IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 734 OF 1971

BETWEEN	ASTON L. DAVIS	PLAINTIFF
AND	THE WATER COMMISSION	1st DEFENDANT
AND	TECHNICAL ASSOCIATES LTD.	2nd DEFENDANT
AND	JAMAICA PUBLIC SERVICE CO. LTD.	THIRD PARTY

W. B. Frankson Q.C. instructed by Messrs. Gaynair and Fraser for the Plaintiff.
Gordon Robinson instructed by Judah Desnoes Lake Nunes Scholefield and Company for First Defendant.
D. Muirhead, Q.C. (and with him Mrs. Scott) instructed by Milholland Ashenheim and Stone for the Third Party.

The second defendant was not involved in the action at any stage.

Heard: November 22, 23, 24, 25, 26, 1982; February 28, 1983; March 1, 2, 3, 1983; and November 29, 1984

WRIGHT J.

The plaintiff claims to recover from the defendants damages for trespass and/or conversion and/or detinue in respect of a length of pipe-line to which he maintains he had obtained title by purchase from the Third Party. The defences will be set out more fully but so as to put the matters in perspective, I will put them shortly at this point:-

First Defendant:	There was never a concluded contract between the plaintiff and the Third Party. Hence no property in the pipe-line passed to the plaintiff.
Second Defendant:	It acted in pursuance of instructions of the First Defendant given by virtue of a contract between them both.

Though this defendant filed a defence it took no part in the trial.

Third Party: Admits there was an agreement with the plaintiff for the sale of certain lengths of pipeline within a specified time but contends that the pipeline in dispute had never been appropriated to that contract with the result that property therein had never passed to the plaintiff.

It emerges, therefore, that the determination of the plaintiff's claim involves a consideration of the dealings between the parties.

The Third-Party (hereinafter referred to as the JPS) at some time prior to 1968 generated electricity at a hydro-electric plant situated by the side of the road leading through the Bog Walk Gorge on the banks of the Rio Cobre river. A dam had been built on the river about one mile from the hydro-electric station and water channelled to the station via a 7 foot steel pipe-line. Portions of this pipeline ran along-side and in process of time, provided support for the main road. Operations at the station closed and in an effort to secure some money from the sale of certain portions of the pipeline the JPS invited tenders to purchase such portions as were being offered for sale. On a date apparently in April, 1968 there appeared in the Daily Gleaner the following advertisement which in evidence became Exhibit 3:

" TENDERS

BOG WALK POWER STATION PIPELINE

Tenders are invited for the purchase and prompt removal of the disused 7 ft.

diameter steel pipeline of the Bog Walk Hydro Station in the Rio Cobre Gorge, extending from the intake works to the station site.
Sections of Pipeline which support any part of the adjacent roadway are not to be included in the tender.

Offers to be addressed to -

Operating Manager,
Jamaica Public Service Co. Ltd.
P.O. Box 54, Kingston.

The Company does not bind itstelf to accept the highest or any tender."

The plaintiff, who is an engineer, and who was well acquainted with the area traversed by the pipeline, saw the possibilities of constructing 12 foot water tanks from the pipe-line and selling them. Accordingly he inspected and measured the pipe-line and then put in a tender by letter dated 8th April, 1968 (Ex. 4) which reads:

"
Operating Manager,
Jamaica Public Service Co. Ltd.,
P.O. Box 54,
Kingston.

Dear Sir,

Re: Tender Bog Walk Power Station Pipeline

With reference to your advertisement in the Daily Gleaner of today's date, asking for tenders for the above mentioned pipeline, I hereby make a firm offer of Four Thousand Two Hundred Pounds (£4,200.00). This should include the old tank on the hill on the other side of the road, and beside the dwelling house at an additional price of (£200) Two hundred pounds.

Yours truly,

A. L. Davis "

This was really an offer to purchase on terms not then specified. In evidence, the plaintiff stated that he was advised that his was the only tender. Not surprisingly, therefore, the JPS offered to sell at the price in the tender on conditions spelt out in a letter dated 30th July, 1968 (Exhibit 5) as follows:

" Mr. A. L. Davis,
Diamond Iron Works,
203½ Spanish Town Road,
Kingston.

Dear Sir,

Tender for Pipeline - Bog Walk Power Station

We are in receipt of your letter dated 8th April, 1968 offering the sum of £4,20[illegible] for the pipeline at Bog Walk which formerly formed part of this company's hydro-generating plant and £200 for the surge tank. This pipeline extends from the down-stream side of the gate valve at the head works to the station site.

We beg to advise that your offers have been accepted subject to the following conditions:-

(1) Sections of the pipeline which support any part of the adjacent roadway, or the removal of which are likely to cause subsidence of buildings or other structures on adjoining land, are not included in the sale and must not be removed. The Senior Superintendent of Public Works, Area 3, is to be consulted with a view to determining what sections of the pipeline support the roadway.

(2) The sections of the pipeline which are to be included in the sale and removed by you, as determined after consultation with the Public Works Department, are to be finally decided upon and agreed with the Company, and the purchased material and all equipment are to be removed from the Company's property within a period of time to be agreed.

(3) In removing the said pipeline you shall cause no damage to the Company's freehold that can be avoided by the exercise of reasonable care and shall forthwith make

good at your sole expense any damage caused.

(4) You will be required to indemnify the Company against all claims in respect of entry by you, your servants and/or agents on property not belonging to the Company, or for loss or damage in any way caused or arising as a result of the removal of the pipeline, and all costs incurred in connection with such claims.

(5) It will be your responsibility to make all necessary arrangements with land owners for entry on their premises and for the removal and/or storage of material salvaged and any charges in this connection shall be for your account.

(6) You are not hereby authorised to enter any property not owned by the Company.

If you are interested in purchasing any material within the station building itself we will be pleased to entertain your further negotiations in this regard.

Kindly signify your acceptance of the conditions specified above by signing and returning the copy of this letter which is enclosed for the purpose, together with your cheque for the purchase money.

Yours very truly,

T. S. Oliver
Operating Manager

It is trite learning that unless these terms were accepted by the plaintiff matters would not have proceeded beyond the stage of negotiations. And that is exactly what the situation was up to the 19th August, 1968 when the plaintiff wrote the JPS (Exhibit 6) thus:-

Production Manager,
Jamaica Public Service Co. Ltd.,
Orange Street,
Kingston.

Dear Sir,

I am in contact with my bankers, who are quite willing to finance the payment for the pipeline and tank.

They are desirious of knowing what time payment should be made and what time the pipe

line and tank should be removed.

I will be very much obliged if you would allow me six weeks in which to pay you and twelve months to remove the pipe line and tank.

Trusting you will oblige.

Yours truly,

A. L. Davis

The reply (Exhibit 7) dated 27th September, 1968 expressed inability to allow twelve months as requested and instead offered a maximum of six months. Further it was pointed out that acceptance of the terms and conditions of sale had not been indicated and urged that same be done.

The plaintiff's bank was obviously disenchanted with the venture upon being made aware of this latest letter from the JPS and left the plaintiff to fend for himself. Whereupon the plaintiff on the same date, 27th September, 1968 armed himself with a cheque for £1000 and went to the office of the JPS where he was directed to Mr. Carney who he thought was the manager or treasurer/manager to whom he explained his inability to pay the money all at once and sought an extension of time in which to make payment by instalments. Mr. Carney, he said, agreed and took the cheque which he passed to his secretary directing her to have it receipted. She was apparently away for some time during which the plaintiff testified that Mr. Carney, seemingly solicitous of the profitability of the venture, asked him many questions about it. He assured Mr. Carney that had he not thought it profitable, he would not buy whereupon Mr. Carney said "wish you luck." Further it is his contention that while awaiting the return of the

secretary with the receipt he signed and handed to Mr. Carney the copy letter with the terms and conditions of sale. I may here point out that when Mr. Carney testified at this trial, some 14 years or so later, he disclaimed any knowledge of these allegations. But more of this anon. When the secretary returned with the receipt Mr. Carney examined it and then handed it to him with the words "I hope to see you soon again with some more money." That receipt bearing date 27/9/68 for the amount of £1000 was put in evidence along with three other receipts for the balance to make the total of £4,400. Those receipts show payments as follows:

12/11/68 - £800

12/11/68 - £2,200

31/3/69 - £400

All receipts have printed on them "J.P.S. Co. Ltd. A/c no. 143.1 A.R.M." The JPS has not disclaimed these receipts nor has any evidence been adduced to relate them to any other transaction, nor have these amounts been refunded. Therefore, the plaintiff's evidence of the purpose and the context in which these payments were made stands unchallenged except to the extent that Mr. Carney denies any knowledge of or involvement in the matter. And be it noted that the plaintiff insists that as well as the first payment the three subsequent payments were made by him to Mr. Carney who passed it to his secretary.

Up to the time of the final payment the plaintiff had done nothing to assert any rights to any portion of the pipeline. And he

was correct in so acting because the subject matter of the transaction was unascertained goods and until ascertainment and appropriation to the contract no property could pass to him. In order, therefore, to activate the passing of property and in compliance with conditions 1 and 2 set out in letter dated 30th July, 1968 the plaintiff said:

> " I went to the Public Works Department in Spanish Town. Engineer absent. I went to Public Works Department Head Office at Half Way Tree - spoke to Engineer Mr. Cox, and he called another engineer, Mr. Massey, and told him to make appointment with me to visit and discuss the excepted portions of pipeline. Later we had an appointment and Mr. Massey met me at my workshop with a Mr. Beckford a representative of the JPS and another man. We went to the site in Bog Walk starting at the power station. We travelled together in Beckford's car. We alighted and a point by the power station was shown to me and Mr. Massey said that portion supported the road and had to be left. I agreed. We then drove along the road and alighted and looked at spots and Mr. Massey indicated a second portion to be left. We decided it should be left. Mr. Massey said that sometime later there would be a diversion of the road at that spot and when that is done, I could remove the pipe. No other portions were identified to be left."

The two portions identified as excepted totalled about 800 ft.

Thereafter the plaintiff said he cut and removed about 2000 ft. leaving a balance of the contract pipeline which he measured and found to be 3155 ft. This is the portion of the pipeline in respect of which he seeks compensation in this action. From the above-quoted portion of his evidence it would appear that Mr. Massey purported to extend the life of the contract indefinitely and to increase the amount of the pipeline encompassed by the contract. Of course no effect can be given to his effort; so if it is found

that any of the pipeline to which he lays claim includes this additional amount conferred on him by Mr. Massey then to that extent his claim would be reduced.

The plaintiff said he began cutting and removing portions of the pipeline about one month from the date of the last payment (31/3/69). It is clear that he did not keep to the six months provided in the contract for removal of the pipeline because he said sometime in 1971 about 3 or 4 months after he had stopped cutting he observed that portions of the remaining pipeline had been cut by the second defendant who were contracted to the first defendant who were laying a new pipeline to convey water along the route of the old pipeline for the corporate area. The idea was to cut and remove portions of the old pipeline longtitudinally to enable the new pipeline to run inside the old one.

The plaintiff reported his discovery to his attorneys and his writ was filed on the 29th June, 1971. Thereafter there were discussions and letters between his attorneys and the attorneys for the Water Commission. Eleven of these letters covering the period 10/8/71 - 18/1/72 were put in evidence as Exhibit 1. The first of these letters is reproduced hereunder for its effect -

Messrs. Gaynair & Fraser
Solicitors
Kingston

Dear Sirs,

Re: Suit C.L. 734 of 1971
Aston L. Davis vs. The Water
Commission et al.

With reference to discussion with your Mr. Fraser, we confirm that our clients the Water

Commission had instructed their Contractors to proceed to remove the pipeline on the instructions of the Jamaica Public Service Co. Ltd. and were not aware that your client had an interest in the same.

As a result of the Writ filed by you, we took up the matter with the Jamaica Public Service Co. and they have now advised us that there had been negotiations between themselves and Mr. Davis but it was their understanding that Mr. Davis had already removed the pipeline or should have done so some time ago. However, they state that they have no objection to your client having any of the remaining sections of the pipeline which were not excluded from the sale by the conditions contained in their letter to him of the 30th July, 1968. This being the case, our clients are quite willing for Mr. Davis to take delivery of the sections of pipeline which have been removed and which are now stored at Bog Walk and would be happy to deliver any further sections to be removed to Mr. Davis' storage area at Bog Walk; as we assume that Mr. Davis' interest is in the pipeline (the actual metal) on obtaining possession thereof this should now dispose of the matter. Assuming that this is so, we have advised our clients that they can proceed with the work in hand which is of some national importance and delay would be costly.

Yours faithfully,
LAKE NUNES SCHOLEFIELD & CO.

Per:

Paragraph 1 discloses the relative positions of the first defendant and the third party as related by the first defendant's Attorneys, but this will be more fully dealt with at a later stage. There is disclosed also the ignorance on the part of the first defendant of the plaintiff's interest. But that is not all that emerges in the nature of ignorance; because if the third party is accurately represented there was much haziness on their part as to what, if any, interest the plaintiff still had in the pipeline as a result of the negotiations with him of which they had knowledge. It is obvious that the one sure source of information, the plaintiff himself, had not been contacted. Nowhere had time been made of the

essence of the contract and although the contract had provided for six months the prudent thing to have done was to ascertain the true position from the plaintiff; the moreso that what was proposed to be done would reduce the pipeline to scrap.

By letter dated 17th August, 1981 the plaintiff's Attorneys refuted the first defendant's confessed ignorance contending that the plaintiff had had numerous discussions by telephone with Mr. Gaches of the Water Commission and with their Mr. Kearon personally on the site during which he informed them that he had purchased the pipe-line from the JPS and that it was his property. Further, the letter pointed out that as of that date 1003 running feet of the pipe-line valued at $30 per foot had been cut and rendered useless for the plaintiff's purposes. Proposals were put forward for a settlement of the matter but it was cautioned that no further work should be done on the pipeline until agreement had been reached along the lines suggested, even though the plaintiff admitted that the laying of the pipeline was in the national interest.

What is clear is that an opportunity was thus afforded the defendants as well as the Third party to identify the portion of the pipeline to which the plaintiff lay claim; but it was not accepted.

That strenuous and obviously genuine efforts were made to settle the matter there can be no doubt. In this regard a conference was held on 23rd September, 1971 the results of which were confirmed by letter dated 24th September, 1971 to the plaintiff's Attorneys. It reads:-

Dear Sirs:

Re: Supreme Court Suit Aston Davis vs The Water Commission

With reference to previous correspondence and to conference which took place yesterday, we confirm that we are prepared to recommend to our clients, entirely without prejudice, that they settle the matter on the following basis :

(a) That they will cut and remove all that portion of pipeline to which your client is entitled under his agreement with the Jamaica Public Service Co. Ltd. and transport it at their expense to your storage site at Bog Walk.

(b) That your clients will not be called upon to bear any of the expense of removing any part of the pipeline.

(c) That our clients will pay your client's reasonable legal expenses incurred to date.

After careful investigations, inspection and obtaining expert advice on the question of figures, we are advised that it would cost $25 per foot on an average to remove the pipeline in the way your client apparently wishes, that is, in twelve foot sections. We send you herewith a copy of the figures prepared and notes made, also more important the length of pipeline which we are instructed have been actually measured and these are based on a plan on which the Public Works have marked the areas which support the road and therefore are excluded from the sale.

We are advised that the portions of the pipeline which your clients have not yet removed would cause grave difficulty in the removal thereof in view of the fact that they are down in the gorge and although possible removal would be very expensive, it is also clear even to the most casual observer that the pipe itself is completely rusted in many places.

We do feel, in the circumstances, that our suggestion is more than reasonable and we would ask you to advise us if your client agrees to the same so that we may recommend to our clients to dispose of the matter on the above basis.

Yours truly,
LAKE NUNES SCHOLEFIELD & CO.

Per:

This letter while acknowledging the plaintiff's claim to some portion of the pipeline introduces a challenge to his claim that

he would be able to remove the entire 3155 feet of pipeline to be used as contemplated. The plaintiff apparently found himself unable to maintain his view and so capitulated to the challenge, albeit in an endeavour to compromise, as the reply from his Attorneys dated 12th October, 1971 shows:-

Dear Sirs:

Re: Supreme Court Suit - Aston Davis Vs. The Water Commission - Your Ref. WAS:G.

Our client has discussed with us the contents of your letter of the 24th ultimo and in reply we would ask you to let us have a copy of the Plan from the Public Works mentioned in your letter aforesaid.

Our client has consulted an Engineer who has suggested that rather than cut and remove the pipes and expend the sum suggested in so doing, negotiations should proceed for the sale of the pipeline by our client as is with particular reference to what is recoverable by him as this would have the following advantages in your client's favour:-

(a) The new 24" main to be installed would rest inside the bottom of the existing 8' diameter pipes, thereby using the existing plinths without any intermediate ones to be installed.

(b) No surveying or levelling or grading would be necessary as the original pipes had been laid under the most suitable conditions that could be done in this terrain.

(c) The new 24" mains to be installed could be carried out immediately.

Our client's consultant estimates that these advantages would save your client approximately $150,000.00.

We take it that you will discuss the above proposals with your client and please let us have the Plan mentioned above.

Yours faithfully,
GAYNAIR & FRASER

Per:

Having regard to the manner in which I am told the new pipeline was eventually installed the reply dated 14th October, 1971 is interesting. The relevant portion reads:-

> " We are instructed to say that the proposal you have made is quite unacceptable and it is not feasible from an Engineering point of view.
>
> We are further instructed to reiterate the offer made in our letter of the 24th ultimo and our clients have asked us to say that they cannot wait any longer and will be proceeding with the work. "

The evidence is that the pipeline was installed inside the old one as was suggested at (a) of the letter dated 12th October, 1971.

Negotiations had so far produced no settlement but efforts did not slack. By letter dated 30th November, 1971 the plaintiff's Attorneys signified their client's willingness to accept the proposals contained in letter dated 24th September, 1971 (supra) but indicated that it was essential that there be an on-the-spot inspection and meeting between the plaintiff, a representative of the Water Commission and the Superintendent of the Public Works Department for the area "to determine exactly the portions of pipelines to be cut and removed." The plaintiff's address for contact was also supplied.

It would seem that at last the sun had broken through the dark clouds of disagreement and counter-proposals and that a formula for settlement had been found. Whether the defendants were so elated at the new turn in the negotiations that they omitted to read and digest the stipulation for inspection and meeting has not been disclosed, but they obviously thereafter proceeded with great speed in cutting the

pipe line. The result was that by letter dated 13th December 1971 the plaintiff's Attorneys complained that their client had inspected the site and discovered that in the previous week the defendants had cut " 1200 running feet of the pipeline. " This action they contended had nullified the efforts to finalise the matter. Accordingly the action would proceed.

The reply dated 17th December, 1971 expressed surprise . inasmuch as the defendants claimed to be doing what they had agreed to do and to which the plaintiff had consented. They maintained that the requirement for inspection was beside the point because they were being guided by a plan received from the Public Works Department.

But the caveat against reliance on that plan springs from the fact that it has not been shown by evidence that any effort was made to relate the representations on the plan to what the plaintiff claims had been pointed out to him in keeping with the terms of the contract. Whether it sought to reduce, enlarge or confirm what had been done in keeping with the contract the plaintiff had no way of knowing. Indeed a photo-copy of the plan came to the hands of the plaintiff's Attorneys, upon request, under cover of letter dated 14th October, 1971 - well over two years after the plaintiff had paid the final instalment and had proceeded to cut and remove portions of the pipeline. Writings on this copy plan are not very legible, but the date 27th August, 1971 is observed though the significance remains a secret. There was / no evidence to suggest it had been prepared by or in conjunction with the persons who had inspected and pointed out the

excepted portions of the pipeline to the plaintiff in 1969. The reason for the preparation of this plan has not been divulged.

A point not to be ignored in the letter dated 17th December, 1971 to the plaintiff's Attorneys is the alleged impossibility of removing the pipeline in 12 foot lengths a matter to which I have already adverted.

The Statement of Claim and Defence of the first defendant which were filed on 22nd February, 1972 and 15th May, 1972 respectively after the disclosures in the several letters referred to, make interesting reading. Here is the Statement of Claim :

STATEMENT OF CLAIM

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
COMMON LAW
SUIT NO: C.L. 734 of 1971

BETWEEN	ASTON LESLIE DAVIS	PLAINTIFF
AND	THE WATER COMMISSION	
AND	TECHNICAL ASSOCIATES LIMITED	DEFENDANTS

1. The plaintiff is a Businessman and resides at No: 2 Montclair Drive in the Parish of Saint Andrew.

2. The First Defendant is a Statutory Corporation with offices at 28 Church Street in the Parish of Kingston.

3. The Second Defendant is a Limited Liability Company duly incorporated under the Provisions of the Companies Act - No: 7 of 1965, with offices at 18 Belmont Road in the Parish of Saint Andrew and was at all material times the servant or agent of the First Defendant.

4. On or about the 27th day of September 1968, the Plaintiff purchased the disused seven foot diameter pipeline of the Bog Walk Hydro Station from the Jamaica Public Service Company Limited and took possession of the said pipeline which is located in the Rio Cobre Gorge in the Parish of Saint Catherine, extending from the intake works to the Station Site.

5. It was a condition of the said purchases that the Plaintiff was entitled as of right and/or

by licence to enter upon and to occupy the freehold lands of the aforesaid Jamaica Public Service Company Limited for the purpose of dismantling and removing the said pipeline from the said premises on which it lies and in which it is partly embedded.

6. Pursuant to the averments in paragraph 5 hereof, the Plaintiff entered upon the said premises and began the work of dismantling and removing the aforesaid pipeline.

7. On or about the 21st day of June, 1971 and on divers dates thereafter, the servants and/or agents of the second Defendant, itself the servant or agent of the First Defendant, entered, not having any lawful business upon the Plaintiff's pipeline aforesaid and wrongfully cut out portions of the said pipeline by Oxy-acetylene torches and have removed portions thereof, as a consequence whereof the said pipeline is useless to the Plaintiff for the purposes for which he purchased it, and the Plaintiff has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGES

3155 feet of pipeline @ $30.00 per foot...$94,650.00

8. On or about the 10th day of August, 1971, the First Defendant's Attorneys-at-Law, Messrs. Lake, Nunes, Scholefield and Company, by telephone and letter opened discussions with the Plaintiff's Attorneys-at-Law with respect to the Plaintiff's claim but despite the said discussions, the Defendants have continued to cut and remove the Plaintiff's pipeline to the great damage of the Plaintiff.

WHEREFORE the Plaintiff claims:-

(a) Damages for trespass.
(b) Damages for conversion.
(c) An injunction to restrain the Defendants, by their servants, agents or otherwise from committing acts of trespass against the Plaintiff's said pipeline, and --
(d) The sum of $94,650.00 as hereinbefore set out.

AND THE PLAINTIFF CLAIMS DAMAGES.

SETTLED.

(Sgd.) W. B. Frankson.

18th February, 1972.

The Defence which follows is even more interesting:-

DEFENCE OF THE FIRST DEFENDANT

SUIT NO. C.L. 734 OF 1971.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
COMMON LAW:

BETWEEN	ASTON LESLIE DAVIS	PLAINTIFF
AND	THE WATER COMMISSION	
AND	TECHNICAL ASSOCIATES LTD.	DEFENDANTS

1. The First Defendant admits paragraphs 1 to 3 of the Statement of Claim.

2. As to paragraph 4 of the Statement of Claim, the First Defendant says that the Plaintiff made an offer to the Jamaica Public Service Company Limited to purchase certain sections of the pipeline but this offer was not accepted as the Jamaica Public Service Company Limited replied by making a counter-offer, which counter-offer the Plaintiff did not accept.

3. If, which is not admitted, the Jamaica Public Service Company Limited accepted the Plaintiff's offer, such acceptance related only to unspecified parts of the said pipeline and was subject, inter alia, to the following conditions;

   (a) The Determination of the section of the pipeline which were to be included in the sale and the conclusion of an agreement between the Plaintiff and the Jamaica Public Service Company Limited as to those sections;

   (b) The dismantling and removal of the said sections of the pipeline by the Plaintiff within a reasonable time;

4. The said conditions were never fulfilled and/or performed.

5. If, which is denied, an agreement for sale came into existence between the Plaintiff and the Jamaica Public Service Company Limited, such agreement determined by reason of the non-performance and/or non-fulfillment of the aforesaid conditions.

6. As to paragraphs 5 and 6 of the Statement of Claim the First Defendant says that if the Plaintiff was granted a licence by the Jamaica Public Service Company Limited, which is denied, the said licence was conditional on it being exercised within a reasonable time and this the Plaintiff failed to do, and the Plaintiff had no right at the material time to enter upon the

premises for the alleged or any other purposes.

7. As to paragraph 7 of the Statement of Claim, the First Defendant says that they were authorised by the Jamaica Public Service Company Limited, the owners and/or Lawful occupiers of the said premises and/or the lawful owners of the said pipeline, to enter upon the said premises, and cut and/or remove portions of the said pipeline and that at all material times, they acted in accordance with that authority.

8. The Plaintiff has never demanded the said pipeline or any parts thereof from the First Defendant.

9. The First Defendant does not admit the alleged or any damage.

10. Save as is hereinbefore expressly admitted, the First Defendant denies each and every allegation in the Statement of Claim appearing as if the same were set out herein and traversed seriatim.

SETTLED

(Sgd) Richard A. Mahfood, Q.C.
(Sgd) L. G. Barnett

LLOYD G. BARNETT
May 10, 1972

LAKE, NUNES, SCHOLEFIELD & CO.

Per:.....

ATTORNEYS-AT-LAW FOR THE
FIRSTNAMED DEFENDANT

The First Defendant had obtained the written authorisation of the JPS (Ex. 8) to undertake the work on the pipeline and now that it found itself in difficulties was bent on invoking the protection by the JPS. The JPS authorisation is as follows:-

Chief Engineer,
The Water Commission,
4, Marescaux Road,
Kingston 5.

Dear Sir,

Rio Cobre Water Supply Scheme - Contract C2
J.P.S. Co. Penstock in Bog Walk Gorge

With reference to your letter of the 27th ultimo,

we confirm the verbal permission given through Mr. Self of Howard Humphreys & Sons (Jamaica), your consultants, for your contractor, Technical Associates Limited, to enter on to the property of this Company for the purpose of removing the steel penstock, formerly part of the Bog Walk pipeline, and to cart it to storage in Bog Walk, subject to the following conditions:-

1. That satisfactory arrangements have been concluded between the Public Works Department of the Ministry of Communications and Works and yourselves regarding the stability of the adjacent carriageway.

2. In removing the penstock you should cause no damage to the Company's freehold that can be avoided by the exercise of reasonable care, and shall forthwith make good at your sole expense any damage caused.

3. You will indemnify the Company against all claims in respect of entry by you, your servants, agents and/or contractors on property not belonging to the Company, or for loss or damage in any way caused or arising as a result of the removal of the penstock and against all costs incurred in connections with such claims.

4. You are not hereby authorised to enter any property not owned by the Company.

5. The penstock shall remain the property of the Company and you will be responsible for its safe custody pending the Company's instructions as to its disposal, and will deliver it in accordance with the Company's instructions in the same condition as at the time of its removal and storage.

Kindly signify your acceptance of the conditions specified above by signing and returning the copy of this letter which is enclosed for the purpose.

Yours faithfully,
JAMAICA PUBLIC SERVICE COMPANY LIMITED

(Sgd) M. Burke
M. BURKE
SECRETARY

Not surprisingly, the First Defendant issued Third Party Proceedings against the JPS in respect of which the Master on a Summons for Directions on 11th October, 1973 ordered, inter alia:-

3. "That the Third Party be at liberty to appear at the trial of this action and take such part as the Judge shall direct and be bound by the result of the trial. And that the question of the liability of the Third Party to indemnify the First Defendant be tried at the trial of this action and subsequent thereto."

The Defence of the Third Party was filed on 20th July, 1977. It admits a transaction with the Plaintiff but denies that it subsisted to the material time so as to vest title in the disputed pipeline in the plaintiff. The real thrust of this Defence is that property in the disputed pipeline never passed to the plaintiff by reason of the fact that the agreement was for sale of unascertained goods which " was not in a deliverable state, and was not unconditionally or at all appropriated to the contract of sale with the consent express or implied of the Third Party. "

Paragraph 11 of this Defence is put thus:-

" Further or in the alternative the Third Party says that if which is not admitted, the remaining pipeline was included in the said agreement of sale it was a condition precedent of the said agreement of sale that the pipeline included therein would be removed by the Plaintiff within one year of the date or within a reasonable time. In breach of the said condition precedent the Plaintiff failed to do so within one year or within a reasonable time. "

I make the comment that it is a misnomer to call a condition relating to performance a condition precedent in circumstances where there was not a series of contract and the passing of property to the plaintiff was made dependent on whether the plaintiff had received any particular amount which would become the subject-matter of such contract, within a specified time.

But be that as it may it is clear that the inescapable issue was whether the plaintiff did acquire property in the section of the pipeline in dispute. And it is also equally clear that that was an issue between the plaintiff and the third party a fact which added significance to the Master's Order that the third party be bound by the result of the trial.

I can think of no tenet of justice which would uphold the exclusion of the third party from participation in a trial the result of which would bind the Third party. Yet so vigorously did Mr. Frankson oppose the application of the Third party made on the first day of trial;

> " to take full part in the trial including cross-examination of the plaintiff and his witnesses, the entitlement to put suggestions and the entitlement of the third party to lead evidence supportive of its suggestions and the defence filed with a view to allow the Court to decide the issue for or against the plaintiff "

that it was not until the afternoon of the third day I was able to rule on the application. And I granted the application sought because in the circumstances of the case as disclosed by the pleadings it was evidently just so to do. The role played by the Third Party was inextricably bound up in what the Plaintiff had to prove and I held that the requirements of justice were paramount to the Plaintiff's complaint that the order sought to foist upon the Plaintiff a Defendant he did not choose. Such a complaint ignores the fact that the Third Party would end up being bound by the results of the trial very much as if it had been a Defendant and would, in the circumstances, be accorded the right of appeal (See The Millwall [1905] P 155).

The participation of the Third Party would in my view also facilitate the adducing of evidence by the Plaintiff to which the Defendant was a stranger and would have been objectionable as res inter alios acta. But even this inclusion did not obviate numerous objections by Mr. Robinson who served early notice of the resistance he would offer when Mr. Frankson essayed to open his case.

The instalment receipts are evidence of a variation of the term requiring payment in full of the purchase price - an extension of a little over six months. And this appears supportive of the Plaintiff's evidence that sometime after the expiration of the agreed time when he outlined his position to Mr. Carney and he told him that he did not have a large sum of money to complete the cutting and removal within the time prescribed and had asked for more time the latter had said " Yes, take your time. "

This purported extension of time by Mr. Carney was rejected by the Attorney for the Third Party on the basis that Mr. Carney had no such authority. But isn't this clearly a domestic matter of which the Plaintiff would have no knowledge? He had not gone to the JPS to see Mr. Carney in the first instance. He did not know him. Rather he had gone to speak to the appropriate authority at the JPS about his changed financial prospects and had been directed to Mr. Carney whose authority he would not know. And if the remark attributed to Mr. Carney on that occasion viz; " Hope to see you soon with some more money " be accepted as true, then inherent in such remark is the inference that there was no longer any insistence on the money /

being paid as had been set out in the contract. In other words, there was a variation of that term of the contract. It was now within his discretion but subject to what was a reasonable time. The unexplained acceptance of the money by instalments for which there had been no previous provision tends to lend credence to the evidence as to the extension of time by Mr. Carney whether acting on his own or with the sanction of the appropriate authority.

It is important to keep in perspective the fact that the Plaintiff's writ had been filed much later than one year from the payment of the final instalment on 31st March, 1969 and the first letter from the first defendant's Attorneys to the plaintiff's Attorney dated 10th August, 1971 (supra) makes it clear that this defendant had been in consultation with the JPS concerning the plaintiff's complaint of interference with his property. It is inconceivable that the endeavours to accommodate the plaintiff's claim evident in the ensuing correspondence could have been without the knowledge and approval of the Third party who, though not then a party to the proceedings must have anticipated a claim to indemnity against it by the Water Commission. And even the last letter dated 17th December, 1977 written on behalf of the Water Commission in which their Attorneys stood by their offer made in letter dated 24th September, 1971 did not evince any denial of or challenge to the plaintiff's claim. Rather there was an implicit admission.

The letter concluded:-

" If you would be kind enough to let us know your client's legal expenses we will be happy to go into the matter. "

It is against this background that must be considered the defence of the first defendant filed 10th May, 1972 and the defence of the Third Party filed 20th July, 1977, more than six years after the letter under reference, in both of which the Plaintiff's title is denied. I am prepared to concede that the Plaintiff's adversaries may well have sought to justify the retraction of the concessions to the Plaintiff's claim, even if such argument would have done no Attorney any credit, bearing in mind that the Writ had been filed, on the ground that such concessions had been made on a mistake of law or fact or both. But the fact remains that no such argument has been advanced so that the denial in the defences must be seen as an unexplained volte face. Further, the admission of the letters in evidence as exhibit compels me to consider their import in determining the primary question whether property in the disputed pipeline did pass to and remain in the Plaintiff up to the time of the Defendants' intervention as well as their bearing on any related issues.

Mr. Robinson announced that the First Defendant would not be able to call any witnesses by reason of the fact that their contractors, the second Defendant, had long ago been dispersed to several parts of the globe. He would have to depend on evidence put forward by the Third Party and whatever he gained by cross-examination.

A not inconsiderable portion of the cross-examination by Mr. Robinson was devoted to an endeavour to establish inconsistencies between the witness' testimony and evidence he had given sometime in

1977 in an abortive trial before Mrs. Justice Allen. The results were not at all flattering to the defence. The remainder of the exercise concentrated on the details of Mr. Davis' operation in the removal of the pipe and the fabrication of water tanks. I cannot confirm that anything emerged which either advanced the defence pleaded or tended to negative the effect of the correspondence which had passed between the Attorneys. It is obvious that the Defendant would have to rely very heavily upon the Third Party to carry the day.

Consistent with the defence pleaded by the Third Party Mr. Muirhead concentrated much effort in the attempt to show that no contract was concluded between the Plaintiff and the Defendant such as could pass title in the disputed pipe-line to the plaintiff. His method was to examine what the plaintiff had done against the background of the terms and conditions set out in Exhibit 5 - the letter dated 30th July, 1968 in which the JPS notified its acceptance of the Plaintiff's offers. And indeed the Plaintiff agreed that he regarded acceptance of those terms as essential to the conclusion of a contract between him and the JPS. He was taken through the various stages of his endeavour to comply with these stipulations. He did not deviate from his evidence in chief. Accordingly, it will not be necessary for me to repeat the result. It must be noted, however, that in this regard the strong point in the case of the Third Party is that nothing short of literal compliance with the stipulations in question could give birth to a contract. Mr. Muirhead contends that since, from the

Plaintiff's own evidence he did not confer with the officers indicated in Exhibit 5 he had deviated from the terms specified with the result that no contract was formed. For what it is worth I may observe that no persons were named in these terms and Mr. Davis has testified, and there has been no contradiction, as to how he came to make contact with the persons he has named. It was his understanding that Mr. Cox at the Public Works Department Head Office was above all the Area Superintendents and he went to him only after he had failed to locate a Senior Superintendent in the Area. The question may be asked if this was an invalidating departure from the specified terms, how is it that Mr. Beckford, a representative of the JPS came to be among the party which inspected the pipeline to give effect to an important provision in the terms specified viz; to indicate the excepted portions of the pipeline and so by necessary implication identifying those portions which fell within the contract? I would find this approach more palatable if fourteen long years had not gone their weary way without the Third Party disembowelling any of the money received from Mr. Davis and without them pointing to one single act of appropriation consistent with the terms they themselves had specified. If they were not party to and did not accept this purported act of appropriation, are they to be understood to be saying that they intended to pocket Mr. Davis' money and nonetheless destroy the pipes in the manner in which they were treated by the first defendant and their agents upon the authorisation of the Third Party? But I am persuaded that they are of nobler vein than so to act.

For how then would the correspondence, already referred to, be accommodated?

As part of the case for the Third Party, Mr. Muirhead secured from the Plaintiff an admission that he did discuss the matter of the pipeline with Mr. Basil King of the JPS[illegible]. This had to do with the question of removal. Mr. King had had nothing to do with the transaction between Mr. Davis and the JPS in the initial stages. There were two discussions. In the context where it is being denied that property in the pipeline had passed to the Plaintiff by virtue of there never having been a concluded contract a portion of the witness' evidence in relation to the conversations with Mr. King is worth reproducing:-

> " Now say before Water Commission began working I recall a conversation with Mr. King. Don't recall him saying JPS would shortly be removing the balance of the pipeline. No, he did not ask if Jamaica Public Service could store said pipeline at my work place at Bog Walk. He phoned and asked me if I wanted to buy the valve. I said " How can you want to sell me something that is mine? " I said it is between the power station and the dam so it is mine. He asked if I am going to use it and I told him that there is nowhere in Jamaica they could use a 8 ft. diameter valve and that when I reached to that point I would break it up because it is made of cast-iron and sell it to the foundry. "

The two points worthy of note are:-

1. A portion of the pipeline had been removed already before the Water Commission began working.

2. The Plaintiff was still asserting his rights to pipeline not yet removed.

Was there any protest about the removal of portions of the pipeline? None has been aired in Court in any form. If removal had been without

any proprietary rights, then a trespass would have been involved. On this aspect there is an uncanny silence. And indeed this attitude is consistent with the indications in the correspondence and with what is implicit in the following portion of the encounter between Mr. Muirhead and Mr. Davis:-

Q. Did you not recognise that on your account after the year ended you had no further entitlement to remove pipe?

A. No

Q. Mr. King spoke to you on the telephone?

A. I spoke to him more than once

Q. Early 1971 - March - May - Mr. King spoke to you and you advised him or agreed with him that only the vent pipe was left to be removed?

A. Was it the 1st or 2nd?

Q. Did you have discussion re the vent pipe?

A. No

" Not true I told him only the vent pipe left to be removed. No, I did not tell him I knew the time for removal of pipes had passed. Can't tell you what happened. No, did not say I'd remove the vent pipe within fortnight nor did I say I was asking for a crane to remove it. "

Here the Plaintiff's claim continues to be asserted and the nature of the questions involves, at least, an implicit acknowledgement. But it is apparent that the questions ignore the attempted compromise and in particular letters dated 24th September, 1971 and 17th December, 1971 (supra) which, rather than challenging the Plaintiff's claim, admit it.

Predictably, Messrs. B. King and R. F. Carney were witnesses for the Third Party. The absence of other important persons mentioned in the despatches was partially accounted for by the demise of some.

The evidence of Mr. Carney was of such inconsequential value - and I say so not without some charity - that it may be appropriate to deal with it first.

It must for this witness, who at the time he gave evidence was just three months away from his 79th birthday, have been a somewhat embarrassing ressurrection to be taken from the comfort of his Grenville, Rhode Island residence to be again concerned with the long past transactions of the JPS. His working life had begun in 1922. He had been Treasurer of JPS in the period 1966-1971, Vice-president in early 1969 and in the same year elected President. But it had been 11½ years since he had demitted office and left Jamaica and so was no longer involved in the affairs of the JPS. However, having regard to the extent to which the Plaintiff's evidence involves this witness there can be no blame attached to the Third Party for calling him. And yet it would be asking a lot of him if he were expected to testify with precision about the matter under query. Consistent, therefore with this position the positive aspect of his evidence were of negative content e.g. he did not know Mr. Davis; he had no power to act as Mr. Davis had testified concerning him; he did not play the role assigned to him by Mr. Davis etc. Thereafter my pen grew weary to record " I have no recollection " which prefaced his

response to questions put to him both during his evidence-in-chief and during cross-examination by Mr. Frankson. His evidence was meant to traverse the very positive evidence of Mr. Davis involving him. But he could do little more than go through the motions in a very pleasant manner. It transpired, therefore that his stay in the witness box, pleasant though it seemed, could not overcome being labelled as a pitiful interlude.

It was by the evidence of Mr. Basil King that the Third Party endeavoured to confront the Plaintiff's claim to any portion of the pipeline in dispute. But there is this reservation that he had nothing to do with the matter before 1970 or 1971 when the first Defendant approached the JPS requesting the removal of the pipeline to facilitate the installation of the new pipeline. It follows, inevitably, that his evidence so far as there exists any contractual relationship between the Plaintiff and the Third Party and the incidents flowing therefrom suffers from the defect of its ex post facto nature. Indeed, it was from an officer (Mr. Myers) now deceased that he became aware of Mr. Davis having any interest in the pipeline though such information related to the portion known as the vent pipe. And as regards the vent pipe he acted on the basis that it was Mr. Davis' when he requested him to remove it. He visited the site in 1971 (June or September) and according to him, observed that an estimated 3000 feet of pipeline had already been removed leaving roughly 2000 feet supporting the roadway. Unfortunately, in relation to the evidence before the Court up to his entering into the witness-box this

is new material. But even in his evidence-in-chief he admitted seeing pipeline - about 10 feet - which did not support the roadway.

The witness testified that he was employed to the JPS on 6th January, 1969 as a Supervisor in the Civil Engineering Department and latterly as Property Manager. He did not say he is a Civil Engineer. But even such qualification would not render his evidence relevant to the question of the pipeline which Mr. Davis testified quite positively, had, in conformity with the provision in the contract, been appropriated thereto. And be it noted that this evidence has not been contradicted. Mr. King was not indicated in the contract among the persons designated to partake in the act of appropriation. How can he now denigrate what was done pursuant thereto? Further, if it is correct that none of the remaining pipeline fell within the Plaintiff's contract, then the letter dated 30th November, 1971 from his Attorneys accepting proferred terms of settlement only after an on-the-spot inspection and meeting between the persons indicated, presents a puzzle to which no solution has been suggested. And this is also true of the letter dated 24th September, 1971 (supra) in which the proposals were put forward.

One way in which Mr. King's evidence does affect the Plaintiff's claim is that he tends to support the first Defendant's contention as to the difficulty in removing certain portions of the pipeline in twelve foot sections because those portions were 50-60 feet down in the gorge. But unfortunately, the amount of pipeline so affected has not been stated. That aspect of his evidence, which

remains un-contradicted, is not difficult to accept. Because of the location of those portions of the pipeline, his opinion confirmed by the Plaintiff, is that a crane would have to be used. So far the Plaintiff was able to effect removal by the use of a small tractor and a gantry because the terrain facilitated the employment of this method. The removal of the remainder of the pipeline however, posed quite a different problem. Employing a crane would cost an estimated $14 per hour agreed Mr. Davis. So, granted he was still entitled to remove pipeline it is not difficult to see that the cost to him would be greatly increased. But there is no evidence to show that he could dispose of such water tanks as could be made from these pipes at a correspondingly higher price. I have thought it necessary to make this comment because Mr. Davis when questioned as to what the $30 per foot represented variously stated it to be the cost of the material at the manufacturing end as well as the profit rate on sale of the tanks.

Let me now turn to the legal contentions. Such comments as I have made are predicated on the assumption that there was a concluded contract vesting property in the disputed pipeline in the Plaintiff. But while this accords with Mr. Frankson's position, it is very strenuously opposed by Mr. Robinson and Mr. Muirhead. Mr. Frankson's submissions may be summarised thus:-

> " Once a sale has been effected and the purchaser has given valuable consideration in exchange for goods the purchaser acquires an indefeasible title to those goods.
> All the proprietary rights which vested in the seller devolves on and vests in the buyer.
> The goods were unascertained at the time of acceptance and both parties agreed to be bound by the judgment of the Public Works Department [illegible]

Officer.
There has been no challenge to the Plaintiff's evidence that only 800 feet were excluded from the contract. The act of appropriation conforms scrupulously with the terms of the contract and, there being no demurrer, the rest of the pipeline was appropriated to the contract. Payment was made and Plaintiff acquired an indefeasible right exercisable against the world. Such title is absolute and can be lost only by sale, gift or abandonment.
The acquisition of property in the pipeline was not conditional on its removal within any period of time. Removal was incidental to and was not an integral part of the contract.
Time not of the essence of the contract and no notice given to make it so. But even if notice had been given the pipeline would still be the Plaintiff's property. There was no abandonment by him. Hence any unauthorised interference with his property will sound in damages.

When the Defendant entered on the Plaintiff's pipeline and began to mutilate same it may fairly be said that they acted under authority given them by the Third Party. But from about August 1971 neither the Defendant nor the Third Party could seriously contend that they were unaware of the Plaintiff's property.

Mr. Frankson's submissions on damages will be deferred.

Inasmuch as Mr. Robinson adopted certain of Mr. Muirhead's submissions, it will be appropriate to set out Mr. Muirhead's submissions next.

Summarised these are as follows:-

1. There was no concluded contract, only an agreement to sell.
2. If, which is not admitted, there was a contract, it had been discharged by abandonment or effusion of time.
   Hence, the Plaintiff would have no entitlement to the pipe in 1971.
3. Property passed to the Plaintiff only on removal.
   Hence in 1971 all remaining pipes were the property of the Third Party.

These points were elaborated in argument.

The three questions, outside of the question of damages, submitted by Mr. Robinson requiring consideration are:-

1. Was there a contract at all?

2. If yes, when was it concluded?

3. If yes, what are its terms?

Submissions which conflict with the Pleadings they are intended to support are not worthy of respect. The submissions of Mr. Muirhead and Mr. Robinson offend in this regard. Mr. Muirhead, in order to create room for argument essayed to find relief from the effect of his pleadings, which clearly admitted an Agreement for Sale by suggesting that this term he construed an offer to agree. Reliance was placed on Badische Anilin Und Soda Fabrik v. Hicks (1906) A C 419 per Lord Loreburn L.C. at p. 421 -

> " A contract to sell unascertained goods is not a complete sale. "

But to extract this lone sentence from its context is to do violence to the judgment. The passage continues:-

> " There must be added to it some act which completes the sale such as delivery or the appropriation of specific goods to the contract by the assent express or implied of both buyer and seller. Such appropriation will convert the executory agreement into a complete sale. What actually happens need not involve any change either in the condition of the goods or in their location. They were the property of the seller before appropriation. They become the property of the buyer as soon as they are appropriated; and that is all. "

See also Rule 5 (1) Section 19 of the Sale of Goods Act, 1895.

Problems which may attend the appropriation of goods to a contract do not call for attention here because the unequivocal and

uncontradicted evidence of the Plaintiff, which I accept, clearly sets out what was done in pursuance of the requirement for appropriation.

But even so Mr. Muirhead while denying both the act of appropriation and the amount of pipeline so appropriated, contends that the agreement was one for ascertainment and removal of the ascertained pipeline. Accordingly, he contends, no property in the pipeline passed to the Plaintiff until the pipeline had been removed from the premises of the Third Party within the time allowed therefor. Hence, the Plaintiff acquired no property in pipeline remaining on the Third Party's premises in 1971. Support is sought from Gale v. New (1937) 4 A.E.R. 645.

The Headnote reads:-

> " The Plaintiff had entered into a contract with the war office whereby he agreed " to collect during the currency of this contract the remains of exploded projectiles, protective shell case, shot and fuses lying on or about the artillery ranges ..... and in consideration of our being allowed to retain as our property all such remains, including metals, collected therefrom to pay annually" an agreed sum.
> This contract expired on June 21, 1936 and the Defendant had a similar contract which started on June 22, 1936. On June 22, 1936 there was on the ranges a dump of metal collected by the Plaintiff, and the Defendant removed and sold this metal. The Plaintiff brought action for conversion and claimed that the property in the metal was his. "

For the avoidance of confusion it is appropriate to observe that the subject matter of the contract was " Clearance of artillery ranges. "

It was held -

(i) The purpose of the contract was to clear the ranges of metal and this was not

accomplished until the metal had been removed from the ranges altogether, and not merely collected in a dump.

(ii) The property in the metal did not pass to the Plaintiff until he had so removed it from the ranges.

An Editorial Note points out that this case turns upon the construction of the contract, and the particular word on which the construction turns is "collect", associated, however with the word "therefrom."

This case is clearly distinguishable from the instant case and can afford the Third Party no support whatsoever. The subject matter of the instant transaction is not the clearance of the premises but the pipeline, which, of necessity would have to be removed. The first and third of Mr. Muirhead's submissions in support of which Gale v. New was cited are answered against the Third Party.

On the issue of abandonment the Third Party is in the peculiar position of almost total ignorance of the course of events following the invitation to tender. With the exception of the information contained in the correspondence the Third Party has not been able to supply any evidence to off-set the Plaintiff's viva voce evidence supported by documentary evidence. A finding in favour of abandonment, therefore, must be an inference to be drawn from the Plaintiff's evidence. But if anything is clear it is the fact that the Plaintiff strenuously resists the drawing of any such inference. But this would not prevent the drawing of the inference if so to do were warranted on the accepted evidence. His evidence that when he first became aware of any interference with the pipeline he protested

has not been contradicted in any way and is inconsistent with his having abandoned the contract and with it the property in the pipeline. To establish abandonment there must be evidence that neither party has insisted on the performance of the contract for an inordinate length of time (See Pearl Mill Co. Ltd. v. Ivy Tannery Co. Ltd. (1919) 1 KB 78) or that the parties have acted in a manner inconsistent with the continuance of the contract (Fisher (G.W.) Ltd. v. Eastwoods Ltd. (1936) 1 All E.R. 421). Having regard to the subject-matter of the contract and the time involved I find that there was no inordinate delay in performance. Nor is there any evidence of the Plaintiff acting in a manner inconsistent with the continuance of the contract.

Inasmuch as the Third Party denies the conclusion of a contract and having regard to the state of the evidence it adduced it is in no position to fix any time when the removal of the pipes ought to have commenced. But it is manifest from the correspondence that up to 27th September, 1968 when Exhibit 8 was written, the negotiations had not been concluded. Exhibit 2B (Receipt for £1000) shows that on that very date (27th September, 1968) the Plaintiff moved from the stage of negotiation to concluding a contract by making payment of a part of the contract price. It cannot escape notice that whereas by letter dated 19th August, 1968 (Ex. 6) the Plaintiff requested time to pay as well as to remove the pipe-line, the reply dealt only with time to remove. But the four receipts comprising Exhibit 2 reveal that the Third Party accepted payment

over a period extending from 27th September, 1968 to 31st March, 1969 during which time the Plaintiff said he removed no pipes because he did not think he was entitled so to do until he had completed payment and there is no evidence to show that the Third Party held a contrary view and insisted upon removal. Indeed, although the date of the visit to the site to make the appropriation was not supplied by the Plaintiff it seems unlikely that it was done even before the first payment was made becuase up to then it was being queried as to whether the Plaintiff had accepted the terms contained in the letter dated 30th July, 1968. These are factors to be taken into account in considering the question of abandonment.

Mr. Robinson was in the inviduous position of being charged with being a tortfeasor and not being able to lead one single line of evidence. He was forced to rely on the non-evidence adduced by the Third Party and such help as he hoped to cull from the Plaintiff's case. But this did not detract from the vigour displayed nor the ingenuity employed by him.

In support of his submission that there was no concluded contract Mr. Robinson cited -

Lee Parker and anor. v. Izzet and anor (2) (1972) 2 All E.R. 800 and Scammell v. Ouston (1941) 1 All E.R. 14.

In the Lee-Parker case a condition in a contract for sale of a freehold house which provided that -

> " This sale is subject to the purchaser obtaining a satisfactory mortgage. "

was held to be void for uncertainty and consequently no contract arose.

In Scammell v. Ouston the contract for the sale of a lorry provided that the balance of " the purchase price was to be had on hire-purchase terms over a period of 2 years. " It was held that the expression " on hire-ourchase terms " was too vague to be given any definite meaning. In my judgment no comparable element of vagueness or uncertainty is indicated in the terms of the agreement for which the Plaintiff contends: the price was fixed; the goods although at first unascertained, subsequently became ascertained and appropriated to the contract. The only remaining question was the length of time for removal, the evidence on which has already been dealt with. But Mr. Robinson was not relying on these alone. He submitted that the Plaintiff was guilty of a breach of warranty, which disentitled him from obtaining any compensation. This is how he put his submission. Referring to Exhibit 6 the Plaintiff's letter dated 19th August, 1968 in which he requested 12 months to remove the pipeline, he submitted that -

> " The Plaintiff has made a forecast based on his wide experience in these matters and that such a forecast will be construed by the Court as being a warranty made by the Plaintiff that all his pipes will be removed within 12 months of the date of that letter and that by not so doing the Plaintiff is in breach of that warranty. Further, both parties considered that that term of the contract was a fundamental one, the breach of which automatically brought the contract to an end. "

I must confess my admiration for the effort that must have been required for the formulation of such a submission. But further

than that my admiration cannot go because it is a submission that ignores the facts of the case. In the first place, " the Plaintiff's wide experience in these matters " i.e. the removal of pipes of the size in question and, that not as scrap metal but in sections to be used for fabrication, has been scrupulously concealed from the Court. Then, as it transpired more than one month of the " warranty period " was to elapse before the Third Party responded. (See letter dated 27th September, 1968) and, even if for the sake of argument it were conceded that a warranty had been offered it is abundantly clear that it was not accepted.

The case cited in support of the submission is so far from assisting Mr. Robinson that I will advert to it merely to demonstrate the point. That case is Esso Petroleum Co.Ltd. v. Marlon (1976) 2 All E.R. 5. It involved the tenancy of a new petrol station which the defendant was induced to accept on the basis of the calculation as to the thorough-put of petrol which calculations had in fact been falsified by irreversible factors without Esso making the necessary adjustments to their calculations. In reversing the trial Judge's rejection of the defendant's claim that Esso was guilty of a breach of warranty, the Court of Appeal held, inter alia:-

> " Where during the course of pre-contractual negotiations, one party who had special knowledge and expertise concerning the subject-matter of the negotiations made a fore-cast based on that knowledge and expertise with the intention of inducing the other party to enter into the contract, and in reliance on the fore-cast the other party did enter into the contract, it was open to the Court to construe the forecast as being not merely an expression of an opinion but as constituting

> a warranty that the forecast was reliable, i.e. that it had been made with reasonable care and skill. Since the forecast made by Esso of the thorough-put of petrol was based on their wide experience of the petrol trade and had induced the defendant to enter into the tenancy agreement, the forecast was to be construed as constituting a warranty that it was sound. Accordingly, since the estimate had been made negligently and was therefore unsound, Esso were liable to the Defendant for breach of their warranty. "

It is not difficult to identify the source of Mr. Robinson's submission but it is extremely difficult to identify the basis for the submission. There is no resemblance between the two cases.

Rather late in his submissions, Mr. Robinson contended that the Plaintiff was not entitled to pursue his claim for trespass because his claim had been compromised as between his Attorney and the Attorneys for the first Defendant which compromise, he maintained is in law binding on both the Plaintiff and the First Defendant. Evidence of this compromise he says is supplied by letters dated 24th September, 1971, 30th November, 1971, 13th December, 1971 and 17th December, 1971 (part of Exhibit 1 Supra).

In this regard it seems appropriate to include the last letter on the question of compromise - letter dated 18th January, 1972 - from the Plaintiff's Attorneys which together with their letter dated 13th December, 1971 disclose their final stance on the attempt to compromise.

In the letter dated 13th December, 1971 they had said -

Messrs. Lake, Nunes, Scholefield & Co.,
Solicitors,
72-76 Harbour Street,
Kingston.

ATT: MR. SCHOLEFIELD

Dear Sirs,

Re: Supreme Court Suit - Aston Davis
vs. The Water Commission -
Your Ref: WAS :G.

Further to our letter to you of the 30th ultimo and our telephone conversation this morning, we beg to advise that to our surprise the Plaintiff attended on us today and informed us that he inspected the pipeline site yesterday and discovered that 1,200 running feet of pipeline were cut last week by your clients, and as you will appreciate, this action on their part has nullified all our efforts to have this matter finalised. We would therefore advise you to confer with your clients and let us know what they intend to do, as we have received instructions to apply for an Order of Injunction.

We await your early reply.

Yours faithfully,
GAYNAIR & FRASER

Per:

When the letter dated 18th January, 1972 was written the prospect of a compromise had obviously been irreparably ruined.

In support of his submission Mr. Robinson cited [illegible] Waugh and others vs. H.B. Clifford & Sons Ltd. (1982) 2 WIR 679 in which case a party was held to be bound by a compromise entered into by his solicitor who, it was held, had ostensible authority so to do. But be it noted that the authority of the Plaintiff's Attorney to enter into the suggested compromise is nowhere questioned. What is being said here is that although the parties were well on the way to a compromise, the terms of which had been clearly set out, the first Defendant had ruined the prospect of a compromise by acting so

contrary to the proposed terms that the compromise could no longer be effectuated. On the evidence this is manifestly so. Accordingly, there is no compromise which the Plaintiff could be enjoined to observe. This submission goes the way of all Mr. Robinson's submissions affecting liability. It fails.

It would have been a rather exhausting effort to give detail consideration to every bit of the submissions made. But I have, I hope, dealt with their substance and I conclude that there was a valid and subsisting contract vesting property in the appropriated portion of the pipeline and that the first Defendant did commit trespass against the Plaintiff's property when they entered upon and proceeded to cut up the portion of the pipeline belonging to the Plaintiff. Also the evidence is clear that the first Defendant is liable for conversion and detinue of the pipeline which unauthorised interference will sound in damages. But a problem of no lesser magnitude awaits solution. Has the Plaintiff proved the damages claimed?

Mr. Muirhead did not belabour the point and was content to submit that the figure claimed ought to be rejected as being in the nature of Special Damages which has not been proved, as the Law requires, with cogency. The claim was speculative, he said, based on a mistaken belief as to ownership by the Plaintiff whose case is starved of reliable evidence.

While agreeing with Mr. Muirhead's submission, Mr. Robinson spent some time in the effort to demonstrate that the Plaintiff's claim for Special Damages had not been proved as required. He pointed

to the fact that having regard to the difference between the Plaintiff and Mr. King as to the amount of pipe remaining it was uncertain what amount of pipeline belonged to the plaintiff. The Plaintiff claims for 3155 feet @ $30.00 per foot but Mr. King's evidence is that when he visited the site sometime in 1971 the portions of the pipeline supporting the roadway was roughly about 2000 feet. The length of the pipeline between the Power Station and the Dam Head he thought to be roughly 5000 feet.

Mr. Davis' evidence on this point was -

> " I started to cut and remove lengths of the pipeline - about 2000 feet. I measured the balance of the contract pipeline as 3155 feet. "

There is obviously a violent conflict between Messrs. Davis and King not only as to the length of pipeline supporting the roadway but also concerning the amount of pipeline to which Mr. Davis could possibly lay claim. Opting to abide by Mr. King's evidence Mr. Robinson contended that Mr. Davis would be entitled to only 1200 feet (apparently accepting Mr. Davis' evidence that only 800 feet had been excluded) and that since, on Mr. Davis's evidence he had to use 3 lengths of pipeline to make 2 tanks only two-thirds i.e. 800 feet could be used for the production of tanks. But cross-examination had elicited that the cost of production was $19 per foot; so the actual loss would be $11 per foot i.e. $11 x 800 = $8800. However, for want of proof, the Plaintiff was not entitled to this sum. Further, Mr. Robinson submitted that the Plaintiff could not be awarded as general damages what he had failed to prove as Special

Damages: Robinson & Co. Ltd. and Jackson v. Lawrence (1970) 15 W.I.R. 349.

In resolving the conflict between Mr. Davis and Mr. King I find myself constrained to accept Mr. Davis' figure which reflects the amount of pipeline which he testified he measured. On the other hand, quite apart from the fact that Mr. King's evidence came too late in the day to adversely affect the issue of appropriation which had long been an accomplished fact, it cannot be overlooked that Mr. King's figure represents an estimate of the remaining pipeline, which was not a continuous piece.

On the basis that 3155 feet of pipeline remained as the Plaintiff's property Mr. Frankson submitted that 263 12 feet tanks could be fabricated therefrom. On the Plaintiff's evidence his profit was between $500-$900 per tank. Hence loss - net profit would be $600-$900 x 263 i.e. $157,800 - $263,700. But inasmuch as these figures bear no relationship to the amount claimed as Special Damages ($94,650.00) Mr. Frankson was quick to detect the flaw in his reasoning and amended that to say that he must claim the amount in the Statement of Claim as Special Damages and in addition claim for Trespass and Conversion. What he did not do, however, was to demonstrate from the evidence that the amount claimed in the Statement of Claim had been proved. Accordingly, there is no want of charity in categorising the proferred solution as simpliatic and at variance with the evidence.

It is trite learning that Special Damages must be specifically pleaded and strictly proved. It is not enough to plead without proving.

The claim is for 3155 feet of pipeline @ $30 per foot = $94,650.00. Obviously, since the $30 per foot represents to the Plaintiff either the cost of the material as it goes into manufacture or the rate of profit from his efforts, the claim is based on the assumption that all the pipeline would be usable for the manufacture of tanks. But the evidence of the Plaintiff contradicts this assumption. He testified, as reflected in Mr. Robinson's submissions, that of the lengths removed he had to use 3 lengths to make 2 tanks. Accordingly, one-third of the 2000 feet so used was useless for this purpose. But that proposition only related to the pipeline actually in hand. There is no line of reasoning which must conclude, not even on a balance of probabilities, that the same ratio of utility would apply to the remaining portion of pipeline, which from the evidence I accept, was down in the gorge (50-60 ft.) and completely rusted in many places. Then, too, the colossal cost ($25 per foot) estimated to be inescapable in the removal of the pipeline by crane must be taken into account. But this was not done.

From the evidence it is impossible to say what proportion, if any, of the remaining pipeline could be valued at $30 per foot. Accordingly, the claim for Special Damages fails completely.

But accepting, as I do, that the Plaintiff had acquired and had not lost the property in the pipeline at the time of the intervention by the First Defendant, I am persuaded that he should not go away empty handed. He is entitled to damages for trespass and conversion. The claim for damages enables the making of such

an award. Even if the pipeline could not be used for making tanks, as the Plaintiff intended, it would still have value as scrap metal. Such award must of necessity be arbitary and should in my opinion, be satisfied by the amount of $35,000 as general damages. As against the First Defendant, therefore, the Plaintiff is entitled to recover the sum of $35,000 and such costs as are awarded.

COSTS

I have already mentioned the unreasonableness of the Plaintiff in seeking to exclude the participation of the Third Party in circumstances where the Third Party would, in all probability, be adversely affected, to the extent of being bound, by a judgment in favour of the Plaintiff. It is my considered opinion, therefore, that the Plaintiff is not entitled to recover the costs of those two days spent in resisting the Third Party's application. The first Defendant, quite understandably, was not concerned with this aspect of the case and so is not affected by this order respecting costs.

The Plaintiff will therefore have his costs of the action, to be agreed or taxed, less the costs for these two days.

The Third Party will have its costs, to be agreed or taxed, for the two days such costs to be paid by the Plaintiff.

THIRD PARTY PROCEEDINGS

There can be no doubt that the First Defendant's claim to full indemnity from the Third Party succeeds. While the Third Party sought by such means at its disposal to resist the Plaintiff's claim, there was not even a suggestion that the first Defendant had acted outside the authorisation granted by the Third Party. It follows, therefore, that judgment will be entered for the First Defendant against the Third Party for the amount of damages and costs awarded against the First Defendant in favour of the Plaintiff. Also, as against the Third Party the First Defendant will have its costs of the action between it and the Plaintiff as well as costs between the first defendant and the Third Party; such costs to be agreed or taxed.

In the result there will be judgment -

(a) for the Plaintiff against the first Defendant for $35,000 and costs as stated above;

(b) for the Third Party against the Plaintiff for 2 days, costs to be agreed or taxed;

(c) for the first Defendant against the Third Party for the full damages and costs awarded the Plaintiff against the first defendant;

(d) for the first Defendant against the Third Party for the first Defendant's costs of the action between it and the Plaintiff;

(e) for the first Defendant against the Third Party for the costs between the first Defendant and the Third Party.