[2026] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE BROWN JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00063

BETWEEN	**VANLY RAMSAY**	**APPELLANT**
AND	**BRYAN SWEENEY**	**RESPONDENT**

Mrs Simone Mayhew KC instructed by Mayhew Law for the appellant

Mrs Terri-Ann Guyah-Tolan and Miss Aisha Thomas instructed by George Soutar KC for the respondent

8 February 2024 and 31 July 2026

Civil Law – Contract – Frustration – The Law Reform (Frustrated Contracts) Act, section 3(2) and (3) – Remedies – Reliance Loss and Expectation Loss

F WILLIAMS JA

[1] I have read, in draft, the judgment of Shelly-Williams JA (Ag) and agree with her reasoning and conclusion. There is nothing that I wish to add.

BROWN JA

[2] I, too, have read the draft judgment of Shelly-Williams JA (Ag). I agree with her reasoning and conclusion.

SHELLY-WILLIAMS JA (AG)

Background

[3] This matter arises from a decision of J Pusey J ('the learned judge') in the Supreme Court, wherein on 31 May 2019, the learned judge made the following orders:

> "1. Judgement for the claimant with costs to be agreed or taxed.
>
> 2. That an accounting be conducted by a Chartered Accountant to ascertain the amount of rent collected from 2005 to the date of judgement and 50% of that sum is to be paid to the claimant with interest at a rate of 6% less the sum already advanced.
>
> 3. That the defendant reimburse to the claimant the sums of US$272,000.00 and J$1,472,000.00 with interest at a rate of 6% from the date of judgement.
>
> 4. Stay of Execution granted until the 1st July 2019."

[4] Order number 4, regarding a stay of execution, is still in effect by virtue of an application (dated 11 July 2019) that came before our brother, Brooks JA (as he then was). On 26 September 2019, Brooks JA granted a further stay of execution until the appeal is disposed of, subject to certain conditions.

[5] The appellant, being displeased with the learned judge's orders, filed an appeal against her decision on the following grounds (as amended):

> "(1) The Learned Judge erred when she found that the contract was not frustrated as the purpose for which the contract was entered was accomplished in circumstances where the clear and undisputed evidence showed that it was the intention of the parties for the relevant property called 'the Signature' to have been acquired /transferred to the joint venture company but which transfer was never effected.
>
> (2) The Learned Judge erred in her finding that the Respondent had advanced the sum of US$272,000[.00] and J$ 1,472,000.00 to settle the costs of the land, building materials and payroll expenses when the amount claimed by the Claimant was disputed and was not supported by any documentation or other cogent evidence and in circumstances where there were discrepancies in the amounts allegedly advanced by the Claimant even on his own case.

(3) The Learned Judge erred in awarding the Respondent one half of the rent for the property from 2005 to the date of judgment to be ascertained by a chartered accountant together with the reimbursement of sums advanced by the Respondent to the Appellant as in doing so the Learned Judge permitted the Respondent to recover both reliance loss and expectation loss and in this regard the Respondent would be over-compensated and/or unjustly enriched.

(4) The Learned judge erred in her award of damages to the Respondent as she employed an incorrect measure in her award of damages in that she assessed damages on both the basis of reliance loss and expectation loss when the claimant would not claim and recover loss on both grounds and on the facts before her the reliance method was the more appropriate method of assessing damages.

(5) The Learned Judge erred when she ordered an accounting of rent and payment of the sums ascertained as rent to the Respondent as she treated such rent as profit in circumstances where there was no evidence that [the] Appellant had made a profit from the rental of the apartments and that the rent as ascertained was indeed a profit and therefore capable of being awarded as expectation loss.

(6) The Learned Judge erred in ordering an accounting of rent and payment of 50% ascertained as rent earned from the property called the Signature in circumstances where the owner of the property was not a party to the proceedings and there was no determination that the Appellant had a beneficial interest in the property so as to be entitled to rental income therefrom." (Underline as in the amended grounds of appeal)

[6] Van Bryant Ltd ('the company') was incorporated in Jamaica on 6 March 2002, with the appellant and the respondent listed as managers and directors. The memorandum of association indicated that the company was incorporated to, among other things:

> "(A) To acquire by purchase, lease, exchange, hire or otherwise, lands, buildings, houses, fixtures and furnishings and any interest in same and to deal with in general, alter and improve the property of the Company.
>
> (A1) To erect and construct houses, buildings or works on any land of the Company or upon any other lands or property, and to pull-down, rebuild, enlarge, alter and improve existing houses, building or works thereon, to convert and appropriate such land into and for roads, streets, squares, gardens and the pleasure grounds and other conveniences and generally to deal with and improve the property of the Company."

[7] Sandra Fongwoo-Ramsay, the respondent's wife and the only registered owner of the property listed at volume 986, folio 505 of the register book of titles ('the property'), acquired ownership on 31 October 2001. According to the respondent's witness statement, in December 2001, the appellant and respondent made an oral agreement to build apartments on the property, known as The Signature. The property was never transferred to the appellant, the respondent, or the company. The apartments were completed and rented afterward. The respondent's name was added to a bank account into which rental income was deposited, and the respondent received US$72,000.00 from that account.

[8] The matter came before the learned judge regarding a breach of contract and/or, in the alternative, a claim for specific performance. That claim was brought by the respondent on the basis that the appellant breached a contract to share rental money collected (minus maintenance costs) for 13 apartments (both furnished and unfurnished).

[9] It was argued that the respondent only learned of the development's location on land solely owned by the appellant's wife after the agreement was made. After construction ended in 2005, the appellant advised that issues arose regarding the transfer and conversion of the development/apartment into strata lots on the land, and the parties agreed to rent the properties and share the proceeds as previously stated. The defence, in essence, was that the contract was rescinded or frustrated because the property could

not be transferred to the company, a condition precedent to the coming into operation of the contract.

Ground 1 – whether the judge erred in finding that the contract was not frustrated?

[10] This is the central question to be resolved. In the submissions made by counsel for the appellant, it was argued that the learned judge's finding that the contract was not frustrated was flawed in that the learned judge failed to appreciate that the company's inability to own the property on which The Signature was located prevented the company from obtaining income earned from the complex.

[11] Relying on Chitty on Contracts, Vol 1 para. 23-001 at page 1311 and para. 24-046 at page 1397, **Strata Invest OU v Palmyra Resorts and Spa Limited and Palmyra Properties Limited** [2017] JMCA Civ 28 at para. 21, and section 3(1) - (2) of the Law Reform (Frustrated Contracts) Act (1968) ('the Act'), the appellant argued that his failure to convince his wife to transfer the property to the company frustrated the contract. Based on these authorities, it was argued that this frustration was not caused by either party; it was a true frustration rather than one caused by a breach. Consequently, it was argued that the contract was determined automatically and cannot be affirmed later by either party. It was also submitted that, further to the Act, the respondent was solely entitled to repayment of the sums invested pursuant to the contract.

[12] The respondent argued that the contract was not frustrated, as the learned judge rightly found, because there was a significant change in circumstances between the parties that caused the agreement's performance to deviate from what was agreed. It was proffered that the transfer of ownership of the property was not a requirement for the performance of the contract because the company was created to facilitate other joint ventures/developments between the parties, other than the one at issue in this appeal. For this argument, reference was made to the case of **Implementation Ltd v Social Development Commission** [2019] JMCA Civ 46, at para. 107.

Analysis

[13] In this case, the appellant's position before the learned judge was that there was an initial oral agreement between the parties to:

> a. develop apartments referred to as The Signature;
>
> and
>
> b. transfer the property to the company.

The agreement was later revised after the appellant discovered that the property was solely owned by the respondent's wife and that she had declined to transfer it to the company. Subsequently, the parties agreed to develop and rent the apartments. Rental income was to be shared equally after deducting maintenance costs. The central questions were the contract's specific terms and whether it had been frustrated.

[14] The law relating to the frustration of contracts has been opined upon in several decisions. Bingham LJ, in the case of **J Lauritzen A S v Wijsmuller B V (The "Super Servant Two")** [1990] 1 Lloyd's Rep 1; [1989] EWCA Civ 6, relied on dictum by Lord Radcliffe in **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696 ('**Davis**'), at page 729, where he said:

> "… frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do."

Bingham LJ further cited the **Davis** case to explain the basis on which a contract can be deemed frustrated. He opined at page 721: -

> "...there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did

> make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."

[15] In **Implementation Ltd v Social Development Commission**, a case concerning the appellant's failure to grant the respondent permission to sublease premises, one issue raised on appeal was whether the parties' contract had been frustrated. Phillips JA adopted the dictum of **Davis** and concluded, at para. [112], that:

> "… Finally, to succeed on this point, in my opinion, it would be incumbent on SDC to prove that the contract was incapable of being performed, and in the circumstances of this case, it had clearly failed to do that."

The foregoing followed Phillips JA's reiteration of certain pronouncements, at para. [109] of the written judgment, which was made in **Super Servant Two**. These were that:

> "1. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises (*Hirji Mulji v. Cheong Yue Steamship Co. Ltd. (sub nom. Dharsi Nanji v. Cheong Yue Steamship Co. Ltd.*), (1926) 24 Ll. L. Rep. 209 at p. 213, col. 2; ... The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances...
>
> 2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended...
>
> 3. Frustration brings the contract to an end forthwith, without more and automatically...
>
> 4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it...

> 5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it..."
> (Italics as in the original)

In the case of **Maritime National Fish Ltd v Ocean Trawlers Ltd** [1935] All ER 86, Lord Wright stated, at page 89, that:

> "… The essence of 'frustration' is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point ..."

[16] Lord Wright quoted Lord Sumner from, **Bank Line v Capel & Co. (2)** [1919] AC 435 at page 89 as follows:

> "… I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration ..."

The Board concluded:

> "… If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure. The appellants cannot rely on their own default to excuse them from liability under the contract."

[17] The House of Lords decision in **Davis**, referenced above among the other authorities, concerned the construction of 78 units in eight months. Instead, the units were constructed in 22 months, neither party to the matter to be faulted. Viscount Simmons, at page 715 of the decision, stated that:

> "But it by no means follows that disappointed expectations lead to frustrated contracts."

On page 716 of the judgment, Viscount Simmons elaborated, after analysing why **Bush v Whitehaven Port and Town Trustee** (1888) 52 JP 392; 2 Hudson's Building

Contracts, 4th ed, 122 was not relevant considering later House of Lords decisions on the frustration doctrine, such as **British Movietonews Ltd v London District Cinemas Ltd** [1952] AC 166. He observed that the earlier ruling might still be considered correct.

> "… But I do emphatically say that it cannot, in the light of later authority, be used to support the proposition that where, without the default of either party, there has been an unexpected turn of events, which renders the contract more onerous than the parties had contemplated, that is by itself a ground for relieving a party of the obligation he has undertaken ..."

[18] In the instant case, the learned judge, after analysing the evidence, accepted the respondent's evidence and found at para. [66] of her judgment that:

> "… It follows, and I find, that the agreement between the parties was for a 50/50 investment in the purchase and development of The Signature and returns shared on a 50/50 basis. It is arguable that the defendant was not competent to pledge his wife's property. He nevertheless pledged it to the business venture and his friend who, based on his understanding of the laws to which he is accustomed, saw no danger in the transaction as he felt he was protected under the notion of community property in the United States and over 30 years of friendship."

[19] The learned judge having found that these were the terms of the agreement, the question is whether the inability to transfer the property would render the agreement frustrated. The learned judge accepted the evidence and submissions of the respondent that he is a United States citizen and was operating under the belief that the property in question was community property, in accordance with the law that obtained in the land of his citizenship. This meant that the respondent believed the appellant, as the owner's husband, would have been able to perform the terms of the agreement. The learned judge, after assessing the evidence and the submissions, found that the agreement had not been frustrated. She found, at para. [84] of her written judgment, that:

> "The full purport of this is that the purpose for which

> the agreement was entered into was accomplished. The apartments were constructed and there was return on the claimant's investment. The failure of the defendant to effect the transfer did not end the project or the association between the parties. It cannot therefore be asserted that the substratum of the agreement was removed by unforeseen contingencies outside the control of the parties rendering the contract impossible to perform. Performance is manifest. It seems not only disingenuous at the juncture of litigation to raise the sceptre of frustration after the building is completed with the participation of the claimant but also unsustainable, as the objective of the agreement was accomplished. The continued operation of the business is what is questionable."

[20] The issue is what was the actual agreement between the parties. If the agreement was that the property was to be developed and transferred to the company, the appellant would have been unable to fulfil that obligation, as he could not transfer the property. The property was always owned by the appellant's wife. This was the position before the company was registered and before the parties reached an agreement to develop it. So even though the learned judge found that the appellant "pledged" The Signature, no consequence can flow from that, as he could not legally do so.

[21] The learned judge accepted the respondent's evidence that he was unaware that the appellant's wife had not agreed to transfer the property to the company. The learned judge found the respondent to be a reliable witness and accepted his evidence. Having accepted his evidence, the fact remained that the agreement hinged on the transfer of the property to the company, to which the owner never agreed. The agreement between the appellant and the respondent is not binding on the owner of the property, the appellant's wife, as she was not a party to the contract. Without the transfer being executed, the parties would be unable to apply for strata titles for the apartments, which was an essential part of the agreement. The original agreement was, therefore, unenforceable. I, therefore, find that the learned judge erred in finding that the agreement was not frustrated.

[22] It could be argued that the learned judge might have concluded that the original agreement was modified after the respondent learned that the appellant did not own the property. The amended terms would have specified that the apartments be completed and rented. However, this would not address the fundamental problem of a lack of ownership or interest in the property, which is essential to the agreement's enforceability. Ground 1 succeeds.

Ground 2 – whether the learned judge erred in awarding the sums of US$272,000.00 and J$1,472,000 to the respondent

[23] Once a contract is frustrated or otherwise unenforceable, section 3 of the Act provides guidance on which sums are recoverable by the aggrieved party. It states that:

> "(3) (1) Where a contract governed by the law of Jamaica has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section 4, have effect in relation thereto.
>
> (2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:
>
> Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.
> …"

[24] No issue was taken before the learned judge as to whether the respondent could recover the sums paid to the appellant. The question of liability apart, the only issue before the court regarded money was quantum. The appellant has also argued that the learned judge's factual finding of the amount advanced by the respondent was flawed, in that discrepancies existed in the amounts the respondent claimed to have advanced towards the project in the pleadings, witness statements, and oral evidence. It is argued that these discrepancies were acknowledged by the learned judge at paras. [91] and [92] of the written judgment, but nonetheless the learned judge preferred the respondent's version as credible because the appellant and his wife were "vague and inexact". This decision, which was criticised, was based on oral evidence given long after the events and in the absence of any documentary evidence. In this regard, this court is being asked to find that this fact-finding was unreasonable.

[25] Relying on the case law of **Cablemax Limited, J T Cable Network Ltd and Stony Hill Cable Services Ltd v Logic One Ltd** [2012] JMCA Civ 14, at para. [12], wherein the case of **Watt v Thomas** [1947] 1 ALL ER 582 ('**Watt**') was referred and relied on, the respondent posits that the learned judge's decision was not plainly wrong, unreasonable and/or unsatisfactory. Thus, there is no basis for this court to depart from the position that where a matter is on appeal because of a finding of fact, this court must be cautious to disturb the decision made by the judge at first instance. This is because the learned judge had the opportunity to assess the witnesses' demeanour and would thus have been better positioned to determine issues of credibility and fact.

[26] The respondent proffers that the learned judge's assessment of damages was correct. Further, that opportunity cost was an aspect of reliance loss, and expenses were incurred due to reliance on the contract. It is also argued that the learned judge's lack of finding on what, if any, possible interest the respondent may have in the property does not affect the respondent's ability to benefit from the rental income. This was argued to be the case because the respondent's money was utilized to assist with the development, on the understanding that the earnings would be shared equally. To order otherwise

would be unjust, as the appellant and his wife would benefit from the respondent's investment, and he would receive nothing in return for said investment.

[27] There are two issues arising from the award of the sums by the learned judge namely: -

a. Was the computation of the sums correct? and

b. On what legal basis was were the sums awarded?

[28] The contention is that the learned judge failed to explain how she computed the sums. The appellant submitted that the respondent had failed to produce documentary evidence to support the payment of all the sums claimed. In the alternative, the appellant's position in the amended defence as well as in his witness statement is that, on a proper examination of the evidence before the court, the sum paid over towards the construction of the apartments amounted to US$130,000.00, which was deposited into an account.

[29] The learned judge, under the heading of "the computation", indicated at para. [92] of her judgment that:

> "I scrupulously reviewed the evidence with the discrepancies highlighted in mind and my computation reveals that the claimant advanced US$272,000.00 and J$1,472,000.00 to settle the cost of the land, building materials, and payroll expenses. This evidence was given in large measure without supporting documents and reflects the informality with which the parties conducted their business. I find the claimant to be a credible witness and I accept his evidence that this is what he paid on the occasions that he paid. The defendant says he only received J$1,400,000.00 and US$130,000.00. One of the stand-out features of the defendant and his wife's evidence on this issue is again how vague and inexact they are. The defendant on a number of occasions when he was challenged by opposing counsel with the amounts advanced by the claimant, was unable to recall and even said, if it [sic]

there it is there. Therefore on a balance of probabilities
I prefer the evidence of the claimant."

[30] The original sum claimed by the respondent in his particulars of claim was US$300,000.00, being the sum paid to the appellant, his agents, and servants. In his witness statement, the respondent provided a breakdown of the sums paid to the appellant, which amounted to less than the sums claimed. The respondent, in his amended defence, stated the sum paid to him as US $130,000.00, but in his witness statement, stated that the sum paid was "approximately" US$130,000.00.

[31] In **Watt**, the approach an appellate court should adopt when reviewing a trial court's evidence was established. Viscount Simon, at page 581 - 582 of the judgment, stated:

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given ..."

[32] In those cases where the appellate tribunal is disposed to differ from the trial judge's findings, Lord Thankerton had this to say at page 587A:

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: -

I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

...

It may be well to quote the passage from the opinion of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co.,* (15) (1919 S.C. (H.L.), 35, 37) which was quoted with approval by Lord Sankey, L.C., in *Powell v. Streatham Manor Nursing Home (1)* ([1935] A. C. 250). Lord Shaw said:

'In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to

> be my duty to defer to his judgment'." (Emphasis as in the original)

[33] Adopting the approach in cases such as **Watt**, I find that the learned judge, having heard and seen the witnesses, indicated in her findings that she accepted the respondent's evidence and, having considered it, arrived at the sums awarded. The sum awarded is less than the sum pleaded in the particulars of the claim. The claim was for US$300,000.00. The sum awarded was US$272,000.00 and J$1,472,000, which converts to approximately US$282,000.00. I must agree with counsel for the appellant that the learned judge did not indicate which evidence she accepted in relation to each sum to arrive at the sums awarded; however, in reviewing the overall evidence, I do not find that the learned judge was palpably wrong. The sum awarded by the learned judge was permissible on the evidence before her and so, it cannot be said that she erred in making the award to the respondent. This ground, therefore, fails.

Grounds 3 to 6 - whether the learned judge err in awarding the respondent one-half of the rent for the property from 2005

[34] The respondent sought the relief of specific performance in his particulars of claim. The learned judge found, in para. [89] of her judgment, that she was unable to order specific performance of the contract in relation to the property, as it did not belong to the respondent. Despite this conclusion, the learned judge found that the respondent was entitled to 50% of the rental income from the apartments. Two issues were raised in relation to the award of the rental income, namely:

a. Could a claim be mounted for rental income?

b. Whether the rental income paid to the respondent is to be deducted from the sum to be repaid to the respondent?

[35] The learned judge, having determined that the sums paid to the respondent were recoverable, then ordered that the respondent receive 50% of the rental income from 2005 until the judgment. The appellant argued that the learned judge erred in awarding amounts representing reliance loss—US$272,000.00 and J$1,472,000.00—as well as

expectation loss from the rental income. The respondent contended that the learned judge correctly based the award on reliance on the executed contract. Consequently, the rental income award can be seen as an opportunity cost, effectively extending reliance damages.

[36] The learned judge, in arriving at her decision to award rental income, found at para. [90] of her judgment that:

> "In relation to recovery of rental income by the claimant according to the agreement - the purpose of the agreement having been realised that is, the construction of The Signature and it earning returns, the claimant is entitled to 50% of the sum collected. The breach by the defendant will make him unable to recover any returns in the future as the contract is discharged. However, rent collected since 2005 up to the date of judgement [sic] is recoverable as the agreement was subsisting and the sum represents returns due to him under the agreement."

[37] In the case of **Caribbean Cement Company Ltd v Freight Management Company** [2016] JMCA Civ 2, Brooks JA (as he then was), at para. [48] of the decision, opined on the category of damages available to a wronged party in a contract that was repudiated. He stated that:

> "In assessing these competing submissions, it must be noted that the general aim of analysing the issue of damages is to secure for the wronged party an award that will put him in the position, as far as money will achieve, that he would have been had the wrong not been committed. Two types of loss may entitle a wronged party to damages. The first is called 'expectation loss', that is, the failure to secure the profit that he would have made if, as in a case of contract, the contract had been performed. **The second type of loss is called 'reliance loss', that is, the expenditure that the wronged party incurred in preparing, in the case of contract, to perform his end of the bargain.** The wronged party is entitled to choose either approach in his claim for damages." (Emphasis added)

The respondent performed his obligations under the contract and thus was entitled to damages. The issue was quantum.

[38] The particulars of the claim prayed for were for the sum of US$300,000.00 to be paid to the respondent, as well as damages for breach of contract, in lieu of or in addition to specific performance. The learned judge rightly found that she could not grant specific performance, as the property was not owned by either party to the agreement. The learned judge correctly concluded that sums were to be repaid for the construction of the apartments. Having made this finding, could the learned judge then find that the respondent was entitled to rental income? The simple answer is no. Counsel for the respondent has argued that the declaration that the respondent was entitled to the rental income amounted to opportunity cost. Unfortunately, I cannot agree with this submission. The award of any sum for rental income amounted to an expectation loss to which the respondent would not be entitled.

[39] The entitlement to rental income flows from an interest in land. At para. [89], the learned judge stated that:

> "Specific Performance is an equitable remedy. Equity's maxims include the concept that equity will not act in vain. **What is clear from this analysis is that the property, the subject matter of the agreement, is still solely owned by the defendant's wife and the buildings and hereditaments appurtenant thereto are fixtures that inure to the land. It is unlikely that this will change and the court has no jurisdiction to order it to be changed**. Therefore [,] any order for specific performance of the agreement would be unenforceable as the parties to the agreement do not own the subject matter of the agreement. The equitable jurisdiction of the court cannot therefore be invoked to decree specific performance of the agreement by the operation of The Signature for the benefit of any of the contracting parties." (Emphasis added)

The main reason stated by the learned judge would hold true for rental income as well and any other remedy based on the ownership of land. The learned judge therefore erred in declaring that the respondent was entitled to 50% of the rental income. Having found that no order should have been made for the payment of the rental income, it follows that the orders for the auditing of the accounts must be set aside. I find there is merit in grounds 3-6.

[40] The last factor to be addressed regarding the payment of the rental income was how the court should treat the US$72,000.00 that had already been paid to the respondent. The learned judge outlined two payments: US$40,000.00 and US$32,000.00. That sum would have to be deducted from the sums awarded to the respondent. The respondent would then be awarded US$200,000.00 and J$1,472,000.00.

Conclusion

[41] I find that the learned judge was correct in her findings of fact that there was an agreement between the appellant and the respondent for the construction of apartments named The Signature. Further, that the appellant and the respondent formed a company whose purpose, among other things, was to construct and renovate buildings and that the agreement was for the apartments to be constructed, and the property on which they were built was to be transferred to the company so that strata titles could be issued. Additionally, that the property on which the apartments were constructed was solely owned by the wife of the appellant and the wife never agreed to the transfer of the property to the company, nor was she privy to the agreement between the appellant and the respondent. I find that the agreement was frustrated, and, as such, the sums of US$272,000.00 and J$1,472,000.00 were to be repaid to the respondent. I also find that the respondent has no legal or beneficial interest in the property on which the apartments were constructed, and I agree with the learned judge that the respondent was not entitled to a declaration for specific performance. I further find that the respondent, having been reimbursed the sum he had paid towards the construction of the apartments, is not entitled to any rental income. In light of that, the original award is to be reduced by US$72,000.00, representing the rental income already received by the respondent.

[42] The appellant succeeded on grounds 1, 3, 4, 5 and 6. Ground 2 failed. Since the appellant was successful on most of the grounds, I see no need to depart from the general rule that costs follow the event. Therefore, I will award costs to the appellant. In the light of the above, I would propose that the appeal be disposed of as follows:

1. That the appeal be allowed in part;
2. Order 1 of J Pusey J, made on 31 May 2019 is affirmed.
3. Orders 2 and 3 are set aside, and order 3 is substituted for the following:

   "3. That the defendant reimburse the claimant the sums of US$200,000.00 and J$1,472,000.00 with interest at a rate of 6% from the date of judgement until the date of payment."

4. Costs to of the appeal to the appellant to be agreed or taxed.
5. If there is a contrary view on the costs award, then the party disagreeing with same is to file and serve written submissions within 14 days of the orders made herein. Failing same, this costs order stands. If written submissions are filed disputing this costs award, then the other party has seven days from the date of service to file submissions in response to same.
6. The stay of execution granted by Brooks JA on 26 September 2019 is lifted.

F WILLIAMS JA

ORDER

1. The appeal is allowed in part.

2. Order 1 of J Pusey J, made on 31 May 2019 is affirmed.

3. Orders 2 and 3 are set aside, and order 3 is substituted for the following:

   "3. That the defendant reimburse the claimant the sums of US$200,000.00 and J$1,472,000.00 with interest at a rate of 6% from the date of judgement until the date of payment."

4. Costs of the appeal to the appellant to be agreed or taxed.

5. If there is a contrary view on the costs award, then the party disagreeing with same is to file and serve written submissions within 14 days of the orders made herein. Failing same, this costs order stands. If written submissions are filed disputing this costs award, then the other party has seven days from the date of service to file submissions in response to same.

6. The stay of execution granted by Brooks JA on 26 September 2019 is lifted.