SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2004

BETWEEN:

GOLFVIEW DEVELOPMENT LIMITED

Appellant/First Defendant

and

ST. KITTS DEVELOPMENT CORPORATION

Respondent/Claimant

and

MICHAEL SIMANIC

Second Defendant

Before:

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| The Hon. Mr. Brian Alleyne, SC | Chief Justice [Ag.] |
| The Hon. Mr. Michael Gordon, QC | Justice of Appeal |
| The Hon. Mr. Hugh A. Rawlins | Justice of Appeal |

Appearances:

Mr. Anthony Astaphan, SC, with him Mr. Sylvester Anthony for the Appellant
Mr. Frank Walwyn, with him Mr. Fitzroy Eddy for the Respondent

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2007: February 14;
June 20.

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JUDGMENT

[1] RAWLINS, J.A.: This is an appeal by Golfview against an aspect of a judgment in which Baptists J dismissed a claim that the respondent Corporation brought against Golfview for injunctive relief and specific performance of a contract between Golfview and the Corporation for the sale of condominium units in Golfview's Development project. The Corporation also claimed relief for unjust

enrichment. Golfview had repudiated the contract, retained sums which the Corporation advanced towards the project and counterclaimed against the Corporation seeking damages for breach by the Corporation.

[2] The learned trial judge found that the Corporation breached the agreement by failing to close on a due date. The judge dismissed the Corporation's claim for specific performance and awarded damages and costs to Golfview on the counterclaim for the Corporation's breach. However, the learned judge ordered Golfview to return US$700,000.00 to the Corporation with 5% interest per annum from June 2000 until final payment. In arriving at this decision, the judge held that Golfview was not entitled to retain this money because it was unconscionable to do so. The judge found that the total sum which the Corporation advanced was not a reasonable deposit since it was 35% of the eventual full purchase price for the condominiums. Golfview appealed against this order.

[3] The learned trial judge awarded the Corporation 25% of its costs. He dismissed the Corporation's claim against Michael Simanic with costs. The Corporation cross-appealed against these decisions.

[4] Golfview's appeal is on the following grounds:

(1) The trial judge erred in finding as a matter of fact that the claimant Corporation advanced the sum of US$700,000 as payment towards the purchase price of the condominium units, when there was no evidence adduced to support such a finding.

(2) The trial judge erred in law in granting relief from forfeiture in the sum of US$700,000 having regard to the fact that the US$700,000 consisted partly of deposits and partly of purchase monies.

(3) The trial judge erred in law in finding that it was inequitable and unconscionable for Golfview to retain the US$700,000 having regard to the fact that part of the total comprised a deposit.

Golfview seeks an order setting aside that aspect of the order against which it appeals; an order against the costs awarded to the Corporation and an order that the Corporation should pay the costs in the appeal.

[5] The grounds on which the Corporation cross-appealed are:

(1) The trial judge erred in law and in fact in finding that the claimant Corporation advanced the sum of US$700,000 as its investment toward the purchase price of the condominium units when the evidence was clear that the total of the Corporation's investment in cash and materials was US$840,000.

(2) The trial Judge erred in law and in fact in awarding interest at 5% per annum on the sum which he ordered Golfview to pay to the Corporation when the evidence was clear that the borrowing rate was 14.5% per annum.

(3) The Judge erred in law by failing to appreciate that the Claimant pleaded in the alternative and having succeeded in the alternative claim was entitled to full costs as opposed to 25% of its costs, as ordered.

(4) The trial Judge erred in law in ordering an assessment of the 1st Defendant's damages when the trial was not bifurcated and the 1st Defendant did not prove damages at the trial.

(5) The learned Judge erred in law in awarding costs to the 1st Defendant when the said 1st Defendant did not prove any damages at trial.

The Corporation sought an order directing Golfview to pay US$840,000.00 to the Corporation with interest at the rate of 14.5% per annum, from June 2000 until payment. The Corporation also sought an order setting aside the award of damages for breach of contract and costs in favour of Golfview in the Court below, and an order for costs in their favour in the appeal and in the Court below.

[6] Since an aspect of the appeal and cross-appeal seeks to impeach fact-finding, the issues in this appeal will be considered against a detailed background. First,

## Background

[7] Golfview and the Corporation entered into a written agreement on 1st October 1997. In that agreement, the Corporation agreed to purchase 24 semi-detached condominium units from Golfview. The agreement was subsequently amended on four occasions as problems in the financing and the building of the units arose.

[8] Under the October 1997 Agreement, the Corporation agreed to purchase the 24 units at a purchase price of US$145,000.00 per unit subject to adjustments for upgrades. The total purchase price was stated as US$3,480,000.00. The Corporation agreed to forward cash deposits for the purchase of the units in the amount of US$50,000.00 on or before September 29, 1997 and US$400,000.00 on or before 10th November 1997. The development was to be completed by May or June of 1998. The Corporation was also responsible for purchasing materials valued at CDN$744,000.00 towards the construction of the units. This obligation was referred to as purchaser's construction expenses. These monies were to be applied towards the purchase price of the specified units and the amount outstanding on the purchase price of the units was to be reduced in relation to the materials purchased.

[9] The Corporation agreed to have on deposit with a lawyer, in trust for the Golfview Estates Development, the entire amount of funds required to pay for the

purchaser's construction expenses on or before 15th December 1997. Alternatively, the Corporation agreed to provide a letter of credit for the equivalent amount in favour of Golfview. These funds were to be drawn down to pay for the purchaser's construction expenses. The agreement further provided that all cash deposits advanced by the Corporation to Golfview were to be secured by a charge/mortgage against the 24 units. The agreement was executed on behalf of the Corporation by Vincent Ursini, Jack Scivoletto and Tony Andretti. Mr. Simanic signed on his own behalf.

[10] The Corporation alleged that its business discussions in 1997 with respect to the construction of the condominium units were with Golfview and Mr. Simanic. The claim also alleged that Mr. Simanic was a director, directing mind and chief executive officer of Golfview, who at all material times was the personal guarantor of all money advanced by the Corporation to Golfview. According to the claim, the personal guarantee was to be released and discharged when the amount of the advances were officially registered as a charge against the 24 lots. Golfview and Mr. Simanic undertook to develop the property, to construct the units for the benefit and in the best interest of the Corporation, and, ultimately, to transfer the units to the Corporation.

[11] The Corporation defaulted on the payment of the cash deposits that were to be paid before 10th November 1997. The Corporation had only paid a cash deposit of US$50,000.00 and had failed to deposit the CAN$744,000.00 in trust with a lawyer or to provide a letter of credit for the equivalent amount. The parties amended the original agreement on 26th November 1997 to remedy the Corporation's default. By the first amendment, the amount of the deposit that was to be paid in cash was varied to allow the Corporation to put forward the equivalent in materials and services as agreed by both the Corporation and Golfview. The requirement that the Corporation would provide a trust deposit and/or a letter of credit in respect of the CAN$744,000.00 for the purchase of construction materials was deleted from the agreement. The agreement stated that the US$450,000.00 deposit would be

paid in monthly installments of US$50,000.00 commencing in November 1997. However, it was expressly stipulated that the total sum was to be paid by 28th February 1998. The parties agreed that the charge against the lots would be registered at the time of the amendment in the amount of cash and material paid for by the Corporation. The amendment was executed by Mr. Simanic on behalf of Golfview and Jack Scivoletto and Vincent Ursini on behalf of the Corporation.

[12] The Corporation again defaulted. The Corporation failed to make the required cash payments by 28th February 1998 or to provide the requisite construction materials. Golfview again accommodated the Corporation by a second amendment on 16th March 1998. This amendment confirmed the description of the 24 units which the Corporation would purchase. It confirmed that of the US$450,000.00 deposit which was to be paid by the Corporation pursuant to the original agreement, the unpaid balance as at 12th March 1998 was US$179,000.00. The amendment established a payment schedule for the balance. The last payment became due on 15th April 1998. The value of the Corporation's construction expenses was confirmed in the sum provided for in the original agreement. However, the parties agreed that the Corporation would deliver materials in "partial quantities" and in accordance with Golfview's requests. Additionally, the Corporation agreed to make monthly cash advances of US$35,000.00 beginning 15th May 1998 to 15th December 1998, expressly to assist in funding the construction of the 24 units. It was also expressly stated that the additional cash advances would substitute the same amount in construction material that the parties had prior agreed. The completion date was 15th December 1998. The amendment was executed by Vincent Ursini and Mr. Simanic on behalf of the Corporation and Golfview.

[13] The Corporation again defaulted. The Corporation failed to keep the stipulated payment schedule or that for the monthly payment of US$35,000.00. They did not supply the construction materials in accordance with the agreement. Golfview again accommodated the Corporation. The parties made a third amendment to

the agreement. This was dated 31st July 1998. The amendment stated that its terms represented the latest alterations to their original agreement and the 2 subsequent amendments. The amendment provided for closings to begin in December 1998 and to run to April 1999 in the absence of delays in the payments to Golfview. It further recognized that the Corporation was responsible for paying US$450,000.00 in cash and for supplying CAN$744,000.00 in materials. It acknowledged that to that date, the Corporation had advanced approximately US$560,000.00 and CAN$75,000.00 in cash and approximately CAN$80,000.00 in materials under the agreement. This meant that the Corporation had met its cash deposit requirement, but not its obligation for the supply of materials.

[14] Golfview and the Corporation agreed to obtain US$1 million construction financing to complete the project. The Corporation agreed to remove its caveat from the property in order to permit the lender to register a charge on it. The parties agreed to share the costs associated with the financing, proportionately, based on the amount that the Corporation owed to Golfview. The parties also agreed that once financing was obtained, the Corporation would have been relieved from making advances, because the Corporation would have fulfilled its obligation regarding cash advances under the original agreement. The Corporation remained responsible for closing the purchase of the 24 units.

[15] A default clause was also inserted into the agreement by the third amendment. This clause provided that in the event that Golfview breached the agreement, the Corporation would be entitled to complete the units and deduct the amount thereby expended from the purchase price. The clause also provided that in the event of breach by the Corporation, Golfview was entitled to sell the units for which the Corporation was in default and credit the Corporation for any deposits that the Corporation made against each unit.

[16] The parties failed to secure the construction financing. The learned trial judge stated[1] that this meant that the Corporation was not relieved of its obligations under the original agreement, as amended, in respect of the purchase of construction materials, and therefore remained in breach for this. This breach was however accommodated by a fourth amendment dated 21st November 1998.

[17] The fourth amendment reduced the number of units to be purchased by the Corporation from 24 to 12. The purchase price of each unit remained unchanged, except that the Corporation agreed to pay a premium of US$12,500.00 above the original selling price on each unit except on units 17 and 18. The premium on these 2 units was US$50,000.00. The parties agreed that Golfview alone would have tried to obtain the bank financing, and that the Corporation would have removed the caveat to allow for the completion of that bank transaction. The Corporation could subsequently re-register the caveat, but not on units 17 and 18. The closing was to be between 1st and 30th June 1999. Golfview was required to give at least 30 days notice of the closing date. At least 30 days prior to closing, or seven days following the date on which Golfview gave notice, the Corporation was to advise Golfview of the exact amounts of the deposits to be applied towards the specific unit. This amendment contained no default clause.

[18] The learned trial judge noted[2] that in its re-amended statement of claim the Corporation pleaded that between 1st October 1997 and April or May 2000, the parties had agreed to amend the original October 1997 agreement and that another amendment, which was executed in or about April or May 2000, represented the contractual relations and obligations between the parties. It was referred to as "the Revised Agreement". The trial judge also noted[3] that the Corporation also pleaded that pursuant to the Revised Agreement, the number of units to be purchased was decreased from 12 to 8 and the price per unit increased

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[1] At paragraph 38 of the judgment.
[2] In paragraph 20 of the judgment.
[3] In paragraph 21 of the judgment.

from US$145,000.00 to US170,000.00. The learned judge also noted[4] Golfview's assertion that between April and May 2000, Golfview concluded a new agreement with the Corporation for the sale and purchase of the units. The learned judge noted that the parties were in the process of negotiations, which was evidenced in a number of correspondences between them. He found that the parties made a revised agreement regarding the sale of 8 instead of 12 units and the price per unit was increased from US$145,000.00 to US$170,000.00. In the judge's view, however, this did not exclude all the terms of the original Agreement as amended. This finding was not appealed.

[19] The Corporation claimed that as at March 2000, all of the units referred to in the revised agreement were constructed, but in breach of the agreement, Golfview wrongfully failed or refused to complete the sale or to take any steps towards completion. The Corporation further alleged that Golfview wrongfully rejected the Corporation's efforts to tender the closing documentation, including proof of financial capability to pay the balance of the purchase price of the revised Units. The Corporation also alleged that Golfview and Simanic wrongfully failed to register a charge/mortgage in favour of the Corporation against the lots which were to be sold to the Corporation; sold or transferred a number of the lots to other persons without approval or consent; failed to account to the Corporation as equitable mortgagee for the proceeds of the sale, and wrongfully rented the remaining units and collected and/or derived benefits from the rents without authorization, consent or agreement. In the alternative, the Corporation alleged that Golfview and Simanic acted in breach of their fiduciary duty to the Corporation to act in the Corporation's best interests.

[20] In their counterclaim, Golfview claimed damages for breach of contract against the Corporation on the ground that the Corporation had consistently failed to meet their obligations under the original agreement and amendments thereto. Golfview alleged that the Corporation failed to complete the transaction by the specified

[4] In paragraph 22 of the judgment.

dates, even when they were given an extension to 13th May 2000 and a final extension to 12th June 2000 to pay the balance on the purchase price for 8 units. The Corporation has not appealed the award for breach of contract or the award of damages in the cross-appeal.

[21] It is noteworthy that the Corporation's fourth ground of appeal is against the judge's decision to have a separate assessment hearing in order to determine the quantum of damages to be awarded to Golfview. However, that question is not a live issue. Mr. Walwyn correctly did not pursue it at the hearing of the appeal. This issue was in effect put to rest by this court in St. Kitts Development Corporation v Golfview Development Limited,[5] when it was held that the trial judge properly exercised his discretion to preclude new evidence which Golfview unilaterally filed for the assessment. This court also directed the Registrar to schedule the hearing of the assessment with such directions as the assessment judge might issue.

[22] Although Golfview stated 3 grounds of appeal, I think that these grounds are adequately encapsulated in one issue. That issue is whether the trial judge erred in fact and in law when he ordered Golfview to repay US$700,000.00 to the Corporation on the ground that it would be unconscionable to permit the corporation to forfeit that sum. Ground 1 of the Corporation's cross-appeal is related to this question because by it, the Corporation contends that the judge erred because the amount which he should have ordered Golfview to repay was US$840,000 because the evidence shows that this was the sum that the Corporation advanced to Golfview.

The order to repay US$700,000 to the Corporation

[23] To the extent that Golfview's appeal and the Corporation's cross-appeal on this issue seek to impeach fact-finding by the trial judge, the legal principles which are

[5] St. Christopher and Nevis Civil Appeal Nos. 17 and 15 of 2004 (23rd March 2005).

applicable are well settled. In David Carol Bristol v Dr. Richardson St. Rose,[6] I stated[7] that on the authority of the judgment of the House of Lords in Benmax v Austin Motor Co., Ltd[8] and from decisions of this Court, including Francis v Boriel,[9] Grenada Electricity Services Ltd. v Isaac Peters,[10] and Asot A. Michael v Astra Holdings Limited, Robert Cleveland and Others v Astra Holdings Limited,[11] an appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. I continued by stating that an appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Section 33(1)(b) of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act empowers this Court to draw factual inferences.[12]

[24] Where therefore there is an appeal against the fact-finding of a court of first instance, the burden upon the appellant is a very heavy one. The appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes elegantly stated, exceeded the generous ambit within which reasonable agreement is possible.

The judge's reasons for decision

[25] In his judgment, the learned trial judge stated,[13] correctly, that an important distinction exists between a deposit, on the one hand, and part payment of

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[6] St. Lucia Civil Appeal No. 16 of 2005 (20th February 2006)
[7] At paragraph 13 of the judgment.
[8] [1955] 1 All E.R. 326.
[9] St. Lucia Civil Appeal No. 13 of 1995 (20th January 1997).
[10] Grenada Civil Appeal No. 10 of 2002 (28th January 2002).
[11] Antigua and Barbuda Civil Appeals Nos. 17 and 15 of 2004 (16th May 2005).
[12] No. 17 of 1975 of the Laws of St. Christopher and Nevis.
[13] In paragraphs 89 of the judgment.

purchase money on the other. He stated, further, that a deposit is forfeitable upon breach by the purchaser, while part payment of purchase money must be returned to the purchaser. He cited as authority Howe v Smith.[14] Part payment is simply a payment of a part of a contract price. Although it is generally recoverable by a purchaser who advanced it, it may not be recovered if there is a valid clause in the contract that excludes recovery.

[26] The learned trial judge noted[15] that the Agreement of October 1997 provided for cash deposits of US$450,000.00 to be paid by the Corporation on or before 10th November 1997 as well as a trust deposit with a lawyer of CDN$744,000.00 for purchaser's construction expenses. This latter provision was removed in a subsequent amendment. The trial judge noted that the amendment of 26th November 1997 provided that the US$450,000.00 was to be paid in cash or its equivalent in materials and services and in the amounts of at least US$50,000.00 monthly, beginning in November 1997. The total sum was to be paid by 28th February 1998. The judge found that this sum was primarily security for the performance of the contract, which Golfview had the right to retain upon breach by the Corporation, even without an express forfeiture clause, unless the contact viewed in the round manifests an intention to exclude forfeiture. He cited in authority Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd.[16]

[27] The trial judge further noted[17] the Corporation's assertion that it invested US$700,000.00 against an eventual total purchase price of US$1,965,000.00, which meant that the investment exceeded 35% of the eventual contract price. The judge commented that in the Workers Trust case the Privy Council found that a deposit of 25% was not "reasonable earnest money" and therefore not subject to forfeiture. The Privy Council opined that 10% was a reasonable deposit that could be forfeited.

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[14] [1884] 27 Ch. 89.
[15] At paragraph 90 of the judgment.
[16] [1993] 2 ALL ER 370.
[17] In paragraph 91 of the judgment.

[28] The judge then proceeded to consider the application of equity on the principles in Stockloser v Johnson.[18] He noted the statement by Lord Denning in that case that whether the circumstances which give rise to equity exist depends, first, on whether the forfeiture clause is penal in nature, and second, on whether it was unconscionable for the seller to retain the money. The judge noted Lord Denning's further statement[19] that the equity of restitution could be applied, even when a purchaser is in breach of an agreement, in order to ensure that a seller is not unjustly enriched at the purchaser's expense. The equity is to be tested not at the time of the contract, but by conditions existing when it was invoked.

[29] The trial judge applied these principles and relieved the Corporation from the forfeiture of the monies that the Corporation paid to Golfview. He observed[20] that by the time of the operable breach, the Corporation had made a total investment in cash and material in the project, which was approximately US$700,000.00 or about 35% of the $1,960,000.00 total purchase price of the 8 units. He held that this was an unreasonable sum and it would be unconscionable to allow Golfview to retain it particularly because those advances were used in the building of the units, which Golfview sold and/or rented. The judge stated, further, that in the circumstances forfeiture of those advances would be inequitable and justice required that Golfview should be ordered to repay the US$700.000.00 to the Corporation with 5% interest payable from June 2000.

[30] A determination as to whether the learned judge erred requires 2 separate inquiries. The first is whether there was a sufficient evidential or factual basis for his finding that the Corporation had paid US$700,000.00 to Golfview under their agreement. At the hearing this issue was rendered more simple for decision when Mr. Astaphan, on the prompting of the court, accepted that the court could enter US$560,000.00 and CAN$181,600.00 as the sums that the Corporation paid to

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[18] [1954] 1 ALL ER at 630.
[19] At pages 638 and 639 of the judgment.
[20] In paragraphs 93 of the judgment. SKDC is the Corporation and GDL Golfview.

Golfview, instead of US$700,000.00. Jack Scivoletto, the principal witness for the Corporation, had admitted under oath that these were the only sums paid to Golfview.[21] Golfview admitted in its pleadings that it received US$560,000 and CDN$165,000 or US$560,000.00 and CDN$166,000.00[22] from the Corporation.

[31] Additionally, at the hearing of this appeal, our attention was drawn to Golfview's Monthly Summary of Funds Received from the Corporation. The Summary reveals[23] that from October 1997 to May 1999, Golfview received US$560,000.00 and CDN$166,600.00. In his evidence,[24] Mr. Scivoletto stated that these were the figures which Mr. Simanic communicated to the Corporation in May 2000 but the figure was not consistent with those contained in the Corporation's books. It is noteworthy though that the agreed Statement of the Corporation and Golfview, which was also drawn to our attention, reveals[25] that Golfview acknowledged receiving US$560,000.00 and CDN$181,600.00 from the Corporation.

[32] Mr. Astaphan insisted, however, that these were not refundable deposits because the Corporation paid these sums to secure the performance of the agreement. The critical issue, therefore, is whether there is a basis in law to support the judge's order for Golfview to return the money to the Corporation. This will be considered against the opposing contentions.

## The opposing contentions

[33] Mr. Walwyn submitted that the judge's order that directed Golfview to repay the sums to the Corporation has statutory support in the provisions of section 49 of the English Law of Property Act, 1925,[26] which is reproduced in section 8 of the

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[21] See Tab 12 of the Record of Appeal, last paragraph, page 152.
[22] In paragraph 37 of their amended defence and counterclaim, at page 27 of the Record of Appeal, US$165,000.00 was stated, but US$166,000.00 was stated.
[23] See Respondent's Appeal Book, Tab 10, p. 39
[24] See witness statement at pages 47 and 48 of the Record of Appeal.
[25] See the Corporation – Golfview Transfers, Record of Appeal, Tab 8, pages 93 and 94.
[26] This section provides that where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.

Conveyancing and Law of Property Act.[27] However, the first-mentioned Act does not apply to St. Christopher and Nevis. The provision in the latter Act is applicable only to land which is held by Deed in St. Christopher and Nevis. The land in Golfview's condominium development is held by certificate of title registered in Book Z1 folio 58 of the Register of Titles and is therefore not subject to that provision.

[34] Mr. Astaphan submitted that the judge erred in law in finding that it was inequitable and unconscionable for Golfview to retain the monies, and erred in granting relief from forfeiture to the Corporation having regard to the fact that the US$700,000.00 consisted partly of deposits and partly of purchase monies. He insisted that the Corporation was not and is not entitled to any refund because the Corporation consistently breached the agreement by failing to close the transaction, causing severe hardship and injustice to Golfview. According to Mr. Astaphan, this entitled Golfview to keep the monies, which were deposited as a guarantee for the due performance of the purchaser's obligations. The principle, he said, is that deposits for the purchase of land are forfeitable by the seller where the purchaser is in breach having expressly or impliedly repudiated the contract. Learned senior counsel contended that this holds notwithstanding that the money deposited would have gone in part payment of the total price had the contract been performed. He cited as authority Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Limited,[28] Howe v Smith[29] and Halsbury's Laws of England 4th ed. Volume 42 paragraph 244.

[35] Mr. Astaphan further submitted that the judge did not consider that the agreement was in the nature of a building agreement which required, among other things, significant monies as deposits to mobilize and complete the construction of several units. Instead, he stated, the trial Judge considered post agreement facts such as the sales or rentals made by Golfview after the Corporation failed to comply with

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[27] Cap. 271 of the Revised Laws of the Federation of St. Kitts and Nevis, 1961.
[28] Antigua and Barbuda Civil Appeal No. 13 of 2005 (18th September 2006).
[29] (1884) 27 Ch. 89.

the agreement and close the transaction. According to counsel, it was also significant that the Corporation was at all material times owned and controlled by businessmen and represented by lawyers, but the judge made no inquiry into bargaining power. In any event, he submitted, even if the judge felt that US$700,000.00 was "much higher that the conventional 10%", he should have determined what was a fair amount which Golfview was entitled to retain.

[36] This last submission refers to the notion of set-off. In this regard, Mr. Astaphan contended that even if this court finds that the Corporation was entitled to a refund, Golfview was entitled to keep all monies paid by the Corporation until Golfview was able to sell the units and set-off the monies as agreed under the third amendment. It is clear, he contended, that by ordering the repayment, the judge failed to properly consider the default clause in the third amendment and the fact that Golfview was unable to sell any of the units because of the caveats that the Corporation placed on the property. In the further alternative, he submitted, Golfview was entitled to set-off any monies it retained against the compensation payable by the Corporation. He insisted that the learned judge failed to order that any monies due to the Corporation should be set-off against any sales as agreed under the third amendment, and, more importantly, against the damages awarded by the judge to Golfview for the Corporation's breach of the agreement.

[37] Golfview stated in the defence and counter-claim[30] that it repaid CDN$70,220.80, CDN$65,000.00 and US$45,000.00 to the Corporation to enable the Corporation to purchase building materials to meet the Corporation's obligations under their agreement. Consequently, said Mr. Astaphan, the net sums that the Corporation paid to Golfview were US$525,000.00 and CDN$31,000.00, which sums fell far short of the Corporation's obligations to Golfview. He insisted that the judge erred in law by ordering a repayment of the sum, and, in the event that this court does not agree that the judge erred in law, such sums which Golfview repaid to the Corporation should have been taken into account.

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[30] At paragraphs 39 and 41 of the counterclaim.

[38] Golfview alleged that it repaid CDN$70,222.80 to the Corporation to enable the Corporation to purchase building materials. Golfview further alleged that the Corporation failed to purchase the materials thereby causing it (Golfview) to suffer loss.[31] Golfview also alleged that it repaid CDN$65,000.00 to the Corporation on 26th January 1999. US$45,000.00 of this sum was to be used for the purchase of roofing materials. According to Golfview's pleadings, the Corporation did not purchase the materials and never repaid these monies.[32] On the other hand, the Corporation asserts, in the reply and defence to counterclaim, that having advised Golfview that the cost for supplying these materials was CDN$70,222.80, Golfview paid CDN$70,210.80 and the Corporation delivered the materials for shipping to Golfview in January 1999.[33] The Corporation further stated that it supplied granite products to Golfview for which Golfview forwarded uncertified funds in part payment and the cheque for US$45,000.00 was not cashed. However, the Corporation stated that it requested the full payment of the sum of US$65,000.00 and Golfview duly paid it.[34]

[39] Mr. Walwyn insisted that there was no finding that the Corporation owes any compensation money to Golfview. He said that the statements by Golfview, in paragraphs 39 and 41 of Golfview's defence, that Golfview repaid certain sums to the Corporation are allegations which will fall for consideration in the assessment of damages. The extent of the judge's finding, said Mr. Walwyn, was that the Corporation breached its contractual obligations and that loss and consequently damages are to be assessed. Therefore, he submitted, set-off has no principled foundation or application to this appeal. He noted that Mr. Astaphan offered no authority for his submission that there should have been set-off.

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[31] See paragraph 39 at page 27 of the Record of Appeal.
[32] See paragraph 4 at pages 32 of the Record of Appeal.
[33] See paragraph 4 at page 32 of the Record of Appeal.
[34] See paragraph 5 at page 32 of the Record of Appeal.

[40] In my view, whether these sums are really outstanding to the account of Golfview is a matter of contest. Golfview sought no specific relief in relation to them. Golfview sought no order for set-off, for account or for the return of these funds. In the circumstances, I am not aware of any legal principle or practice by which the learned trial judge could have taken those sums into consideration. I agree, however, that these are matters which Golfview may seek to canvass in the assessment of damages for the Corporation's breach, since by those damages Golfview is to be compensated for loss so that it is financially restored to its original position.

[41] Finally, Mr. Astaphan submitted that the judge should have considered the default clause in the third amendment.[35] I think, however, that the learned judge quite correctly did not consider that clause because the operation of that clause was contingent upon the parties obtaining the construction financing, which they failed to secure. The operation of the clause was also contingent upon no arrangements being made by the parties to waive the default. However, the Corporation's default was waived when the parties executed the fourth amendment on 21st November 1998. In any case, the clause does not give Golfview a right to forfeit the monies.

Is there any legal basis for the repayment order?

[42] It is sound legal principle, on the authority of Howe v Smith that, generally, deposits paid to secure the performance of a contract are forfeitable where the

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[35] The default clause stated: "Once the construction financing has been obtained, then SKDC has fulfilled its financial commitment regarding advances and will be responsible for closing the Purchase and Sale transaction. GDL will be responsible for delivering the completed units as required. Should there be any default on the part of any of the VENDOR or PURCHASER of any term or condition of this agreement, then assuming no arrangements are made between GDL and SKDC to waive the default, then the party in default will have thirty (30) days after receipt in writing of a Notice of Default from the other party to correct the default. Failure to correct the default within the thirty (30) day period will mean the defaulting party is in violation of this agreement. In the case that GDL is unable to complete the units, then SKDC would have the right to complete the units and deduct from the purchase price, the costs expended to complete the units. If SKDC is in default, GDL will have the right to sell the units for which SKDC are in default and shall credit SKDC for any deposits, if any, against the unit." GDL is Golfview and SKDC is the Corporation

purchaser breaches the agreement. This is so whether or not there is a forfeiture clause. The learned trial judge stated that the monies advanced by the Corporation would have been forfeitable as sums advanced to secure the performance of the agreement. However, he found that it was not forfeitable in the present case because the legal principles that relate to penalties, which were stated in the Workers Trust case, are applicable.

[43] In Workers Trust a contract for the sale of land provided for the payment of a 25% deposit by the purchaser and for forfeiture of that deposit in the event of the purchaser's default. The purchaser paid the deposit but failed to complete on the due date. The vendor rescinded the contract and purported to forfeit the deposit. The Privy Council held that the deposit was not a reasonable pre-estimate of the loss which the vendor was likely to suffer in consequence of the default, so that the deposit was penal. The vendor was ordered to repay the deposit to the purchaser. It is noteworthy that the agreement in Workers Trust contained a forfeiture clause which permitted the seller to forfeit the deposit in the event of breach by the purchaser while the agreement in the present case does not contain an operable forfeiture clause.

[44] The issue whether the deposit was not forfeitable because it constituted a penalty did not arise in Howe v Smith because the deposit was £500 while the purchase price was £12,500.

[45] The equitable principles which the learned trial judge invoked from Workers Trust and from the statements in Stockloser v Johnston indicate that the court has an overriding equitable jurisdiction to grant relief from forfeiture where the forfeiture would be out of proportion to the damage suffered by the seller and it would be unconscionable for the seller to retain the money. The learned judge found, in effect, that Golfview used the funds to assist with the building of the development and sold and/or rented the units at a profit, such that forfeiture would be inequitable. The judge held that it would be unconscionable to allow Golfview to

keep the units, the profits from sales, the rental monies and the monies paid by the Corporation as well.

[46] A deposit is generally forfeitable and the learned trial judge opined that the deposits which the Corporation agreed to pay before the third amendment were forfeitable because they were reasonable. He however noted that by the time of the breach, the contract was for the sale and purchase of 8 units for a total selling price of US$1,960,000.00. According to the trial judge, the Corporation had by then advanced US700,000.00. The amount is now to be entered as US$560,000.00 towards security deposit and CDN$181,600.00 towards completion. The judge found that, compendiously, the US$700,000.00 amounted to about 35% of the total selling price. He held that equity could not permit Golfview to retain those sums because it would be penal and unconscionable to do so, based on the decision in Workers Trust where the agreement provided for a 25% deposit by the purchaser.

[47] It is my view that the learned trial judge erred when he considered the advances together in deciding whether they constituted a forfeitable deposit. This is because the verified figures show that US$560,000.00 was advanced as security deposit and CDN$181,600.00 was paid towards completion. The judge should have considered this latter sum independently because it was not a forfeitable deposit but a repayable sum, which Golfview should repay without equitable considerations. I would so order. The question which then arises is whether Golfview could retain the US$560,000.00 deposit.

[48] The Privy Council held, in Workers Trust, that the actual payment of the deposit showed that the purchaser was in earnest in performing the contract. In the present case Golfview waived the Corporation's successive defaults and entered into accommodation amendments. The evidence shows that the Corporation was experiencing difficulties. However, its contributions by way of deposits were about 28.57% towards the selling price by the time of the default. The trial judge

correctly found that the Corporation was in earnest in performing the contract. The Corporation in the present case was in default just as the purchaser in Workers Trust. It will be recalled that in Stockloser v Johnson, Lord Denning stated that the equity of restitution is to aid a defaulting party who is unwilling or unable to perform the contract, but it does not operate because of the default, rather, it operates because in the particular case it is unconscionable for the seller to retain the money or value obtained from the purchaser.

[49] In Workers Trust, the Privy Council also reaffirmed the principle that a genuine deposit is generally forfeitable, but the deposit must be reasonable if equity is to permit the seller to retain it, even when there is, as in that case, a forfeiture clause. Their Lordships found that the 25% security deposit in that case was not a reasonable or true deposit by way of earnest so that the forfeiture clause was a penalty clause. Similarly, on the principles in Workers Trust, a deposit of 28.57% by the Corporation was not a reasonable or true deposit by way of earnest to secure the performance of the contract. For this reason, I think that although the learned trial judge erred when he considered all monies that the Corporation paid to Golfview as security deposits for the performance of their contract, he would have been entitled in any event, in the exercise of his equitable jurisdiction, to order Golfview to repay the security deposits verified as US$560,000.00 to the Corporation.

[50] Having found that Golfview should also have repaid the CDN$181,600.00 to the Corporation, I would dismiss Golfview's appeal. I would also dismiss the Corporation's first ground in the cross-appeal, which states that the learned judge should have awarded US$840,000.00 repayment by Golfview instead of $700,000.00, because the sums advanced have been verified as US$560,000.00 and CDN$181,600.00.

[51] It is noteworthy, however, that in Workers Trust, the Privy Council held that the Court of Appeal of Jamaica erred when it ordered the seller to retain 10%, which

was a reasonable deposit by custom and practice, and repay the 15% balance to the purchaser. The full deposit in that case was $2,875,000.00 and their Lordships held that it was repayable.[36] It is also noteworthy that their Lordships also held that the seller was entitled to retain a sum from the deposit to offset the damages assessed in favour of the seller as a result of the purchaser's default. Their Lordships decided, however, that it would not have been right to keep the purchaser out of the money to await the outcome of the assessment. They therefore ordered the seller to repay, forthwith, a substantial amount of the deposit monies ($2 million) with interest, and to retain the balance from which to deduct the damages, paying any balance over to the purchaser.[37]

[52] In the present case, therefore, where the Corporation advanced US$560,000.00 and CDN$181,600.00, since there is no indication that Golfview's damages have been assessed, I think that it would be reasonable for Golfview to return US$300,000.00 and CDN$181,600.00, forthwith, with interest. It would be reasonable for Golfview to retain US$260,000.00 from which to deduct the damages assessed in its favour, repaying any balance to the Corporation. If the assessed damages are more than the sums that Golfview retain, the Corporation shall pay the balance to Golfview, forthwith.

The applicable interest rate

[53] This question arose on the cross-appeal. Mr. Walwyn submitted that the trial judge erred when he awarded only 5% pre-judgment costs on the sum which he ordered Golfview to repay. He said that there was clear evidence to support an award of 14.5% interest, but the judge gave no reasons for this decision. He relied on evidence given on behalf of Golfview that that company borrowed at 14.5% interest, and on his assertion that the advances held by Golfview were monies which Golfview did not have to borrow at 14.5% compound interest. He submitted

[36] See page 376e-f.
[37] See from page 376g to page 377b.

that Golfview should disgorge the benefit it received from the use of that money from the time that it was received through to judgment and repayment at 14.5% interest.

[54] Mr. Astaphan submitted, on the other hand, that the rate of interest which can be awarded by a judge is not a function of evidence, but is prescribed by the Supreme Court Act. Consequently, he said, there is no basis in law for an award of interest at the rate of 14.5%. I agree with this submission as a statement of the true position in the absence of statute which there is in England. Additionally, the parties made no provision in their agreement for a 14.5% interest rate to be applicable in any aspect of their relationship or to any award made by a court or tribunal. Accordingly, I shall dismiss the cross-appeal on this ground.

Costs awarded to Simanic

[55] In his judgment, the trial judge awarded costs to the 2 defendants, Golfview and Mr. Simanic. They were represented by the same counsel at the trial. Mr. Astaphan submitted that the learned judge correctly awarded costs to both Golfview and Simanic because they had to defend a number of claims which, save for the refund, were dismissed by the trial judge. In addition, he said, the entire claim against Simanic was dismissed and Golfview succeeded on its counter-claim.

[56] Mr. Walwyn submitted that the judge erred in that he should have awarded one set of costs because this was the only costs incurred. He cited as authority rule 64.7 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000[38] and Susan Barbara Dodge and Tony Zapparoli v Michael Simanic and Others.[39] Rule 64.7 provides that where two or more parties who have the same interest in proceedings are separately represented the court may disallow more than one set

[38] Hereinafter referred to as "CPR 2000".
[39] St. Christopher and Nevis Civil Appeal No. 15 of 2003 (12th January 2004).

of costs. The appellants prevailed in Susan Barbara Dodge and Tony Zapparoli. The parties agreed that costs should be awarded to the successful party in accordance with the general rule. $7,500.00 costs were awarded to them. Sir Dennis Byron, CJ, stated:[40]

> "Both Appellants have the same interest in the proceedings and were represented by the same Counsel. One set of costs is to be paid. See part 64.7."

[57] Golfview and Simanic had the same interest in the present case. They were represented by the same counsel at the trial. The implication of rule 64.7 of CPR 2000 is that even where parties that have the same interests in a case are represented by different counsel the court may in its discretion award only one set of costs. It is also implicit from rule 64.7, as the abovementioned statement by the Chief Justice in Susan Barbara Dodge and Tony Zapparoli indicates, that where, as in the present case, the parties have the same interests and are not separately represented by counsel, the court should award one set of costs. Since the judge awarded costs to Golfview, he erred in also awarding costs to Simanic. I would therefore allow the counter-appeal on this ground, set aside the costs order against the Corporation in favour of Michael Simanic, and order that the costs order in favour of Golfview should instead be for one set of costs to be paid by the Corporation to both Golfview and Michael Simanic.

The award of 25% of its costs to the Corporation

[58] Mr. Walwyn submitted that the Corporation was entitled to all of its costs in the High Court on the general rule that costs must generally follow the event. According to Mr. Walwyn, since the Corporation prevailed in its claim for the repayment of the monies which Golfview retained, the Corporation is left to surmise that the reason for the 25% award was the Corporation's failure to establish an entitlement to specific performance of the agreement of purchase and sale. He submitted that the contractual right to specific performance, which was

[40] At paragraph 13 of the judgment.

not granted, and the equitable relief from forfeiture, which was granted, are by their very nature in the alternative. The possible existence of an equitable remedy, he submitted, cannot be considered until the parties' contractual rights and obligations have been established. He contended that, barring unconscionable conduct on the part of the Corporation, and none was found by the judge, the trial judge erred when he did not award full costs to the Corporation.

[59] Golfview did not state a ground of appeal against the learned trial judge's award of 25% of the Corporation's costs. In the relief that Golfview sought from this court, solicitors for Golfview prayed for an order against that costs decision. Mr. Astaphan submitted that the award of a proportion of the costs to the Corporation was premised on an erroneous finding that the Corporation had paid US$700,000.00 as a deposit and/or was entitled to the monies or a refund. Alternatively, he submitted, because of (i) the nature of the claims and allegations made by the Corporation; (ii) the dismissal of the Corporation's primary case against the appellant; (iii) the respondent's pre-trial conduct and several breaches of the agreement as amended; (iv) conduct during the trial[41]; and (v) the appellant's success on the counterclaim, the judge ought not to have awarded any costs to the Corporation. Mr. Astaphan said that his submissions were fortified by the fact that if and only if the Corporation is entitled to any refund, it would be so entitled by a principle of law and not as a result of any conduct on the part of Golfview. Accordingly, he insisted that the trial judge misdirected himself when he ordered Golfview to meet 25% of the Corporation's costs.

[60] The Corporation sought a number of orders in the re-amended claim. Specific performance was the first substantial relief that was sought therein. This claim failed. Golfview and Simanic had to defend against it in proceedings that were protracted. The order for restitution was the second substantial relief that the Corporation sought. In nature, it is quite different from specific performance. It

[41] See, for example, paragraph [65] of the judgment.

was not pleaded in the alternative. The Corporation was entitled to a proportion of its costs for prevailing on that ground.

[61] It is unfortunate that the trial judge gave no reasons for awarding 25% of the costs to the Corporation. The judge made no adverse findings in relation to the conduct of any party in the proceedings. Paragraph 65 of the judgment refers to the Corporation's contention that Vincent Ursini, the Corporation's financial comptroller, who signed the original October 1997 agreement and its amendments was not authorized to sign on behalf of the Corporation. The judge found that he was so authorized because the words "Authorized Signing Officer" appear under his signature, and, under those words, the words "We have authority to bind the Corporation". The judge also noted that all of the parties had relied on the agreement and the amendments to it. It is my view that while it was open to the judge to think that it might have been disingenuous for the Corporation to contend that Ursini was not authorized to sign on behalf of the Corporation, there was nothing that pointed to conduct that could have militated against the award of costs. It is also my view that Golfview cannot rely on the many breaches by the Corporation when Golfview continually reinstated the agreement by amendments.

[62] Golfview was awarded full costs for prevailing on its counterclaim for breach, while the Corporation failed to obtain an order for specific performance. Since restitution was the Corporation's second substantial claim for relief, and it prevailed on that claim, I think that the Corporation was entitled to 50% of its costs. I would therefore allow the appeal on this ground, to the extent that I would vary the award of costs to the Corporation by awarding 50% instead of 25%.

[63] In relation to costs in this appeal and cross-appeal, I indicated that I shall dismiss Golfview's appeal, but would order Golfview to repay US$300,000.00 and CDN$181,600.00 to the Corporation. I shall dismiss ground 1 of the Corporation's cross-appeal because these sums have been verified by the parties and they are not as much as the US$840,000.00 which the Corporation claims in that ground. I

shall also dismiss ground 2 of the Corporation's cross-appeal which seeks 14.5% interest on the repaid sums. I shall allow ground 3 of the Corporation's cross-appeal by ordering that its costs in the High Court should be increased from 25% to 50%, and allow the Corporation's cross-appeal on the ground that the trial judge erred when he awarded separate costs to Golfview and to Mr. Simanic. In the premises, I shall award the Corporation 70% of its costs in these appeal proceedings.

[64] In summary then, the order the order that I would issue on this appeal is as follows:

(1) Golfview's appeal and ground 1 of the Corporation's cross-appeal are hereby dismissed.

(2) Golfview shall return US$300,000.00 and CDN$181,600.00 to the Corporation, forthwith, with interest at the rate of 5% per annum from June 2000 until payment, retaining US$260,000.00 from which Golfview shall deduct the damages assessed in its favour.

(3) Golfview shall repay to the Corporation any balance from the retained sum, forthwith, after Golfview is notified of the amount in which damages are assessed. There shall be interest on the amount so repayable at the rate of 5% per annum from the date of the order of assessment until repayment.

(4) If the assessed damages are more than the sums that Golfview retains, the Corporation shall pay the balance to Golfview, forthwith, after the Corporation is notified of the amount in which damages are assessed. There shall be interest on the amount so payable at the rate of 5% interest from the date of the order on the assessment until payment.

(5) Ground 2 of the Corporation's cross-appeal which seeks 14.5% interest on the repaid sums is dismissed.

(6) Ground 3 of the Corporation's cross-appeal is allowed to the extent that the costs awarded in the High Court for prevailing in its claim for restitution is varied by increasing it from 25% to 50% of the prescribed costs which

shall be calculated on the sum which the Corporation has recovered on its restitution claim.

(7) Golfview shall have prescribed costs on their counterclaim which shall be calculated on the sum which Golfview is awarded when damages are calculated on the counterclaim.

(8) Ground 4 of the Corporation's cross-appeal against the trial judge's decision to order a separate assessment hearing is dismissed because it is redundant.

(9) Ground 5 of the Corporation's cross-appeal against the trial judge's award of costs to Mr. Simanic is allowed. The costs order against the Corporation in favour of Michael Simanic, and the costs order against the Corporation in favour of Golfview shall instead be for one set of costs to be paid by the Corporation to Golfview and Michael Simanic.

(10) In these appeal proceedings, Golfview shall pay the Corporation 70% of two-thirds of the costs which the Corporation is to be paid on its claim in the High Court.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal