THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2012/0028

BETWEEN:

RIVER DOREE HOLDINGS LIMITED

Appellant

and

ATTORNEY GENERAL OF ST. LUCIA

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Davidson K. Baptiste — Justice of Appeal
The Hon. Mr. John Carrington, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Stanley Marcus, SC and Ms. Kimberley Roheman for the Appellant
Mr. Raulston Glasgow, Solicitor General and Ms. Jan Drysdale for the Respondent

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2013: July 10;
November 25.

Civil appeal – Lease agreement – Lease of Crown lands to Danish owned and controlled company – Lease containing sub-clause providing for option to purchase property after specified term – Interpretation of sub-clause containing option to purchase – Whether proper construction of option clause in lease required that appellant should have satisfactorily carried out terms and conditions of lease in order to be able to either exercise option or compel Government to execute Deed of Sale – Whether appellant rightly exercised option to purchase – Whether Government breached terms of lease agreement – Whether proper construction of sub-clause which provided for grant of Aliens Landholding Licence was that conditions stated therein were conditions precedent to grant of licence – Whether learned judge erred in finding that Government could not have bound itself in advance to issue Aliens Landholding Licence for purchase of remaining lands under lease

On 20th February 1987, the Danish owned and controlled appellant company entered into a lease agreement with the Government of Saint Lucia. By this agreement, 1,337 acres of land belonging to the Crown was to be leased to the appellant for a term of 50 years with

the appellant having the option to renew the lease for a further 25 years. The lease agreement contained sub-clauses 9(9) and 9(10) which gave the appellant the option of purchasing the lands and buildings then subject to the lease at any time after the 10th year of the term of the lease and stipulated a purchase price of EC$10.00. Sub-clause 9(11) provided for the grant of a licence under the Aliens (Landholding Regulation) Laws free of charge, for the lessee to hold as owner the land and buildings then subject to the lease. Additionally, the preamble of the lease contained a recital 'E' which stated that at the end of the first 10 year period of the lease, the lessee will be permitted by the Government to purchase the then remaining lands and buildings subject to the lease provided that the lessee has satisfactorily carried out the terms and conditions of the lease including 'the Development Program'. Recital E further set out the purchase price of EC$10.00 and made provision for the grant of an Aliens Landholding Licence to the lessee. The Development Program mentioned in recital E was contained in Schedule 6 to the lease and set out the initial framework and objectives for the development of the land subject to the lease.

On 10th January 1997, a few months after the expiration of the first 10 years of the term of the lease, the appellant gave notice to the Government of its desire to purchase the freehold interest in the remainder of the lands and buildings which comprised the leasehold property. Upon receipt of this notice, Government began conducting a series of investigations to review the operations of the appellant on the leasehold property and concluded that the Development Program had not been satisfactorily carried out. The Government refused to convey the property into the appellant's name and subsequently gave notice to the appellant of its intention to determine the lease as a consequence of the appellant's failure to comply with specific obligations set out in the agreement and eventually of its intention to acquire the leased lands compulsorily.

The appellant instituted legal proceedings against the respondent in the court below, seeking, inter alia, a declaration that it was entitled to have the lands then in its possession transferred to it by the Government at any time after the 10th year of the term on payment of the prescribed price of EC$10.00. Government contended that on the basis of various reports and investigations, the appellant had failed to carry out the said terms and conditions of the lease satisfactorily and either no longer wished to, or no longer had the capacity to perform its obligations under the lease. On 27th October 2006, a master ruled on a pre-trial preliminary point as to the true construction of sub-clause 9(9), which created the option to purchase. He held that in construing the meaning of the option itself, regard must be had to recital E in the preamble of the lease and that when this is read in conjunction with sub-clause 9(9) it was clear that the option to purchase was and is conditioned upon the lessee having satisfactorily carried out the terms and conditions of the lease including the Development Program. The learned trial judge fully concurred with the ruling of the master and ultimately found that the appellant had failed to comply with the terms of the Development Program and dismissed the appellant's claim, holding that the appellant was not entitled to the declarations that it sought. The appellant appealed to this Court.

Held: allowing the appeal and setting aside the order of the court below, that:

1. The operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention. In the instant case, the operative clauses 9(9)-(12) of the lease agreement appear to be unambiguous and complete so there is no need for recourse to recital E in the preamble to assist in their construction. The learned master and trial judge therefore erred in finding that the words of recital E should be incorporated in order to determine the proper construction of the option clauses 9(9)-(12) of the lease. There was therefore no requirement that the appellant should have satisfactorily carried out the terms and conditions of the lease including the Development Program in order to be able either to exercise the option or compel the Government to execute the Deed of Sale. Rather, the only condition precedent to the exercise of the option is that stated in sub-clause 9(9) itself, namely that the appellant should give notice to the Government of its desire to the exercise the option to purchase the leasehold property. The notice given to the Government on 10th January 1997 was sufficient for this purpose.

   Mackenzie and Others v The Duke of Devonshire and Others [1896] AC 400 applied; Halsbury's Laws (4th edn. reissue, 2007) vol. 13, paragraphs 218 and 219 cited.

2. The proper interpretation of sub-clause 9(11) is that the conditions stated therein are conditions to be included in the grant of the Aliens Landholding Licence and not conditions precedent to the grant of the licence.

3. The transfer of the beneficial interest in the property to the appellant, which would occur on the date on which the option is exercised, is independent of the grant of the Landholding Licence to the appellant.

   In re Marlay [1915] 2 Ch 264 applied; Ho Young and Another v Bess [1995] 1 WLR 350 applied.

4. There is no specific statutory provision in the Aliens (Landholding Regulation) Act 1973 that prohibits the Government from agreeing to the grant in the future of an Aliens Landholding Licence. The Government had exercised its statutory discretion to grant the licence to hold the title to the land in the event that the lessee were to enforce the option to purchase, prior to or at the time of the execution of the lease which included the option agreement, in 1986. This was not a case of agreeing to restrict the way in which Government would exercise its discretion in the future, but one of exercising that discretion in advance even if the result was that the discretion having been exercised, it was no longer available to be exercised in a different manner at a later date.

   Regina v Hammersmith and Fulham London Borough Council, Ex parte Beddowes [1987] 1 QB 1050 applied.

JUDGMENT

Introduction

[1] CARRINGTON JA [AG.]: This is an appeal from the order of Georges J [Ag.] in the High Court dated 30th July 2012 after a 5 day trial during the course of 2009 in which he dismissed the claim by the appellant, the claimant in the court below, and the counterclaim of the respondent, the defendant in the court below. The appellant was ordered to pay the costs of the respondent on the claim, such costs to be determined on the prescribed costs basis. The counterclaim was struck out with no order as to costs.

[2] The appellant has appealed to this Court against the dismissal of its claim. There is no appeal by the respondent against the dismissal of the counterclaim.

[3] In its claim that was issued in 2005, the appellant had sought against the respondent, the Government of Saint Lucia, several heads of declaratory relief and damages in respect of the Government's alleged breaches of the terms of its lease to the appellant of approximately 1337 acres of land in Saint Lucia. The substantive relief sought was:

> "(1) A declaration that the Claimant on the 10th day of January, 1997 became legally entitled to the transfer and a Deed of Sale of and in respect of the freehold interest of and in the lands described in the First Schedule to [the] Deed of Lease dated 20th February, 1987 between Her Majesty Queen Elizabeth the Second, represented by His Excellency Sir Allen M. Lewis, Governor-General of St. Lucia and the Claimant.
>
> (2) A declaration that the Claimant on the 10th day of January, 1997 became legally entitled to the grant of an Alien's [Landholding] Licence by the Government of Saint Lucia for the purpose of holding the freehold interest in the said lands.
>
> (3) A declaration that on the 10th day of January, 1997 the Government of Saint Lucia became trustee on behalf of the Claimant in respect of the said lands and from that date remained and continues to remain trustee thereof on behalf of the Claimant.
>
> (4) Damages for breach of the terms and conditions contained in the said Deed of Lease between the Crown and the Claimant."

[4] The essence of the defence to the claim was as follows:

1. The claimant had failed to comply with the terms of the lease, particularly the conditions contained in Schedules 3 and 6.

2. The provisions of sub-paragraphs 9(9)-(12) of the lease were specifically made subject to the lease and all of the provisions of the lease were to be read to give effect to the entire agreement and in particular clause E of the recitals.

3. The grant of a (future) Aliens Landholding Licence (to the claimant) to hold the land as owner referred to in clause 9(11) would invoke the exercise of a future executive discretion which could not be circumscribed by an agreement entered into by hand.

4. Any variation of the Development Plan inconsistent with the specific objective of the lease would have to be endorsed by the Cabinet of Ministers.

5. The defendant had concluded that the claimant had 'failed to satisfy the terms of the Agreement necessary to trigger the option to purchase'; and

6. The decision by Cabinet in 2005 to acquire the lands for public purposes 'diffuses the Claimant's claim for specific performance'.

Background

[5] The appellant is a company incorporated under the laws of Saint Lucia but is owned and controlled by a Danish private foundation ("Faelleseje"). According to its pleaded case, the appellant was established substantially for the purpose of conducting agricultural business on the island of Saint Lucia.

[6] The appellant and defendant entered into a written lease on 20th February 1987 for the lease of 1337 acres of land in the Quarter of Choiseul and Laborie (as

described in Schedule 5 to that lease) for a term of 50 years commencing 24th October 1986 with an option at clause 6 on the part of the appellant to renew the lease for a further term of 25 years 'on making written application in the forty-ninth year to [the Government] – all relevant terms and conditions of this Lease having been satisfactorily performed.'

[7] Under clause 8, the lessee undertook that during the term of the lease it would perform and observe the obligations set out in Schedule 3. The chief among these obligations included the payment of the basic rent, which under Schedule 2 was US$1.4 million payable in an initial instalment from October 1986 and thereafter by seven further annual instalments commencing in October 1987 with interest thereon at the rate of 10% per annum payable in quarterly instalments on the outstanding balance after the initial payment of $125,000.00 in October 1986; the obligation to use the lands for farming purposes only save for the portions sold as house spots and in accordance with the Development Program; to comply with the terms of the Development Program and to 'give effect at once to any order direction or notice duly served on it by [the Government] in connection with The Development Program'. There were also other obligations concerning the maintenance of the irrigation scheme and of all improvements on the leasehold property.

[8] The lease contained at clause 9 the following sub-clauses, the interpretation of which lie at the heart of this appeal:

> "(9) At any time after the end of the tenth year of the term hereby created and prior to the expiration of such term THE LESSEE may give notice in writing to THE GOVERNMENT of its desire to purchase the absolute ownership of the lands and buildings then subject to this Lease in which event subject to sub-clauses (10) (11) and (12) THE GOVERNMENT will forthwith execute in favour of THE LESSEE a Deed of Sale of the lands and buildings then subject to this Lease in the form to be settled by Lawyers for THE GOVERNMENT and THE LESSEE so as to be consistent with the obligations of THE LESSEE in this Lease and to enable restrictions and positive obligations for the benefit of the River Doree Holdings Limited Development to be imposed and enforced by THE GOVERNMENT and THE LESSEE.

(10) THE LESSEE shall pay to THE GOVERNMENT EC$10.00 by way of purchase price.

(11) THE GOVERNMENT shall grant to THE LESSEE a Licence under the Aliens (Landholding Regulation) Laws free of charge for THE LESSEE to hold as owner the land and buildings then subject to this Lease and transferred in accordance with Sub-clauses (9) and (11) hereof. Such Licence to contain conditions designed to ensure that in so far as practical the Development Program, on pain of forfeiture of the said land and buildings, shall be carried out in accordance with its terms and this Lease.

(12) THE LESSEE shall be liable only for the cost of registration of the Deed of Sale and Notarial fees. No other taxes, duties or fees shall be payable to THE GOVERNMENT."

[9] The term 'Development Program' was defined at clause 1 as 'the program set out in Schedule 6 as modified by this Lease and as updated from time to time by THE GOVERNMENT and THE LESSEE'. The Development Program under Schedule 6 is set out under four main headings:

a. Objects:
    i. The transformation of the leased lands into a modern highly productive farm;
    ii. A well-proportioned division between domestic and export production and the promotion of scientific agricultural methods and technology in combination with the best traditional farming methods of the area.
b. Conversion from objective into action:
    i. 300 acres from certain areas of the leased lands were to be cut up and sold as 5 acre plots to local peasants in conjunction with the Government;
    ii. 10 acres around Gayabois and Balca were to be cut up into housing lots;
    iii. Persons already living on the leased premises were to offered the purchase of a piece of land around their homes;

iv. The remaining lands were to be transformed into a model farm (a "Coor farm").

c. Implementation:

i. 250 acres were to be surveyed and divided into 50 lots;

ii. The lessee would construct a road through the area;

iii. The remaining lands would be run as a Coor farm in accordance with the objects above;

iv. A Farmers Association would be formed based on voluntary participation to work for the common interest of the farms at River Doree Holdings Limited Development (which was defined at clause 1 of the lease as the project being undertaken by the lessee and the Government for the agricultural development of the leased lands partly for the sale of house spots, partly for the sale to smallholders for farming and partly for farming by the lessee).

d. Production Programme:

i. The Coor farm, which was described as approximately 800 acres of arable lands, was set certain targets with respect to acreages under cultivation of various crops: bananas, pineapples, fruit trees, mixed coconut and pure coconut; production of pigs and compost and the creation of an irrigation scheme.

[10] As the appellant was an alien controlled company, it required a licence under the Aliens Landholding laws to hold the leasehold titles to the lands. This was granted by the Governor General of Saint Lucia on 12th January 1987. The second schedule to this licence states as follows:

> "(a) the Lessee shall develop the property in the First Schedule in accordance with the lease made between Her Majesty Queen Elizabeth the Second and River Doree Holdings Limited dated 20th day of February [1987]; and
>
> (b) if after 10 years of the lease the Lessee has complied with (a) the Government of Saint Lucia will sell to the Lessee such of the property in the First Schedule as has not been disposed of in

accordance with the terms of the lease for a sum of $10.00 and will grant the Lessee an Aliens Licence to own the said property sold."

[11] By letter dated 10th January 1997, approximately 3 months after the expiration of the first 10 years of the term, the appellant gave notice to the Government, via the Permanent Secretary in the Ministry of Agriculture and Lands, of its desire to purchase the freehold interest in the balance of lands and buildings comprising the leasehold property.

[12] The initial response to this notice appears to have been that the respondent established a committee to 'conduct an inquiry into and review the operations of the Claimant'[1]. This committee gave its final report (the "Dunstan Campbell report") in July 1999. The report concluded that the Development Program had not been satisfactorily carried out. The respondent pleaded that thereafter it established another committee to provide an assessment of the findings of the first committee. It does not appear, however, that the findings of this committee formed part of the evidence in the case.

[13] The notice of 10th January 1997 gave rise to several years of correspondence between the appellant and the respondent culminating in the letter of 16th June 2003 from the respondent giving notice to the appellant of its intention to determine the lease as a consequence of the (appellant's) failure to comply with the obligations referred to in clauses (8) and (B)[2] of the lease. By further letter of 7th March 2005, the respondent wrote to the appellant's legal advisors indicating that it was of the view that the appellant 'no longer has the capacity to perform its obligations under the lease' and that 'Cabinet has agreed, in the public interest, to acquire the leasehold interest of the Company in the remaining portions of the property, being that part of the property not yet sold in accordance with the Lease.'

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[1] See para. 25 of the defence.

[2] This apparently refers to the Preamble B in the Lease Agreement:

"B. THE LESSEE will develop the land in accordance with a Development Program agreed between THE GOVERNMENT and THE LESSEE and set out in Schedule 6 hereto and sales to Smallholders and others will be made by THE GOVERNMENT and THE LESSEE."

[14] As could be gleaned from the terms of the Development Program under the lease, the purpose of the lease was not merely the grant of an interest in land to the appellant to carry out farming on a commercial scale but also to create a certain socio-economic infrastructure of peasant farming, home ownership and the introduction of new farming methods, including irrigation and organisation of peasant farmers, in the relevant parts of Saint Lucia where the leasehold lands lay.

Findings by the court below

[15] In his analysis and evaluation of the evidence commencing at paragraph 115 of his judgment, the learned judge made several findings which were not challenged before us and are relevant to the determination of the issues arising on this appeal.

[16] It appears that contrary to the provisions of Schedule 5, the leased lands comprised 1137 and not 1337 acres and that the respondent's evidence confirmed that 'there seemed to have been little evidence in the Ministry of Agriculture of what exactly comprised the River Doree Estate the subject matter of the lease agreement and … that the figure of 1337 acres was itself questioned by River Doree and remained unchallenged'[3] The judge also found that contrary to the provisions of Schedule 6, some 133 additional acres were sold by the appellant at the request / with the consent of the respondent. The result was that the appellant was left with 465, rather 800, acres in which to conduct the Coor farm.

[17] The trial judge found that the case raised conflicts of fact regarding inter alia 'the apprising of Government by the claimant of modifications to the development programme [sic] and development plan and the reasons for them and … the numerous meetings with Prime Minister John Compton and other functionaries'[4]. The court observed that primary evidence of these matters was given only by Mr. Hofdahl who gave evidence for the appellant and whom the court assessed as a

[3] See para. 230 of the learned judge's judgment.
[4] See para. 231(6) of the learned judge's judgment.

frank and truthful witness and no primary evidence was led by the respondent challenging his evidence.

[18] The trial judge further noted the evidence that 'the uncertainty of [the claimant's] land tenure (from 1997) had resulted in its inability to obtain financing to further implement the Development Programme [sic]'[5] and that '[i]t is indeed disturbing that it took Government over six years to provide River Doree with a definitive and unequivocal response to its notice dated 10th January 1997 to exercise its option to purchase the remainder of the River Doree lands in accordance with Clause 9(9) of the Lease and this is compounded by the fact that in the interim the parties had seemingly been negotiating in the expectation of arriving at a mutually acceptable solution only for the claimant to be told by letter from the Attorney General dated 16th June 2003 addressed to Ms. Pedersen that the findings of a four member investigative team which were consistent with those of the later Dunstan Campbell review team had reported that River Doree Holdings had failed to comply satisfactorily with the terms and conditions of the Lease regarding the Development Programme [sic] and that in view of this the Government of Saint Lucia in accordance with the provisions contained in Clause 9(1) of the said Lease Agreement had given notice of its intention to determine the said Lease as a consequence of River Doree's failure to comply with the obligations referred to in Clause 8 and the preamble B of the Lease Agreement.'[6]

[19] While the trial judge appears to have considered favourably the evidence led on behalf of the appellant, especially that of Mr. Hofdahl and Mr. Leonce, he appeared not to have been as impressed with the evidence led on behalf of the respondent. He found that the Dunstan Campbell report and the earlier Economic Review of River Doree Holdings Limited that formed part of the evidence of Mr. Auguste for the respondent had no probative value; and that the evidence of Rufina Paul on factual matters should be rejected as being unreliable, untruthful prevaricating and unconvincing. He also found that Ms. Paul should not be

[5] para. 187 of the learned judge's judgment.
[6] para. 188 of the learned judge's judgment.

deemed to be an expert witness. This has the natural consequence that her opinion evidence was inadmissible.

[20] The trial judge was equally critical of the evidence of the final defence witness, Mr. Clery, whom he found to be evasive.

[21] After considering the evidence of the appellant's main witnesses, Mr. Hofdahl and Mr. Leonce, the trial judge concluded that there was unchallengeable and irrefutable evidence of failure by the appellant to meet crop production targets set in the Development Program. He went on to find that the deviations from the stipulations in the Development Program were in large measure agronomically and commercially justifiable given the circumstances. He also found that given the specificity of the obligations/objectives of the parties 'the claimant [was] quite incapable ... from allowing part performance or alternative performance as a substitute for satisfactory performance or to maintain that it had wholly or substantially done so'.[7]

[22] The trial judge found that the respondent had 'by express agreement acquiesced in certain changes in the terms of the agreement (e.g. by making more land available for purchase/sale by small holders [sic] and peasants than was originally stipulated) or substitution of a different mode of performance for that originally agreed (e.g. expansion of cocoa cultivation in lieu of coffee)' but 'there was no agreement to the fundamental and radical changes in development which the claimant embarked upon when confronted by the challenges and fiscal exigencies which subsequently arose'[8]. He was of the view that the production of other crops did not relieve or waive the obligations of the appellant under the Development Program and that Government's inactivity could not be perceived as being tantamount to acquiescence. He concluded that the failure by the appellant to comply with the Development Program 'was although generally speaking with the knowledge of the Government of St. Lucia was seldom with its acquiescence'.[9]

[7] para. 370 of the learned judge's judgment.
[8] para. 372 of the learned judge's judgment.
[9] para. 383(ii) of the learned judge's judgment.

[23] With respect to the grant of the Aliens Landholding Licence to hold the lands, the trial judge held that the conditions set out in clause 9(11) of the lease could not be considered as conditions subsequent to the grant of the licence as the grant of a licence under clause 9(11) could not be construed to be an automatic grant since the grant the licence in the case would invoke the exercise of a future executive discretion the exercise of which could not be circumscribed by an agreement entered into by hand.

[24] The trial judge concluded that the appellant would not be entitled to exercise the option to purchase as per sub-clause 9(9) since satisfactory performance of the Development Plan was a prerequisite to do so.

The interlocutory proceedings

[25] After the commencement of the proceedings in the court below, the respondent applied to have the construction of clause 9(9) of the lease regarding the exercise of the option to purchase determined as a preliminary point. This was done in a judgment of Master Cottle (as he then was) on 27th October 2006. Master Cottle ruled that clause 9(9) had to be read in conjunction with recital E, which he found was the part of the lease where the parties had provided for payment of the lease rent, with the result the option to purchase was 'conditioned upon the Lessee having satisfactorily carried out the terms and conditions of the lease including the development program'[10]. The trial judge agreed with this construction of the option to purchase and held further that the exercise of the option to purchase was also conditional upon the respondent's grant to the appellant of a licence under the Aliens (Landholding Regulation) Laws containing the conditions set out at clause 9(11) of the lease.

[10] See para. 10 of the master's judgment.

The grounds of appeal

[26] I now turn to the grounds on which the appellant seeks to appeal the order from the judge below. These are numbered (A)-(N) in the notice of appeal but many of them may be conveniently grouped together for consideration.

[27] Grounds (A), (B), (E) and (F) appear to advance a common complaint that the learned trial judge, having accepted the evidence of the appellant's witnesses and rejected that of the respondent's witnesses and having found the reports advanced on behalf of the respondent were deficient and unreliable, came to a decision that was against the weight of the evidence. This must necessarily relate to the findings of fact made by the judge as indicated above.

[28] In Ground (D), the appellant complains that the Government failed to discharge its own obligations under the lease which the appellant alleges prevented it from performing to the letter its obligations under the lease so that the Government was estopped from relying on unsatisfactory performance by the appellant.

[29] Grounds (G), (H), (I) and (J) address the judge's construction of clauses 9(9) and 9(11) of the lease.

[30] Grounds (K) and (L) are directed to the judge's finding that the appellant had not discharged its obligations under the lease.

[31] Grounds (C), (M) and (N) attack the judge's failure to determine in the appellant's favour any issues of waiver, acquiescence and estoppel on the part of the Government.

[32] Notwithstanding the wide ranging nature of the grounds of appeal, it became clear during the course of the oral submissions advanced by counsel for both the appellant and the respondent that the very heart of this matter lay in the proper construction of clauses 9(9)-(11) of the lease concerning the apellant's ability to exercise the option to purchase. I therefore propose to deal with this issue, which

is covered in grounds (G)-(J) first and thereafter address the other grounds in the notice of appeal.

Submissions and discussion

The option to purchase and the licence

[33] The issue that appears to arise in respect of the interpretation of clause 9(9) is whether the terms of recital E of the lease should be imported into that clause, either at common law or by virtue of the Civil Code of Saint Lucia,[11] so that its proper interpretation would be that the obligation of the Government to execute a Deed of Sale would be subject to compliance by the appellant with the Development Program.

[34] Saint Lucia is unique among the States and Territories that comprise the Eastern Caribbean jurisdiction in that its laws are a mixture of codified and common laws. In Northrock Ltd v Jardine and Another[12] Floissac CJ dealt with the relationship between the Civil Code of Saint Lucia and the common law and commented:

> "To the extent to which our article 986 is a rule of law, it conflicts with the law of England and prevails over the latter by virtue of article 917A(4). To the extent to which our article 986 is a rule of evidence, it excludes contradictory English rules of evidence the importation of which would otherwise have been authorised by our article 1137."

[35] Master Cottle, with whose conclusion the trial judge agreed, was of the view that the exercise of the option was subject to performance by the appellant of the covenants in the lease. Master Cottle came to that conclusion by having regard to the provisions of recital E which he reasoned was necessary to consider in interpreting clause 9(9) because it is in the preamble to the lease that the parties had provided for the 'payment of the lease rent'.

[36] Mr. Marcus, SC submitted that Master Cottle was wrong to import the preamble E into clause 9(9) to arrive at that conclusion. This was because nothing in clause

[11] Cap. 4.01, Revised Laws of Saint Lucia 2008.
[12] (1992) 44 WIR 160 at 167b.

9(9) required the application of external provisions to that clause and that it was impermissible as a matter of law to construe the operative part of a deed by reference to its recitals. He further submitted that article 1141 of the Civil Code, on which the respondent relied, was a rule of evidence only.

[37] Mr. Glasgow, the Solicitor General, argued on the other hand that the proper approach to interpretation was to read the lease as a whole rather than to read individual clauses in isolation. He referred to article 1141 of the Civil Code and submitted that the lease should be treated as an authentic writing and the recital would be complete proof of the obligation of the parties as it was not foreign to the obligations under clause 9(9). Either approach required the recital E to be read in conjunction with clause 9(9) to determine the obligation of the parties under the latter clause.

Discussion

[38] Although it is not readily apparent which ground of appeal specifically challenges Master Cottle's judgment, during the course of argument Mr. Marcus, SC indicated that ground (I) was the relevant ground. The Solicitor General did not seek to differ. As both parties made written and oral submissions on this issue, I am of the view that neither is prejudiced by my considering whether Master Cottle's ruling should stand.

[39] I believe that this is the correct approach. The preliminary point determined by Master Cottle was in relation to an essential issue in dispute on the pleadings. In the words of Sir John Donaldson MR in White v Brunton:[13] 'The decisive feature is that the "preliminary issue" was not, when analysed, an issue preliminary to a final hearing, but the first part of a final hearing'. Master Cottle's judgment was therefore in the nature of a final judgment on a discrete issue in the proceedings which were carried out as a split hearing with the other issues being determined by the trial judge. It remained available to the appellant to await the decision at the second part of the split hearing and appeal the entirety of the decision.

[13] [1984] QB 570, 573F.

[40] I cannot, however, agree with the reasoning of Master Cottle and the trial judge on this issue. On the assumption that by 'lease rent' Master Cottle was actually referring to the payment of US$1.4 million referred to at recital C, this does not appear to bear any relevance to the exercise of the option with which clause 9(9) is concerned if, as the authorities discussed below demonstrate, this is to be regarded as a contract that is collateral to and distinct from the contract conferring the lease. If he was referring to the option price of EC $10.00 which is the only figure referred to in recital E itself, he does not appear to have considered that clause 9(10) itself refers to the payment of the option purchase price of EC$10.00. There was therefore no need to have recourse to Recital E for the reason that he gave.

[41] An option to purchase within a lease is generally treated as a distinct contract between the lessor and the lessee and therefore collateral to the relationship of lessor and lessee that is created by the lease. In Griffith v Pelton,[14] Jenkins LJ (as he then was) after describing the attributes of a stand-alone option to purchase (an option in gross) continued:

> "An option contained in a lease for the lessee to purchase the freehold differs from an option in gross only in the respects that the grantor and grantee stand in the relationship of landlord and tenant, and that the contract creating it is made part of the terms on which the lease is granted. But, albeit collateral to the lease, it is in itself a distinct contract possessing all the essential characteristics of an option in gross".

The question for determination must therefore be: what are the terms of this independent agreement and particularly what, if any, were the conditions to which its exercise was subject?

[42] Master Cottle himself had noted earlier in his ruling that the breach by a tenant of a condition in the lease is no bar at law to his exercise of an option for sale. This conclusion really depends on the construction of the option agreement itself and is not a rule of law. This seems to be the effect of the decision of the Supreme Court

[14] [1958] 1 Ch 205, 225.

of New Zealand in Buckeridge v Tucker,[15] which was cited by Mr. Marcus, SC. In that case, Prendergast CJ stated: 'I also think that, as the option to purchase is not made conditional on the performance by the lessee of the covenants in the lease, even if there was a breach, or if the breach had not been waived, that would not defeat the right to purchase …'[16]

[43] Clause 9(9) of the lease which deals with the option to purchase provides that the Government must execute the Deed of Sale of the lands upon the appellant's written notice of its desire to purchase the remaining lands and subject to clauses 9(10)-(12), namely the payment of the purchase price of $10.00; the grant of a licence under the Aliens (Landholding Regulation) Laws which must contain certain conditions; and the payment by the appellant of the cost of registration of the Deed and notarial fees.

[44] The terms of recital E appear at variance with clauses 9(9)-(12) of the lease. Firstly, this recital speaks of the Government permitting the lessee to purchase the remainder of the lands and buildings at the end of the first ten year period. This language in my view speaks to the creation of a licence to purchase rather than the grant of an option to purchase as the latter, once granted, is exercisable entirely at the whim of the grantee provided that he complies with the terms of its grant. Secondly recital E speaks of the permission to purchase being granted at a definite time 'at the end of the first ten (10) year period' and begs the question what happens thereafter. By contrast clause 9(9) speaks of the option being exercisable after the expiration of the tenth year and before the expiration of the term i.e. 50 years from 24th October 1986. Thirdly, recital E relates the permission to purchase to satisfactory compliance with the terms and conditions of the lease. No such condition appears on the face of clauses 9(9)-(12).

[15] (1898) 17 NZLR 513.
[16] p. 525.

[45] In Mackenzie and Others v The Duke of Devonshire and Others[17] Lord Davey, in concurring with the other Law Lords, took it as settled principle that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention. Halsbury's Laws[18] states the general rule that recitals do not control the operative part of an instrument and the exceptions to that rule that recitals assist the construction of the operative part of an instrument where there is ambiguity in the operative part as to the property affected; where the operative part contains general words and the recital shows that only specific property was intended to pass and where the recital shows that a limitation in point of time must be placed on the operative part.

[46] In the instant case, the operative clauses 9(9)-(12) appear to be unambiguous and complete so there is therefore no need for recourse to recital E to assist in their construction.

[47] I find that article 1141(2) of the Civil Code to which Mr. Glasgow referred does not assist the respondent as that article constitutes a rule of evidence with regard to proof of the content of recitals in deeds and not a rule of law that recitals are to control the construction of the operative part of deeds. This article does not appear to me to be in conflict with the relevant principle of common law under consideration.

[48] I am satisfied therefore that the preliminary point of law was wrongly decided and that Master Cottle and the learned judge erred in finding that the proper construction of the option clauses in 9(9)-(12) required that the appellant should have satisfactorily carried out the terms and conditions of the lease including the Development Program in order to be able either to exercise the option or compel the Government to execute the Deed of Sale. I find that on the true construction of clause 9 of the lease, there was no requirement that the appellant should have

[17] [1896] AC 400, 408.
[18] (4th edn. reissue, 2007) vol. 13, paras. 218 and 219.

performed its other obligations under the terms of the lease as a condition precedent to the exercise of the option to purchase granted under clause 9.

[49] I am of the view that the condition precedent to the exercise of the option is that stated in clause 9(9) itself, namely that the appellant should give notice of the exercise of the option to the Government. The notice dated 10th January 1997 to the Permanent Secretary, Ministry of Agriculture was therefore sufficient for the exercise of the option to purchase under sub-clause 9(9). Even though clause 9(9) states that the Government's obligation to execute the Deed of Sale is also subject to sub-clauses (10)-(12), these sub-clauses do not constitute conditions precedent as they deal with matters such as payment of consideration, which is usually contemporaneous with the completion of a sale; the grant of an aliens landholding licence, which for the reasons that I will give below is independent of the Deed of Sale; and the registration of the Deed of Sale which necessarily takes place after the Deed has been executed.

The landholding licence

[50] The appellant also appealed the learned judge's further findings that the Government could not have bound itself in advance to issue the Aliens Landholding Licence for the purchase of the remaining lands under the lease and that the proper construction of clause 9(11) was that the conditions stated therein were not conditions subsequent to the grant of the licence.

Discussion

[51] Taking the latter holding first, I see nothing in the unambiguous language in sub-clause 9(11) which requires performance of the obligations under the lease as a condition precedent to the grant of the licence. This sub-clause states that the Government shall grant a licence for the lessee to 'hold as owner the land and buildings then subject to this Lease and transferred in accordance with Sub-clauses (9) and (11) hereof.' The transfer therefore seems to be the only condition precedent to the grant of the licence. It seems to me that the transfer to which that

sub-clause refers must be the transfer of the beneficial interest in the property which occurs on the date when the option has been exercised.

[52] In In re Marlay[19] Lord Cozens-Hardy MR cited with approval the earlier decision of Lawes v Bennett[20] that the property was converted from the date of the exercise of the option and not the date of the grant of the option. That the sub-clause should be read as referring to the transfer of the beneficial interest rather than the transfer of the legal interest by execution and registration of the Deed of Sale, appears logical in the context of the grant of the licence. The general practice in these jurisdictions where such a licence is required is that it is applied for after the agreement for sale has been entered into and completion of the sale is usually conditional upon the grant. If the licence is granted for the purpose of allowing a non-citizen to hold the property without the risk of forfeiture, as was decided in Ho Young and Another v Bess,[21] it would be illogical to grant it after he is already holding the property by virtue of the transfer of the legal title.

[53] The effect of the exercise of the option therefore is that the agreement granting the option is converted to an agreement for sale as held in In re Marlay with the consequence that the beneficial interest of the Government as vendor in the real property was transferred to the purchase money and it became a constructive trustee of the property for the appellant for so long as the agreement for sale was specifically enforceable.

[54] Sub-clause 9(11) continues thus: 'Such Licence to contain conditions designed to ensure that in so far as practical the Development Program, on pain of forfeiture of the said land and buildings, shall be carried out in accordance with its terms and this Lease'. This refers to conditions that are to be contained in the landholding licence, not conditions that must be satisfied prior to the grant of the licence. I agree with the submission of Mr. Marcus, SC that these are not conditions precedent to the grant of the licence.

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[19] [1915] 2 Ch 264, 275.
[20] 1 Cox 167, 171.
[21] [1995] 1 WLR 350.

[55] The other consideration in relation to the issue of the grant of the licence is whether the Government was able to bind itself in advance to grant the licence in accordance with the terms of sub-clause 9(11). The challenge to this clause in the agreement was raised by the respondent itself. The onus of proof on this issue therefore lay on the respondent.

[56] Neither party addressed this issue in his written submissions before the trial judge or this Court and it is therefore not clear on what basis the judge felt able to reach his conclusion that 'the exercise of a future executive discretion … could not be circumscribed by an agreement entered into by hand.'[22]

[57] I should say from the onset that I doubt whether the lease was in any event an agreement entered into by hand. It states on its face that it was executed as a deed under seal by both parties and was executed in the presence of a notary royal and recorded in the Office of Deeds & Mortgages on 18th March 1987. The distinction is not, however, critical to my conclusion on this issue.

[58] The Government deliberately contracted at clause 9(11) that it 'shall grant to THE LESSEE a Licence under the Aliens (Landholding Regulation) Laws free of charge for the LESSEE to hold as owner the lands and buildings then subject to this Lease and transferred in accordance with Sub-clauses (9) and (11) hereof'. The issue is whether any effect should be given to this clear undertaking.

[59] There is nothing objectionable per se about an agreement to exercise a statutory power in a certain way. The public law concept of legitimate expectation is based on agreements or understandings that statutory discretion would be exercised in a certain way. The real consideration appears to be not whether there is a fetter on the statutory power but whether, if a fetter does exist, such a fetter is illegitimate, i.e. contrary to the purpose of the statute. I adopt and apply the test as stated by

[22] para. 302 of the learned judge's judgment.

Sir Denys Buckley in Regina v Hammersmith and Fulham London Borough Council, Ex parte Beddowes:[23]

> "I am clearly of the opinion that, if a statutory authority acting in good faith in the proper and reasonable exercise of its statutory powers undertakes some binding obligation, the fact that such obligation may thereafter preclude the authority from exercising some other statutory power, or from exercising its statutory powers in some other way, cannot constitute an impermissible fetter on its powers. Any other view would involve that the doctrine against fettering would itself involve a fetter on the authority's capacity to exercise its powers properly and reasonably as it thinks fit from time to time."

[60] One therefore has to look at the objects of the Aliens Landholding legislation and the purposes for which the power was given and determine whether the agreement was contrary to those objects or purposes.

[61] The licence to hold the legal title to land in Saint Lucia is granted in the exercise of a statutory power conferred by the Aliens (Landholding Regulation) Act 1973,[24] which is legislation that has been enacted in similar, if not identical terms, throughout the region. The purpose of the legislation is to regulate ownership of land in the State by non-citizens and to permit the Government to impose conditions on which such persons may hold real property in the State. In Ho Young and Another v Bess,[25] their Lordships in the Privy Council held that property could be held by an alien without a licence but the title would be voidable as the property would be liable to forfeiture by the Crown.

[62] There is no specific statutory provision in this Act that appears to prohibit the Government from agreeing in advance to the grant of a future licence. The terms of sub-clause 9(11) lay out the circumstances in which the licence would be granted and the conditions which must be included in the licence. In my view, this demonstrates that in 1986 the Government of Saint Lucia had regard to what it felt were the relevant considerations for the exercise of the power. The statutory discretion to grant the licence to hold the title to the land in the event that the

[23] [1987] 1 QB 1050 at 1076.
[24] Act No. 10 of 1973, Laws of Saint Lucia.
[25] At pp. 355-356.

lessee were to enforce the option was therefore exercised prior to or at the time of the execution of the lease which included the option agreement in 1986. Whenever the option was validly exercised, only purely ministerial acts concerning the licence needed to be carried out. This was therefore not a case of agreeing to restrict the way in which the Government would exercise its discretion in the future but one of exercising that discretion in advance even if the result was that the discretion having been exercised, it was no longer available to be exercised in a different manner at a later date.

[63] No question of an impermissible fettering of a future exercise of discretion therefore arises. It was not contrary to the statutory provisions to exercise the discretion in advance, and in the circumstances where the Government itself granted the option, the exercise of the discretion at the stage of the grant by setting out the terms on which a licence would be granted does not appear to be incompatible with the objects of the legislation or the purposes for which the powers were granted.

[64] As a result, I find that the Government has not discharged the burden of proof on this issue and for the reasons that I have given the learned judge was incorrect in his conclusions that the grant was (i) automatic; and (ii) involved the exercise of a future discretion which could not be circumscribed.

[65] For the reasons so far given, I am of the view that the order made by the trial judge should be set aside as I now indicate.

[66] The appellant is entitled to the declaration sought at paragraph (1) of the prayer in the claim save that its entitlement was, in accordance with the provisions in clause 9(9) of the lease only to a Deed of Sale of the lands and buildings then subject to the lease.

[67] I also believe that the appellant is entitled to the relief sought at paragraph (2) of the prayer for the reasons stated above. I note that at paragraph (b) of the

Second Schedule to the landholding licence granted in January 1987 there is specific provision that the Government of Saint Lucia will sell the remaining property for $10.00 if there has been compliance with paragraph (a) which deals with the lessee developing the property in accordance with the lease. However, the respondent did not plead to the terms of this licence or address any arguments as to its effect. On that basis, I do not need to deal with its interpretation or effect on the different provisions of the lease itself which were in issue in these proceedings.

[68] With respect to the relief at paragraph (3) of the prayer, I believe that it follows from my conclusions above that the appellant is entitled to a declaration that on the 10th January 1997 the Government of Saint Lucia became a trustee on behalf of the appellant in respect of the freehold title to the lands then subject to the lease.

[69] The appellant seeks further a declaration that the Government continues to remain a trustee of the freehold title to the lands. It was common ground that by letter of 16th June 2003, the Government gave notice of its intention to determine the lease. This notice was given after the exercise of the option in January 1997. I find such notice to be ineffective as by 2003 the appellant was the beneficial owner of the property with the result that the Government, as lessor, no longer had the power to determine the lease. In Raffety v Schofield[26] Romer J found that once the option to purchase had been validly exercised, '[i]n fact, as between vendor and purchaser generally the powers of the vendor to act as owner of the property, and (inter alia) to change tenants or holdings, are suspended pending completion of the purchase. And I think I ought to hold in the case before me that, after the exercise by the defendant of the option of purchase and pending completion, the power of the plaintiff, if any, to determine the defendant's occupation and the defendant's rights and liabilities under the building agreement became as between plaintiff and defendant suspended and not enforceable, at

[26] [1897] 1 Ch. 937, 945.

any rate not enforceable under the circumstances of the case established before me'.

[70] The respondent pleaded further that in 2005 the Government published notice of its intention to acquire the land under the Land Acquisition Ordinance. In its reply, the appellant contended that the purported acquisition was not bona fide.

[71] The trial judge dealt with the issue of compulsory acquisition by saying that the Government's delay of over 6 years in responding to the appellant's notice of exercise of the option and the stark contrast between the statements in the Government's letter of 7th March 2005, in which it informed the appellant of its intention to acquire the property compulsorily, and the statements by Sir John Compton, the former Prime Minister, in his foreword to Mr. Hofdahl's report "Agricultural Production at Mt. Lezard Estate 1986-1997" (the latter of which was supported in the expert testimony of Mr. Leonce), called into question the Government's bona fides in compulsorily acquiring the remainder of the land for a public purpose.

[72] I have a great degree of sympathy with the judge on this issue. The appellant did not seek any relief in its claim in relation to the acquisition although it had been informed of the notice of intention to acquire and one publication had been made in the Gazette prior to the commencement of the claim, the second publication being made on the day the claim form was issued. Its reply to the respondent's pleading was to allege that the acquisition was not made bona fide and was "inequitable". I do not believe that such a pleading advanced the appellant's case materially if the intention was to seek to quash the decision to acquire. If that were the intention, the appellant's obligation was to plead positively and prove bad faith on the part of the Government. The judge's finding falls short of stating that the appellant had discharged the onus of proof on this issue and the appellant did not formulate any ground of appeal from that finding.

[73] In the circumstances, I believe that the appellant is not entitled to the second part of the declaration sought at paragraph 3 of the prayer in the claim form as the effect of the completion of the process of compulsory acquisition would have been to extinguish its beneficial title to the lands.

The appellant's performance of its obligations under the lease

[74] The issue whether the appellant had satisfactorily performed its obligations under the lease appears to arise in two separate contexts on the pleadings: (i) whether such performance was a condition precedent to the appellant's ability to exercise the option to purchase; and (ii) whether the respondent is entitled to damages for breach of the terms of the lease by the appellant.

[75] For the reasons given above, I have come to the conclusion that, contrary to the ruling of Master Cottle, the appellant's performance of its obligations under the lease was not a condition precedent to its exercise of the option to purchase the remaining lands under the lease in January 1997.

[76] The learned judge struck out the respondent's claim for damages for breach of the terms of the lease and the respondent has not appealed this decision.

[77] It would therefore appear that no purpose is served by reviewing the findings of the judge in respect of the appellant's performance of its obligations under the lease and I therefore decline to do so. This effectively disposes of grounds (A), (B), (E), (F), (K) and (L) in the notice of appeal.

Acquiescence, Estoppel and Waiver

[78] The appellant's arguments on these issues were directed to whether in all the circumstances of the matter, the Government is entitled to rely on any breaches by the appellant of its obligations under the lease in order to deny the validity of the exercise of the option to purchase in January 1997. In the light of my decision with respect to the interpretation of the clause 9(9) that the appellant's performance was not a condition precedent to the exercise of the option under that clause, it

follows that the Government's reaction to any breach by the appellant was irrelevant. Grounds (C), (M) and (N) of the notice of appeal therefore also fall away.

Breaches by the respondent of its obligations under the Lease

[79] The appellant pleaded the following at paragraphs 47-49 of its statement of claim:

> "47. The Government has not transferred the subject lands to the Claimant nor has it granted the Claimant the relevant Aliens Landholding Licence
>
> 48. The Claimant avers that the Government of St. Lucia has evinced an intention to repudiate the provisions of the lease conferring on the Claimant the option to acquire absolute title to the subject lands and granting the concommitant [sic] contractual entitlement to an Aliens Landholdling Licence enabling the Claimant to do so. The Claimant avers that in the premises the Government of St. Lucia has been and is in breach of the terms of the said lease.
>
> 49. As a result of the breach aforesaid, the Claimant has been hampered in the further development of its operations, e.g. not being able to raise a loan from commercial banks on account of its incomplete title to the subject lands, and has suffered financial loss and damage."

[80] I pause to say that the averment at paragraph 48 appears odd in light of the fact that by the time the claim had been commenced, matters had gone beyond the stage of merely evincing of an intention to repudiate the option as the Government had by then given notice that it would acquire the entire property for public purposes.

[81] The respondent's response at paragraphs 25 through 32 of the defence was to plead that there were reports which concluded that the appellant had failed to satisfy the terms of the agreement necessary to trigger the option to purchase and '[c]onsequently the Defendant denies that it was guilty of the alleged or any breaches of the lease agreement as alleged in paragraph 48 of the claim or that its acts or conduct amounted to a breach of contract as herein alleged [sic] or at all'.

[82] The appellant also pleaded that the appellant was informed by letter of 16th June 2003 of the respondent's intention to determine the lease agreement and that this intention to terminate was later over taken by Cabinet decision 114 of 2005 to acquire the lands compulsorily for public purposes.

[83] The trial judge posed the issue of the respondent's breach in this way: 'Whether the acts and/or omissions of the Government were such that they prevented or hindered the discharge or fulfilment by River Doree of its obligations under the lease?'[27] He then found on this issue that 'it could be argued that the prolonged delay in obtaining a positive response from Government in that regard [(i.e. in relation to the exercise of the option)] placed River Doree in grave jeopardy by hindering furtherance of the developmental programme or any developmental plans for that matter including the discharge or fulfilment by River Doree of its obligations under the Lease' and concluded that '[i]n sum, a number of circumstances conspired to prevent or hinder the discharge or fulfilment by River Doree of its obligations under the Lease which cannot in my considered view be truly attributed to the acts or omissions of the Government.'[28].

[84] Ground (D) of the notice of appeal states that the learned trial judge was in error in failing to hold that it was a corollary of the appellant's discharge of its obligation and a term implied by law into the deed of lease that the Government would cooperate with and act with reasonable dispatch and diligence in respect of its own obligations that were prerequisites or necessary acts for the discharge of the appellant's obligations.

[85] Both the appellant's and the respondent's written submissions dealt with the allegations of breach of the respondent in the context of an obligation not to impede the appellant's performance of its obligations under the lease.

[27] See para. 308(iv) of the learned judge's judgment.
[28] See para. 383(iv) of the learned judge's judgment.

[86] In his oral argument, Mr. Marcus, SC appeared further to restrict this ground of appeal to hindrances with respect to sales of the property under the lease to third party farmers and for house spots.

Discussion

[87] In my view, when one considers the appellant's pleading at paragraphs 47-49 of the statement of claim,[29] the learned judge asked himself the wrong question at paragraph 308 of his judgment. The appellant's pleading was not that the Government impeded the fulfilment of the appellant's obligations under the lease but impeded the appellant's ability to enjoy its rights under the lease, namely the exercise of the option and the development of its operations.

[88] The appellant appears to have created the judge's difficulty as in its written closing submissions in the High Court it dealt with the failure of the Government only in the context of impeding the appellant's obligations rather than in the manner in which the matter was pleaded.

[89] This trend has been perpetuated by the way in which the ground of appeal in relation to breach by the defendant was framed and presented in argument on the appeal.

[90] Notwithstanding the shift by all parties from the way in which the claim was pleaded, the consequence of my conclusion above on the exercise of the option is that I am also able to conclude that the respondent did act in breach of clause 9(9) of the lease by failing to commence the process leading to the execution of the Deed of Sale and grant of the Aliens Landholding Licence upon receiving notice of the exercise of the option in January 1997.

[91] Clause 9(9) of the lease states that once the Lessee gives notice of the exercise of the option, the Government must 'forthwith execute in favour of THE LESSEE a Deed of Sale … in a form to be settled by the Lawyers for THE GOVERNMENT

[29] Set out above at para. 79 of this judgment.

and THE LESSEE'. There was therefore an immediate obligation on the part of the respondent to instruct its lawyers to settle the terms of the Deed of Sale with the lawyers for the appellant and thereafter to execute the Deed.

[92] The evidence shows that the respondent simply refused after January 1997 to state its position definitively on the exercise of the option. Its eventual responses in 2003 that it would forfeit the lease and in 2005 that it would acquire the property compulsorily carried no more than an implication that it would disregard its obligations under the collateral obligation created by the option to purchase.

[93] It is a well-established principle of law that a party renounces a contract by his conduct if he evinces by conduct an intention not to perform his side of the bargain or if he refuses to perform unless the other party complies with conditions that are not required by the terms of the contract.[30] In the instant case, the evidence shows that the respondent refused to perform its side of the option agreement. The respondent's pleading shows that its position was that it would not do so as it believed, erroneously in my view, that it was not required to do so unless the appellant had complied with its obligations under the terms of the lease with respect to the Development Program.

[94] In light of the above, I am of the view that the appellant has also been able to prove paragraph 48 of the statement of claim, namely that the respondent has wrongfully renounced the option agreement.

[95] The appellant pleaded at paragraph 49 of the statement of claim that the respondent's breaches of the option agreement hampered the further development of its operations and caused it to suffer financial loss and damage. Ms Hansen gave evidence that Barclays Bank plc and Development Bank refused to advance funds to the appellant because it had not received its licence to purchase the land. She was not cross-examined on this evidence. Ms Pedersen gave evidence to the same effect. She was not cross examined on this evidence either.

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[30] See Chitty on Contracts (31st edn., Sweet & Maxwell 2012) vol.1, para. 24-018.

[96] Neither witness, however, gave evidence of the extent of the financial loss suffered as a result of the respondent's breaches which had been pleaded at paragraph 49.

[97] I find that as a result the appellant failed to discharge the burden of proof of loss as pleaded at paragraph 49 of the statement of claim. The appellant, having proven breach of the provisions of the lease, is nevertheless entitled to nominal damages on the basis that it has established a breach but has not proven loss.[31]

[98] I therefore am of the view that the judge's decision to dismiss the appellant's claim for damages was wrong. The appellant had proven its claim that the respondent was in breach of its agreement notwithstanding the way in which the matter was argued at the trial. I am of the view that the appellant is entitled to nominal damages for that breach. For the reasons indicated above, we have not had the benefit of the views of the trial judge on such damages. There are perhaps compelling arguments why such an award could actually have been substantial but these have not been made to us. I would therefore award to the appellant a nominal sum of EC$50,000.00 as damages for the respondent's breach of the provisions of the lease

Conclusion

[99] I would therefore allow the appeal and set aside the order of the court below. I would hold that the appellant is entitled to the following relief:

a. A declaration that the appellant on the 10th day of January 1997 became legally entitled to the transfer and a Deed of Sale of and in respect of the freehold interest of and in such of the lands described in the First Schedule to the Deed of Lease dated 20th February 1987 between Her Majesty Queen Elizabeth the Second, represented by His Excellency Sir

[31] See Surrey County Council and Another v Bredero Homes Ltd. [1993] 1 WLR 1361 where the Court of Appeal agreed that the award of nominal damages made by the High Court where the claimant was able to establish a breach of the agreement but no loss was correct.

Allen M. Lewis, Governor General of Saint Lucia and the appellant that continued to be subject to the lease as at 10th January 1997.

b. A declaration that the appellant on the 10th day of January 1997 became legally entitled to the grant of an Alien's Landholding Licence by the Government of Saint Lucia for the purpose of holding the freehold interest in the said lands.

c. A declaration that on the 10th day of January 1997 the Government of Saint Lucia became trustee on behalf of the appellant in respect of the said lands and from that date remained trustee thereof on behalf of the appellant until the completion of the process of compulsory acquisition of the lands.

d. Damages in the sum of EC$50,000.00 for breach of the terms and conditions contained in the said Deed of Lease between the Crown and the appellant.

[100] As the appellant has succeeded on the appeal, I see no reason to dis-apply the general rule that costs should follow the event. The court below made an order for prescribed costs against the appellant on the claim. In the light of the success of the appellant on the appeal, this order is set aside.

[101] Mr. Marcus, SC submitted that costs of the appeal should be assessed while Mr. Glasgow argued that costs should be determined under rule 65.5(2)(b) of the Civil Procedure Rules 2000 ("CPR"). CPR 65.5(13) states that the general rule is that costs on an appeal must be determined in accordance with rule 65.5 and limited to two thirds of the amount that would otherwise be allowed. If the Court is to be persuaded to make an order that is outside of the application of the general rule, it should be on the basis of evidence or some legal argument that is directed to the reasons why the general rule should not be applied. However, CPR 65.13(2), as recently amended, now gives the Court of Appeal the discretion to depart from the general rule if the circumstances of the appeal or the justice of the case require.

[102] Although no specific basis for departing from the general rule was advanced by Mr. Marcus, SC, I am prepared to exercise the discretion under CPR 65.13(2) on the basis that due to the issues raised in the claim below, the volume of evidence that it was necessary for the parties to prepare, the length of the trial and of this appeal, the justice of the case demands that costs should not be determined on the basis of the claim being treated as a claim for $50,000.00.

[103] I would therefore order that the appellant is entitled to its costs in the court below, such costs to be assessed by a master of the Court, and to the costs of this appeal, such costs to be fixed at two thirds of the assessed costs in the court below.

John Carrington, QC
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson K. Baptiste
Justice of Appeal