IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No GYCV2019/013
GY Civil Appeal No 27 of 2012

BETWEEN

BLAIRMONT RICE INVESTMENT INCORPORATED **APPELLANT**

AND

1. **KAYMAN SANKAR INVESTMENTS LIMITED**
2. **KAYMAN SANKAR AND COMPANY LIMITED**
3. **BENI SANKAR** **RESPONDENTS**

Before The Honourable: **Mr Justice Saunders, President**
Mr Justice Wit
Mme Justice Rajnauth-Lee
Mr Justice Burgess
Mr Justice Jamadar

Appearances

Ms Jamela Ali, SC, Mr Sanjeev Datadin and Mr Donavan Rangiah for the Appellant

Mr K A Juman-Yassin, SC, and Mr Teni Housty for the Respondents

JUDGMENT
of
The Honourable Justices Wit, Rajnauth-Lee, Burgess and Jamadar

Delivered by the Honourable Mr Justice Burgess

and

CONCURRING JUDGMENT
of the Honourable Mr Justice Jamadar

and

DISSENTING JUDGMENT
of the Honourable Mr Justice Saunders, President

Delivered on the 25th June 2021

Contracts – Breach – Interpretation of commercial contracts - Gravity of breach – Condition, Warranty, or Innominate term – Whether the Appellant's breach of the instalment payment sub-clause was a repudiatory breach – Whether the Respondents were entitled to rescind the contract.

Companies – Striking off – Whether a company that has been struck off the register could defend a legal action brought against it – Companies Act Cap 89:01 – ss 487(5) – 488.

SUMMARY

On 21 December 2006, the Appellant (Purchaser) and Respondents (Vendors) executed three agreements for the purchase and sale of lands in Von Better Berbice. The three agreements are similar; all provided for the payment of the balance of the purchase price in half yearly instalments (June and December) over nine years (the "instalment payment sub-clause"). The relationship between the parties went awry when the Appellant failed to pay their June 2010 and December 2010 instalments in respect of all three agreements. Via letters, the Respondents notified the Appellant of their breach, but this was to no avail. In a final letter dated 17 January 2011, the Respondents expressed that they accepted the Appellant's repudiation of the agreements. The Appellant did not accept that the agreements were at an end. This prompted the Respondents to initiate legal action claiming rescission of the contracts, re-possession of the lands and unspecified damages.

At the High Court, then Chief Justice Chang (Ag) held that the agreements were rescinded and ordered that the Respondents pay "restitution" to the Appellant. The Appellant then appealed to the Court of Appeal. Chief Justice Roxane George-Wiltshire (Ag) on behalf of the Court of Appeal determined that the instalment payment sub-clause was an "essential term" which made time of the essence and the failure of the Appellant to satisfy their payment obligations entitled the Respondents to repudiate the agreements. The Appellant then sought redress at this Court. An important issue for the Court's consideration was the fact that the Appellant was struck off the companies register since 24 July 2010. This point was never raised before the courts below.

The Court determined that there were two issues to be addressed. Firstly, whether the Appellant's breach of the instalment payment sub-clause was repudiatory, entitling the Respondents to repudiate the agreements. Secondly, whether the Appellant, as a company

that had been struck off the register could defend against a legal action brought by the Respondents. Burgess JCCJ delivered the judgment of the Court. Jamadar JCCJ delivered a concurring judgment and Saunders PCCJ delivered a concurring opinion on the first point but dissented from the majority on the second point.

Burgess JCCJ highlighted the approaches of classifying breaches of contract. The traditional approach focuses on the nature of the breach, categorising terms as either "conditions" if they were terms, breach of which, went to the root of the contract, or "warranties" if they were terms, collateral to the purpose of the contract. The modern approach, adumbrated in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd*[1] looks at the gravity of the breach. The underlying principle is that some terms are complex, the breach of which, may *or* may not give rise to an event which will deprive the non-defaulting party of substantially the whole benefit which it was intended that they should obtain. These terms were classified as "innominate terms".

Burgess JCCJ concluded that the instalment payment sub-clause was an innominate term. In coming to this conclusion, he endorsed the principles established in *Wood v Capita Insurance Services Ltd*[2]*, Rainy Sky SA v Kookmin Bank*[3] *and Arnold v Britton*[4]*,* that in interpreting a commercial contract, the court's function was to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. A reasonable person could not determine, based on the wording of the instalment payment sub-clause, that non-performance of it presumptively constituted a substantial failure to perform the contract. That term could be breached trivially or substantially. Additionally, even considering the wider context, that is, the evidence of the Appellant's knowledge of the Respondents' obligations to the bank and their cognisance of the need for punctual compliance, whatever its significance, would not change the character of this term, given the context of the agreement as a whole. The variety of consequences that could follow

[1] [1962] 2 QB 26.
[2] [2017] UKSC 24, [2017] AC 1173.
[3] [2011] UKSC 50, [2012] 1 All ER 1137.
[4] [2015] UKSC 36, [2015] AC 1619.

breach of the instalment payment sub-clause meant that it could not be classified as a condition; it was an innominate term.

Burgess JCCJ then determined that the breach of the instalment payment sub-clause deprived the Respondents of substantially the whole benefit of the contract. He stated that the benefit which it was intended that the Respondents should obtain was instalments paid in a timely manner, to avoid the Respondents' default on their financial obligations to the bank and therefore loss of their properties (as was mentioned in the agreements). The Appellant's failure to pay instalments for an entire year was so extensive, as to have a serious consequence for the "commercial purpose of the venture" between itself and the Respondents. That failure undoubtedly put the Respondents at risk of being deprived of the whole benefit they were intended to gain from the agreements. Given the foregoing, the Court determined that the Respondents were entitled to repudiate the agreements.

Burgess JCCJ then turned to the striking off the register issue. He rejected the Respondents' contention that a company struck off the register loses its legal personality, and that personality is only regained if, and when the company is restored to the register. In the absence of an express statute to the contrary, it is more correct to say that the legal personality of a company is suspended when it is struck off the register. The company only loses its legal personality when it is wound up and dissolved under section 402(1) of the Companies Act Cap 89:01 (the "Companies Act"). S 488 of the Companies Act, on its plain words, preserves the legal personality of a company for the limited purpose of the enforcement of its liability incurred either prior or after to its being struck off; but the struck off company cannot enforce any liability owed to it. That section ensures that companies cannot escape their liabilities by causing their company to be removed from the register. For completeness, the Court added that where a struck off company wished to pursue enforcement of a liability, it must be restored to the register according to s 487(5) of the Companies Act.

Burgess JCCJ observed that the above interpretation of s 488 is purposive and accords with the policy of the Companies Act in Guyana. It is also, rational, reasonable and upholds the values of fairness and justice as it is in the public interest that the liabilities of companies be satisfied.

Burgess JCCJ further noted that this second issue arose at an unacceptably late stage in the proceedings. He stated that before litigation against a company is initiated, there should always be a search of the Companies Register to determine the status of that company. In the future, if such an issue exists, it should be raised before the first case management hearing, and when raised at that forum, the court should consider, whether the company's status could be regularised, as well as the possible implications for the continuance of the proceedings. For those reasons, the Court by a majority of four to one held that the Appellant had standing to defend the proceedings and pursue the appeal.

Jamadar JCCJ in his concurring opinion agreed with Burgess JCCJ but made some comments regarding the approach taken with respect to innominate terms. The judge stated that innominate terms were a part of the law of contract in the Caribbean though it had not been widely interrogated in judgments. The classification of terms as being "innominate" or "intermediate" allows for flexibility and advances Caribbean jurisprudence. He opined that such classification was not limited to inherently complex contracts or terms and depended on an objective interpretation of the contractual language used in the relevant surrounding circumstances. When one has determined that a term is innominate, there is an evaluative balancing exercise which is undertaken surrounding the impact on the parties and there is an element of proportionality involved. In Jamadar JCCJ's opinion, the instalment payment sub-clause was an innominate term and default in payments had the effect of rendering a central purpose – *that is, the satisfaction of the Respondents' indebtedness to the bank*, unrealisable. Despite the payments already made, the Respondents were put at risk of being deprived of substantially the whole benefit which they intended to gain from the agreements.

In his dissenting opinion, Saunders PCCJ agreed that the appeal could not succeed but he did not agree with the majority's reasoning on the classification of the term as "innominate". Nor did he agree with the majority on the deregistration point. Saunders PCCJ agreed with the Court of Appeal that the instalment payment sub-clause was a condition. He stated that the issue was whether time for payment was of the essence and to determine that question it was appropriate to consider the parties' common intention at the time the contracts were made. He found that it was clear that the parties intended that the payment provisions were critical to the agreements. The agreements themselves made

mention of the bank, in that payments were to be made directly to it to satisfy the Respondents' debt. Basic common and commercial sense showed that failure to make those payments (even on one occasion) would undermine the contract. Both parties knew the risk of untimely or utter failure to make payment.

In relation to the deregistration point, Saunders PCCJ found that the real issue was not whether a deregistered company was dissolved or if it was suspended. The norm is that a company which has been struck off the register could not sue or be sued but s 488 creates a narrow exception whereby an aggrieved person can seek to enforce against a deregistered company, a liability incurred while the company was registered. The thing that was continued and could be enforced after the company was struck off was not the legal personality of the company but rather a pre-existing liability. A company that has been struck off the register could not validly engage in business operations and as such, it could not incur a fresh liability. S 487(5) on the other hand, provides a mechanism to permit a person to pursue a claim that had not ripened into a liability. The person could apply to have the company restored for the purpose of bringing that claim against it. The suit was brought in January 2011, but it was not brought for the failure to make the instalment payment in June 2010. Had that been the cause of action, then that claim would have properly fallen under s 488. The claims made by the Respondents could not, however, fall under s 488 because the court was being asked to now decide whether there is a liability. Saunders PCCJ's conclusion was that the proceedings were of no legal effect, as a struck off company could not be sued for a liability that did not exist at the time it was deregistered.

This Court dismissed the appeal and affirmed the orders of the Court of Appeal.

Cases referred to

Arnold v Britton [2015] UKSC 36, [2015] AC 1619; *Associated Asbestos Services Ltd v Canadian Occidental Petroleum Ltd* 2002 ABQB 893; *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, (2009) 74 WIR 203 (BZ); *Bacchus v Booklall* (1972) 20 WIR 73 (GY); *Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) 29; *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274; *Bettini v Gye* (1876) 1 QBD 183; *Bunge Corp (New York) v Tradax Export SA (Panama)* [1981] UKHL 11, [1981] 1 WLR 717; *Campbell v A-G of Barbados* [2009] CCJ 1 (AJ), (2009) 76 WIR 63 (BB); *Canadian Imperial Bank of Commerce v Gypsy International Ltd* [2015] CCJ 16 (AJ),

(2015) 88 WIR 23 (BB); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101; *Coggins v Garage and Rolling Door* (Trinidad and Tobago HC, 18 December 2007); *Consolidated Contractors Co SAL v Masri (No 2)* [2011] UKPC 29, (2011) 78 WIR 141; *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2004] 5 LRC 511; *Dies v British and International Mining & Finance Corporation Ltd* [1939] 1 KB 724; *Dumbrell v The Regional Group of Companies* (2007) 85 OR (3d) 616; *Ex p Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 (4) SA 306 (W); *Freeth v Burr (*1874) LR 9 CP 208; *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351; *Galantis v Alexiou* [2019] UKPC 15, [2019] 3 LRC 545 (BS); *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2017] 4 All ER 124; *Graves v Legg* (1854) 9 Exch 709, 156 ER 304; *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; *Johnson v Agnew* [1980] AC 367; *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279; *Leask Cattle Co Ltd v Drabble* [1923] 1 WWR 126, 16 Sask LR 373; *Lombard North Central Plc v Butterworth* [1987] QB 527; *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129; *Miller v NAFCOC Investment Holding Co Ltd* 2010 (6) SA 390 (SCA); *Pacific Carriers Ltd v BNP Paribus* (2004) 218 CLR 451; *Parkin v Thorold* (1852) 16 Beav 59, 51 ER 698; *Perrin v Shortreed Joint Venture Ltd* 2009 BCCA 478; *Persaud v Plantation Versailles & Schoon Ord Estates Ltd* [1970] 17 WIR 107 (GY); *Pocock Floors Ltd v Holmes Construction Ltd* [1971] 1 WWR 394; *Prenn v Simmonds* [1971] 1 WLR 1381; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989; *Schuler v Wickman Machine Tools Sales Ltd* [1974] AC 235; *Sea Haven Inc v Dyrud* [2011] CCJ 13 (AJ), (2011) 79 WIR 132 (BB); *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W); *Sirius International Insurance (Publ) Co v FAI General Insurance Ltd* [2004] UKHL 54 [18]; [2005] 1 All ER 191; *Stickney v Keeble* [1915] AC 386; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361; *System Sales Ltd v Oxley and Suttle* (Barbados CA, 15 May 2014); *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904; *Wallis, Son & Wells v Pratt and Haynes* [1910] 2 KB 1003; *Wickman Machine Tool Sales Ltd v L Schuler AG* [1972] 1 WLR 840; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173; *Workers Trust & Mercantile Bank Ltd v Dojap Investments Ltd* [1993] UKPC 7, [1993] AC 573 (JM).

Legislation referred to

The Bahamas – Companies Act, Rev Ed 2000, CH 308; **Guyana** – Civil Law of Guyana Act Cap 6:01, Companies Act, Rev Ed 2011, Cap 89:01; **Trinidad and Tobago** – Companies Act Chap 81:01; **United Kingdom** – Supreme Court of Judicature Act 1873, Supreme Court of Judicature Act 1875.

Other Sources referred to

Chen-Wishart M, *Contract Law* (1st edn, OUP 2005); Stone R, *The Modern Law of Contract* (6th edn, Cavendish Publishing 2005); Treitel G H, *The Law of Contract* (11th edn, Sweet & Maxwell 2003).

JUDGMENT OF THE HONOURABLE MR JUSTICE BURGESS, JCCJ:

Introduction

[1] The substantive issue in this appeal depends upon the construction to be placed upon a payment by instalments sub-clause (term) in an agreement for the purchase and sale of property between Blairmont Rice Investment Inc (the "Appellant") and Kayman Sankar Co Ltd, Kayman Sankar Investments Ltd and Beni Sankar (the "Respondents"). The Appellant admits breach of this sub-clause but denies that, that breach was of a kind which entitled the Respondents to repudiate the agreement as they claim to have done.

[2] A separate procedural question is also raised as to whether the Appellant, being a company struck off the register of companies by the Registrar of Companies, can defend an action against it by the Respondents for breach of the purchase and sale agreement, and correspondingly, whether the Appellant can pursue an appeal before this Court.

Factual Background

[3] The essential facts of this appeal are relatively straightforward.

[4] The Appellant entered into three separate agreements in writing all dated 21 December 2006 to purchase property at Blairmont and Von Better from the first, second and third Respondents. The property comprised rice land (held by Deeds of Transport and State Leases), rice mills and other assets related to the cultivation of paddy and the production of rice and rice products. The agreements provided for the payment of the purchase monies over a period of ten years and for the delivery of possession of the purchased property to the Appellant at the time of execution of the agreements.

[5] The three agreements were drafted by the attorney-at-law for the Appellant. These agreements are in all material respects similar and typically read, in so far as is relevant, as follows:

….

2. In consideration for the other, BLAIRMONT RICE INVESTMENTS INCORPORATED will pay KAYMAN SANKAR INVESTMENTS LIMITED the sum of (one million, five hundred thousand United States Dollars). Payment terms as follows:-

   US$100,000 on the signing of the Agreement
   US$300,000 Instalment - 20th January, 2007
   US$100,000 Instalment - 20th June, 2007
   US$100,000 Instalment - 20th December, 2007

   The balance of US$900,000 in 18 equal half yearly instalments commencing 20th June 2008.

   Interest is calculated and payable at 7 ½ % per annum from 1st January, 2008, payable every six (6) months.

3. The Vendors offer the Purchasers a reduction of 9% of any monies paid prior to the dates agreed to herein for payment for monies due in excess of 1 (one) year.

4. Vacant possession will be given to the purchaser at the time of signing of the agreement.

5. Rates and taxes up and until 31st December, 2006 shall be paid by the Vendors thereafter by the Purchasers.

6. BLAIRMONT RICE INVESTMENTS INCORPORATED shall enjoy all rights as stated in Lease Agreement between the Government of Guyana and KAYMAN SANKAR INVESTMENTS LIMITED.

7. KAYMAN SANKAR INVESTMENTS LIMITED will transfer the rights, title and or interests in and to 6,226.00 acres to BLAIRMONT RICE INVESTMENTS INCORPORATED clear of any obligation to CDC Group PLC, CDC (EURO) Limited, Republic Bank Limited, Guyana Bank for Trade and Industry, Demerara Bank Ltd or any other party or parties.

8. The Vendors agree that monies paid to them as installments will be used to settle outstanding balances due to the financial institutions and other parties and that as proof of payment to these other parties a receipt will be provided to the Purchasers in confirmation of these payments being made.
9. On the payment of the final installment, the Vendors will transfer the property to the Purchasers.

10. The Vendors will sign the necessary transfer application.

11. All Drainage and Irrigation fees, Rates and taxes and other related expenses are to be fully paid up on or before the transfer is made.

12. The Vendors will indemnify the Purchasers as to any outstanding rates and taxes, Drainage and Irrigation fees, monies owed to other parties and against any judgements obtained against KAYMAN SANKAR INVESTMENTS LIMITED.

13. The Vendor hereby gives the right to the Purchasers to settle from amounts owed by the Purchasers to the Vendors any successful claim against the Vendors for outstanding amounts owed by them to other parties.

14. The Vendors are to provide the Purchasers with the approval of all Financial Institutions confirming their acceptance of this Agreement prior to the payment of the first installment.

15. On or before the transfer of Lease, all outstanding mortgages, leases, charges, Debentures held in relation to KAYMAN SANKAR INVESTMENTS LTD. are to be cancelled.

16. The Vendor has the right to repossess the properties herein if the Purchasers fail to pay the full purchase price.

17. The Purchasers have the right to payment of costs, damages awarded by a Law Court in Guyana, as well as a complete refund of all monies paid in the event that the Vendors decide to discontinue the agreement for any reason other than a breach of this agreement on the part of the Purchasers.

18. In the event of the Purchasers for any good and valid reason refuse to complete the agreement all costs and damages awarded by a Law Court in Guyana are to be deducted from the monies paid up to that point and a complete refund of the balance is to be paid to the Purchasers who shall forthwith vacate the premises.

19. The Purchasers hereby allow Mr. Beni Sankar 6 (six) calendar months to relocate his livestock and fishes from these properties.

20. The Purchasers hereby allow the Vendors to rent part of the lands herein described to rice farmers at an agreed rate of G$3,000 (three thousand Guyana dollars) per acre for the Spring Crop, 2007 ending May, 2007 on condition that all rental income be paid to the Purchasers.

21. Mr. Beni Sankar hereby offers his personal guarantee.

22. Legal expenses related to the transfer or conveyance of the properties herein to be borne equally.

[6] The Appellant made the twice-yearly payments from June 2008 up until December 2009. Some payments were made early, and others were made late. In any event,

by the end of 2009, the Appellant had made payments of US $1.8M out of a total of US $3.3M, in other words, in excess of 50% of the purchase price.

[7] In 2010, the Appellant did not make its June payment.

[8] On 6 October 2010, the Respondents wrote to Mr Jai Benie, Managing Director of Mahaicony Rice Ltd, and who was also the Chief Executive Officer of the Appellant, as follows:

> Bearing in mind, that you have defaulted on most payments to present time and this has resulted in the Bank…being very vulnerable, as they have depended on a third Party, Mahaicony Rice Limited (MRL) to satisfy the repayments schedule of Kayman Sankar & Company Ltd (KSCL).
>
> Below are three options and the most important being number one (1) and number three (3) less important:
>
> > (1) Yes, the Bank have agreed to US$50,000 repayment from you per month but, there should be a change in the Contract to specify that if there is a non-payment of any one instalment, then the whole sum becomes due or payable and, KSCL repossess the property at no cost to them.
> >
> > (2) KSCL can enter into a Joint Venture Company with MRL but KSCL having control in interest.
> >
> > (3) Immediately, we agree on a figure to be repaid to MRL and KSCL repossess the property.

[9] It does not appear from the record that there was any reply to this letter.

[10] On 17 January 2011, the Respondents' attorneys-at-law, Persaud & Associates, wrote to the "Chief Executive Officer" of the Appellant, referencing the three agreements, as follows:

> My clients caused a letter to be written to you on November 19, 2010 advising that Blairmont Investments Inc. has defaulted on their obligations to make payments due under the above contracts since June 2010. Certain proposals were put to you to have this matter speedily resolved in order to stave off drastic action against them by the bank.
>
> You have chosen to ignore my clients' letter and your company has persisted in the breach of the agreements by further defaulting in making payments due in December 2010.

> Your company by its conduct has evinced a clear and settled intention to repudiate the agreement of sale.
>
> My clients accept Blairmont Rive (sic) Investments Inc's repudiation of the agreements of sale and purchase as being at an end on account of the continuing repudiation reflected in the company's behaviour.

History of Litigation

[11] The litigation history of this case as acrimonious, long, and tortuous as its essential factual background is uncomplicated.

[12] On 19 January 2011, the Respondents instituted proceedings in the High Court of Guyana in High Court Action 23/W of 2011 seeking principally the rescission of the agreements.

[13] On 29 March 2012, Chang CJ (Ag) gave judgment in the matter. He ordered, *inter alia,* that the three contracts were rescinded due to the Appellant's breach; that the ownership and possession of the Blairmont Estate be returned to the Respondents, and that the Respondents pay to the Appellant "restitution" in the sum of $232,277,108.00 (two hundred and thirty-two million, two hundred and seventy-seven thousand, one hundred and eight dollars) within fourteen days of the judgment. The reasons for the High Court's decision were never received.

[14] On 17 April 2012, the Appellant filed a notice of appeal to the Court of Appeal of Guyana in Civil Appeal No 27 of 2012 against the decision of the Acting Chief Justice. Simultaneously, the Appellant filed an application by way of summons to a single judge of the Court of Appeal for a stay of execution of the order of Chang CJ (Ag).

[15] The summons to a single judge was heard by Cummings-Edwards JA on 15 May 2012. She ordered a stay of execution of the order of Chang CJ (Ag) until the hearing and determination of the substantive appeal.

[16] The Appellant remained in possession of the property until 12 May 2013 when the Respondents retook possession. Since that date, the Respondents have been in occupation. According to the Appellant, its property and company records were taken and destroyed.

[17] On 13 July 2013, the Appellant filed a motion in the Court of Appeal in the pending Civil Appeal No 27 of 2012 seeking as the principal relief an order of that court, that the Respondents vacate the property forthwith, failing which, the Appellant be at liberty to institute proceedings for the directors and agents of the Respondent companies and Mr Beni Sankar in his personal capacity, be committed to prison.

[18] On 30 July 2013, the Court of Appeal by a majority decision ruled that it lacked jurisdiction to hear the motion.

[19] An application for special leave was made to this Court. This Court, in the vacation period, ruled that the matter was urgent and fit for hearing and ordered that the Court of Appeal hear the matter urgently. It does not appear as though the Court of Appeal ever complied with that order.

[20] The Respondents remained in possession and, according to the Appellant, stripped all of the fixtures on the rice mill property and leased the property subject to the stay order.

[21] On 9 February 2017, the Appellant filed a motion for directions to the Court of Appeal and sought, *inter alia*, that due to the absence of reasons for the decision of the trial judge that, the matter be remitted to the High Court with directions that an early trial be concluded in the shortest possible time. This proceeding culminated in an order from this Court that the matter be heard within a fixed time.

[22] The notice of appeal filed by the Appellant dated 17 April 2012 (Civil Appeal No 27 of 2012), in which the Appellant sought to have the order of Chang CJ (Ag) set aside, was heard by the Court of Appeal at this time.

[23] Before the Court of Appeal, counsel for the Appellant sought specific performance of the agreements and to that end, argued that the breach of the payment by instalment sub-clause by the Appellant was not a fundamental breach and so, could not be a justification for repudiation of the agreements. Counsel for the Respondents, on the other hand, maintained two arguments before that court. The first was that the Appellant falsely and recklessly represented that it would make timely payments and that the agreements should be rescinded *ab initio* based on misrepresentation. The second was that the agreements ought to be rescinded on the grounds of repudiatory breach by the Appellant.

[24] On 30 July 2018, George-Wiltshire CJ (Ag), delivered the judgment of the Court of Appeal.

[25] George-Wiltshire CJ (Ag) explained that the evidence did not support the Respondents' first argument. On the contrary, that evidence proved that the Appellant did in fact intend to make timely payments and this intention did not change at the time of executing the agreements. According to the Honourable Chief Justice, the Appellant complied with the agreements until 2010, and it was only then, some four years into the contractual relationship, that the Appellant's inability to pay arose. Therefore, the first argument (on misrepresentation) could not stand.

[26] In relation to the Respondents' second argument, George-Wiltshire CJ (Ag) stated that the main question for the court was whether the Appellant breached an essential term of the contract. George-Wiltshire CJ (Ag) considered the admissions of the Appellant in its defence, counterclaim, and the evidence at trial, which all indicated the importance of punctual compliance with payment obligations. George-Wiltshire CJ (Ag) also noted the language of the agreement. In light of those considerations, George-Wiltshire CJ (Ag) rejected the arguments to the contrary by the Appellant and held, agreeing with the Respondents, that punctual payment was an essential term and that therefore, the Appellant committed a repudiatory breach.

[27] On the issue of the damages payable by the Appellant to the Respondents for its breach of contract, George-Wiltshire CJ (Ag) noted the competing claims of the parties. The Appellant contended that it made improvements to the property whereas the Respondents maintained that the property had deteriorated. George-Wiltshire CJ (Ag) held that, as there was insufficient evidence to resolve these competing claims, the matter of damages would be remitted to the High Court for an assessment.

Appeal before this Court

The Issues

[28] The Appellant has appealed the decision of the Court of Appeal to this Court. Eight grounds of appeal are raised in the Appellant's notice of appeal. As it appears to us, seven of these grounds may be subsumed under the question whether the Court of Appeal was correct in holding the breach of the payment by instalments term a repudiatory breach. The eighth ground relates to the stay order of Cummings-Edwards JA. This ground was not pursued before us neither in the written submissions of the Appellant nor in its oral arguments to this Court. The dispositive substantive issue before us, therefore, is whether their breach was repudiatory or not.

[29] It is to be noted that there was no appeal against the Court of Appeal's order that the matter of damages for breach of contract or restitution should be remitted to the High Court for an assessment.

[30] As intimated earlier, the Respondents have canvassed before us the subsidiary issue of whether the Appellant, being a company which has been struck off the register of companies by the Registrar of Companies, can raise a defence to a suit by them against it, for breach of contract, and correspondingly pursue an appeal before this Court. This subsidiary issue also has significant consequences for this appeal.

[31] We begin with the question of whether the Appellant's breach was a repudiatory breach.

Legal Principles on Repudiatory Breach

[32] There is no disagreement between the parties that failure by the Appellant to pay two instalments in June and December 2009 constituted a breach of the agreements. Their disagreement is as to whether that breach was of a nature that resulted in the agreements being repudiated. In approaching the resolution of this disagreement, it is advantageous to recall the judgment of Lord Wilberforce in the English House of Lords decision in *Johnson v Agnew*[5], where he pointed to the well-established law that a party to a contract may treat a contract as discharged if the other party to the contract has committed what is sometimes called a fundamental breach and sometimes, a repudiatory breach.

[33] Lord Upjohn explained what is a fundamental breach in the House of Lords decision in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[6] as follows:

> There is no magic in the words "fundamental breach", this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept that breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally or he may at his option prefer to affirm the contract and treat it as continuing on foot in which case he can only sue for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or have been broken.

[34] Two approaches to determining whether a breach is a fundamental breach are now firmly established in common law contract law. The first is what is called the traditional approach which focuses on the nature of the term breached. The second

[5] [1980] AC 367 at 373.
[6] [1967] 1 AC 361 at 421-422.

is the so-called modern approach, also called the "gravity of the breach" approach, which focuses on the consequences of the breach.

[35] In our judgment, the traditional approach is very well explicated in the oft-cited dissenting judgment of Fletcher Moulton LJ in the English Court of Appeal case of *Wallis, Son & Wells v Pratt and Haynes*[7] where he said:

> A part to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But, from a very early period of our law, it has been recognized that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both clauses are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class, he has the alternative of treating the contract as being completely broken by nonperformance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract.

[36] The traditional approach of categorising terms as either conditions or warranties implies that the actual consequences of a breach or the gravity of the breach is not a relevant factor in considering whether a contract is discharged for breach. On this approach, if a term is classified as a "condition", a breach of it will, without more, be "fundamental" or "repudiatory". Similarly, whatever the consequences of a breach of a term classified as a warranty, it will never give rise to the right to treat the contract as discharged. This approach is firmly grounded in freedom of contract principles, that it is for the parties in a synallagmatic contract, not the courts, to decide by their contract what the effect of a breach should be. It gives no quarter to considerations of the justice of the case. For it, justice resides in the agreement that the parties to the contract have reached.

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[7] [1910] 2 KB 1003 at 1012.

[37] The traditional approach was modified in 1961 by Diplock LJ (as he then was) in the leading English Court of Appeal case of *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd*[8]. There, he adumbrated the second approach, the so-called modern approach or "gravity of the breach" approach. The term under consideration in that case was a "seaworthiness" clause which appeared in a time charter of a ship. In approaching the classification of that term, Diplock LJ refused to ascribe to that clause, the traditional taxonomy of contractual terms as either "conditions" or "warranties". As to this, Diplock LJ stated at paragraph 70 of the judgment that:

> There are…many contractual undertakings of a more complex character which cannot be categorized as being 'conditions' or 'warranties'…Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking unless provided for expressly in the contract depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'.

[38] In *Wickman Machine Tool Sales Ltd v L Schuler AG*[9], Stephenson LJ gave to these complex terms the sobriquet, "innominate" terms. Twenty years after *Hong Kong Fir* , Lord Scarman in his judgment in *Bunge Corporation (New York) v Tradax Export SA (Panama)*[10] said of the *Hong Kong Fir* principle:

> I wish, however, to make a few observations upon the topic of "innominate" terms in our contract law. In *Hong Kong Fir Shipping Co. Ltd.* V. *Kawasaki K.K. Ltd…*, the Court of Appeal rediscovered and reaffirmed that English law recognises contractual terms which, upon a true construction of the contract of which they are part, are neither conditions nor warranties but are, to quote my noble and learned friend Lord Wilberforce's words in *Bremer v. Vanden* [1978] 2 Lloyd's Rep. 109 at p. 113, "intermediate". A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual)

[8] [1962] 2 QB 26.
[9] [1972] 1 WLR 840.
[10] [1981] UKHL 11, [1981] 1 WLR 711.

> impliedly agree will depend upon the nature and the consequences of breach.

[39] In *Bunge Corporation* also, Lord Wilberforce stated:

> In Hong Kong Fir Diplock LJ […] in his seminal judgement illuminated the existence in contracts of terms which were neither, necessarily, conditions nor warranties, but in terminology which has since been applied to them, intermediate or innominate terms capable of operating, according to the gravity of the breach, as either …

[40] Using the "seaworthiness" clause which was before him as an example of an innominate term, Diplock LJ at p72 suggested that what a judge had to do in dealing with such terms was to:

> look at the events which had occurred as a result of the breach at the time at which the charterers purported to rescind the charterparty and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings.

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

[42] We agree with Lord Wilberforce's statement in *Bunge Corporation* that the *Hong Kong Fir* principle does not apply by considering the breach actually committed, and then deciding whether that breach would substantially deprive the innocent party of substantially the whole of the benefit of the contract. In our view, the focus must be on whether the parties expressly or impliedly intended that the legal effect of the breach would depend on the gravity of the consequences of the breach. If the effect of the breach is so serious as to strike fundamentally at the purpose of the

contract, then it will be treated as repudiatory, in the same way as if it were a breach of a condition; if it is less serious, it will give rise to a remedy for damages only, in the same way as a breach of warranty. This way, the *Hong Kong Fir* approach upholds the agreement of the parties without compromising certainty of outcome while allowing the court to have regard to the justice of the case.

[43] The *Hong Kong Fir* approach to determining repudiatory breaches has long passed into the *corpus* of contract law, as understood, and practiced in the Commonwealth Caribbean. It was accepted and applied by the Barbados Court of Appeal in *System Sales Ltd v Oxley and Suttle*[11] but has never been considered by this Court. In those circumstances, it behoves us to say that we accept the *Hong Kong Fir* approach. That approach faces off the traditional policy of the law which seeks to promote certainty of outcome through the classification of terms as either conditions or warranties, against an approach which encourages contractual performance, and which favours restriction of the right to repudiate to cases where the consequences of breach result in serious prejudice.

[44] For us, the *Hong Kong Fir* approach conduces to courts reaching a just result in a breach of contract case for two reasons. First, because that approach limits the right to throw up a contract to instances of serious and substantial breaches and so the principle promotes decisions consistent with the interests of justice. Second, it facilitates a just outcome in cases where the breach is of a minor term. In this regard, we agree with the learned authors of Treitel on *The Law of Contract*, 11th edn at 797 that:

> [T]he policy of leaning in favour of classifying stipulations as intermediate terms can be said to promote the interests of justice by preventing the injured party from rescinding on grounds that are technical or unmeritorious.

[45] Admittedly, both parties in the case gave little or no attention to the taxonomy of contractual terms developed in *Hong Kong Fir* to classify the circumstances in which the common law recognises a right in one party to terminate a contract.

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[11] (Barbados CA, 15 May 2014).

Nevertheless, having regard to the approach of the Court of Appeal to the payment by instalments term and repudiatory breach, and because it has consequential significance in this appeal in light of the grounds raised by the Appellant in respect of the Court of Appeal's approach, we thought it expedient to explore the law on contractual terms and breach post *Hong Kong Fir*.

[46] We turn then to the Court of Appeal's approach to the question whether the Appellant's breach was a repudiatory breach.

The Approach of the Court of Appeal

[47] George-Wiltshire CJ (Ag), in delivering the unanimous judgment of the Court of Appeal, appears to have adopted the traditional approach in deciding that the admitted breach by the Appellant was a repudiatory breach. Without expressly adverting to the accepted taxonomy of contractual terms which, as has been seen, divides terms into conditions, warranties and innominate terms, George-Wiltshire CJ (Ag) held that the term which was breached by the Appellant was an "essential term", a term the non-performance of which, destroys the very substance of the agreement and as such as being synonymous with a condition.

[48] George-Wiltshire CJ (Ag) reasoned as follows:

> We now turn to the Appellant's view of the non-payment and whether this was a breach of an essential term so as to constitute a repudiatory breach. In *Bunge Corporation and Tradax Export* [1981] 1 Weekly Law Report, Lord Wilberforce affirmed that the Court will require precise compliance with stipulations as to time whenever the circumstances of the case indicate that this would fulfil the intention of the parties. Lord Roskill who delivered the main judgment said that the right to rescind flows from a breach of any such condition.
>
> It is clear that the Appellant breached their payment obligations under the agreements. The assurance made by the Appellant to faithfully honour these obligations so as to ensure that the Respondents would not have to face enforcement proceedings by the financial institutions was also recognized by Clause 1, as quoted above. This, in addition to the admissions by the Appellant in his defence and counterclaim and the evidence at the trial, indicates the intention of the parties and the importance of the punctual compliance with the stipulations as to the payment of the instalments. The

> parties went even further in recognizing the connection between the agreements and the Respondents' obligations to the financial institutions by contracting that proof of payment to the financial institutions and approval from them will be provided to the Appellant as indicated in Clauses 1 and 2…
>
> In these circumstances, it is evident that punctual payment was an essential term of the contract, hence the Appellant's failure to make payments on all three contracts in year 2010 constituted a serious breach of the agreements. As such, the Respondents were entitled to treat this as a repudiatory breach.

[49] It is evident from this statement that George-Wiltshire CJ proceeded on the basis that the payment by instalment clause was a clause related to the timing of performance of the agreements. That being so, the Honourable Chief Justice (Ag), citing *Bunge Corporation*, determined that the term had to be strictly construed as an "essential term", or in other words, as a term which made time of the instalment payments to be of the essence and with which there had to be "precise compliance" by the Appellant. Breach of that term was therefore a repudiatory breach.

[50] Was this approach to the payment by instalments term correct? More particularly, was the Court of Appeal's approach to time of the essence terms correct?

Legal Principles Governing Time of the Essence Clauses

[51] *United Scientific Holdings Ltd v Burnley Borough Council*[12]is the leading case on time of the essence clauses in contract law. In that case, the House of Lords traced the legal and equitable treatment of the timing of performance in contract law. There, the House of Lords noted that, generally, at common law, at the time of the Judicature Acts, 1873-1875, time was presumed to be of the essence in all contracts. However, as was also noted, even at that time there had developed exceptions to this strict common law approach.[13] Meanwhile, in equity, time was generally presumed, not to be of the essence. Thus, in *Parkin v Thorold*[14] , Lord

[12] [1978] AC 904.
[13] ibid at 927-928 (Lord Diplock) and at 940-941 (Lord Simon of Glaisdale).
[14] (1852) 16 Beav 59, 51 ER 698.

Romilly MR stated that, "time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication."[15]

[52] The approach of equity to timeliness of performance in contract law, historically, is usefully captured in a statement of Lord Diplock in *United Scientific* at 927, as follows:

> [T]he rules of equity, to the extent that the Court of Chancery had developed them up to 1873 as a system distinct from rules of common law, did not regard stipulations in contracts as to the time by which various steps should be taken by the parties as being of the essence of the contract *unless the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract.* (emphasis added).

[53] It is plain from the foregoing that at the time of the Judicature Acts, equity presumed that time was not of the essence unless the parties had expressly made it so, or the nature of the property or circumstances allowed for such a presumption. As from 1 January 1917, that rule of equity has prevailed in Guyana and there is therefore no general presumption that time is of the essence. This is because of s 3(b) of the Civil Law of Guyana Act[16], which provides as follows:

> The common law of Guyana shall be the common law of England as at the date aforesaid (*ie* 1st January 1917) including therewith the doctrines of equity as then administered or at any time hereafter administered by courts of justice in England, and the High Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter.

[54] In *Persaud and Others v Plantation Versailles & Schoon Ord Estates Ltd*[17] Crane JA said of this provision:

> In my view, what is clearly meant by the above provision is that the Supreme Court (now the High Court) was as from the year 1917, being authorised to administer and apply locally, equitable doctrines side by side with the common law in much the same way as the English Judicature Acts

[15] ibid at 700. See also *Stickney v Keeble* [1915] AC 386 at 415-416 (Lord Parker).
[16] Cap 6:01.
[17] (1970) 17 WIR 107 (GY).

> of 1873-75 sanctioned it in England. Such doctrines of equity as were in existence in 1917, or at any time in the future, were henceforth to be administered in Guyana along with English common law as our legal system.

[55] In *Mazahar Bacchus v Subraj Booklall*[18], the same judge in the Court of Appeal of Guyana expressly stated with specific reference to time of performance clauses in contract law in Guyana that:

> [T]he equitable rule concerning stipulations as to time in contracts is just as operative today in Guyana as in England, and that in the absence of any express or implied stipulation that time is to be of the essence, the rule of equity must prevail.

[56] *Mazahar Bacchus v Subraj Booklall* is particularly relevant here. In that case, by an agreement dated 22 July 1967, the Respondent agreed to sell certain lands to the Appellant. The agreement stipulated that transport was to be passed within three months of the execution of the agreement. On 5 October 1967, the Respondent's attorney-at-law wrote to the Appellant reminding him that the transport was, "ripe for passing". However, transport was not passed within the three-month period. The Respondent unilaterally terminated the agreement claiming that time was of the essence. The Appellant sued for specific performance and was unsuccessful in the trial court. The main issue before the Court of Appeal was whether time was of the essence. That court found that the stipulation in the agreement that "transport must be passed within three months" did not make time of the essence given the rule of equity set out in s 3 of the Civil Law Act.

[57] The correct approach in the instant case was therefore for the Court of Appeal to begin from the presumption that time was not of the essence in the contract before it and that the payment by instalment sub-clause was not a condition. That court should have then assessed whether the parties had expressly or impliedly made time of the essence, and thus a condition, of their contract through the incorporation of the payment by instalments sub-clause in their contract or whether circumstances

[18] (1972) 20 WIR 73 (GY).

allowed for such a presumption. If that question were answered in the affirmative, then that was the end of the matter. Effect would have had to be given to the parties' intention by holding that any breach of that sub-clause, no matter how slight, justifies repudiation of the entire contract by the Respondents: *Lombard North Central Plc v Butterworth*[19]. If, however, that question was answered in the negative and the sub-clause was not properly classified as a condition, the only other basis on which breach of that sub-clause could have been held to be repudiatory was by the application of the *Hong Kong Fir* doctrine.

[58] Needless to say, the answer to the foregoing question depends upon the proper interpretation of the payment by instalments sub-clause. Accordingly, we turn to the construction of the payment by instalments sub-clause, starting with the general principles which should govern the construction of this sub-clause.

General Principles governing Contractual Interpretation

[59] In *Sea Haven Inc v John Dyrud*[20], this Court cited Lord Hoffmann's adumbration in the House of Lords decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[21] as providing the guiding principles in the interpretation of commercial contracts. In the *Investors Compensation Scheme* case itself, Lord Hoffmann enunciated five guiding principles at 912-913, namely, that: (i) interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract; (ii) the background includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man; (iii) the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent; (iv) the meaning which a document (or any other utterance) would

[19] [1987] QB 527.
[20] [2011] CCJ 13 (AJ), (2011) 79 WIR 132 (BB).
[21] [1998] 1 All ER 98 at 114-115.

convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean; and (v) the "rule" that words should be given their "natural and ordinary meaning" reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

[60] These principles are encapsulated in a statement of Lord Steyn in the later House of Lords decision of *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd*[22], where he said:

> The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

[61] The *Investors Compensation Scheme* principles were recently reformulated and applied in the UK Supreme Court decision in *Rainy Sky SA v Kookmin Bank*[23]. That case concerned the interpretation of a bank guarantee. The Supreme Court preferred a construction of that guarantee that was consistent with the court's view of the commercial purpose of the transaction, rather than adopting the meaning Patten LJ in the Court of Appeal had considered was the "natural and obvious construction". Lord Clarke explained that:

> [T]he ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have

[22] [2004] UKHL 54, [2005] 1 All ER 191 at 200.
[23] [2011] UKSC 50, [2012] 1 All ER 1137 at [14].

> understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme* case … the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[62] Prior to the *Investors Compensation Scheme* case, the guiding principle governing inquiry into the meaning of contractual language was different. The approach to interpretation that prevailed in the common law courts throughout the 19th century and for much of the 20th was that the terms of a written contract must be given their plain meaning. Reference to external material was allowed only where the document was ambiguous or unclear, or their application to the facts uncertain to determine which of the competing interpretations is to be preferred, in the light of the factual matrix. If it was alleged that the parties chose the wrong words to give effect to their intention, the appropriate course was to seek rectification.

[63] In *Investors Compensation Scheme*, however, Lord Hoffmann propounded that, "the background of facts ... play an indispensable part in the way we interpret what anyone is saying". Accordingly, the process of interpretation must involve examining the context in which words are used, and admissible surrounding circumstances should always be examined whether or not at first sight the words appear to be ambiguous. This principle, Lord Hoffmann declared, had provenance in speeches of Lord Wilberforce in *Prenn v Simmonds*[24] agreed in by all other members of the House who sat on that appeal, as well as in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*[25].

[64] In *Prenn,* Lord Wilberforce said at 1383-84, "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations." He then summarised his view at page 1385 as follows:

> [E]vidence of negotiations, or of the parties' intentions, and a fortiori of [one party's] intentions, ought not to be received, and evidence should be

[24] [1971] 1 WLR 1381.
[25] [1976] 1 WLR 989.

> restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

[65] In *Reardon Smith*, the same Law Lord explained that latter phrase at page 996 saying that, "... when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

[66] The guiding principles in *Investors Compensation Scheme* were accepted and applied, without explanation, by this Court in the Barbadian case of *Sea Haven*[26] and was again cited with approval by this Court in *Campbell v Attorney General of Barbados*[27]. Similarly, the *Investors Compensation Scheme* principles were accepted and applied by the Privy Council in the Belizean case of *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor*[28] and in the Bermudan case of *Consolidated Contractors Co SAL v Masri (No 2)*[29].

[67] The *Investors Compensation Scheme* guiding principles were also accepted and applied in other Commonwealth courts. It was accepted and applied: by the Australian High Court including *Pacific Carriers Ltd v BNP Paribas*[30]; in New Zealand in the Privy Council case of *Dairy Containers Ltd v Tasman Orient Line CV*[31]; in Canada in *Perrin v Shortreed Joint Venture Ltd*[32] and *Dumbrell v The Regional Group of Companies et al*[33], and in Hong Kong in *Jumbo King Ltd v Faithful Properties Ltd*[34] and *Fully Profit (Asia) Ltd v Secretary for Justice*[35].

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[26] ibid at [30].
[27] [2009] CCJ 1 (AJ), (2009) 76 WIR 63 (BB) at [43].
[28] [2009] UKPC 10, (2009) 74 WIR 203 (BZ).
[29] [2011] UKPC 29, (2011) 78 WIR 141 at [17].
[30] (2004) 218 CLR 451 at [22].
[31] [2004] UKPC 22, [2004] 5 LRC 511.
[32] 2009 BCCA 478 at [23].
[33] (2007) 85 OR (3d) 616.
[34] (1999) 2 HKCFAR 279.
[35] (2013) 16 HKCFAR 351.

[68] The UK Supreme Court's decision in *Arnold v Britton*[36] raised serious questions as to whether English common law was moving away from the *Investors Compensation Scheme*/*Rainy Sky* contextual approach to contractual interpretation towards a more traditional literalist approach, with considerations of context and commercial common sense assuming lesser importance. In *Arnold*, Lord Neuberger, who delivered the main judgment in the case, stated that, "the reliance placed in some cases on commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision which is to be construed." In his view, emphasis should be placed on the importance of the contractual wording used by the parties and its natural meaning. He held that that meaning must be assessed in the light of: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

[69] The *Arnold* approach was foreshadowed by the UK Supreme Court decision in *Marley v Rawlings*[37] in which Lord Neuberger held *obiter dicta* that the same principles he later outlined in *Arnold* were to be followed in the interpretation of contracts. Referring to Lord Neuberger's dicta in *Marley* and a dictum of Lord Steyn in *Sirius*, Hayton JCCJ in *Canadian Imperial Bank of Commerce v Gypsy International Ltd and Beepat*[38] stated, "We respectfully adopt these dicta as correct statements of the law applicable to the construction of commercial contracts". Given this statement of Hayton JCCJ and this Court's interpretational stance in its earlier decisions in *Sea Haven Inc* and in *Campbell*[39], it becomes necessary to reconcile these two seemingly dichotomous approaches.

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[36] [2015] UKSC 36, [2015] AC 1619.
[37] [2014] UKSC 2, [2015] AC 129.
[38] [2015] CCJ 16 (AJ), (2015) 88 WIR 23 (BB) at [22].
[39] See *Sea Haven* (n 20) and *Campbell* (n 27).

[70] In our judgment, the explanation given by Lord Hodge in the UK Supreme Court in the recent case of *Wood v Capita Insurance*[40] to the *Rainy Sky* and *Arnold* approaches to contractual interpretation provides such a reconciliation. In *Wood*, Lord Hodge clarified that the approaches taken in *Arnold* and *Rainy Sky* are consistent with the "recent history of the common law of contractual interpretation [and] is one of continuity rather than change". According to Lord Hodge, *Arnold* and *Rainy Sky* established that the court must have regard to both the language used and the commercial context in which it was drafted in ascertaining the objective meaning of the words in question. The extent to which each is used will vary according to the circumstances. Generally, however, greater emphasis should be given to textual analysis in complex, detailed contracts drafted by experienced lawyers whereas commercial context should be more relevant where the agreement is more informal or lacking in detail. Of course, there will always be exceptions and every case must be decided on its own facts.

[71] In our judgment, the principles which should guide our courts, based as they are on the common law system, in the interpretation of a commercial contract, are those enunciated in *Wood*. Our courts must always have in mind that their function in interpreting a contractual term is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. Such ascertainment is achieved "by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be".[41]

[72] The foregoing does not mean that our courts should treat contract interpretation, in the words of Lord Hodge in *Wood*, as a "literalist exercise focused solely on a parsing of the wording of a particular clause". Rather, it should be viewed as requiring consideration of the contract as a whole and, depending on the nature, formality, and quality of its drafting, more or less weight should be given to elements of the wider context in reaching its view as to that objective meaning. The

[40] [2017] UKSC 24, [2017] AC 1173.
[41] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 (Lord Hoffmann).

interpretation of a contract should be approached as an iterative exercise and, where there are rival meanings, the court should give weight to the implications of rival constructions by reaching a view as to which was more consistent with business common sense.

[73] With these principles firmly in mind, we turn to interpreting the payment by instalments sub-clause which is in dispute in this case.

Construction of the Payment by Instalments Term

[74] The sale and purchase agreements in this case are professionally drafted contracts. They were drafted by the Appellant's attorney-at-law. They provide for the purchase and sale of properties owned by the Respondents. Clause 2 provides for the terms of payment by the purchaser.

[75] The particular sub-clause in clause 2 which is in issue reads: "The balance of US$900,000 in 18 equal half yearly installments (sic) commencing 20th June 2008". As has been already stated, it is hornbook law that breach of this provision can be repudiatory only if it can be properly classified as a condition or as an innominate term, and that the consequences of its breach are of a serious nature.

[76] As drafted, the payment by instalments term is shrouded in opacity as to whether that term is to be regarded as a condition. However, adopting the approach outlined later in this judgment in seeking to determine the nature of the term, we should remind ourselves that the function of this Court is to ascertain the objective meaning of the language of that term in which the parties have chosen to express their agreement. To do this, we must ask ourselves whether a reasonable outside observer would take this phrase as drafted to mean that, any non-performance of it by the Appellant, could be reasonably considered as a substantial failure to perform the contract, sufficient to entitle the Respondent to throw up the contract. Would the reasonable outside observer have to so consider non-payment by the Appellant for say a week or a month or so?

[77] It does not appear to us that the payment by instalment term by itself would reveal much to the reasonable outside observer by way of answer to that question. Nor, in our judgment, does reading that term textually assist.

[78] As regards a textual approach to the term, it was argued by the Appellant that two clauses in the purchase and sale agreement point away from the term being interpreted as a condition. They are clauses 9 and 16. Clause 9 obligates the Respondents "on the payment of the final installment (sic)" to transfer the property to the Appellant. In the meantime, clause 16 restricts the Respondents' "right to repossess the properties" to the failure by the Appellant "to pay the full purchase price". According to the Appellant, it is difficult to see how the payment by instalments term could be intended to be a condition and the Respondents be under the clause 9 obligation and the clause 16 restriction.

[79] *Per contra*, the Court of Appeal appears to have relied on clause 8 of the agreement as supporting an interpretation of the payment by instalments term as a condition. Clause 8 provides that:

> "The Vendors agree that monies paid to them as instalments will be used to settle outstanding balances due to the financial institutions and other parties and that as proof of payment to these other parties a receipt will be provided to the Purchasers in confirmation of these payments being made."

The Court of Appeal interpreted that clause to be an "assurance made by the Appellant to faithfully honour these [the payment by instalments] obligations so that the Respondents would not have to face enforcement proceedings by the financial institutions." This, according to the Court of Appeal, supported an interpretation of the payment by instalments term as a condition.

[80] In our judgment, neither of the clauses relied on by the Appellant nor that by the Court of Appeal either expressly or impliedly made time of the instalment payments, of the essence, and thus a condition. We must therefore look to see whether there are any elements of the wider context of the purchase and sale

agreement which may be considered in reaching a view as to the objective meaning of the payment by instalments term.

[81] As regard this, the major contextual element that was urged upon us as relevant was that the evidence established that the Appellant was notified by the Respondents of the connection between the agreements, and the Respondents' obligations to the financial institutions. The Appellant was therefore cognisant of the importance of the need for punctual compliance with the payment by instalments term. Indeed, it cannot be denied that it was admitted on the pleadings that: (a) the Appellant was perfectly aware of the Respondents' delicate position with the bank; (b) the Appellant gave assurances to the Respondents that it would faithfully honour the payment obligations under the agreements to ensure that the Respondents would not be exposed to any such jeopardy; and (c) the Appellant represented that it was "a well-established company which will have access to funds to satisfy all of its payment obligations under the agreements."

[82] Be that as it may, in the context of the agreement as a whole, the payment by instalments term cannot be classified as a condition, breach of which, entitles the Respondents to repudiate the agreement. In our judgment, that term is a complex term like the seaworthiness clause in *Hong Kong Fir*. The obligations embraced by it may be breached by payment defaults of days, months or even years. The term may therefore be breached by defaults which may reasonably be regarded as trivial as well as defaults which can only be regarded as disastrous. The term is therefore more properly classified as an innominate term, a breach of which, will justify repudiation only if such breach deprives the Respondents of substantially the whole benefit which it was intended that they should obtain from the contract. And so, was the breach by the Appellant, in this case, a serious breach?

[83] To us, it was undoubtedly such a breach. The Appellant defaulted on two payments in June and December for 2010 before the Respondents claimed to repudiate the agreements. The benefit which it was intended that the Respondents should obtain from the Appellant was instalments paid in such a manner, as to avoid the

Respondents' default on their obligations to the financial institutions, mentioned in the agreements. The Appellant's failure to pay instalments for an entire year is of so extensive a nature as to have serious consequences for, the "commercial purpose of the venture" between itself and the Respondents. Admittedly, up to the time of the 2010 default by the Appellant, it had paid a significant portion of the purchase price. The two consecutive instalment payment defaults effectively put the Respondents at risk of being deprived of the whole benefit which they were intended to gain from these agreements, namely, not losing the properties to their creditors and being able to pay them off while securing for those purposes, the agreed purchase price.

[84] For all the foregoing reasons, we conclude that the payment by instalments term was not a condition. It was an innominate term. Breach of that term was repudiatory because the consequences of that breach were so serious so as to deprive the Respondents of substantially the whole benefit which it was the intention of the parties, as expressed in the agreements, that the Respondents should obtain. The Respondents are therefore entitled to treat the agreements as discharged and to recover the usual contractual damages.

[85] In its claim for relief by this Court, the Appellant sought an order from this Court pursuant to clause 17. That clause provides:

> The Purchasers have the right to payment of costs, damages awarded by a Law Court in Guyana, as well as a complete refund of all monies paid in the event that the Vendor decides to discontinue the agreement for any reason other than a breach of this agreement on the part of the Purchasers.

As we have found that it was the Appellant who was in breach and not the Respondents, this claim is denied.

[86] The parties did not raise nor argue, in the words of the Court of Appeal, "the issue of calculation of damages or the payment of a sum as restitution." This issue was raised and argued in the Court of Appeal which declined to determine it because the evidence on the record for such determination was deficient. The Court of

Appeal ordered that, that aspect of the case should be returned to the High Court for assessment unless the parties agree otherwise. We feel considerable persuasion in this approach and order accordingly.

The Appellant's Standing to Pursue this Appeal

[87] We now turn to the second issue in this appeal, namely, whether the Appellant, being a company that has been struck off the register of companies by the Registrar of Companies, has standing to pursue an appeal before this Court against the decision of the Court of Appeal. As the Respondents put it in their written submissions to this Court, "…the Appellant having been struck off the register and not to have been restored, the ability to prosecute an appeal is impaired."

[88] The facts are that the Appellant was struck off the register of companies by the Registrar pursuant to s 487(1) of the Guyana Companies Act[42] on 24 July 2010 and had not been restored to the register at the time this suit started on 18 January 2011, and still has not been restored. Notwithstanding, no issue was taken by the Respondents in either the High Court or before the Court of Appeal with the legal effect of the Appellant's status of a struck off company to defend the Respondents' action against it for breach of contract. They have for the first time argued before us that the Appellant cannot pursue this appeal unless and until it is restored to the register in accordance with s 487(5) of the Companies Act. The legal status of the Appellant was raised in earlier submissions to this Court and arguments were deferred to the hearing of the substantive appeal.

[89] The Respondents' contention is based on a proposition that, as a general principle of company law, a company which is struck off the register, without more, loses its legal personality and that personality is only regained if, and when, the company is restored to the register. In our view, this proposition is not correct. In our judgment, in the absence of express statutory provision to the contrary, it is more correct to say that the legal personality of the company is suspended since a company only

[42] Cap 89:01.

loses its legal personality when the company is wound up and dissolved under the provisions of the Companies Act.[43]

[90] The provisions on dissolution in the Companies Act are instructive on this point. In this regard, section 402(1) of the Act makes provision on dissolution for all types of winding up as follows:

> When the affairs of a company have been completely wound up, the court, if the liquidator makes an application in that behalf, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

Section 459(1) is similarly significant. That section confers power on the court at any time within two years of dissolution, to make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved. An application to invoke the voiding power of the court may be made by the liquidator of the company or "by any other person who appears to the court to be interested."

[91] It is clear then that the striking off the register of a company and the dissolution of a company are disparate concepts, thus, in the absence of a provision in the Companies Act similar to s 273 of The Bahamas Companies Act[44], striking off the register does not dissolve a company and as such does not mean that the company has lost is legal personality.

[92] The foregoing is important to understanding s 488, the section on which resolution of the second issue turns. That section provides as follows:

> Where a body corporate is struck off the register, the liability of the body corporate and every director, officer or shareholder of the body corporate shall continue and may be enforced as if it had not been struck off the register.

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[43] See *Galantis v Alexiou* [2019] UKPC 15, [2019] 3 LRC 545 (BS) at [26].

[44] See s 273 of The Bahamas Companies Act Cap 308: "Where a company is removed from the register of companies… the company shall thereupon be dissolved and any property vested in or belonging to any such company shall thereupon vest in the Treasurer for the benefit of The Bahamas and shall not be disposed of without the prior approval of both Houses of Parliament signified by resolution thereof."

[93] In our judgment, the clear purpose of this section is to ensure that companies, directors, and shareholders cannot escape their liabilities by causing their company to be removed from the register. This is achieved legislatively because, on its plain words, the section has the effect of preserving the legal personality of a struck off company for the limited purpose of the enforcement of its liability, incurred either prior or after to its being struck off.[45] This means that the section may be invoked to enforce liabilities owed by the struck off company whereas a struck off company cannot enforce any liability owed to it. For completeness, we would add here that it is only where a struck off company wishes to pursue enforcement of a liability owed to it that it must first be restored to the register pursuant to s 487(5) of the Companies Act.

[94] The Privy Council in the Bahamian case of *Galantis v Alexiou*[46] supports the principle that s 488 may be invoked to enforce liabilities owed by a struck off company. That case concerned the operation of provisions in the Bahamas Companies Act (ss 271(4) and 272) in *pari materia* with ss 487(5) and 488. In it, G brought an application under s 280 of the Bahamian Companies Act claiming that the two directors of a company of which G was a creditor were liable to him for their oppressive conduct of the affairs of the company. The Privy Council held that liability for oppression under the Companies Act was encompassed in the expression "liability" in s 272 but that because of the peculiar requirements of liability for oppression, G could not establish that such liability was continuing before or after the company was struck off the register, and so, his application failed.

[95] On the other hand, a dictum of the Privy Council in *Galantis* supports the principle that, it is only where a struck off company wishes to pursue enforcement of a liability owed to it that it must first be restored to the register pursuant to s 487(5).

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[45] ibid.
[46] [2019] UKPC 15, [2019] 3 LRC 545 (BS).

In that case, after holding that G's application under s 272 failed, Lord Lloyd-Jones said:

> This does not necessarily mean that the respondent was without remedy. It would have been open to him to apply to the court for an order under s 271(4) of the 1992 Act to restore the company to the register. If that had been granted, he could then have applied for permission to bring a derivative action under s279 in the name of the company alleging breach of fiduciary duty owed by the directors to the company pursuant to s81. In this way, the company might have recovered funds which could have been used to pay the respondent. However, that course was not followed, and, with some regret, the Board has come to the conclusion that the route which sought to employ ss 272 and 280 was not open to the respondent.

We would also add that the Canadian case of *Associated Asbestos Services Ltd v Canadian Occidental Petroleum Ltd*[47] cited to us by the Respondents is a case where a struck off company sought to bring an action against a defendant. The dicta from that case which was referred to us is to the effect that such a company would first have to be restored to the register.

[96] It is clear then that, provided the claim by the Respondents against the Appellant for rescission and for unliquidated contractual damages for breach of contract falls within the meaning of "liability" in s 488, that claim was properly before the Court. As to the term "liability", there is no definition of that term in the Act except in the Sixth Schedule para 31(1) … where it is provided that, "in this paragraph the expression "liability" shall include all liabilities in respect of expenditure contracted for and all disputed or contingent liabilities." The term "liability" is used throughout the Act in different contexts: marginal notes, for example, s 281 (Liability of receivers etc); s 309 (Liability of insider); s 351 (Nature of liability of contributory; and s 445 (Liability where proper accounts not kept). In addition, in the Third Schedule para 21, it is provided that:

> The directors may, before recommending any dividends, set aside out of the profits or income surplus of the company such sums as they think proper in order to provide for a known liability, including a disputed or contingent liability…

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[47] 2002 ABQB 893.

[97] We are of the view that the expression as used in s 448 should be given a broad meaning in order to achieve the statutory purpose of that section; see also the Privy Council in *Galantis*. In that case, the expression was held to include liability for a claim for directorial liability in respect of oppressive conduct under the Bahamian Companies Act. Given that holding, it would be more than strange if the expression were held not to include the ancient claims for rescission and unliquidated damages for breach of contract against the Appellant, a struck off company.[48]

[98] The upshot of the foregoing is that pursuant to s 488, a struck off company such as the Appellant can be a defendant in a claim against it to enforce its continuing liability. It is undoubted that, as a defendant, in such a claim, a struck off company must be able to contest and defend such claims, including, depending on how they are framed, by way of counterclaims, and to vindicate its position by way of all appeals available to it. For this reason, we would hold on the second issue that the Appellant has standing to pursue this appeal in this Court.

[99] In concluding our consideration of this second issue, we feel bound to emphasise that our interpretation of s 488 is purposive and accords with the policy of the Companies Act in Guyana; a policy that is primarily gleaned from the language of the section read in the wider context of the Act. As explained above, that policy is to facilitate the enforcement of liabilities against "the body corporate and every director, officer or shareholder of the body corporate" even if a company "is struck off the register." This is so whether those liabilities are existing at the time the company is struck off the register, or otherwise. There is no prejudice caused by this interpretation, as it is in the public interest that the legitimate liabilities of companies be satisfied. Indeed, ascribing this meaning to the section is rational, reasonable, and has a consequence of upholding the values of fairness and justice, core values, in a democratic legal system.

[48] We see no reason as the Privy Council seems to have decided in *Galantis* with respect to s 273 of the Bahamian Companies Act, to limit the liability in s 488 to one that only existed before the company's removal from the register.

[100] We also think that we should observe here that this second issue has arisen at an unacceptably late stage in these proceedings. Litigation against a company should always be preceded by a search of the Companies Register to determine status and to ensure that court proceedings are properly constituted. With due diligence it should have been apparent since July 2010 that the appellant company had been struck off the Register. Considerable judicial time and resources have been devoted to the resolution of this issue in these proceedings and before this Court. Indeed, there is a division of opinion on it. In the future, it is hoped that as a matter of best practice such points: a) be taken at the earliest opportunity and ideally at or before the first case management conference or pre-trial hearing; and b) when taken at such a hearing the court should consider the matter with a view to inquiring whether, and if so, how the company's status can be regularised, as well as implications for the continuance of the proceedings.

Disposition

[101] Given our conclusions with respect to the first issue, we will nevertheless dismiss the appeal. As we indicated in [86], the decision of the Court of Appeal will thus be upheld but we note that where the assessment to be performed by the High Court includes elements of the original counterclaim of the Appellant, these must be left untouched unless and until the Appellant will be restored to the register in accordance with section 487(5). As regards the second issue, the Respondents' application is dismissed.

JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

Introduction

[102] This appeal concerns the purported repudiation by the Respondents of three ten-year contracts (executed in December 2006) for the sale of rice-lands and rice milling equipment.[49] The basis of the repudiation was the failure of the Appellant

[49] The total sale and purchase price under the three contracts was US$3,300,000.

to pay two consecutive instalment sums in respect of all three contracts (collectively amounting to approximately US$255,555.00). The Appellants failed to make the payments due under those agreements in June 2010 and in December 2010, respectively. Since then, no further payments have been made.[50]

[103] The Appellant accepts that the failure to pay those instalments constituted a breach of the contracts but contends that the breach did not warrant repudiation. The Appellant also contends that the Respondents have forcibly put the Appellant out and retaken possession of the lands and equipment. This dispute as to whether the breach warranted repudiation is at the heart of the substantive issue on appeal to this Court. There is also a procedural matter that is raised in this appeal, which goes to the *locus standi* of the Appellant.

[104] Saunders PCCJ and Burgess JCCJ have both written substantive opinions in this matter. Both identify the two issues in dispute and there is agreement between them about this. As explained, the first issue concerns the status of payment by instalments sub-clauses in the three contracts and what is the lawful remedy that was available for their breach. The second has to do with whether the Appellant, a company that was struck off the register could have lawfully participated in and defended these proceedings, and consequently, pursue this appeal.

[105] Saunders PCCJ and Burgess JCCJ agree on the outcome in relation to the first issue but disagree as to the path to get there. They disagree on the second issue. I agree with both Saunders PCCJ and Burgess JCCJ on the outcome of the first issue, but support the path taken by Burgess JCCJ. On the second issue, I agree with Burgess JCCJ and with his reasoning. I also join in his observations on this aspect.

[106] I do however wish to make some comments on the approaches taken on the first issue to the matters of: a) innominate or intermediate terms in a contract; and b) approaches to commercial contractual interpretation. Both Saunders PCCJ and Burgess JCCJ have comprehensively set out all the relevant facts and

[50] Up to June 2010, a total of US$1,511,111.08 had been paid under all three contracts (excluding any interest payments).

circumstances, and I will not do so again, but will refer to them where necessary. As well, these two opinions recite the relevant law, about which there is no material disagreement, and I will again only cite what is required for my discussion.

Innominate and Intermediate Terms in a Contract

[107] In my opinion, the payment by instalment clauses in the three contracts are innominate or intermediate clauses. Such a species of clauses is a part of the law of contract in the Caribbean, though it has not been widely interrogated in written decisions. In this case, from the contracts themselves and the relevant and admissible surrounding circumstances, it is not objectively reasonable to pre-determine and classify these terms as at the time of the making of the contracts as either conditions or warranties. As such, they fall into the presumptive category of being 'in-between' and 'not-to-be-classified' terms.

[108] The UK justification for such terms was explained in the modern era by Diplock LJ in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd*[51], as follows:

> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties,"… Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking unless provided for expressly in the contract depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a "condition" or a "warranty".

[109] With innominate or intermediate terms, the focus is on the nature, effects, and consequences of the breach. More so, whether those consequences resulted in the innocent party being deprived of substantially the "whole benefit which it was intended he should obtain from the contract". This general approach aligns with this Court's views on what the law in this area should be, taken together with the nuances explained below.

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[51] ibid (n 8).

[110] Two decades later in the UK, this approach was decisively re-affirmed in the House of Lords in *Bunge Corporation (New York) v Tradax Export SA (Panama)*[52]. Lord Scarman would say of such "in-between" terms:

> An innominate or intermediate term is one, the effect of non-performance of which the parties expressly or (as is more usual) impliedly agree will depend upon the nature and the consequences of breach.

[111] In my opinion, the process of discovery and classification of this species of terms, turns on an objective and reasonable interpretation of a contract in its surrounding circumstances. The task with such terms, as in this case, is therefore to interpret the three contracts in their surrounding circumstances and determine whether it was the intention and agreement of the parties, expressly or impliedly, that the consequences of non-performance of the contractual terms for payments in instalments would depend on the nature and effects of the breach. That is, whether the parties expressly or impliedly agreed that in relation to the payment by instalment terms and for certain breaches of those terms: a) they would operate as a warranty; and for other breaches of the same terms, b) they would operate as a condition.

[112] Once decided that the terms are intermediate or innominate terms, the parties are taken to have agreed that, when the payment by instalment term operated as a condition, the effect of the breach would be that the innocent party to the breach (in this case, the Respondents) would be entitled to treat the contract as at an end. And when the same term operated as a warranty, the effect of the breach would be that the innocent party would be entitled to damages but not to terminate the contract.[53] This bi-functional capacity of these types of terms means that they are, 'capable of operating, according to the gravity of the breach, as either conditions or

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[52] ibid (n 10) at 717.

[53] ibid: "A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract" (Lord Scarman).

warranties.'[54] Hence the evaluative focus on 'the gravity of the breach' and its consequences in relation to the innocent party to the breach.

[113] There is therefore an evaluative balancing exercise to be undertaken centred around the impact on the parties, requiring generally an interrogation of the following: a) of the innocent party - the seriousness of the loss, the quantitative ratio of the breach to the entirety of the contract, the adequacy of damages, and the value of performance already received; and b) of the contract breaker – the quantitative ratio of the obligation breached to the whole contract, the contract breaker's willingness and ability to remedy the breach, and the likelihood of future breaches. There is also a qualitative assessment to be made, that focuses on the impact of the nature of the breach. In this latter context, the idea of a loss of "substantially the whole benefit" of a contract is not to be taken too literally. There is an element of proportionality involved. As well, and as in this case, the cumulative effect of multiple breaches may also justify the inference of future breaches and be sufficiently serious to justify the innocent party bringing the contract to an end.[55]

[114] I have no doubt that the flexibility afforded by the classification and use of innominate or intermediate terms advances the jurisprudence in this area of the law and is appropriate in Caribbean commercial contractual contexts. In the Caribbean, unlike in some other legal jurisdictions, widespread access to experienced and specialised commercial legal resources is not always readily available or affordable. The consequence is that many commercial contracts are not always as clear, coherent, or comprehensive as may be considered ideal, and these three contracts are no exception.

[115] In my opinion, the classification and use of innominate or intermediate terms are not limited to complex contractual arrangements, or in relation to terms that are inherently complex in character. Rather, they can be used or implied in any contract, where it is reasonably foreseeable and can be anticipated at the time of making the

[54] ibid at 714 (Lord Wilberforce).
[55] M Chen-Wishart, *Contract Law* (1st edn, OUP 2005) ch 13.

contract, that the effects of breaches of a single term could have a range of consequences. Consequences that may have the effect of depriving the innocent party of substantially the whole benefit that the parties had agreed was to redound in their favour, or that may in that regard be relatively inconsequential.

[116] This is exactly such a case, as the terms in issue are not complex, and yet their breaches are also foreseeably capable of a range of consequences. Consequences that include what can amount to a fundamental breach that could deny the Respondents a core and centrally known and agreed benefit of these contractual relationships. This nuance in relation to complexity, applied in this case, is illustrative of its appropriateness in the Caribbean.

Interpreting Commercial Contracts

[117] An equally challenging undertaking, in my opinion, is the determination of whether a term is at the time of the making of a contract, a condition, a warranty, or an innominate/intermediate term. Indeed, in this appeal Saunders PCCJ and Burgess JCCJ disagree on this very point and do so rationally.

[118] In this latter regard, Burgess JCCJ has carefully and comprehensively outlined the general principles governing commercial contractual interpretation, and these are instructive in this appeal. Indeed, there is broad agreement on these principles. He has also identified and proposed a solution for an apparent dissonance in this Court's approach on this matter.[56]

[119] In my opinion, the appropriate approach in Caribbean contexts is one for which the contours are generally described by Lord Steyn in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd*[57] as follows:

> The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person,

[56] See generally [51] to [72], and [69] to [72] in particular.
[57] ibid (n 22).

> circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

[120] It is an approach that balances both text and context and does so without any prescriptive prioritisation of one over the other. Both text and context are relevant and informative. Thus, relevant background facts and surrounding circumstances are salient and an aid to construing the language of the text and to discovering what was agreed. Circumstances determine the extent to which text and/or context may be significant, bearing in mind the presumption that, all other things being equal, parties intend what they agree to in writing as expressed in the language of their contract.

[121] In addition, because the assessment is an objective one based on an assumed reasonable person, that hypothetical person is presumed imbued with general knowledge of: a) commercial practices, traditions, and common-sense; and b) all the background information which would reasonably have been available to the parties at the time of making the contract.

[122] Of particular significance to this appeal, therefore, is: a) admissible, admitted and/or agreed evidence of the factual background known to the parties prior to and at the time of making the contract; as well as b) evidence of the purposes and objectives of these contractual arrangements.[58] This evidence is outlined in the opinions of Burgess JCCJ and Saunders PCCJ, and in relation to both categories above, I consider the material evidence relevant and admissible.

[123] In my opinion, the approach of this Court to the interpretation of commercial contracts is already explained. Regard is to be had to both the language used in the contracts and the commercial contexts that were operative. I also agree with Burgess JCCJ, that, 'Generally, however, greater emphasis should be given to

[58] See *Prenn* (n 20) at 241: '… evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction." (Lord Wilberforce).

textual analysis in complex, detailed contracts drafted by experienced lawyers whereas commercial context should be more relevant where the agreement is more informal or lacking in detail. Of course, there will always be exceptions and every case must be decided on its own facts.'[59] Commercial context and surrounding circumstances are relevant to this approach and operate as an aid to interpreting the express language used.

Application and Summary

[124] The application of the above principles to the facts in this appeal, lead me to the following conclusions: a) the parties did not expressly classify the payment by instalment terms as either conditions or warranties; b) the payment by instalment terms were central to a core purpose and objective of these contracts, and for the benefit of all parties; c) for the Respondents, as known and agreed to by the Appellant and as objectively foreseeable, default in payment of any of the terms and schedule of payments could result in the Respondents completely losing the substantial benefit of the contracts, which was not simply for the sale of lands and equipment but included the servicing of debts due to creditors, for which, the subject matter lands were also encumbered; and d) equally foreseeable at the time of making the contracts, was that default in payment of any of the terms and schedule of payments may not necessarily have had the consequences at c), and could objectively be considered trivial and consequentially insignificant in relation to the stated benefit to the Respondents.

[125] In this case there is no presumption in law or in fact that time was of the essence in relation to the payment of these instalments. Further, the contracts read as a whole and in context are ambiguous and/or uncertain as to whether the time stipulations (for the payments by instalments) were intended or agreed to be conditions.[60] It

[59] At [70] above.
[60] See for example, and as explained by Burgess JCCJ, the meanings and effects of clauses 9 and 16 of the contract in respect of the plot of state land comprising 6226.00 acres and known as Tract "B" a portion of Tract "A" in the Von Better area.

follows as a matter of principle and law, that these payment by instalment terms are properly classified as innominate and intermediate terms.

[126] One must therefore turn to the consequences of the breaches in this case, to see, whether in effect these terms are to be applied as conditions or as warranties. That is, one must undertake a "gravity of the breach" analysis.

[127] In my opinion, the default in payments in both June and December 2010 and the continuing failure to make those payments or any others, are consequentially such as to render the payment by instalment terms (for the purposes of these breaches and defaults), conditions. These defaults had the effect, which I would consider indisputable, of rendering one of the central purposes and objectives of the contracts unrealisable for the benefit of the Respondents. That is, the consistent and reliable receipt of fixed and periodic payments to be applied by the Respondents to service known indebtedness, which also encumbered the rice-lands.

[128] In this regard, while I accept that a significant portion of the purchase price has already been paid (and the value of that part-performance received), in balancing all the relevant considerations, I am satisfied that these failures to pay on time or at all constitute breaches that, judged at the time of the breaches, are, "fundamental" and "go to the root of the contract" (to adopt more traditional language). These part-payments may be accounted for if and when an assessment of damages is undertaken.[61]

[129] In my opinion these breaches are repudiatory as they evince conduct by the Appellant that it does not intend to honour its obligations for payment on a timely basis or at all, whether judged at the time of the breaches or in the future – payments which the parties knew went to the very heart of what was agreed for the parties' mutual benefit (and certainly for the Respondents' part of the bargain), and intended therefore (seen in light of the breaches and their consequences) to be fundamental.

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[61] See for example, *Dies v British and International Mining & Finance Corporation Ltd* [1939] 1 KB 724; and *Workers Trust & Mercantile Bank Ltd v Dojap Investments Ltd* 1993] UKPC 7, [1993] AC 573 (JM).

That is to say, despite the part payments actually made, the Respondents were effectively put at risk of being deprived of substantially the whole benefit which they intended to gain from these contracts.

Conclusion

[130] The consequences of the defaults in payments in the circumstances of this case effectively undermined the "commercial purpose of the venture" ('the gravity of the breach'). The Respondents have been substantially deprived of a central and significant benefit that it was agreed and intended would be derived from these contractual arrangements. The Respondents were therefore entitled to consider the contracts discharged and to repudiate them.

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

Introduction

[131] For the reasons that follow I agree that this appeal cannot succeed. I also agree that the Respondents were entitled to rescind the Agreements. Regrettably, I do not agree with the views of the majority on the deregistration point.

[132] I refer to the litigants respectively as purchaser and vendors. The purchaser is the Appellant. It was once registered as a limited liability company, but it was struck off the Companies Register on 24 July 2010, well before these proceedings were commenced against it. The vendors, the Respondents, comprise two companies along with an individual who holds a substantial stake in each of the two companies.

[133] The vendors had legal interests in separate parcels of land, buildings and equipment ("the property") described at [4] in the judgment of Burgess JCCJ. The property was held by them by Deeds of Transport and State Leases, respectively. The property was encumbered with mortgages to certain financial institutions ("the Bank"). At all material times, to the knowledge of the purchaser, the vendors were concerned about the risk of foreclosure on the property by the Bank. The individual

vendor was particularly concerned because he had given the Bank a personal guarantee. He was exposed to serious jeopardy if the payments to the Bank were not made timely and in full.

[134] By three separate agreements, each dated 21 December 2006, (hereinafter collectively referred to as "the Agreements") the parties agreed that the vendors would sell and transfer their interest in the property to the purchaser. The terms contained in each of the Agreements are similar. They are set out in the opinion of Burgess JCCJ at [5] above. The purchaser was obligated to make significant payments on the signing of the Agreements followed by substantial half yearly instalments, in June and December respectively, spread over a nine-year period. Provisions were also made for payment of interest on a half yearly basis and for reduction in the interest payable if the purchaser paid instalments in advance, subject to certain terms. In return, the purchaser was given immediate vacant possession.

[135] There is undisputed evidence surrounding the making of the Agreements. That evidence is undisputed because it was admitted on the pleadings and or established in the evidence at trial. We therefore know that: a) the purchaser was perfectly aware of the vendors' delicate position with the Bank, namely the risk of foreclosure and the jeopardy the individual vendor would suffer should that risk materialise; b) the purchaser gave assurances to the vendors that it would faithfully honour the payment obligations under the Agreements to ensure that the vendors would not be exposed to any such jeopardy; and c) the purchaser represented that it was, "a well-established company which will have access to funds to satisfy all of its payment obligations under the Agreements."

[136] All was going well with the performance of the contract. The purchasers fulfilled their payment obligations in 2008, the first year the instalments fell due. But a year later in 2009, the payments that were due in December were made late. Then in June 2010 the purchaser failed to make the instalment payments then due. This was a clear breach of the Agreements. The vendors wrote to the purchasers about the

breach and suggested ways of curing the same. We have seen no evidence of any response by the purchasers. The purchasers failed to cure the breach or to agree, or even treat with, the vendors' proposals for keeping the Agreements underfoot. The purchaser compounded their breach by failing to pay the instalment that was due by the end of December 2010.

[137] By letter dated 17 January 2011, the vendors purported to terminate the Agreements. The vendors filed proceedings that month alleging that the agreements had been properly terminated by them. At the time the vendors filed the proceedings, no one adverted to the fact that the purchaser had already been struck off the register of companies. It is possible that counsel on both sides were unaware of this development.

[138] On 29 March 2012, after a full trial, then Acting Chief Justice Chang gave judgment for the vendors. He ordered that the Agreements were properly rescinded by them, that the property should be returned to the vendors, and that the latter should return to the purchaser GY$232,277,108.00 as restitution. Regrettably, neither the Court of Appeal nor this Court has seen the reasons of the then Acting Chief Justice. But, given the serious admissions made on the pleadings, the evidence adduced before the judge and the conclusions reached, it is not difficult to surmise that the judge believed the evidence given on behalf of the vendors. And rightly so.

[139] The purchaser appealed. The Court of Appeal examined all the facts and circumstances and noted that there was a clear intention by the parties to treat as important, punctual compliance with the stipulations as to payment of the half yearly instalments. George-Wiltshire CJ held that punctual payment was an essential term of the contract and as such, the vendors were entitled to treat the failure to make any payments in both June and December 2010 as a repudiation of the Agreements. The Court of Appeal was unable to determine the manner by which Acting Chief Justice Chang arrived at the figure of G$232,277,108.00 as restitution to be repaid to the purchaser by the vendors. In the circumstances, the Court of Appeal felt that the appropriate thing to do was to remit the matter to the trial court for a proper investigation of that issue. The ostensible purpose of the remittal was

regrettably couched in the terms of an "assessment of damages", but the context clearly suggests that the Court of Appeal desired that evidence be taken so that the court could determine what was a just sum the vendors should return to the purchaser, in light of all the circumstances.

[140] The purchaser insists that the vendors were not entitled to rescind the Agreements. The purchaser therefore appealed the decision of the Court of Appeal to this Court. In the meantime, the vendors re-took possession of the property.

The Issues for Determination

[141] The above is the barest outline of the essential facts that form the background to the dispute between the parties. There are other issues raised in the case regarding repairs effected by the purchaser and the mode of re-possession of the property by the vendors. Those are not matters with which this Court can be concerned as there has been no fact finding on them by the courts below and, in any event, those matters are not relevant to whether the vendors were entitled to rescind the agreements.

[142] Two critical questions arise for determination in this appeal. The first has to do with the purchaser's undoubted breach of the Agreements. It can be stated in this fashion: Were the vendors entitled to treat the failure to pay the 2010 instalments as a breach entitling the vendors to put an end to the Agreements? I treat with this first question under the heading: 'The Purchaser's Breach'.

[143] The second question has to do with the status of the purchaser. I would pose it in this way: Were the vendors entitled to commence these proceedings against a deregistered company? I treat with the second question under the heading: 'The Consequences of the Purchaser having been Deregistered'.

[144] My short answer to these two questions respectively is, **yes** to the first, and **no** to the second.

The Purchaser's Breach

Conditions, Warranties and Innominate Terms

[145] No one doubts that in failing to pay the 2010 instalments, the purchaser was in breach of the Agreements. The key question is what could the vendors legally do about that breach? This is a fundamental question businesspeople must contend with at the formation stage of a contract. What are my remedies if something goes wrong?

[146] The law traditionally addressed the consequences of the breach of contractual terms by dividing those terms into conditions and warranties. The distinction lay in the rights accorded to the innocent party when the other party had breached the term. Certain contractual terms were regarded as going to the root of the contract. The law labelled such terms, "conditions". Because of the significance of a condition to the life of a contract, when a condition was breached, the innocent party was entitled to elect whether they wished to continue with the contract or to treat the conduct of the party in breach as a repudiation of the agreement, and on this account, properly rescind the contract. Use of the word "rescind" here did not mean that the contract was to be treated as if it never came into existence. The existence of the contract was acknowledged, but it had been put to an end by the innocent party on account of the repudiatory breach of the other party[62].

[147] If a term was subsidiary or collateral to the main purpose of the contract, the breach of it did not entitle the innocent party to terminate the contract. The innocent party could seek only a remedy in damages. The law labelled as *warranties*, terms of such relatively minor importance. The difference between conditions and warranties therefore lay in the rights the law accorded to the innocent party when the term in question was violated.

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[62] See *Johnson* (n 5) at 392-393.

[148] How did one go about identifying in a contract which terms were conditions and which were warranties? Sometimes the parties made it very explicit in the contract itself. The parties might expressly label as such those terms that were conditions and those that were mere warranties. The use of such labels by the parties was not always conclusive. There were circumstances in which the court chose to disagree with the labels the parties placed on them.[63] Ultimately, the court was entitled to assess the obligation in question to determine whether in substance it properly fell into one category or another. The court would normally do so by assessing the importance of the term, in the context of the contract, as at the date of the contract. This classification depended on the true construction of the contract as a whole[64], in light of the surrounding circumstances. The court ascertained the intention of the parties, collected from the instrument and the circumstances legally admissible in evidence, with reference to which the contract had to be construed.[65] At the end of the day, once a term was classified, the breach of it had a particular consequence.

[149] Over time, the law recognised that it was necessary and just to mitigate against the rigor of the consequence of an inflexible classification of contractual terms into conditions and warranties.[66] Suppose, for example, a contractual term is labelled as a condition by the parties, but it could be breached in a wide variety of ways, some causing serious and some, insubstantial consequences. Should the innocent party be afforded the right to rescind the contract and seek damages if the actual breach was inconsequential and caused minimal loss or damage to the innocent party? In *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [67], the House of Lords answered that question in the negative. So was born the descriptor "intermediate" or "innominate", which was given to a third category of contractual terms. The category of innominate terms was originally reserved for those terms which were too complex to be fitted into the traditional scheme of conditions and warranties. For such terms, the legal consequences depended on the effect of the breach. If the

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[63] See for example *Schuler v Wickman Machine Tools Sales Ltd* [1974] AC 235.
[64] See *Bettini v Gye* (1876) 1 QBD 183 at 187.
[65] See *Graves v Legg* (1854) 9 Exch 709, 156 ER 304. See also *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281.
[66] See *Reardon Smith* (n 25) at 998, (Lord Wilberforce).
[67] See *Hong Kong Fir* (n 8).

breach deprived the innocent party of substantially the whole benefit of the contract, rendering further commercial performance impossible, then in addition to an appropriate remedy in damages, the innocent party was entitled to be discharged from further obligation. If the breach did not have that effect, its consequences could be remedied only by an award of damages.

[150] The fact-sensitive assessment as to whether breach of a particular innominate term justified rescission is naturally carried out *after* the innocent party has purported to rescind the contract. The court must decide as at that time whether the consequence of the breach is really so serious that it strikes fundamentally, at the purpose of the contract, or caused the innocent party severe loss or damage. The focus is not so much on the parties' intentions at *the time of the making of the contract*, but on the effect of the actual breach which has occurred.[68] In order to adjudge whether the breach of an innominate term gives rise to rescission, one must "look at the events which had occurred as a result of the breach".[69] A determination of whether the stipulation in these Agreements as to prompt and full payment of each of the instalments ("the instalment payment provisions") was a condition, warranty or an innominate term must depend on the true construction of the terms of the contracts.

Construing the Terms of the Agreements

[151] Courts have devised rules for construing commercial contracts. In this regard, writing for this Court in *Canadian Imperial Bank of Commerce v Gypsy International Limited*[70], Hayton JCCJ adopted the approach to the construction of commercial contracts as indicated in *Marley v Rawlings*[71] where Lord Neuberger stated:

> The court is concerned to find the intention of the parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known

[68] Richard Stone, *The Modern Law of Contract* (6th edn, Cavendish Publishing 2005) at 428.
[69] See *Hong Kong Fir* (n 8) at 488-89.
[70] *Canadian Imperial* (n 38) at [22].
[71] *Marley* (n 37) at [19].

> or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions.

Hayton JCCJ also referenced and adopted an earlier statement by Lord Steyn to the effect that[72]:

> The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.

[152] There is nothing ambiguous or complex about the payment by instalments provisions located at clause 2 of each of the Agreements. The issue is whether one should regard the time for payment as being of the essence, notwithstanding the fact that the Agreements did not expressly so indicate, or whether it is to be regarded as an innominate term. This leads one to ask what did the parties intend? This question can only be answered by interpreting each contract as a whole; by examining the circumstances surrounding the creation of the Agreements; by reminding ourselves of the facts known by the parties at the time that the documents were executed, and by applying common sense.

[153] The evidence tendered in this case supported the pleadings of the vendors and give us an understanding of how the parties themselves regarded their contracts. Paragraph 9 of the Statement of Claim stated:

> Prior to the execution of the Agreements the [vendors] made known to the [purchaser] that the reason for entering into the Agreements was that [the vendors] were indebted to financial institutions and to other parties and that in most of those loan transactions the [individual vendor] was personally liable by way of guarantee to secure repayment of the loans. The [purchaser] was also advised that it was intended to apply the proceeds of sale towards liquidation of such indebtedness of the [vendors] and was therefore seeking a purchaser who would appreciate that the punctual payment of the balance was vital in order to stave off enforcement proceedings by the financial institutions in the event of default.

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[72] *Sirius* (n 22) at [18]. See also *Sea Haven Inc* (n 20) at [30].

[154] Paragraph 10 of the Statement of Claim stated:

> The [purchaser] assured the [vendors] that it will faithfully honour the payment obligations under the Agreements to ensure that the [vendors] will not be exposed to any such jeopardy. Such assurance was communicated to the [vendors] by the [purchaser's] Chief Executive Officer, Jai Benie, who advised the [vendors] that the [purchaser] was a well established company which will have ready access to funds to satisfy all of its payment obligations under the Agreements.

[155] Paragraph 11 of the Statement of Claim stated:

> In recognition of [the] indebtedness of the [vendors] to the financial institutions and in furtherance of the assurance of prompt payment the [purchaser] insisted on the inclusion of a clause in the Agreements requiring the [vendors] to provide to the [purchaser] evidence of approval by the financial institutions of the sale and purchase transactions between the parties. Such evidence was provided prior to the execution of the Agreements.

[156] Paragraph 12 stated:

> On the demand of the [purchaser] it was also provided in the Agreements that the [purchaser] shall be at liberty to settle from amounts payable to the [vendors] any claim which may be made against the [vendors] for outstanding amounts owed to other parties.

[157] Paragraph 13 stated:

> The [vendors] in good faith and induced by the representation and by the assurance given by the [purchaser] agreed to the inclusion of the demands made by the [purchaser] and executed the Agreements.

[158] The allegations stated in each of these pleadings were fully substantiated by admissions by the purchaser on its own pleadings (paragraph 10 of the Statement of Claim, for example, was expressly admitted in paragraph 6 of the Defence) and/or in the evidence adduced before the trial judge.

[159] In hindsight, the parties could have, at the outset, stated in the Agreements something along the lines that, "It is hereby agreed and understood that [the clauses related to the time for payment and what must be done with the payments] are a

condition of this Agreement, the breach of which will render either party entitled to rescind this Agreement." But hindsight, it is said, is always 20/20. In any event, a failure to state expressly that a clause is a condition does not absolve the court of the necessity to construe the clause in question, with a view to determining whether the obligation set out there was really a condition. As was stated in *Bunge Corp v Tradax International SA*[73]:

> . . . [T]he basic principles of construction for determining whether or not a particular term is a condition remain as before, always bearing in mind on the one hand the need for certainty and on the other the desirability of not, when legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy.

[160] It has been said that "the modern approach is that a term is innominate unless a contrary intention is made clear".[74] In my view, when one looks at all the surrounding circumstances and applies ordinary business sense, a contrary intention is evinced here. The evidence points overwhelmingly to the fact that the parties here intended that the payment provisions were critical to the Agreements. This was a contract entered into on the representation by the purchaser that it was a reputable company that could and will pay on time. The Agreements brought third parties into play in relation to the instalment payment provisions. The parties agreed special provisions to ensure that the payments were ultimately made to the Bank. In furtherance of this, some instalments were actually paid by the purchaser not to the vendors but directly to the Bank. The vendors were contractually obliged to provide the purchasers with receipts from the Bank to confirm that the instalments had been paid to it. One only has to apply common commercial sense to recognise that failure to make those instalment payments and to service the vendors' loan with the Bank would undermine the contract as a whole.

[161] Just consider for a moment if the shoe were on the other foot. If the purchaser always punctually paid their instalments in full, but instead of paying them over to the Bank as agreed, the vendors used those monies to acquire luxury items for their

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[73] See *Bunge* (n 7) at 727 (Lord Roskill).
[74] See *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2017] 4 All ER 124 at 153.

personal enjoyment neglecting to service the loan at the bank. Such a breach would have similarly paved the way for the Bank to foreclose on the property. In that case, surely, the purchasers would have alleged that such conduct by the vendors evinced a breach of a fundamental term as it would have equally jeopardised the purchaser's ability to obtain specific performance when all the payments were made. The purchaser would then have had good grounds on which to rescind if that was what they desired.

[162] It is true that, generally speaking, equity would not regard stipulations as to time as being of the essence of a contract. Any such stipulations are usually regarded as warranties unless they are expressly stated to be or are treated as conditions.[75] That general rule always, however, gave way in those instances where the court inferred from the surrounding circumstances that the parties intended the time stipulations to operate as conditions. The law is that the court will require precise compliance with stipulations as to time whenever the circumstances of the case indicate that this would fulfil the intention of the parties.[76] As was observed in *Stickney v Keeble*[77], the maxim that in equity, the time fixed for completion is not of the essence of the contract is not applicable in cases where, the stipulation as to time could not be disregarded without injustice to the parties, or where there was something in the nature of the surrounding circumstances, which would render it inequitable to treat it as a non-essential term of the contract.

[163] I agree that in cases of this kind the right question to ask is whether:

> [U]pon the true construction of the particular clause, did the parties intend that the particular stipulations as to time must be strictly adhered to or not; or if, as happens in so many cases, the parties have not expressly dealt with this question, must there be imputed to the parties an intention that the particular stipulations as to time must be strictly adhered to or not? [78]

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[75] See *Bacchus* (n 14).
[76] See *Bunge* (n 10) at 542(Lord Wilberforce).
[77] See (n 15) at 416 (Lord Parker).
[78] *United Scientific Holdings* (n 12) at 147.

[164] In *Bunge Corp v Tradax International SA*[79] *with reference to a time clause in a mercantile contract* Lord Wilberforce stated[80], *inter alia*:

> As to such a clause there is only one kind of breach possible, namely, to be late, and the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence, and secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole.

[165] Having regard to the agreements as a whole, I have come to the conclusion that the stipulations for adherence to the clauses surrounding the timeliness and ultimate destination of the payments were of fundamental importance to the contracts. Timely payment by the purchaser, and ensuring that the Bank received such payment, went to the root of the performance of the contract. Each side knew that the breach of either of those stipulations placed ultimate performance of the agreements at grave risk. The Court of Appeal and the trial judge were entitled and right to treat the breach of the instalment payment clauses as a repudiation of the agreements, entitling the vendors to the remedy of recission. Upon the breach by the purchaser of those clauses it was open to the vendors to rescind the agreements if their attempt at re-negotiating them failed. Given the purchaser's failure even to respond to the vendors' letters calling attention to the breaches, the vendors were entitled to rescind as they did.

[166] The purchaser's attempt to trivialise their breach on the basis that it was non-payment of only two instalments out of eighteen misses the point. That argument would perhaps be more convincing if these agreements were divisible in nature; that is, if the performance of a specified obligation on the part of the vendors was contingent upon the payment of each instalment. That would be the case, for example, if what was being sold was several separate properties and each instalment represented the costs of an individual property. That is not the case here. These agreements are indivisible or "entire" in nature, notwithstanding the stipulation that the purchase price be made in instalments. It is only upon payment of the final

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[79] *Bunge* (n 10).
[80] ibid at 541.

instalment that the property could be transferred to the purchaser. The cases cited by counsel for the purchaser[81] must therefore be distinguished. They are cases that deal with the principles of repudiation applicable to divisible contracts.

The Consequence of the Purchaser having been deregistered

[167] A human being has a natural existence. A company does not. A company is a creature of Parliament. Its capacity to operate as a legal person is granted and regulated by statute. The presence of a company's name on the companies register, and the accompanying certificate of registration evidence this capacity. Registration gives the green light to the corporate entity to assume a legal personality and engage in commercial transactions as a body corporate. Discussion on the characterisation of the instalment payment clauses is therefore without prejudice to what emerges when one considers the circumstance that the purchaser, a limited liability company, was sued and has engaged in this litigation after and during the period it has been struck off the register.

[168] The legal framework governing registration is to be found in the Companies Act.[82] Among other things, the Act provides for a Registrar of Companies who is mandated to maintain a register that contains the name (and other pertinent bits of information) of every body corporate.[83] Anyone who pays the prescribed fee is entitled to examine and make copies of extracts from the register.[84]

[169] The regulatory framework requires every company to furnish certain annual returns to the Registrar.[85] This framework is enforced by empowering the Registrar, among other things, to strike off the register any company that fails to submit its annual

[81] *Coggins v Garage and Rolling Door* (Trinidad and Tobago HC, 18 December 2007): contract for the manufacturing, supply and installation and commissioning of a garage door. It was agreed that there be a fixed price payable in instalments, and *Freeth v Burr* (1874) LR 9 CP 208 at 214: contract for the purchase of pig iron, to be delivered in two instalments. Payment was due fourteen days after each delivery.
[82] The Companies Act, Rev Ed 2011, Cap 89:01.
[83] ibid, s 470.
[84] ibid, s 471.
[85] ibid, sch 5.

returns.[86] The effect of deregistration is that, save for any statutorily defined exception, the company, while it is deregistered, forfeits its privilege to function in the same way as a registered company may. It can neither validly institute a suit nor can it be sued. It is incapable of lawfully conducting business while it is deregistered, unless the statute so permits it.

[170] Issues surrounding deregistered companies were discussed recently in the Bahamian case of *Galantis v Alexiou*.[87] The case is relevant because the comparable legislative framework in The Bahamas approximates Guyana's with one difference. In The Bahamas, a deregistered company is said to be "dissolved" during the period of deregistration. In Guyana, no such description is accorded to a Guyanese company during the period it is struck off the register. At first blush, this difference might seem to be material for the purpose of this case but, on closer scrutiny it is not. Indeed, I agree with the Privy Council's view, expressed in *Galantis,* that the Bahamian descriptor "dissolved" is:

> unsatisfactory because there is no obvious means of reconciling the dissolution of the company with the continuation of its liabilities thereunder. Ordinarily, dissolution would terminate the company's legal personality and hence its existence.[88]

By not deeming a deregistered company as having been "dissolved" Guyana's legislation merely, and sensibly, avoids a legal conundrum.

[171] In The Bahamas, as in other jurisdictions like The Bahamas where a deregistered company is deemed to be "dissolved", the so-called "dissolved" company has the same entitlement to be restored to the register as does a deregistered Guyanese company. Equally, in The Bahamas, as in Guyana, the relevant statute makes it clear that the liability of a "dissolved" Bahamian company shall continue and may be enforced as if it had not been struck off the register. The real issue to be determined in these proceedings hinges not on whether the statute renders a

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[86] ibid, s 487.
[87] See *Galantis* (n 46) at [37].
[88] ibid at [26].

deregistered company "dissolved", or, whether a court decides that such a company is merely "suspended" when it has been struck off the register. The critical questions to be decided and the answers to those questions are the same, whether in Guyana or in those countries where the company is said to be "dissolved" but which, like The Bahamas, otherwise have provisions similar to Guyana's. These questions are: Firstly, can a deregistered company incur liabilities while it is deregistered? Secondly, what is the position where a company, while registered, incurred a liability to a party and the company was struck off the register before the party could enforce the lability against the company? Thirdly, what is the position of a party who has *a claim* to be litigated against a deregistered company for something allegedly done by that company.

[172] To assist in answering these questions two provisions of the Companies Act require interpretation. Section 487(5) of that Act states:

> 487(5) Where a company or other body corporate is struck off the register, the registrar may, upon receipt of an application in the prescribed form and upon payment of the prescribed fee, restore it to the register and issue a certificate in a form adapted to the circumstances.

[173] On the other hand, s 488 states:

> 488 Where a body corporate is struck off the register, the liability of the body corporate and of every director, officer or shareholder of the body corporate shall continue and may be enforced as if it had not been struck off the register.

[174] The majority's interpretation of these provisions proceeds on the premise that, unlike the case, say in The Bahamas, a deregistered company is not deemed by the Guyana legislation to have been dissolved upon being struck off and that this circumstance has an important consequence. While deregistered, according to the majority, the legal personality of the Guyanese entity is merely "suspended" and there is a difference between the status and capacity of a company whose legal personality is "suspended", and those of one that is said to be "dissolved". On this basis, the majority conclude that s 488 has the effect of preserving the legal

personality of a struck off company for the limited purpose of the enforcement of its liabilities incurred whether prior to ***or after*** it has been struck off the register. As to s 487(5) which addresses restoration to the register, the majority state that this provision is intended to be available ***only*** where a struck off company wishes to pursue enforcement of a liability owed to it. On the strength of these interpretations, the majority conclude that, even if the purchaser incurred liabilities to the vendors ***after*** 24 July 2010 (the date on which it was deregistered) those liabilities could be enforced against it by a suit brought by the vendors even while the purchaser was deregistered.

[175] I respectfully disagree with this reasoning and the conclusion based on the same. On my interpretation, s 488 provides an exception to a norm. The norm is that a company loses its capacity to sue or be sued when it is struck off the register. Section 488, however, creates a narrow exception to this norm by specifically authorising enforcement of a liability against a deregistered company. The section is necessary only because without such a provision the person to whom the liability is owed would not have been able, while the company was deregistered, to enforce that liability. If a party were entitled in the normal fashion to sue a deregistered company or to enforce a liability against such a company, there would be no need for the section.

[176] My interpretation of s 488 is that what is preserved and may be enforced is any liability existing at the date of the removal of the company from the register. Textually, the subject of the verb "shall continue" is not the legal personality of the company. The thing that Parliament decrees "shall continue" and "may be enforced as if [the company] had not been struck off" is "the liability" of the struck off entity and also, the liability "of every director, officer or shareholder of the body corporate". For the liability to *continue* it must have first existed at the time when the company was struck off the register. I disagree entirely that the section can be interpreted to mean that liabilities may be incurred by a company after it has been struck off the register and may then be enforced against the company via the use of s 488. That interpretation would accord validity to the post-deregistration conduct

that produced such a liability. The reality is that a struck off company, while deregistered, is not permitted validly to engage in any corporate activity far less incur liabilities. A deregistered company is no more capable of incurring a liability while deregistered than a human being in a coma can. To continue with this analogy, at the time a company is struck off the register, it is sent into a coma. A new liability cannot be incurred during this period because the company cannot validly operate. But in order to protect creditors, through s 488 a creditor may enforce a liability incurred prior to deregistration. And section 487(5) is available to take the company out of the coma.

[177] Read together, in relation to creditors, what ss 487(5) and 488 convey is this. A company rich with assets cannot contrive to have itself deregistered as a device to escape honouring a liability the company incurred while it was on the register. The law allows neither a deregistered company nor the directors, officers or shareholders of such a company to evade their liability by deliberately engineering to have the company deregistered. On the other hand, s 487(5) provides a mechanism to permit a person to pursue a claim that had not yet ripened into a liability at the time when the company was struck off. The person may apply to have the company restored so as to bring that claim.

[178] I agree that to render s 488 effective one must give a certain latitude to the word "liability". But there is a distinction between permitting reasonable latitude and re-writing the section. It is one thing, for example, to say that s 488 allows one to sue a deregistered company to enforce an inchoate liability, incurred while registered, but which only matures into an enforceable liability by the passage of time after deregistration. It is quite another to say that s 488 decrees the prolongation of the legal personality of the company after it has been struck off the register. In my view s 488 does not permit a deregistered company to incur a liability that never existed when it was on the register. Nor can s 488 be used to permit a claimant to initiate a suit in the hope that a favourable result may yield a liability which may then be enforced. Attention was drawn to this latter aspect in *Galantis* where the Privy Council allowed an appeal against a finding by the court below that the latter

was entitled to enforce a liability that did not exist at the time the company was struck off the register. In a passage that contradicts the majority's interpretation of s 488, it was stated there, *inter alia*, that[89]:

> …[T]he liability, if any, of …[the company]… which is kept alive despite the dissolution of the company by its being struck off the register is the liability existing at the very time of the dissolution of the company. The liability kept alive at the time of dissolution … must be clearly some antecedent liability in connection with a company which up to dissolution had a legal existence.

Whether, in this passage, one substitutes the word "dissolution" with "suspension" or with "deregistration", what is stated there, in my view, accurately captures the meaning of s 488.

[179] In this case before us, at the time when the purchaser was struck off the register, 24 July 2010, the vendors had not yet contemplated taking legal proceedings against the purchaser. On *my* interpretation of the Agreements, in failing to make the June instalment, the purchaser had breached a condition of the contracts. As at 24 July 2010, however, the vendors, by their conduct, had waived that breach as they had similarly done in January 2010 when there was also failure to pay punctually the December 2009 instalment.

[180] The vendors' suit, launched on 18 January 2011, was not brought against the purchaser for any act or omission occurring before the purchaser had been deregistered. The suit was not brought, for example, for the failure to make the instalment payable in June 2010. Such a suit would have qualified under s 488 as a liability that was capable of being enforced. The claims made by the vendors in 2011 were instead for: a) rescission of the Agreements; b) an injunction to restrain the purchaser and its agents from entering and remaining on the property; c) a declaration that the vendors should be entitled to retain as the Court considered proper such of the purchase monies as were already paid; and d) damages for breach

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[89] See *Galantis* (n 46) at [28].

of contract. These claims were stoutly resisted by the deregistered purchaser which presumed to file a counterclaim of its own.

[181] Such litigation is ill suited to qualify as the enforcement of a liability incurred prior to 24 July 2010. The vendors were really asking the court – to decide in their favour the question whether a liability existed, to define the nature and extent of that liability and to award them discretionary relief if the court took their view of matters. A suit of that sort cannot properly be categorised as one aimed at the enforcement of a liability. As was stated in *Galantis*, one can hardly enforce the possibility that an order will be made in the future.[90] To take the view that such proceedings as were instituted here are cognisable under s 488 strains the meaning of the section to breaking point. It disregards the basis upon which the section states a suit may be brought against a deregistered company. In my opinion, the majority's interpretation of s 488 elides a critical distinction between registered and deregistered companies. It opens the way for a deregistered company to operate validly and incur liabilities as if that company were a registered company in good standing. All of this does violence to the legal framework within which it is intended that companies must operate.

[182] It must again be stressed that these conclusions do not mean that the vendors had no legal recourse against the deregistered purchaser. All is not lost for a party that has a valid claim against a deregistered company for something the company may have done or omitted to do while it was registered but which act or omission cannot be said to constitute a liability that may readily be enforced. In disagreement with the majority, I am convinced that s 487(5) is worded as it is in part to accommodate that situation. The appropriate recourse for a party that seeks to litigate a claim, as distinct from enforcing a continuing liability against a deregistered company, is to apply to have the company placed back on the register so that it can be sued. For that application to succeed the registrar need only be satisfied of the genuineness of the claim and the desire of the applicant to pursue it. The registrar is then

[90] ibid at [28] et seq.

specifically authorised to "issue a certificate in a form adapted to the circumstances".

[183] The above analysis and conclusions are fully in sync with the case law regarding deregistered companies and the clearer language of some jurisdictions. In South Africa, for example, as in The Bahamas, on removal from the register a company is said to be "dissolved" as of the date its name is removed. As in Guyana, the removal of a company's name from the companies register did not, however, affect the liability of the company or any former director or shareholder of the company or any other person, in respect of any act or omission, that took place before the company was removed from the register. Any such liability continued and could be enforced as if the company had not been removed from the register. Several cases indicate that in those jurisdictions with such provisions, upon being deregistered the company cannot legally sue or be sued.[91] But, any interested person could apply in the prescribed manner to reinstate a deregistered company to the register. In Trinidad and Tobago s 461(6) of the Companies Act[92] makes it clear that if a company or any member or creditor feels aggrieved by the company having been struck off the register, on an application made by the company or member or creditor and on certain conditions being fulfilled the company may be restored to the register.

[184] I would give the following answers to the questions posed above at [171]. Firstly, a deregistered company cannot validly operate and hence is unable to incur fresh liabilities while it is deregistered. Secondly, where a company, while registered, incurred a liability to a party and the company was struck off the register before the party could enforce the liability against the company, s 488 avails the party. The liability may be enforced as if the company had not been struck off the register. Thirdly, a party who has a claim to be litigated against a deregistered company may

[91] See for example in South Africa *Miller v NAFCOC Investment Holding Co Ltd* 2010 (6) SA 390 (SCA) at [11]; *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W); in the Province of Alberta, Canada *Pocock Floors Ltd v Holmes Construction Ltd* [1971] 1 WWR 394; in the Province of Saskatchewan *Leask Cattle Co Ltd v Drabble* [1923] 1 WWR 126, 16 Sask LR 373.
[92] Cap 81:01.

on the strength of s 487(5) apply to have the company restored to the register so that a suit may be instituted against it.

[185] The commencement of this suit manifested a serious lapse on the part of the lawyers for the vendors. When an Attorney is instructed to file legal action against a corporate entity, one of the preliminary steps that Attorney must take is to ensure the existence and current registration status of the entity that is proposed to be sued. That is an elementary and easy step to take. One merely examines the register held by the Registrar.

[186] Similarly, when these proceedings were commenced against the purchaser, if its directors or officers were aware that the company had been struck off the register, they in turn should have so instructed their attorneys. And the latter should have brought that fact to the attention of the court and the claimants. These failures have resulted, in my view, in a colossal wastage of costs, time and resources. There is learning to the effect that an attorney who continues to prosecute or defend proceedings, involving a deregistered company, may be personally liable for the costs of the action from the date of deregistration.[93]

[187] There has now been ten years of litigation against a deregistered company that, at the time it was struck off the register, had no enforceable liability to the claimant. It is a difficult thing to conclude that the time, money and effort consumed over those years have all been in vain. But equally, as the old adage goes, hard cases often make bad law. It is my view that, from the start, these proceedings were misconceived. If at the outset the vendors needed to sue the purchaser then they could and should have made an application to the Registrar in keeping with section 487(5) for the reinstatement of the company so that it could be sued. The wording of that provision is calibrated precisely to accommodate such an application. The sub-section allows *anyone* to make the application for reinstatement and it entitles the Registrar to adapt the certificate to the circumstances.

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[93] See *Barclays National Bank Ltd v Traub, Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) 295; *Ex p Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 (4) SA 306 (W).

[188] Can a court rescue the present situation by, *ex post facto*, ordering the restoration to the register of the purchaser for the limited purpose of validating these proceedings? We heard no argument on that question and, in any event, the Registrar of Companies and/or the Attorney General should ideally be heard before such an extraordinary step is contemplated. Can either of the parties at this stage make application to the Registrar to have the company restored with retroactive effect? It would not be prudent to venture an opinion on the prospects of any such application.

[189] In all the circumstances I regret that I disagree with my colleagues on the outcome of this issue. In my view, given all the circumstances, these proceedings were a nullity from the start. I would dismiss this appeal but stay the implementation of the orders of the Court of Appeal until such time as the company is back on the register.

DISPOSITION OF THE COURT

[190] The following are the orders of the Court:

a. The Appellant has standing to pursue this appeal in this Court.
b. The appeal is dismissed.
c. The orders of the Court of Appeal are affirmed.
d. The Appellant shall pay basic costs to the Respondents in the sum of GY$1,705,250.00.

/s/ A Saunders

The Hon Mr Justice A Saunders

/s/ J Wit

The Hon Mr Justice J Wit

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar