JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 29/84

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN	RIVERTON CITY LIMITED	PLAINTIFF/APPELLANT
AND	NORMA P. HADDAD	DEFENDANT/RESPONDENT

Dr. L.G. Barnett & Arthur Hamilton for Appellant

Mr. D. Muirhead Q.C. & Mrs. Janet Morgan for Respondent

October 9, 10, 11, 16, 1985; January 27 & March 17, 1986

CAREY J.A.

I have had the privilege of reading in draft the judgment of Campbell J.A. and for the reasons therein stated I entirely agree that the appeal should be dismissed with costs to the respondent.

ROSS J.A.

I have read the judgment of Campbell J.A. and I agree that the appeal should be dismissed.

CAMPBELL J.A.

By a Memorandum of Sale dated January 7, 1955 Mrs. Norma Haddad the respondent agreed to purchase 50 residential lots from Riverton City Limited, the appellant in a subdivision described as the Riverton City subdivision.

The clauses of the Memorandum of sale in so far as they are germane to the issues raised at the trial and on appeal are as hereunder:

"Sale Price Agreed: Eight Thousand Pounds (£8,000)

Payable: The purchase money shall be paid in the following manner:

(1) On the signing hereof, £2,500 (Two Thousand Five Hundred Pounds) Balance on delivery of Title.

(2) deleted

(3) deleted

Completion: The balance of the purchase money shall be paid in full to the vendors in the manner set out above. Immediately after payment thereof the Vendors will execute and register a transfer to the Purchaser. Time shall be of the essence of the contract as regards payments of purchase money and should the purchaser neglect or fail to make payments of any instalment of purchase money and/or interest on any of the dates herein specified for the payment thereof, all payments made shall be forfeited to the Vendors who shall be at liberty to retake possession of the said land and/or to resell the same by public sale or private contract at such time and in such manner and subject to such conditions as the vendors shall think fit without any previous tender of transfer, and without notice to the Purchaser who shall be liable to pay to the vendors the deficiency (if any) together with all costs and charges attending

"such resale but any increase in price on any subsequent sale shall be retained by the vendors.

Condition Precedent: The sale is subject to the approval of the Kingston and St. Andrew Corporation and the Water Commission to the subdivision and is also subject to any terms and conditions attached to such approval. The Vendors agree to apply for such approval with reasonable promptitude. In the event of the subdivision plan not being approved by both the K.S.A.C. and the Water Commission the contract shall be void and of no effect and the Vendors will on refusal of the subdivision by either the K.S.A.C. or the Water Commission repay the deposit of the Purchaser without any interest thereon and shall be under no other liability or obligation to the Purchaser."

The lots purchased by the respondent were all in section C of the subdivision though not all contiguous. They comprised:

Lots 41 to 53 inclusive in Block 24;
Lots 1 to 15 inclusive in Block 30;
Lots 40 to 48 inclusive in Block 34;
Lots 4 to 16 inclusive in Block 35.

Approval of the subdivision was applied for on January 5, 1955 prior to the contract of sale and approval with terms and conditions annexed thereto was given on February 18, 1955. The approval was given under the provisions of the Local Improvements Law, Chapter 227 of the Revised Laws of Jamaica.

The deposit was duly paid but instead of the sale being satisfactorily consummated, differences of opinion regarding the memorandum of sale developed culminating in the appellant instituting action on October 9, 1964 claiming the balance of the purchase price. This claim was abandoned in July, 1976 and by an amended statement of claim rescission was sought or alternatively a declaration that the contract had been frustrated. This action was dilatorily pursued. It ended in a judgment delivered by Wright J., on May 4, 1984 in favour of the respondent.

Against that judgment, the appellant has appealed. The facts consisting primarily of correspondence between the parties, having been fully set out in the judgment of Wright J., I will therefore limit myself to such only of the evidence as is necessary for the determination of this appeal.

In 1959 the Government moved to acquire six of the lots numbered 1 to 6 inclusive in Block 30 either compulsorily or through purchase. The lots were eventually acquired by purchase and were transferred by the appellant on the instructions of the respondent to the Chief Secretary of Jamaica. The sum received on the sale, less the outstanding balances of the purchase price of these lots, was paid over by the appellant to the respondent. The acquisition by Government was intended for purposes of the Sandy Gully Drainage Scheme and not for residential purposes.

Subsequent to this acquisition by Government, a notice dated April 28, 1961 was served on the appellant by the Permanent Secretary, Ministry of Communications and Works under the Flood-Water Control Law, 1958 declaring that certain areas in the subdivision identified on a plan, might be needed for the construction of the works in connection with the Sandy Gully Scheme and that therefore, no development in those areas of the subdivision should be effected pending the completion of the aforesaid works. The notice concluded thus:

> "Following the completion of the works it will be possible to construct roads in accordance with some such arrangement as that suggested on the enclosed plan (road alterations shaded) and develop those parts which are outside the reserved areas."

Work on the Sandy Gully Scheme commenced early in 1964 and was completed in 1967. The evidence of Mr. Harrison then Acting Director of Technical Services who was familiar with the scheme is that before the works commenced, Government acquired the lands through which the channel had to run. On either side of the channel, 200 feet was reserved as declared area within which the contractors could operate, but would not be retained as Government land on completion of the scheme. The 200 feet on either side of the channel was only reserved between 1963 and 1967. He said the original subdivision would have been affected with regard to layout of some lots, roads and infrastracture works. However, apart from the lots acquired for the channel which would be permanently affected, the other lots, namely those in the reserved area, would be affected only during construction, and on completion would revert to the owners. Some subdivision roads which crossed the channel area would have to be modified and relaid, but the rest of the subdivision scheme could be developed in accordance with the original plans. It is to be noted that the six lots acquired from the respondent in 1959 were among the lots acquired by Government permanently for the channel course. Prior to this notice reserving areas in the subdivision, some roads had actually been constructed in the subdivision, though it does not appear that such roads were within the section in which the respondent's lots were situated.

On October 9, 1964, the appellant having unsuccessfully made demand on the respondent for payment of the balance of the purchase price, issued a writ endorsed with a claim for this balance. The appellant pleaded that the title to the respondent's remaining 44 lots was registered in appellant's name in Volumes 997 and 998 of the Register of Titles and that it had on June 26, 1964 delivered Certificates of Title to the respondent with a transfer

duly executed and demanded the balance of £4840 which the respondent had failed, neglected and or refused to pay. This was a claim for specific performance, premised on an assertion by the appellant, that it had performed its obligations under the contract by delivery of title.

The respondent on October 1, 1965 filed and delivered a Defence and Counterclaim to the appellant's claim. She pleaded that the Certificates of Title and executed transfer had been prematurely sent to her solicitors and had therefore been returned to the appellant. The demand for payment of the balance of the purchase price was equally premature in that the appellant had not discharged all its obligations under the contract. In particular the respondent pleaded that a term and/or condition of the approval of the subdivision given by the Kingston and St. Andrew Corporation which was incorporated as a term of the contract of sale was that no building should be erected on any of the lots fronting on the proposed roadways until the said roadways had been constructed to the satisfaction of the City Engineer and taken over by the Corporation. The appellant had failed to construct the said roadways as required by the Kingston and St. Andrew Corporation and the said roadways had not been taken over by the Corporation. The respondent further pleaded that the appellant was obliged under the Local Improvements Law (Chapter 227) to construct the aforesaid roadways which it has failed to do. By reason of such failure, the appellant, so said the respondent, was not entitled to the relief claimed or to any relief. By way of counterclaim she repeated all material averments in her defence including those above and counterclaimed for:

"(1) Repayment of the deposit of £50 paid on each of the 44 remaining lots, being a total amount of £2,200 together with interest thereon at the rate of 6 percent per annum from 7th January, 1955.

(2) Damages

(3) Costs

(4) Further or other relief."

This counterclaim in my view, in-as-much as it seeks relief in the form of repayment of deposit with interest from the date of the memorandum of sale asserts a right to the remedy of rescission on the basis that the agreement never came into being. The appellant by its reply and defence to counterclaim filed in or about January 14, 1966 in effect confessed and avoided its failure to construct the roadways by pleading that it was for the time being impossible for it to do so in that by notification to it dated 28th April, 1961 an area of land embracing a part of the subdivision might be required for the purposes of the Sandy Gully Flood Water Control Scheme and that in consequence of this notification, it could not proceed further with the roadways of the subdivision until the lands involved were released from the operative effect of the aforesaid notice.

As to the counterclaim, the appellant specifically pleaded that it disclosed no cause of action or claim in that the aforesaid appellant has always been ready and willing to complete the roads but it has been impossible to do so having regard to the notice under the Flood Water Control Law. The appellant further pleaded that the respondent was in effect estopped from making any claim on the basis that the contract had not come into being or had been discharged since she had up to the time when action was brought by the appellant refused to treat the contract as at an end and had continued to demand that the roadways be completed. Also, the respondent having affirmed the contract by

selling six of the lots in 1959 could not now treat the contract as discharged and or at an end. This reply certainly recognized that the respondent was not claiming that the appellant had repudiated the contract but rather that since the construction of the roadways was in her view a condition precedent to the operative force of the memorandum of sale and this had not been achieved, there was a "locus poenitentiae," within which she was asserting a right to rescind. The appellant did not accept this claim.

Nothing further was heard of the appellant's claim for the next nine and one half years until July 17, 1975 when it filed a notice purporting to discontinue its action. In the light of the evidence that on August 8, 1975 the appellant had entered into a contract with the Minister of Housing for the sale to him of the remaining 44 lots of the respondent, this purported discontinuance was no doubt pursued to save the appellant the embarrassment of entering into a contract with the Minister of Housing, while there was subsisting an action in court, in which it was claiming the balance of the purchase price for the identical lots from the respondent. Further in the light of its later conduct it seems reasonable to infer that the appellant, having subsequently advised itself that the purported discontinuance not having been made with the leave of the court would be inoperative to put an end to its claim against the respondent, decided instead, to amend its statement of claim. In doing so it sought to achieve two objectives, first to abandon the claim against the respondent for the balance of the purchase price and secondly to claim relief from any further contractual obligations to the respondent on the ground of the frustration of the contract. Thus on January 1, 1976 it filed a summons seeking leave to amend its subsisting pleadings. This summons not apparently being pursued expeditiously, the respondent decided to

pursue her counterclaim and accordingly filed a notice on July 25, 1976 of her intention to proceed. Thus goaded into action, the appellant's summons was heard on July 7, 1976 and an amended statement of claim was filed on July 13, 1976. In this amended statement of claim the appellant pleaded the matters which it had pleaded in the original claim and also the matters pleaded in the Reply and defence to the respondent's defence and counterclaim except as to the claim for ₣4,840 as money due and owing by the respondent. In substitution for this claim the appellant claimed:

> "(1) Rescission of the said contract,
>
> (2) Further or alternatively, a declaration that the said contract has been frustrated;
>
> (3) Further or alternatively, damages for breach of contract;
>
> (4) Further or alternatively, a set off in diminution or extinction of the defendant's right (if any) to refund, the amounts paid under the said contract or of her claim, being the expenses incurred by the plaintiff before the said contract was discharged by frustration;
>
> (5) Further or other relief."

It is to be noted that in this amended statement of claim, the appellant as at July 13, 1976, is still pleading that "it cannot proceed further with the roadways of the subdivision until the lands involved are released from the operative effect of the aforesaid notice." In fact, to the knowledge of the appellant, the land in the subdivision had long since been released from the notice contained in the letter of April 28, 1961. The evidence of Mr. Harrison shows that the lands were released in 1967. It is further to be noted that as at the date of the said amended pleading, the appellant had from documents admitted in evidence, already sold the respondent's lots to the Minister of Housing. This had been done from August, 1975 and payment therefor had been obtained in early December 1975. None of these

matters were disclosed by the appellant in its pleadings or at all. The non-disclosure of these vital facts certainly would raise grave doubts as to the bona fides of the appellant in seeking the equitable reliefs from the court. The respondent faced with this new posture taken by the appellant, filed an amended defence and counterclaim on or about March 8, 1978 which differed from the original pleading only by the addition of the following averments paraphrased as hereunder namely:

(1) that the appellant had failed to perform its obligation to construct the roadways within a reasonable time or at all,

(2) that the respondent does not admit the receipt by the appellant of the notice under the Flood-water Control Law and or denied the consequences allegedly flowing therefrom insofar as it purportedly affected the respondent's lots,

(3) that the equitable estate in the lots having become vested in the respondent from January 7, 1955, the contract was not capable of being frustrated as alleged in the amended statement of claim,

(4) that the respondent had at all times stood ready, willing and able to make payment of the balance of the purchase price on fulfilment by the appellant of its obligations or on reduction of the price by the appellant commensurate with the cost to the respondent of making good the default of the appellant.

The respondent by way of her amended counterclaim repeated her averments in the amended defence and further pleaded in substance that:

(1) She had lodged a caveat against the lots affected since January 30, 1964.

(2) She had on November 20, 1975 received a Registrar's notice dated November 17, 1975 that the appellant had applied for registration of title of the lots in favour of the Minister of Housing.

(3) That the transfer to the Minister of Housing is in breach of the contract of sale with her.

She accordingly sought the undermentioned relevant reliefs:

(1) Declaration that she was entitled to the equitable estate in fee simple in the 44 lots.

(2) Specific performance of the contract of sale.

(3) Damages in addition to Specific Performance.

(4) Alternative to (2) and (3) Damages for breach of contract.

(5) Account of all monies and or benefits received by the appellant from the Minister of Housing in respect of the transfer to him;

(6) Declaration that all such monies and benefits are received by the appellant as trustee for the respondent;

(7) An account of what is due from the appellant to the respondent;

(8) An order for payment by the appellant to the respondent of all sums found due upon the taking of such accounts.

Alternative to (1) to (8)

(9) Repayment of the deposit of £50 paid on each of the 44 lots with interest.

(10) Damages for breach of contract.

The appellant on March 22, 1978 filed an Amended Reply and defence to counterclaim in which it pleaded:

(1) That the K.S.A.C. approval was with respect to a composite scheme which by virtue of the Sandy Gully Flood-water Scheme could not be complied with in terms of the application for approval or the approval itself;

(2) the provision of the agreement for sale relative to the K.S.A.C. approval is uncertain and imposes no valid legal obligation on the appellant;

(3) the respondent had repudiated the agreement and cannot now seek to enforce it;

(4) the K.S.A.C. approval did not fix any time within which its conditions were to be complied with, this was left to the discretion of the appellant. In the circumstances which arose any attempt to complete would have been unreasonable and when the respondent repudiated the agreement she terminated any obligations the appellant may have had to comply with the K.S.A.C. condition;

(5) the respondent having repudiated the agreement and or been guilty of long and inexcusable delay in claiming and pursuing the claim for Specific Performance should not be granted the relief.

The issues which on the pleadings, required determination were fully dealt with by the learned trial judge in a full and well reasoned judgment. On the issue of frustration he cited with approval an extract from the speech of Lord Radcliffe in Davis Contractors Ltd v. Fareham U.D.C. (1956) A.C. 696 at pp. 728-9 in which the learned Law Lord stated the principle applicable to frustration as follows:

> "So perhaps it would be simpler to say at the outset that 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 is not this that I promised to do."

The learned judge thereafter determined the issue of frustration by reasoning that the respondent was not requiring the appellant to do anything not contracted for. Nor did the evidence as presented, demonstrate that the appellant, to satisfy the respondent's rights under the contract, would, despite the changed circumstances in which performance was called for, be performing something radically different from that which was undertaken.

Further, the appellant had scrupulously avoided any reference to the question of absence of fault on its part. He concluded, by finding as a fact that in so far as the respondent's lots were concerned, the lots in Blocks 35, and 24 were far removed from the 200 feet reserved area and that only lots 7-15 in Block 30 could have been affected, being closer to the channel area. He held that the defence of frustration failed. His determination provided the basis for grounds 1,2 and 6 of the grounds of appeal.

Dr. Barnett before us submitted that there had been extensive work under the Flood Water Control Scheme, such that the subdivision scheme as approved could not be implemented. He submitted that the learned judge had found that it was impractical to identify the lots as the topography had changed. Thus he submitted that both physically and legally the objective of the contract could not be achieved.

The learned judge did not however find that a substantial number of the lots, even in relation to the respondent's own, as to which he was concerned, were unidentifiable, or that where the lots had become unidentifiable, such was occasioned by the Flood Water Control Scheme. It is true that the evidence/under cross examination of Mr. Melvin Dyce was that lots 7 - 15 in Block 30 were dumped with marl; Riverton Boulevard a roadway in Block 24 was unusable in parts; Trelawny Avenue another roadway was also covered with mud and much flooding had taken place, the roadways in Block 24 and lots 41-53 therein, as well as the roadway in Block 34 and lots 4 - 16 in Block 35 had been marled and obliterated. He however stated that it was the Ministry of Housing that had done the marling. It was in this context that the learned judge said:

> "What is clear from this witness' testimony is that the lots in question no longer are identifiable as such. The whole topography has been radically altered by flooding and the endeavours of the Ministry of Housing."

Later in his judgment when dealing specifically with the issue of frustration, the learned judge found as a fact, that by reference to the Flood Water Control plan which was in evidence, only lots 1, 2, 3, 4 and 5 in Block 30 were affected by the channel in whole or in part. He further found that the lots in Blocks 35, 34 and 24 were far removed even from the 200 feet reserved area, which confirmed, that their obliteration by flooding or marling was not due to the scheme. The lots which are closer to the channel area but separated from it, were only lots 7 - 15 in Block 30.

The irresistible inference from the learned judge's finding was that any practical difficulty that existed in identifying the respondent's lots was not due to the Flood Water Control Scheme, but to natural flooding or the acts of the Ministry of Housing to whom the respondent's lots had been sold from August 1975. Thus Dr. Barnett can take no comfort from, nor can he rely on, the learned judge's finding of change in topography as a basis for his submission on the issue of frustration. As regards the submission that extensive work was done in the subdivision under the Flood Water Control Scheme, the evidence on record is to the contrary. The evidence of Mr. Melvin Dyce as stated by the learned judge was that about 60 or 80 lots in the subdivision would be affected by the 20 feet wide main channel of the Sandy Gully Scheme in Blocks 30 and 29, and another 10 - 12 lots in Blocks 23 and 24 affected by the smaller channel. Thus at most only 72 lots would be affected in a subdivision consisting of 1207 lots as admitted by Dr. Barnett. The subdivision could not, on this evidence, be extensively affected, particularly as the works in connection with the Sandy Gully Scheme would be primarily concentrated in Blocks 30 and 29.

It is unnecessary for me to consider whether the doctrine of frustration is applicable to a contract for the sale of land and in this regard to consider the cases cited, because on the facts as found by the learned judge there was no frustration.

His findings are well founded on the evidence. His reasoning and conclusion on the facts including the appellant's pleadings commend themselves to me, and for similar reasons I find, on the facts, that there was no frustration and there was no error in law in the learned judge's conclusion that the defence of frustration was not established. As a last desperate effort, Dr. Barnett in his written submissions in reply to Mr. Muirhead, raised the issue of frustration of the contract based on supervening illegality in its performance. His submission in this regard, is that since the subdivision scheme could not be completed in accordance with the approval plans, and the appellant was prohibited from proceeding with the subdivision other than in accordance with this approved plan, he would be contravening the law, were he to continue with the subdivision by perfecting the sale. Thus supervening illegality would result, and this was a frustrating circumstance. This is a new matter and would raise the collateral issue as to whether approval of a modified subdivision plan necessitated by the Sandy Gully Scheme was legally incapable of being secured from the K.S.A.C. This issue was never a serious pillar on which the defence of frustration rested in the court below and is not expressly made a ground of appeal and cannot therefore be entertained in this appeal. In any case, the submission is wholly without merit. There is accordingly no merit in grounds 1, 2 and 6 of the appeal.

The next issue addressed by the learned judge was the issue of election in relation to alternative remedies and his conclusion thereon is the subject of grounds 3 and 7 of the appeal.

The issue was raised because the appellant in its amended reply and defence to counterclaim dated 22nd March, 1972 had pleaded thus:

"7. The Defendant, having repudiated the agreement, and/or being guilty of long and inexcusable delay in claiming and pursuing the claim for specific performance should not now be granted."

Dr. Barnett's submission before us is substantially the same as before the learned judge as disclosed in the record. It is that the respondent's refusal to pay the balance of the purchase price amounted to a repudiation of the contract. This he says is made evenmore manifest by her counterclaim for repayment of deposit. He submitted that one cannot by a previous pleading repudiate a contract and claim rescission and then by subsequent pleading reverse one's position and claim Specific Performance. Such repudiation in effect constituted an unequivocal act of election which puts an end to the contract. He cited in support of this proposition, the principle stated in Scarf v. Jardine (1882) 7 A.C. 345 at p. 360. He submitted before us that the learned judge having accepted the correctness of the principle there laid down was wrong in saying it did not apply in this case. That case was one in which Mr. Jardine had an indisputable right to sue Mr. Scarf a retired partner for the value of goods sold to the partnership firm at a time when, though he had retired, he or his remaining partner had not notified Mr. Jardine of the retirement. Mr. Jardine had an equally indisputable right to sue Mr. Beach the incoming partner who with the continuing partner actually received the goods. The claim against Mr. Scarf was based on the principle of estoppel to which claim Mr. Beach was a stranger. The claim against Mr. Beach was based on the fact that he with his partner actually received the goods. To this claim Mr. Scarf was a stranger. Thus either Mr. Scarf or Mr. Beach could be sued but not both. It was held that Mr. Jardine who had full knowledge of the facts and of his rights, having sued Mr. Beach and subsequently proved in his bankruptcy when the suit was brought to an end due to Mr. Beach's bankruptcy, could not thereafter proceed against Mr. Scarf.

The learned trial judge considered the facts of that case and cited with approval the general principle of election stated in these words by Lord Blackburn at pp. 360 - 361.

> "I may also refer to the case of Jones v. Carter (15 M & W 718) as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, this alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act - I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other way - the fact of his having done that unequivocal act to the knowledge of the person concerned is an election."

The learned judge however concluded that the principle enunciated, though not susceptible of doubt, was not applicable to the circumstances of the present case in that it could not apply to pleadings which are always open to amendment. Further, that to uphold the submission would be to deny the respondent the benefit of her amended pleading which did not infringe the provisions of the Judicature (Civil Procedure Code) Law. This conclusion is both correct and supported by authority.

It is noteworthy that having stated the principle, Lord Blackburn goes on to say that the particular application of this general principle may be peculiar as in Jones v. Carter (15 M & W 718) which he considered as illustrative of the principle. Continuing his statement of principle at p. 361 he said:

> "In Jones v. Carter the question was whether a man who had a right to avoid a lease had avoided it or not. He had at first brought a writ of ejectment for the purpose of avoiding it, by which in modern times you do not actually enter; but it had proceeded so far that the defendant had entered into a consent rule; and the defendant having entered into a consent rule by which he had admitted the entry, the court held that it must be taken as if the plaintiff had entered and that inasmuch as the entry to avoid a lease was unequivocal in its nature he could not afterwards say the lease was not void."

What this case illustrates in my opinion, is, that as regards court proceedings, the mere issue of a writ, though manifesting an intention to claim one of two inconsistent rights or of seeking one of two inconsistent remedies, is not conclusive as an election to pursue such right or seek such remedy. In order to amount to a final election the adverse party must irreparably have acted to his detriment pursuant to that manifest intention, or the party initiating the proceedings must have prosecuted the claim to judgment or have otherwise secured satisfaction of his claim directly or indirectly through such court proceedings.

It is true that Lord Blackburn did express himself as though the mere issue of a writ suffices, but in the end he showed that this was not the case. At. p. 362 he said:

> "But then the plaintiff goes on and issues a writ against Rogers & Beach - he sues Beach. I am unable to conceive a more unequivocal act; he has thereby adopted Beach as his debtor at that time. I do not think its going to judgment or not going to judgment is material. How he could possibly do a more unequivocal act than issuing a writ against Rogers & Beach I cannot imagine. The result of his issuing the writ was that Rogers and Beach not being able to get time to obtain terms went into liquidation and then the plaintiff sent in his affidavit claiming to prove against Rogers and

> "Beach for this sum which is in dispute and also for the subsequent debts, treating them all as one. I think that also is an unequivocal act. And taking the whole together I can bring myself in no way to doubt that upon the facts we ought to find that Mr. Jardine having the right of election between holding Beach liable and holding Scarf liable, had before he ever came upon Scarf, finally determined his election and taken Beach as liable, and that he could not hold both Scarf and Beach liable." (emphasis mine)

Thus, it seems that only an inchoate election at best arises from the issue of a writ or other claim. The inchoate election ripens into a final election only when for example the person against whom the writ has been issued, or claim made, has at the least acted pursuant to the writ or other claim in a manner irreparably prejudicial to himself, thus making it unjust for the issuer of the writ or other claimant to resile from the position taken in issuing the writ or making the claim. In my view, the statement by Lord Blackburn that it mattered not whether the writ proceeded to judgment was clearly obiter since in that case, judgment on the writ became legally impossible with the supervening bankruptcy and the question as to what would have been the effect of a voluntary discontinuance of the action before judgment was never addressed. In any case, Mr. Jardine had sought and inferentially secured satisfaction of his claim by proving in the bankruptcy of Messrs Roger and Beach, who were plunged into bankruptcy, consequent on the writ having been issued against them.

Dr. Barnett cited the cases of MacNaughton v. Stone (1950) 1 D.L.R. 330, Johnson v. Agnew (1979) (H.L.) 2 W.L.R. 487 and McNabb v. Smith (1981) 124 D.L.R. (3rd) p. 547 in further support of his submissions. I do not find these cases helpful, nor do they support Dr. Barnett's submission having regard to the facts and pleadings in the present case. In MacNaughton's

case (supra) the headnote reads thus:

> "Where prior to the date of completion under a contract of sale of land the vendor informs the purchaser that he will not carry out the contract and the purchaser as a result of this anticipatory breach asks for return of his deposit, this amounts to an election on his part to treat the contract as at an end. Although the deposit is not returned, he cannot revive the contract and seek specific performance. He is entitled to receive only the deposit.

The facts as narrated in the headnote, bear no similarity to the facts in this case, because in this case, the appellant had no where notified the respondent that he did not intend to complete. To the contrary, his claim was for specific performance, namely, a demand for the payment to him by the respondent of the balance of the purchase price on the basis that he had fully performed the contract. The respondent denied that the appellant had performed the contract and sought the remedy of rescission in her counterclaim as is implied in her demand for a return of her deposit. In so far as this could amount to a repudiation, had the appellant accepted it in its reply and defence to counterclaim filed on January 14, 1966, it would have effectively put an end to the contract, whether it had then and there returned to the respondent, her deposit. The appellant however refused to accept the repudiation implied by the respondent in her claim for return of her deposit. Instead, the appellant resolutely denied that the respondent was entitled to the relief sought by her in her counterclaim. No election by the respondent having the effect of terminating the contract could therefore arise, since the repudiation from which the election purportedly arose was not accepted by the appellant. Further, in this case, the purported election consisted of a statement in a pleading in relation to which, different considerations arise as to whether the statement even if unequivocal is necessarily per se final

and is not, as stated earlier, at best inchoate. Dr. Barnett's reliance on Johnson v. Agnew (supra) appears to be derived from the uncontroversial propositions of law stated by Lord Wilberforce at pages 491 -492 which are as follows:

> "First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance (similar remedies are of course available to purchasers against vendors) this is simply the ordinary law of contract applied to contracts capable of specific performance Secondly, the vendor may proceed by action for the above remedies (viz specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance."

The above propositions of law are unquestionably correct but again, they cannot assist the appellant who has pleaded that it was the respondent who had repudiated the contract and there is no evidence that the appellant has ever accepted the repudiation so as to bring the contract to an end. As earlier stated, contrary to accepting the repudiation, the appellant denies any right of the respondent to treat the contract as at an end and consequently to claim the return of her deposit.

McNabb v. Smith (supra) deals with the question whether specific performance is available to enforce a contract for the sale of land which was undisputedly purchased for resale at a profit. I do not perceive its relevance to the issue involved here and accordingly, I derive no assistance therefrom.

Mr. Muirhead in his reply, steadfastly and resolutely anchored himself and justifiably so, on United Australia Ltd v. Barclays Bank Ltd (1940) 4 All E.R. 20 which is a decision of the House of Lords /determining the issue whether there was an election to waive a tort which was available as a defence in a subsequent action brought against a defendant in tort by a plaintiff who had in an earlier proceeding against another defendant claimed an alternative remedy in contract based on facts common to both suits. The facts appearing in the headnote are stated thus:

> "E was the secretary and a director of the plaintiff company. Without authority, he indorsed a cheque, made payable to his company, the M.F.G. Trust, Ltd. The defendant bank accepted it for collection, and credited the proceeds to the account of M.F.G. Trust, Ltd. Subsequently, the plaintiff company commenced an action against M.F.G. Trust, Ltd to recover the value of the cheque as a loan, or, in the alternative, as money had and received. Before final judgment, M.F.G. Trust, Ltd went into liquidation. The plaintiffs put in a proof for the sum alleged to be due in the liquidation, but the proof was not admitted, as the funds to meet the demands of creditors were merely trivial. They then brought the present action against the bank for wrongful conversion of the cheque. The defence pleaded was interalia, that the plaintiff had ratified E's indorsement of the cheque by suing the M.F.G. Trust, Ltd, and had therefore, waived the tort, to which it was answered that there could be no waiver, as no judgment had been obtained against M.F.G. Trust, Ltd.
>
> Held: (1) there was no election or waiver as the plaintiffs were not called to elect until they applied for judgment against M.F.G. Trust Ltd;

> "(2) even if the plaintiffs had waived the tort or elected against M.F.G. Trust, Ltd, the earlier proceedings provided the defendant bank with no defence, because the plaintiffs had not received satisfaction for their loss."

Viscount Simon L.C. at p. 22 crystallised the issue for determination in these words:

> "Thus the Court of Appeal also regarded the initiation of the action against M.F.G. as conclusive election which prevented the appellants from thereafter alleging that the bank converted the cheque.
>
> The House has now to decide whether the courts below are right in holding that the appellants are barred from recovering judgment against the bank because they previously instituted proceedings, on the basis of 'waiving the tort' against M.F.G. when those proceedings never produced any judgment or satisfaction in the plaintiffs' favour."

Viscount Simon L.C. then gave a historical synopsis of how the process known as "waiving the tort" originated and why it was side-stepped in favour of a claim in assumpsit. He pointed out that in the instances where "waiving the tort" was possible, it was nothing more than a choice between possible remedies derived from a time when it was not permitted to combine them or to pursue them in the alternative. He further pointed out that the observation of Holt C.J. in Lamine v. Dorrell (1705) 12 Digest 562 was the first judicial reference which he was able to find as to the effect of success in pursuing one form of action in barring proceedings under the other and from it the reasonable inference to be drawn was that the commencement of an action in one form did not bar the possibility of recovery under another form of action. Even against the same party the bar only arise, at earliest, on recovering judgment.

Viscount Simon L.C. concluded his historical synopsis, in these words at pp. 29-30:

> "If, under the old forms of procedure, the mere bringing of an action, while waiving the tort, did not constitute a bar to a further action based on the tort, still less could such a result be held to follow after the Common Law Procedure Act, 1852 and the Judicature Act, 1875, for it is now possible to combine in a single writ a claim based on tort with a claim based on assumpsit, and it follows inevitably that the making of the one claim cannot amount to an election which bars the making of the other. No doubt, if the plaintiff proved the necessary facts, he could be required to elect on which of his alternative causes of action he would take judgment but that has nothing to do with the unfounded contention that election arises when the writ is issued. There is nothing conclusive about the form in which the writ is issued or about the claims made in the statement of claim. A plaintiff may at anytime before judgment be permitted to amend. ..... At some stage of the proceedings, the plaintiff must elect which remedy he will have. There is, however, no reason of principle, or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment."

Lord Atkin in his contribution distinguished between election in relation to inconsistent rights as in Scarf v. Jardine (supra) and election in relation to choice of remedies in order to establish that the mere issuing of a writ or otherwise instituting a claim seeking a particular remedy alternative to some other remedy do not, per se, constitute an election. At pages 37 - 38 he said:

"Concurrently with the decisions as to waiver of tort, there is to be found a supposed application of election and the allegation is sometimes to be found that the plaintiff elected to waive the tort. It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights. As far as remedies are concerned from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one, you could not claim on the other. Real actions have long disappeared, and subject to the difficulty of including the causes of action in one writ, which has also now disappeared, there has not been, and there certainly is not now, any compulsion to choose between alternative remedies. You may put them in the same writ, or you may put one in first and then amend and add or substitute another.

On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which after the first choice, is by reason of the inconsistency, no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal, the right of a landlord whose forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant and the like. To those cases the statement of Lord Blackburn in Scarf v. Jardine at p. 360 applies:

> '.....where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted.' "

"In a latter passage at p. 361 Lord Blackburn speaks of a man choosing between two remedies, but it is plain that he is speaking of remedies in respect of the two inconsistent things as stated above."

> "..... I think therefore, that, on a question of alternative remedies, no question of election arises until one or other claim has been brought to judgment. Up to that stage, the plaintiff may pursue both remedies together, or pursuing one, may amend and pursue the other, but he can take judgment only for the one, and his cause of action on both will then be merged in the one."

In the present case we are dealing with remedies, since Specific Performance and Rescission are equitable remedies. The respondent by her counter-claim chose to pursue the remedy of rescission which was implicit in her claim for the return of her deposit. This, if she was not entitled to claim, would amount to repudiation of contract which the appellant could, but did not accept. Further, in accord with the principles stated by Viscount Simon L.C. and Lord Atkin with which I respectfully agree and adopt, the respondent was entitled to amend her pleading as she in fact did to claim specific performance since she did not, by seeking the earlier remedy which had not proceeded to judgment and/or satisfaction of her claim, commit herself to any final irrevocable election. This ground of appeal accordingly fails for the reasons stated herein.

A further issue before the learned judge was the true construction of the memorandum of sale, in particular the clauses captioned "how payable," "completion" and"condition precedent". This issue arose because by paragraph 4 of the appellant's amended statement of claim it pleaded that:

> "4. The titles to the remainder of the said lots of land are registered in Volumes 997 and 998 of the Register of Titles and on the 26th June, 1964 the Plaintiff delivered to the Defendant Certificates of Title to each of the said lots and a transfer duly executed of all the said lots in favour of the defendant and demanded payment of the balance due in terms of the contract to wit £4,840."

To this paragraph the respondent pleaded that the Certificates of Title and transfer were returned to the appellant without payment of the balance of the purchase price because the appellant was not then entitled to demand payment of the balance of the said purchase price. This was so because it had not discharged all its obligations under the contract, in particular, the obligation to construct the roadways in the subdivision arising from the terms and/or conditions attached to the approval of the subdivision by the Kingston and Saint Andrew Corporation which were incorporated in the contract.

The appellant in reply pleaded that the provisions of the agreement for sale relating to the K.S.A.C.'s approval were uncertain and imposed no valid legal obligation on it.

Before the learned judge, Dr. Barnett's submission in opening the appellant's case, as appears on the record, was as follows:

> "The defendant has sought to rely on the paragraph in the contract headed 'condition precedent'. If the defendant is saying there was no contract at all, or that the existence is suspended until completion of the roads, then quite clearly there is no obligation on either party if the roads are not completed; a claim for specific performance could not be entertained. If defendant is saying that duty to pay balance of purchase money suspended, then it is necessary for the defendant to point to some provision in the contract which so stipulates. In fact the contract contained no such provisions. If the paragraph is given its only reasonable and workable interpretation, then it is clear that the vendors discharged their obligations to apply for approval with reasonable promptitude and the approval was obtained. Hence the purchaser has no justification in treating her objective as not having come into effect. If all the terms and conditions attached to K.S.A.C.'s approval have to be complied with, the agreement becomes unworkable because most of those terms can only be fulfilled by the imposition of restrictive

> "covenants on the transfer to the purchaser or by carrying out of works, and the observance of restrictions either indefinitely, or for periods subsequent to the time contemplated for completion of the contract."

Substantially the same submission was made by him in his final address.

In opening the respondent's case, Mr. Muirhead submitted that the provision for avoiding the contract contained under the rubric "condition precedent" does not arise because approval was given by the K.S.A.C. What the defence was contending was that the obligation to pay, did not arise, because the appellant had not performed those obligations such as construction of roadways in the subdivision which are incorporated in the contract by the "condition precedent" clause. The performance of these obligations was necessary if the appellant was to give possession to the defendant at completion because by the contract, possession and completion are simultaneous and it was at this time that payment of the balance of the purchase price was due.

The learned judge considered the clause providing for the payment for the purchase price and that providing for completion. He correctly in my view concluded that all the provisions in the clause providing for completion save the first sentence, were mere surplusage relating to some provisions for the payment of the purchase price by instalments which had been struck out as not intended to be applicable to this particular contract. Dr. Barnett in this appeal did not pursue with any vigour the complaint based on the learned judge's conclusion that the words were mere surplusage. He properly conceded that such a conclusion was not too important. The learned judge thereafter embarked on an interpretation of the clause headed "condition precedent".

He held that in so far as a condition precedent implied that no contract would come into existence pending the fulfilment of the condition, the caption "condition precedent" truly described only the provision in that captioned clause which stipulated for the securing of approval of the subdivision by the K.S.A.C. and the Water Commission. Since on the evidence, the approval of the K.S.A.C. had been given on February 18, 1955 and it may be inferred that the approval of the Water Commission had also been given, this condition precedent had been fulfilled and a contract had come into existence. As regards the other provisions in the clause, namely, that the sale was also subject to any terms and conditions attached to the approval of the K.S.A.C. these related not to the formation but to the performance of the contract. Some of these terms and conditions bear the attributes of restrictive covenants and the appellant, perspicacious that these latter would be included as terms and conditions of approval, had provided by special condition in the contract for such restrictive covenants forming a schedule to the contract and being incorporated therein. As regards the other terms and conditions which related to the performance of the contract, the learned judge concluded that they had not been performed by the appellant. He had earlier in his judgment adverted to the evidence of Mr. Melvin Dyce, the appellant's witness, who had testified that he knew of the conditions which were attached to residential subdivision approval by the K.S.A.C. Such conditions provided for the roadways being constructed to the satisfaction of the City Engineer and for the aforesaid roadways being thereafter taken over by the K.S.A.C. Such takeover of the roadways by the K.S.A.C. was fundamental to the use by purchasers of the roadways. Further, that though title to the subdivision land

could be issued to the vendor/subdivider before the roadways were constructed and handed over to the K.S.A.C., no transfer of the vendor's title to the purchasers could be effected before the said roadways were constructed and handed over. The learned judge's conclusion on this evidence was that it demonstrated that until the roads had been completed and taken over, the Certificates of Title and executed transfer which had been forwarded to the respondent by the appellant in June 1964, produced no legal effect such as is expected of a transfer because they could not have been registered in the respondent's name.

The learned judge's interpretation of the clauses of the contract resulted in grounds of appeal as hereunder:

> "The learned trial judge erred in law and misdirected himself on the fact in holding that:
>
> 4. The provisions of the contract regarding completion were mere surplusage and should be denied any effect in that such a conclusion cannot result from the established principles for the construction of documents.
>
> 5. The amendments made to the Local Improvements Act rendered the stipulation in the contract that certain of its provisions were condition precedent "manifestly unjust" or the provisions of the Act nullified the specific provisions of the contract, in that the Act merely saved certain illegal contracts from invalidity and had not restricted the right to freedom of contract."

I must confess to having had great difficulty in following and comprehending Dr. Barnett's submission in relation to these grounds. My difficulty stems from the fact that the submissions were not, in particular with regard to ground 5, centred around the grounds of appeal, nor did the submissions show in what respect, if any, the Learned judge strayed from the correct path in construing the contract. Dr. Barnett having correctly

admonished us that a court must construe a document independently of any concession as to its meaning made by the parties thereto, or any view a party may have had of the documents or of any oral variation thereto, thereafter in his written submission in reply to Mr. Muirhead embarked on the very thing which we were admonished not to do namely a consideration of the respondent's construction of the contract namely that the completion of the roads was a condition precedent. He then proceeded to hypothesize on the alternative legal consequences dependent on whether she was right or wrong in her construction. Such an approach while logically leading up to the grounds of appeal based on repudiation and/or election, failed to pinpoint any error of the learned judge, that is to say, whether he was in error in interpreting the provisions under the caption "condition precedent" as comprehending both a provision which was a true condition precedent affecting the formation of the contract, and others which related to the performance of the contract which were incorporated as an integral part of the contract despite the caption, or alternatively whether having correctly interpreted the provisions of the contract including the last mentioned clause, he failed to give the correct legal effect to such construction.

I set out verbatim Dr. Barnett's written submission which must be construed as capsuling his oral submissions in the light of Mr. Muirhead's submission, to demonstrate its departure from the grounds of appeal and from any issue on the failure by the learned judge to make a correct objective and independent construction of the contract.

"A. Contractual Terms

1. The Sales Agreement provided for the payment of two instalments by the purchaser. One on execution and the other on completion. Time was made of the essence of the contract as regards the obligation to pay the purchase money but not as regards the obligations of the vendor. Consequently, on tender of the duplicate certificates of title and registrable transfer, the purchaser was liable for the balance of the purchase price even if she alleged breach by the vendor of any of its obligations. The purchaser's stand was that the completion of the roads was a condition precedent to her liability to pay the balance of the purchase price.

2. If the purchaser was right, then it follows that when the conditions precedent were not performed within a reasonable time the contract fell through and she was entitled to recover her deposit. Aberfoyle Plantations v. Chung. If she was wrong on this point but the vendor was in default in the performance of a condition subsequent of fundamental importance which the learned trial judge found to have been the case, she would have been entitled to claim the return of the deposit, a step which could only be taken on the basis that she was no longer proceeding with the contract of sale.

3. The governing legal principle is expressed by Dixon J, as he then was in McDonald v. Dennys Lascells Ltd (1933) 48 C.L.R. 475 (476-7) and is quoted with approval by Lord Wilberforce in Johnson v. Agnew (1979) 2 W.I.R. 487, at p. 495 F - H in the following terms:

'But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved by the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.'

I have already adverted to the learned judge's construction of the relevant provisions of the contract. I do not perceive where he has erred in his construction. The learned judge, while interpreting the conditions pertaining to the construction of the roadways as conditions relating to performance which are incorporated into the contract, did not expressly or impliedly construe the same as conditions subsequent in the sense of conditions which, if not performed, automatically determined a validly subsisting contract but rather as constituent elements in the performance by the appellant of his contract.. It is also to be noted that no submission was advanced against the respondent in the court below based on any breach by her of her contract by failing to observe and or comply with the stipulation that time was, as against her, though not against the appellant, of the essence of the contract, in regard to payment by her of the purchase price. This has been raised for the first time in the closing submission of Dr. Barnett. The submission is however, in any event, without merit since no firm date was fixed for payment of the balance of the purchase price. In terms of the contract, payment was due on completion which meant "on delivery of title". Delivery of title was properly construed as meaning delivery of a registrable title in favour of the respondent. This could be done only after the roadways had been completed and taken over by K.S.A.C. As on the evidence no registrable title had been delivered, there had been no completion on which date the balance of the purchase price was payable. On this date also there was to be delivery of possession, since completion and possession were concurrent conditions. Grounds 4 & 5, having not in my view either been squarely, properly or seriously addressed, are dismissed as being without merit.

The final issue which was determined by the learned judge related to what Dr. Barnett paraphrased for purposes of his submission as the issue relating to "Remedies and the principle of trusteeship of a vendor under a contract for the sale of land." The learned judge's determination of this issue provides the basis for ground 8 of the appeal.

The learned judge in determing this issue, delivered himself thus:

> "The immediate effect of a binding contract for sale of land is to pass the equitable estate in the land to the purchaser - the legal estate remains in the vendor until conveyance has been executed, but meanwhile equity regards the vendor as a trustee for the purchaser and is prepared to decree specific performance at the instance of the latter: Shaw v. Foster (1872) L.R. 5 H.L. 321; Howard v. Miller (1915) A.C. 318, 326, also 3 Hals. Vol. 14 at paras. 1040-41. In Lysaight vs. Edwards (1876) 2 Ch. D. 499 Jessell, M.R. had this to say: 'The moment you have a valid contract for sale the vendor become in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, inthe absence of express contract as to the time of delivery of possession.'
>
> On this principle, therefore, and assuming, without deciding for the moment the validity of the contract, on the 7th of January, 1955 the defendant Haddad became the owner of the equitable estate in the 50 lots (inclusive of the 44 now in question) and the vendor, the plaintiff, became Haddad's trustee."

Thereafter the learned judge, having considered the effect on subdivision contracts of the Local Improvements Law as amended by Act 36 of 1968, concluded that the contract under consideration was a valid contract and therefore in keeping with the principle earlier enunciated, the respondent obtained an equitable estate at the time the agreement was signed and the appellant became a trustee of the respondent and the former was not entitled to deal with the property in derogation of the latter's right unless the respondent was in default, or the contract had failed for any of the reasons advanced. As the respondent was not in default nor had the contract determined for any of the reasons advanced, the respondent was entitled to the declaration sought that she was entitled to the equitable estate in fee simple in the remainder of the said lots.

Dr. Barnett submitted that the principle stated in Lysaight v. Edwards (supra) on which the learned judge relied was an incomplete statement of the principle and that the complete principle gleaned from the authorities is that stated in Voumard-Sale of Land at pages 97 to 98 where the learned author wrote thus:

> "Upon the signing of a valid and enforceable contract for the sale of land the vendor becomes in equity (and so long as the contract is specifically enforceable he continues to be) a trustee of the land for the purchaser and the beneficial ownership passes to the latter subject to his paying the purchase money. The vendor is, however, until the whole of the purchase money is paid, a trustee in a qualified sense only, for until that time he has still a substantial interest in the property a lien on the property as security for the payment of the purchase money, the right to retain possession (unless the contract otherwise provides) until

> "payment in full of the purchase money, and an active right to protect his interest if anything should be done to endanger it. These results will not flow from the contract if either party is unable to obtain a decree for specific performance by reason for example of the existence of some ground for setting the contract aside, or of delay, or of the vendor's inability to make out a good title, but of course a defective title will be no bar to specific performance if the purchaser has chosen to accept it."

The principle above stated does not differ from that stated in Lysaight's case except by emphasising the fact that the decree of specific performance being an equitable remedy and being discretionary will not be granted, if to do so, would for any good and sufficient reason be unjust to the party against whom the decree is sought. It does not question the correctness of the principle that a valid contract for the sale of land where title exists in the vendor will ordinarily be a proper subject for the decree of specific performance and that in consequence a qualified trustee relation is created between the vendor and the purchaser in relation to the estate contracted to be sold. All that is emphasized in Voumard's Treatise, is that this trustee relation continues subject always to being determined subsequently by a court of Equity in the light of circumstances subsequent to the execution of the contract which would render the enforcement of the trustee relation by a decree of specific performance, unjust and inequitable to the party against whom the decree is sought. The trustee relation being a creature of equity, continues until it is determined by a Court of Equity. Until then, all the incidents of that relation, remain effective.

If I understood Dr. Barnett correctly, part of his submission is that a vendor even under a valid contract for the

sale of land, contrary to being a trustee, albeit a qualified one "eo instanti" with the execution of the contract, is, to the contrary, a person who is only progressing towards that status. He relies for this proposition on Rayner v. Preston (1881) 18 Ch. D. 1, Shaw v. Foster (1872) 42 L.J.C. 49 and Central Trust & Safe Deposit Co. v. Snider (1915) A.C. 266. It is true that in Rayner v. Preston (Supra) which was a decision of the Court of Appeal Brett L.J. doubted whether a relationship of trustee ever exists at any time. At p. 10 he said:

> "It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other."

and at page 11 he continued:

> "Therefore I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other."

Also James L.J. in his judgment at p. 13 said:

> "I agree that it is not accurate to call the relation between vendor and purchaser of an estate under a contract while the contract is 'in fieri' the relation of trustee and 'cestui que trust'. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is 'in fieri'. "

However, neither in the earlier decision of the House of Lords in Shaw v. Foster (1872) (supra) nor the subsequent decision in 1915 of the Privy Council in the Central Trust case (supra) was any doubt expressed as to there being a relation of trustee. What was being emphasized in those cases was that the

the vendor was not a bare trustee who was at the will and direction of the purchaser; he was a trustee with an interest in the subject matter. Further, that the relation could be determined at any time subsequent to its creation by a Court of Equity in which case the parties would be left to their remedies at law.

In Shaw v. Foster (supra) the issue was whether a vendor in a valid contract for the sale of land, could before completion and with notice of assignment by the purchaser of his beneficial interest, dispose of the property in derogation of the interest of the purchaser or the latter's assignee. It is noteworthy that the Solicitor General, Sir George Jessel who subsequently, as Master of the Rolls, stated the principle in Lysaight v. Edwards (supra) in submitting that a vendor could not sell in derogation of the interest of the purchaser or his assignee relied on Daniels v. Davison 16 Ves 249 for his proposition that "if after a contract to sell an estate the vendor sells to another, he is accountable for the money as a trust".

Lord Chelmsford in his judgment at p. 54 said:

> "According to the well known rule in equity, when the contract for sale was signed by the parties, Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase money for Sir William Foster" (emphasis mine)

Lord Cairns at p. 56 said:

> "The contract was a valid contract, the title which the vendor had to make was a good title, and was accepted, and in fact the contract in process of time was duly completed. Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the Purchaser. The vendor was a trustee of the property for the purchaser, the purchaser was the real beneficial owner in the eye of a court of equity of the property subject only to this observation that the vendor whom I have called the trustee was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property ..... the relation therefore of trustee and 'cestui que trust' subsisted subject to the paramount right of the vendor, the trustee, to protect his own interests as vendor of the property".

Lord O'Hagan at page 62 said:

> "The law is clear. It is as Lord St. Leonard has said 'one of the land-marks of the Court - Baldwin v. Belcher - and it ought not to be called into question. By the contract of sale, the vendor, in the view of a Court of Equity disposes of his right over the estate; and on the execution of the contract he becomes constructively a trustee for the vendee ..... This I take to be rudimental doctrine although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee. Thus as it is stated by the Master of the Rolls in Wall v. Bright the vendor is not a mere trustee, he is progressing towards it, and finally becomes such when the money is paid and when he is bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate."

It is clear that what the Master of the Rolls was saying in Wall v. Bright which was adopted by Lord O'Hagan, was that the unpaid vendor progressed from the status of trustee who at the execution of the contract had personal and substantial interest in the property and as such was not a mere dormant trustee to the status of a bare trustee when the purchase money was fully paid and he then had no further personal and/or substantial interest in the property. It does not mean that the relation between a vendor and purchaser under a valid contract for the sale of land was that of a "springing" trustee arising only when the contract comes to be and is decreed to be specifically enforced.

In the Central Trust and Safe Deposit Company v. Snider (supra) the issue was the nature of the interest of a covenantee under a covenant for value to settle land on another. It was held that it was commensurate only with that which a Court of Equity would decree in granting specific performance. In the course of his judgment, Lord Parker of Waddington adverting

to contracts for the sale of land said at p. 272:

> "It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of Equity be enforced specifically. If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was or has ceased to be, a trustee in any sense at all."

This case, with respect, provides no assistance as to the point in time when the relationship of trustee arises. Thus we are left with the decision of the House of Lords in Shaw v. Foster (supra) which unequivocally lays down the principle that the relationship of trustee exists with the execution of the contract though it can be determined by a Court of Equity for reasons which coincidentally justifies the said court in refusing its decree of specific performance.

Submitting further on the issue of trusteeship, Dr. Barnett stated that even if the relation of trustee and beneficiary had existed at the date of the contract, this ceased to be so because, as the learned judge found, the lots subsequently became unidentifiable. Further, the respondent unjustifiably delayed her claim for specific performance. This relief is accordingly no longer available and with its loss, the relationship of trustee ceases. The respondent therefore has no right to have the appellant account to her for the proceeds of sale of the lots sold to the Minister of Housing.

In Lake v. Bayliss & Another (1974) 2 All E.R. 1114, M issued a writ against B claiming specific performance of an alleged agreement whereby B had agreed for valuable consideration to sell certain lands to him. B however sold the land to a third party at a considerable profit before the contract had been completed. The plaintiff who was B's solicitor received the proceeds of sale and took out an interpleader summons for direction as to what he ought to do with the money.

Walton J. in resolving this issue, relied on the judgment of Lord Eldon L.C. in Daniels v. Davison (1809) 16 Ves 249; (1803-13) All E.R. (Rep.) 432 in which the learned Lord Chancellor though not expressly stating that the proceeds must be held in trust for the first purchaser, implied as much. A quote from his judgment, is as follows:

> "My judgment on that point lays out of consideration the question, whether, taking Cole not to be affected with the notice, Davison, the vendor, is to be considered in equity as holding the money derived from the second purchase, viz, the difference between the prices, in trust for the person to whom he had first agreed to sell the estate. The estate by the first contract becoming the property of the vendee, the effect is, that the vendor was seised as a trustee for him, and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust; or should not be considered as selling it for the benefit of that person for whom by the first agreement he became trustee, and therefore liable to account. It is not however necessary to decide that point."

Walton J. continuing his judgment at p. 1114 said, in reference to the above cited judgment:

> "It is perfectly true that Lord Eldon L.C. there puts it in the form of a query, but I think that it is to be understood in the sense that, he would have given, if pressed, the answer to that query that that indeed represented the law.

> "Again the industry of Counsel for Dr. Mullen has found that Sir George Jessel when Solicitor General arguing the leading case of Shaw v. Foster in the House of Lords stated flatly:
>
> 'Daniels v. Davison shews that after a contract for the sale of an estate, if the vendor sells to another person for valuable consideration, he is accountable for the money as a trust.'
>
> In my opinion that is absolutely in line with with authority, and entirely represents the law."

In my view, the question whether a Court of Equity would at the date of trial refuse its decree for Specific Performance to a vendor on the ground of unjustifiable delay or lapse of time in seeking the equitable remedy, or because of the disappearance of lots in a subdivision as a result of the change in the topography resulting in the impracticability of the lots ever being identified as such, pale into insignificance in the face of evidence that prior to the date of trial and/or adjudication by a Court of Equity the land in question had been sold by the vendor to a third party, especially where this fact has been suppressed by the vendor. The critical issue, in my view, in such case, is the status of the parties as at the date when the property was sold. Since at that date, the court had not refused its decree of specific performance, the trustee relation which on the authorities is created on the execution of the contract, remains in full force and effect though contingently liable to be determined at any time thereafter by decree of the court. Such a decree in my view, does not relate back to the date of execution of the contract where there was a valid contract with clear title in the vendor. The effect of refusing the decree would be prospective only. It relieves the vendor of his pre-existing obligation to execute a transfer or otherwise convey the land to the vendee. Only at this point in time, does the

vendor cease to be a trustee of the estate for the purchaser.

Thus the determination by the learned judge that "at this point in time (meaning the date of adjudication) the remedy of Specific Performance is not available to the defendant" for the reasons therein mentioned is not inconsistent with his determination that the respondent was entitled to the equitable estate meaning the equitable estate at the date prior to the adjudication, when the property was sold by the appellant. At that date it was trust property, with all the incidents of a trust. It was sold in breach of the trust and by application of the principle stated in Lake v. Bayliss (supra) the appellant held the proceeds of sale to the Minister of Housing in trust for the respondent.

That such must have been what was meant by the learned judge, he, immediately after saying that "at this point in time Specific Performance is not available to the respondent," proceeded to deliver himself thus:

> "The real situation here is that as trustees for the defendant the plaintiff in an endeavour to oust the defendant's right disposed of the defendant's property and received money to the tune of $124,049.00 ..... Out of the amount received, therefore the plaintiff must account to the defendant for the sum of $114,369"

In this regard, I would respectfully adopt the words of Walton J., in Lake v. Bayliss supra at p. 1118:

> "In my view it would be pessimi exempli (a very bad example) if a vendor was entitled to shed the character of a trustee by a wholly wrongful act on his or her part. Once one has undertaken the role of trustee then it is a role which, unless discharged by some external circumstances, one must carry out to the bitter end if so required by the other party to the contract. The vendor cannot be heard to say that because of her wrongful act in selling the property

> "she never was a trustee. She remained a trustee right down to the moment of resale and accordingly is bound to hold the purchase price as trust property to transfer to the purchaser on the purchaser completing the obligations on the purchaser's part."

Since a trustee can always seek direction from the court in all cases of doubt affecting property held in trust, a vendor under a valid contract of sale who sells without seeking such direction does so at his peril.

For the reasons herein expressed, I would dismiss the appeal and confirm the judgment of the court below.