey revealed the existence of nine land occupiers, list of which is attached marked "VR7"."

[61] At paragraph 16 of Mr. Rapier's witness statement, he says: *"The survey work done in 2014 revealed the existence of some 9 land occupiers."* I note that the survey work undertaken in 2014 would have followed closely after the execution of the 2013 Agreement and would likely have been pursuant to that agreement, given that it was a condition contained therein.

[62] 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. C 12512 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.

Issue 3: Was the 2019 Agreement subsequently voided on account of impossibility of performance and/or frustration brought about by the acquisition of Parcel 314 by the Crown?

[63] Concerning compulsory acquisition, Geest evidence is that discussion with the Government commenced as far back as 2010, when Mr Richard Peterkin, Accountant and

Financial Analyst, was appointed as Geest agent to negotiate with the Government for acquisition of Geest lands in its entirety. In his witness statement Mr Peterkin provided the history of a Land Rationalization Program commenced by Geest, which included subdivision and sale of lots to workers of Geest, their families and other individuals who lived on the lands. Negotiations culminated in the Government agreeing that acquisition of the lands in its entirety, under the Government's Program for the Rationalization of Unplanned Developments (PROUD) was the best way forward, and he commenced the process on behalf of Geest, with an estimated completion date of 31st March 2011. Thereafter, the acquisition project went into abeyance on account of the devastating effects of Tropical Storm Thomas, on the area in question, and the General Elections held in 2011, which made it increasingly difficult to organize meetings. Mr Peterkin says he remained in contact with Ms Rapier over the years to assist in her endeavors to conclude the acquisition, and subsequently learned from her in 2019 that she had successfully negotiated full acquisition of the Geest lands.

[64] Mr Rapier and Ms Rapier testified that from around November 2015, as the Board had concerns about whether EHL had the ability to carry out the development project, it was felt that the only solution was for the Government to acquire all of Geest lands in its entirety. After the Board refused to enter into a joint venture with EHL in late 2015, the directors began fully focusing again on selling the entire program to the Government. By a letter dated 23rd March 2016 from the Government, Geest received a notice of intention to acquire the remaining lands in Cul-de-Sac by Cabinet Conclusion No. 144 of 2016.

[65] There was no further development regarding this communication until August 2018 when Ms Rapier received a telephone call from Senator Mary Isaac, inquiring about the acquisition of the Goodlands lands, and expressing a keen interest in the acquisition of the lands to assist occupiers in obtaining title. The complexity of the program was explained to the Senator, with the conclusion that the program needed to be acquired in full to ensure fair and equitable treatment of all occupiers. Geest was invited to submit a written proposal to the Government. Mr Johannes was informed of this and a meeting was arranged with him to discuss the proposal and supporting information to be submitted. He did not attend the meeting and without his assistance, Ms Rapier prepared the proposal relying on the

2014 data file provided by Mr. Rapier. Geest requested \$3.0 million as the price for the acquisition.

- [66] Sometime in October 2018, Ms Rapier received another telephone call from the Senator informing her that there was a document from Mr Johannes which contradicted her instructions. Ms Rapier says this was a clear indication that he was acting on his own agenda and was working against the Board's wishes, despite all notice given to him that the Board was proceeding with the Government's intention to acquire Geest's lands in its entirety. She instructed that the letter from Mr Johannes be ignored and that the proposal from the Board should be presented to the Cabinet of Ministers. A few weeks later, she was informed that the Cabinet of Ministers had given verbal approval to the acquisition of the lands, and she immediately informed Mr Johannes and Mr Charlemagne.
- [67] Ms Rapier says after discussions amongst herself, Mr. Rapier, Mr. Charlemagne and Mr. Johannes, Mr. Johannes acknowledged by email that Geest was unable to sell to EHL as it would encounter problems with the occupiers, and Mr Charlemagne advised that the Government would handle that issue after acquisition. On 21st January 2019, she instructed Mr Johannes by email to meet with the Chief Surveyor regarding the acquisition of all the lands and confirmed that same was to be transferred to the Government. In mid-January 2019, she was asked to write officially on the matter, to the responsible Minister, which she did by letter dated 24th January 2019²² and on 11th March 2019 she was informed that the Cabinet of Ministers had approved the acquisition of all the lands. Ms. Rapier says she informed Mr. Charlemagne and Mr. Johannes of this and instructed them to cease all transactions with immediate effect, which they acknowledged.
- [68] Then, around 2nd July 2019 Mr. Charlemagne disclosed the existence of the 2019 Agreement with EHL, to be completed within 30 days of execution, meaning 27th July 2019, together with the receipt of a deposit of \$500,000.00 paid towards the purchase price. Mr Charlemagne assured Geest that EHL had the finances to complete this agreement, and all was clear with the Government. This led the directors to consider accepting the offer, as the \$500,000.00 deposit meant readily available cash, when

²² See Exhibit VR22

compared to the long payment process expected from the Government for full acquisition. However, further investigation into the exact nature of the 2019 Agreement and the consequences of this offer on Geest's agreement with the Government revealed there was no formal agreement with the Government to remove Parcel 314 from the acquisition of Geest's lands, and none of the Government officials could substantiate the existence of any such agreement. To proceed on that basis would have caused Geest's agreement with the Government to collapse. Given the late stage of the acquisition process, it would also have required approval from the Governor General.

[69] However, on 16th July 2019, the Government published the first Notice of Acquisition of the lands in the Gazette and on 22nd July 2019 the second Notice was published, effectively making the Crown the owner of all lands previously owned by Geest.

[70] Geest approached new counsel and was advised that the issue of the nine occupiers was not circumvented and would remain a problem for Geest, and not EHL, as the latent title warranty clause in the 2019 Agreement placed the onus on Geest to resolve the issue of the occupiers. Furthermore, acquisition of all Geest's lands was gazetted by 22nd July 2019 and as such the lands in question no longer belonged to Geest. Thus Geest concluded that agreement between EHL and Mr. Johannes had no substantiated position and could not be executed. On 23rd July 2019 Geest new counsel warned against issuing the required Board resolution for the EHL agreement and against signing the agreement. Additionally, if a new agreement between the Government and Geest were to be substituted, a new Cabinet Conclusion would also be needed, and further approval from the Governor General would also have been required. Neither of these requirements were in place on 27th June 2019 when the 2019 Agreement was signed by Mr. Johannes.

[71] Consequently, on 24th July 2019, Ms Rapier informed Mr Charlemagne in response to his efforts to exclude Parcel 314 from the acquisition, that the Board would not endorse the 2019 Agreement and by letter dated 24th July 2019²³, she instructed the Chief Surveyor to ignore all requests for withdrawal of Parcel 314, made by Mr Charlemagne and Mr

²³ See Exhibit VR24

Johannes. On 28th July 2019 by email to Mr Charlemagne and Mr Johannes she requested that the deposit of \$500,000.00 allegedly held in escrow by Mr Charlemagne be returned in full to EHL.

Analysis

[72] The Land Acquisition Act²⁴ provides 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 the land is situate, and in the declaration shall be specified the following particulars in relation to the land which is to be acquired—

...

(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—

...

5. Power to apply land to purposes of acquisition without waiting for formal vesting

If, at any time after the publication of a notification in accordance with the provisions of section 4, it appears to the Governor General that the land or some parcel of the land to which it refers should be acquired but that for any reason it is not possible to make an immediate declaration to that effect, it is lawful for the Governor General to direct the authorised officer to do any work on the land or parcel thereof connected with the use to which the land is intended to be put on its acquisition, and thereupon the authorised officer may proceed with the execution of the work.

...

²⁴ Cap 5.04 of the Laws of Saint Lucia

6. Authorised officer to treat with landowner

(1) As soon as any declaration has been published in accordance with the provisions of section 3, the authorised officer shall, without delay, enter into negotiations (or further negotiations) for the purchase of the land to which the declaration relates upon reasonable terms and conditions, and by voluntary agreement with the owner of the land.

(2) It is not necessary for the authorised officer to await the publication of the declaration before he or she endeavours to ascertain from the owner the terms and conditions on which he or she is willing to sell his or her land, but no negotiations or agreement is considered to be concluded unless and until the conditions of sale and acquisition have been approved in writing by the Governor General.

8. Authorised officer may require information as to interest in land

(1) The authorised officer may, by notice served personally, or by post addressed to the last known place of abode or business of the person concerned, require the owner or occupier of, or any person interested in, any land, or in any part thereof, in respect of which a declaration or a notification has been published in the Gazette under section 3 or section 4 respectively, to deliver to him or her within a time to be specified in the notice, being not less than 21 days after service of the notice, a statement in writing containing, so far as may be within his or her own knowledge, the name of every person possessing any interest in the land, or any part thereof, whether as partner, mortgagee, lessee, tenant or otherwise, and the nature of such interest."

[73] The Land Registration Act²⁵ provides:

"28. Overriding interests

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may subsist and affect the same, without their being noted on the register—

- ...
- (c) rights of compulsory acquisition, user or limitation of user conferred by any other law;*
- ...

However, the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he or she thinks fit.

80. Transmission by compulsory acquisition or judgment of court

Where the Crown or any person has become entitled to any land, lease or hypothec under any law or by virtue of any order or certificate of sale made or issued under any law, the Registrar shall, on the application of any interested person supported by such evidence as he or she may require, register the Crown or the person entitled, as the proprietor."

²⁵ Cap 5.01 of the Laws of Saint Lucia

- [74] Based on the provisions of these statutes, compulsory acquisition of land is complete upon the second publication of the Declaration in the Gazette. Section 3 of the Land Acquisition Act states that upon the second publication of the declaration, the land acquired vests in the Crown. Thereafter the Crown may apply to the Registrar to have the acquired land registered in the name of the Crown pursuant to section 80 of the Land Registration Act. However, it does not appear that acquisition is dependent upon this step being taken, as section 28 of that Act, recognizes rights of compulsory acquisition as an overriding interest in land subsisting whether or not registered on the Land Register.
- [75] Concerning whether a contract will be frustrated by compulsory acquisition, the case law demonstrates that the critical question is the date of acquisition.
- [76] In **E Johnson & Co (Barbados) Ltd v N S R Ltd**²⁶ Johnsons agreed to sell a parcel of land to N S R. A deposit was paid towards the purchase price, and the completion date was set for 30th September 1989. After contract and before the completion date a notice was published under section 3(1) of the Land Acquisition Act to the effect that the Crown was likely to acquire the land compulsorily. On 11th October, N S R gave notice purporting to rescind the contract on the ground (inter alia) of frustration by reason of the section 3(1) notice, and instituted legal proceedings to recover the deposit paid. Johnsons counterclaimed for specific performance of the contract. Some 10 months later on 9 July 1990 before trial of the action, a notice was published under section 5 of the Act which vested the land in the Crown. The Privy Council considered whether the initiation of the compulsory acquisition procedure after parties have exchanged contracts for the sale of land but before the contractual date for completion, had the effect of preventing completion of the sale.
- [77] The Board examined the Barbados Land Acquisition Act and determined that the section 3 notice, was a threat of compulsory purchase or a notice of intention to acquire and 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

²⁶ (1996) 49 WIR 27

from that which was undertaken by the contract'. On the conclusion of a contract for sale of land, the risk passes to the purchaser, and it will be presumed, in the absence of specific provision to the contrary, that the purchaser has agreed to accept the normal risks incidental to land ownership. Though the risk of interference with land-owning rights by the Crown or statutory authorities is always present, nonetheless, a section 3 notice did not amount to a frustrating event.

- [78] In relation to the argument that publication of the section 3 notice prevented Johnsons giving vacant possession to the land on the date of completion, the Board stated:

“It is no answer to this contention to say that because the risk of intervention has been accepted by N S R they must accept the risk of not obtaining vacant possession. The position is very clearly set out in Cook v Taylor [1942] Ch 349 where Simonds J draws the distinction between supervening events of which the purchaser has expressly or impliedly accepted the risk and events which disable a vendor from performing specific obligations which he has undertaken...”

- [79] The Board determined that the fundamental question was whether the possession which Johnsons were in a position to give on the closing date was something other than 'vacant possession' within the meaning of the contract. In the cases reviewed, the issue turned on whether the acquiring authority had possession or the right to immediate possession at the completion date and when it had, the vendor could not then give vacant possession. Applying this to the facts before them, the Board held that the Crown had no right to immediate possession on the closing date and there was no certainty at that date that it would ever seek to acquire such a right, and concluded that Johnsons were in a position to give vacant possession of the land to N S R on the closing date, from which it follows that N S R were in breach when they purported to rescind the contract in October 1989.²⁷

- [80] In **Cook v Taylor**²⁸ the vendor and purchaser entered into an agreement for sale of a house and the purchaser paid a deposit. Before the date fixed for completion, the property was requisitioned and taken over by the town clerk and the council was still in possession at the date fixed for completion. The vendor commenced an action against the purchaser

²⁷ At pages 33-35

²⁸ [1942] Ch. 349

who had refused to complete the sale, for specific performance of the contract. The court held that there was a contract expressly to sell the property with vacant possession and there was according to the general law an implication that the property was to be sold with vacant possession. From the moment the requisition notice was served on the vendor, he was not in a position to give vacant possession and therefore he was not entitled to specific performance of the contract. Simonds J had this to say:

"It has been urged that although in the ordinary sense he was bound to give actual possession, that which took place was not a breach by the plaintiff of his obligation in that regard. In the first place it was said that the requisition notice and what took place before February 25, the date fixed for completion, did not preclude actual possession from being given. I do not take that view. It seems to me that, from the moment when the requisitioning authority served the notice and took the keys from the vendor, the vendor was not in a position to give vacant possession and was not in a position to allow the purchaser to enter on the property....."

On the date fixed for completion the vendor was not in a position to do that which he had contracted to do and give vacant possession to the purchaser, for he had already, pursuant to a proper requisition, parted with the keys of the property, which is equivalent to symbolical delivery of the property to the requisitioning authority. From that moment he could not give vacant possession to the purchaser.

*The second point which was taken on this part of the case was this: it is said that, even if the vendor was not in a position to give vacant possession at the date fixed for completion, that was an incident subject to which the purchaser took the property. It is said that, as from the date of the contract, the property became in equity the property of the purchaser and he took it subject to any misfortune such as flood, fire or requisition by the appropriate authority. I think the answer is that the two cases of flood or fire, on the one hand, and requisition by the appropriate authority on the other, are quite different matters. By this contract the vendor, as I have held, agreed to give vacant possession of the property on a particular day. That was his bargain, he must fulfil it and cannot insist on the purchaser performing some bargain which he did not enter into."*²⁹

[81] Simonds J dismissed the action and made a declaration on the purchaser's counterclaim for the repayment of his deposit, that he is entitled to the deposit.

²⁹ At pages 352-353.

[82] Again in **James Macara Ltd v Barclay**³⁰ pursuant to an agreement for the sale of a house and lands with vacant possession, the purchasers paid a deposit but before the date fixed for completion, the competent authority gave notice to the vendor who was in occupation, that the lands and premises were required for national purposes, but the authority never actually entered the land. The vendor informed the purchasers of the notice, but proceeded to negotiate with the requisitioning authority, without the knowledge of the purchasers, with a view to inducing the authority not to proceed with the requisition. On the date fixed for completion of the sale, the purchasers informed the vendor that as he was unable to give vacant possession, they required the return of the deposit paid. The vendor refused to comply with that demand, and the purchasers sued for the amount of the deposit. It was held, that service of the notice of requisition on the vendor without actual possession being taken by the requisitioning authority created an immediate interest in possession in that authority and was an effective exercise of the power conferred on the authority, with the consequence, that the vendor was not in a position at the date fixed for completion, to give vacant possession to the purchasers who were therefore entitled to be repaid the amount of the deposit.

[83] Finally in the **Amalgamated Investment & Property Co. Ltd. case**³¹ discussed earlier, Lawton LJ remarked:

“Anybody who buys property knows ... that there are all kinds of hazards which have to be taken into consideration... There is the hazard of fiscal and legislative changes. There is the hazard of existing legislation being applied to the property under consideration — compulsory purchase, for example... At common law anyone entering into a contract for the purchase of real property had to accept the risk of damage to the property after the contract had been made. Damage to the property nowadays can arise from causes other than fire and tempest. Financial loss can arise from government intervention. This is a risk which people have to suffer.”³²

[84] 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

³⁰ [1945] K.B. 148

³¹ Supra, note 12

³² At page 175

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.

Issue 4: Did Geest cause a repudiatory breach of the 2019 Agreement?

[85] In light of the events borne out by evidence, and the findings above, this issue no longer arises.

Issue 5: Did EHL conspire with the Mr. Johannes and Mr. Charlemagne to interfere with Geest's business relations?

[86] Mrs. Ouhla contends on behalf of Geest that there is sufficient evidence to infer that EHL was aware of the restrictions imposed on Mr. Johannes, by Geest as his employer and was complicit in assisting him to breach his statutory and contractual obligations to Geest. Counsel submits that several inferences can reasonably be drawn from the evidence, based on the following facts:

1. EHL's Table of Expenses and Lost Profits shows that Mr Johannes was given payments of \$1,000.00 and \$75,000.00. It was not clarified in re-examination why these amounts were paid to Mr. Johannes despite the fact that he was acting as agent for Geest in the sale of the Belair Lands. There was no indication that Geest was aware of the payments or consented to such payments being made to him. Thus the inference to be drawn is that Mr. Johannes was paid by EHL to induce him to enter the 2019 agreement

2. Mr. Johannes was not employed by EHL and was the Managing Director of Geest, and such monies paid to him was either as a secret profit or bribe.

3. No survey plan was ever produced, in circumstances where the Belair lands were extensively occupied. The inference is that there never any survey conducted or if a survey was conducted it revealed that the Belair Lands were occupied. As EHL was responsible for paying and obtaining the survey, it was complicit in not carrying out the survey, or failed to reveal the truth from the survey.

[87] Counsel urged the Court, to find that it was reasonable to conclude that there were some underhanded dealings between the EHL and Mr Johannes aimed at injuring Geest and if EHL was successful in its claim, Geest would suffer significant financial loss in circumstances where EHL had significantly contributed to the circumstances which have arisen.

[88] 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.

[89] Concerning the claim of unlawful interference with economic interest, in the case of **OBG Ltd v Allan; Douglas v Hello! Ltd (No 3); Mainstream Properties Ltd v Young**,³³ the House of Lords distilled the elements of the tort as follows:

*"[47] The essence of the tort therefore appears to be (a) a wrongful interference with the actions of a third party in which the Claimant has an economic interest and (b) an intention thereby to cause loss to the Claimant..."*³⁴

³³ [2007] UKHL 21

³⁴ At paragraph 47

[90] Unlawful means was defined by Lord Hoffman as acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. The act against the third party must be actionable by the third party, and if the third party submits to the threat, as the defendant intended, the claimant will have suffered loss instead.³⁵ This does not include acts which may be unlawful against a third party, but which do not affect his freedom to deal with the claimant.³⁶ In **AI Enterprises v Bram Enterprises**³⁷ it was said that 'unlawful' is to be given a narrow construction, such that:

*"... the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue from harm intentionally caused by existing actionable wrongs to a third party. Thus, criminal offenses and breaches of statute would not be per se actionable under the unlawful means tort, but the tort would be available if, under the common law principles, those acts also give rise to a civil action by the third party and interfered with the plaintiff's economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will be therefore no potential liability under the unlawful means tort.."*³⁸

[91] In relation to 'intention,' Lord Hoffman also explained in **OBG Ltd**, that it must be an intention to cause loss, and that it was necessary to distinguish between the ends, means and consequences He stated that:

*"One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions."*³⁹

³⁵ OBG Ltd at paragraph 49

³⁶ OBG Ltd at paragraph 51

³⁷ [2014] 1 R.C.S. 177

³⁸ At paragraph 45.

³⁹ At paragraph 62

- [92] As can be gleaned from these cases, the cause of action contemplates unlawful interference with a third party. In this case that would mean EHL interfering with a third-party and causing Geest loss. The unlawful act that interferes with the third party would have to be actionable by that third party. The evidence has not shown any unlawful act by EHL against Mr. Johannes that is actionable by him. Further, if according to the authorities, unlawful acts are given a narrow construction, none of the 'facts' and inferences that Mrs. Ouhla puts forward amount to unlawful acts for the purpose of establishing the tort and none have been established. Consequently this claim also fails.
- [93] I have already addressed the issue of the survey at length, earlier in this judgment. Failure to conduct a survey was not a breach of the 2019 Agreement and was not required by that agreement. Additionally, the presence of occupiers were known by both parties prior to the 2019 Agreement.
- [94] The evidence has not shown that the monies paid to Mr Johannes were not legitimate sums, and insinuation of secret profits and bribes would have to be established by facts and evidence and this has not been done. Further, Geest has not addressed the requisite intention, and the only loss mentioned is the cost of defending the claim and bringing the counterclaim which does not suffice. Therefore, any claim of unlawful interference with economic interests must fail.
- [95] Finally, any claim for conspiracy to injure, as Mr. Fraser interprets that claim, must also fail. As stated in **Winfield and Jolowicz on Tort**⁴⁰, to establish a claim of conspiracy to injure, it must be shown that there is a combination of persons whose predominant purpose is to injure another in his trade or business or in his legitimate interests. Such predominant purpose to injure may render otherwise lawful acts unlawful. If damage results, then the tort of conspiracy exists. The purpose of the combination must be to cause damage to the claimant. The test is not what the defendants contemplated as a likely or even an inevitable consequence of their conduct. It is what is, in truth, the object in the minds of the combiners when they acted as they did. They must have acted in order that the claimant should suffer damage. If they did not act in order that the claimant should suffer damage

⁴⁰ 17th Edition, 2006 London Sweet and Maxwell WVH Rogers, M.A. page 813-814.

but to pursue their own advantage, they are not liable, however selfish their attitude and however inevitable the claimant's damage may have been.

[96] The evidence has not revealed any such intention to injure Geest, or any damage. Thus, the counterclaim fails in entirety, and must be dismissed.

Conclusion

[97] Based on the foregoing, I make the following order:-

1. EHL's claim for repudiatory breach of contract is dismissed, due to frustration of the contract by the compulsory acquisition of the lands, which formed the subject of the sale.
2. Geest's counterclaim is dismissed.
3. The parties will each bear their own costs.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar