IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1562/64

BETWEEN	RIVERTON CITY LIMITED	PLAINTIFF
AND	NORMA P. HADDAD	DEFENDANT

Dr. L. Barnett for Plaintiff
David Muirhead, Q.C. and Miss Janet Morgan for the defendant.

Heard: November, 17, 18, 20, 1980; July 13, 14, 15, 1981; and May 4, 1984.

JUDGMENT

WRIGHT J

This case is unusual for many reasons not the least of which are the age of the subject-matter, the length of time that elapsed before action was brought, the delay in bringing the case to trial, the amount and nature of the evidence presented after such a long delay, the very heavy dependence upon argument even in the absence of evidence, the changing postures of the parties before trial and, to top it off, the unfortunate delay in producing this judgment occasioned in part by pressure of work and the mislaying of documents in the interim.

With a view to putting in proper focus the issues that will call for attention it will be useful to have first of all a brief outline of the path which the case has followed up to the time of hearing when the plaintiff's case was largely thrown into the lap of the court without the necessary evidence in certain critical areas.

By its statement of claim dated 29th July, 1964 which bears reference to "N. W. Manley" the plaintiff sought payment of a balance of £4,840 ($9,680) claimed to be due and owing under a contract for the sale of 50 lots in the Riverton City Sub-division in the parish of St. Andrew. This was 9½ years after the signing of the contract. The defendant in her defence and counter-claim filed 1st October, 1965 denied that the plaintiff was entitled to the relief sought and counter-claimed

(a) £71.40 ($142.40) being costs of investigating plaintiff's title;

(b) Refund of the amount of £2,200 ($4,400) deposit paid together with interest;

(c) Damages.

In its Reply dated 14th January, 1966 , the plaintiff joined issue with the defendant in respect of her defence and in further answer pleaded that -

para 2. - "Since the making of the contract on 7th January, 1955, it has become impossible to complete the roadways by reason of the fact that the plaintiff was notified on 28th April 1961 by the Government of Jamaica, acting under the Flood Water Control Law, Law 25 of 1958 that an area of land which embraces part of the sub-division of Riverton City might be required for the purposes of the Sandy Gully Flood Water Control Scheme. Consequent on the said notice the plaintiff cannot proceed further with the roadways of the sub-division until the lands involved are released from the operative effect of the aforesaid notice".

para 3. - "As to the counter-claim the plaintiff says that it discloses no cause of action or claim against the plaintiff".

para 4. - "The Plaintiff has always been ready and willing to complete the road but it has been impossible to do so having regard to the matters set out in paragraph 2 hereof".

para 5. - "The defendant is not entitled to make a claim on the basis that the contract has been discharged because the defendant up to the time when action was brought by the plaintiff had refused to treat the contract as at an end and has continuously demanded that the roadways be completed".

para 6. - "In any event the defendant having affirmed the contract by selling six of the lots set out in paragraph 4 of the Statement of Claim cannot now treat the contract as discharged and at an end".

I make the observation that the intention by Government mentioned in paragraph 2 and said to be of a temporary nature arose six years after the signing of the contract and was being raised as a shield eleven years thereafter. It is only fair to the parties to disclose that these passing years had witnessed,to a great degree,the exchange of letters between the opposing firms of lawyers. And so did the next 9½ years up to 17/7/75 when the plaintiff filed notice that -

> "The plaintiff will proceed no further in this action and hereby withdraws from the same".

The defendant's response came almost one year later when on 25/5/76 the defendant filed notice of intention to proceed. Thus goaded into action the plaintiff on 11/1/76 filed a Summons seeking leave to amend its pleadings. The application was heard and indeed rather substantial

amendments were granted on 7/7/76. Subsequently an amended Reply and Defence to counter-claim was filed on 13/7/76. The consequence of all this flurry was an amended Defence and Counter-claim which was filed on 9/2/77 to match the scope of the plaintiff's amendments. It took another 2 years to produce another amended Reply and Defence to Counter-claim on 22/3/78. It will be necessary in due course to refer to these amended pleadings to show how the parties shifted their stances.

But another two years and more elapsed before the case eventually came to trial on 17/11/80 - over 25 years from the signing of the contract. To say that speed was not the order of the day would be a gross understatement.

In the meantime while the letters passed in abundance between the lawyers - 25 such letters have been brought to the court's attention - the defendant, from as early as 29/1/64 before action was filed, had sought to reinforce her position by lodging a Caveat against the titles to the lots in question and this remained undischarged pending the hearing of the action.

Having regard to the submissions made on the contract it is advisable to set it out in full so that its terms may the better be appreciated. The contract reads:

MEMORANDUM OF SALE

MEMORANDUM OF SALE AND PURCHASE made this 7th day of JANUARY, 1955.

VENDORS: RIVERTON CITY LIMITED, a Company duly incorporated under the Company's Law with registered offices at 52 Duke Street, Kingston, Jamaica, B.W.I.

PURCHASER: NORMA PEARL HADDAD wife of BADIA SHUKRELLA HADDAD of 25 Windsor Avenue, Liguanea.

PROPERTY SOLD: See Schedule 2 on back hereof. part of Riverton City formerly Waterhouse as shown on the Plan prepared by C. H. Chang and K. W. Jobson, Commissioned Land Surveyors, dated 1st December, 1954.

SALE PRICE AGREED: EIGHT THOUSAND POUNDS (£8,000)

HOW 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) ~~Upon the Plan being approved by the K.S.A.G.--$~~

(3) ~~On the 1st day of each calendar month subsequent to the date of approval of the Plan by the K.S.A.G.--$ until a total sum of $---------- has been paid.~~

The balance of the purchase money shall then become due and payable by the Purchaser to the Vendor who will, if required in writing by the Purchaser permit such balance to remain on First Mortgage to them. The mortgage shall contain such usual covenants as the Vendors shall require, and shall include the following terms:-

(a) The mortgage shall be for a period of years.

(b) The rate of interest shall be per centum per annum payable monthly.

(c) There shall be a sinking fund of $ per month.

The cost of and incident to such mortgage shall be borne by the Purchaser.

POSSESSION: ~~On completion being passed by the K.S.A.G. and upon payment of at least one third of the total purchase price. Purchaser to pay interest on the unpaid balance thereafter at per centum per annum.--Interest reducible upon payment of each $50.~~

EMCUMBRANCES & RESERVATIONS: Subject to the restrictive covenants set out in the Schedule overleaf and to the Special Conditions mentioned below.

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 re-take possession of the said land and/or to re-sell 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 re-sale but any increase in price on any subsequent sale shall be retained by the Vendors.

CARRIAGE OF SALE: Messrs. Dayes & Rickards, Solicitors. 56½ Duke Street, Kingston.

TAXES: To be paid by the Purchaser as from the date of possession.

COSTS OF TITLE: The Purchaser shall pay to the Vendors half their Solicitor's costs according to the Scale of fee of the Jamaica Law Society, half stamp duty and registration fees on the Transfer and half cash fees incident to issuing new Title in the name of the Purchaser.

SPECIAL CONDITIONS: The Vendors or their successors in title shall not be deemed to have entered into any covenants in respect of the remaining lots or any part thereof similar to the covenants printed hereon and shall not be required to impose similar or any covenants on any sale or other disposition of the remaining lots or any part of the lands comprised in Certificate of Title registered at Volume 131 Folio 47.

CONDITION PRECEDENT: The sale is subject to the approval of the Kingston and St. Andrew Corporation and the Water Commission to the sub-division 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 sub-division 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 sub-division 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.

RIVERTON CITY LIMITED

per: _____ WITNESS: _____

C.D. ALEXANDER
Authorised Agent

PURCHASER: _____ WITNESS: _____

SCHEDULE REFERRED TO OVERLEAF

The land sold (hereinafter called "the said land") is subject to the undermentioned restrictive covenants which shall run with the land and shall bind as well the Transferee his heirs personal representatives and transferees as the registered proprietor for the time being of the said land his heirs personal representatives and transferees and shall enure to the benefit of and be enforceable by the registered proprietor for the time being of the land or any portion thereof now or formerly comprised in the Certificate of Title registered as aforesaid at Volume 131 Folio 47.

1. There shall be no sub-division of the said land.

2. The Vendors shall not at any time be liable for any part of the cost of any fence dividing the said land from other lands of the Vendors.

3. Water closets and septic or absorption pits for the purpose of receiving sewerage and sullage water shall be erected on the said land in accordance with the regulations of the Public Sanitary Authorities and shall thereafter be maintained in good order and condition by the registered proprietor.

4. No bath water or water for domestic purpose in respect of the said land or any part thereof or any water except storm water shall be permitted or allowed to flow from the said land or any part thereof on any portion of the land now or formerly comprised in Certificate of Title registered at Volume 131 Folio 47 or on to any road, street or land adjacent to the said land but all such water as aforesaid shall be disposed of by being run into an absorption pit or pits or by evaporation or percolation on the said land.

5. No fence hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted to be within fifteen feet of any road intersection and the Road Authority shall have the right to enter upon the said land and to clean repair improve and maintain all or any of the drains gullies or water courses which may be thereon and remove cut trim any fence hedge or other construction and any tree, plant which may be erected placed or grown upon the said land in contravention of this restrictive covenant without liability for any loss or damage thence arising and the Transferees shall pay to the Road Authority the cost incurred by reason of the matters aforesaid.

6. The Transferee of the said land shall not in any manner restrict or interfere with the discharge of storm water from the road on the said land and the Road Authorities shall not under any circumstances be liable to the owner or occupier of the land for any damage occasioned by storm water flowing off the roadways.

7. If the Water Commission or the Jamaica Public Service Co., or the Telephone Company shall require or approve of a rising or other main or light, power or telephone lines through or across the said lot the Transferee will grant a way leave in the form usually required by that body.

8. No building other than a private dwelling house with appropriate out-buildings thereto shall be erected on the said land. The value of such dwellinghouse, land, out-buildings, shall in the aggregate be not less than £500 (FIVE HUNDRED POUNDS). No building erected on the said land shall be used for the purpose of a shop, school, chapel or Church and no trade or business whatsoever shall be carried on upon the said land or any part thereof.

It will immediately be observed that this was a standard form which was amended for the purpose of this particular transaction but without scrupulous care being taken to ensure that the terms were tailored to the circumstances of this sale as witness the following:

> The provision relating to payment of the balance of the purchase money is clear and unequivocal i.e. 'Balance on delivery of title'. However, it is plain to be seen that the provisions under the heading ' 'Completion' contradict this prior provision.

There was much argument based on the "condition precedent" in the contract and I shall return to deal with this aspect of the case at a later stage.

The defendant paid the required amount on signing the contract and awaited the due progress of the normal incidents of such a sale but most of what eventuated can better be termed abnormal.

As it appears from the undated notification of approval by the Building Committee of the K.S.A.C. which was subject to the approval of

Insert after '8' -

9. No building erected on the said land shall be used for the purpose of a shop, school, chapel or Church and no trade or business whatsoever shall be carried on upon the said land or any part thereof.

SCHEDULE 2.

Property sold:

Lots Nos. 4 to 16 inclusive Block 35 Section C:
" " 40 to 48 inclusive Block 34 Section C:
" " 1 to 15 inclusive Block 30 Section C:
" " 41 to 53 inclusive Block 24 Section C.

the Town Planning Committee on the 5th January, 1955, Patrick W. Chung on behalf of the plaintiffs apparently in keeping with the 'condition precedent' applied for sub-division approval which was granted on 18th February, 1955. The approval involved modification of the application eg. certain lots were designated as commercial lots which were to be so indicated on the plans for the information of intending purchasers. Such approval was under the provisions of the Local Improvements Law, Chapter 227 of the Revised Laws of Jamaica which will later be considered as they affect the validity of contracts entered into prior to the grant of sub-division approval by the appropriate authorities.

There was tendered in evidence as exhibit 8 a letter dated 20th October, 1956 addressed to Mrs. Norma P. Haddad from the plaintiff's solicitors advising that transfer to her had been prepared and that arrangements should be made to pay the balance of £5,612.2.2 at the time of signing by her. It appears that this letter was intended not for the addressee but for Mr. Badia S. Haddad, the addressee's husband, as the reply (Ex. 9) dated 23rd October, 1956 shows. It reads:

> Dear Sirs,
>
> We have been consulted by Mr. Badia S. Haddad with respect to your letter dated 20th October, 1956.
>
> If you forward us transfer we will have our client execute same. We would, however, point out to you that the balance of Purchase Money is only payable on delivery of Title, and further that the sale is also subject to "any terms and conditions attached to the approval of the Kingston & St. Andrew Corporation to the sub-division" which terms we are instructed include -
>
> (a) The completion of water mains and handing over;
>
> (b) The construction of roads etc.
>
> Our clients naturally will pay when Title is delivered and the terms of the approval of the Kingston & St. Andrew Corporation have been complied with.
>
> We write you early so that you may fully appreciate that our clients do not intend to pay the balance of purchase money on the execution of their transfer but in due terms of their Agreement herein.
>
> Yours very truly,

It is apparent that terms in the contract of Mr. Haddad are identical to the terms in Mrs. Haddad's contract. The stand disclosed in this letter is the stand adopted by the defendant. The response (Ex. 10) dated 6th November, 1976 must be seen as a capitulation to the stand taken by Mr. Haddad as well. That reply is as follows:

> Re: Riverton City Ltd. to
> Elias A. Haddad
> Badia S. Haddad
> Norma P. Haddad
>
> We have your letters of the 23rd ultimo herein.
>
> We are prepared to permit payment of the balances due by your clients to remain in abeyance until the roads are completed. In the meantime, we would suggest that the Transfers be executed, and we will have them registered and the Certificates of Title issued in the names of your respective clients, provided that you let us have your undertaking to complete the purchase of the lots on production of the Certificates of Title, and on our being able to satisfy you that the roads have been duly taken over by the Corporation.
>
> Yours faithfully,
>
> DAYES, RICKARDS & NASH

The reaction as per letter dated 7th December, 1976 (Ex. 11) is self explanatory. It is as follows:

> Re Riverton City - Haddad
>
> "We acknowledge receipt of your letter of 8th November, 1955.
>
> We note that you are prepared to permit payment of the balance due by our clients to remain in abeyance until the roads are completed.
>
> We can assure you that our clients are well able to complete these transactions in due course. If you desire, you can at any time send us the necessary Transfers which we will request our clients to execute.
>
> Yours very truly, "

As of this latter date therefore the position was that -

(a) the defendant would not be required to pay the balance of the purchase money until the roads were duly completed and taken over by the K.S.A.C.

(b) the defendant would execute the transfers.

(c) the plaintiff would have the transfers registered and Certificates of Title issued in the name of the defendant.

(d) the defendant would complete the purchase of the lots when (a) and (c) (supra) were fulfilled.

However, it appears from the material before the court that 2½ years were to pass before anything significant was to happen. What happened had not been planned for. The Government of the day was preparing to undertake the Sandy Gully Drainage Scheme and pursuant thereto sought to acquire by purchase or compulsory acquisition lots 1, 2, 3, 4, 5 and 6 of Block 30, Riverton City Ltd. The lots were sold and duly transferred to the Chief Secretary of Jamaica on the 16th November, 1959 . The parties to the Transfer were Riverton City Ltd., Norma P. Haddad and the Chief Secretary of Jamaica. A handsome profit was made but Riverton City Ltd. got no more than the outstanding balance due on those 6 lots. The profit went to Norma P. Haddad, thus confirming the understanding of the parties at that date that Norma P. Haddad was entitled to the beneficial interest in the lots.

But in derogation of the position as set out in Exhibit 10 (supra) the plaintiff subsequently sought to rely on this event as demonstrating that the defendant had accepted titles to these lots without the fulfilment of the agreed conditions and so she could no longer contend that the fulfilment of those conditions was a pre-requisite to the payment of the balance of the purchase money. But the fallacy of his contention is patent. The sub-division was a residential one. The 6 lots would no longer be part of that sub-division but would be converted into a gully course. Hence, the requirements for residence would no longer apply.

On the 28th day of April, 1961, over 6 years from the signing of the contract between the plaintiff and the defendant and just over 17 months from the sale and transfer of the 6 lots Mr. E. A. Ffolkes on behalf of the Permanent Secretary, Ministry of Communications and Works addressed P. W. Chung as follows:

> Sir,
>
> I am directed by the Permanent Secretary to enclose for your information a plan, as requested, showing in relation to Riverton City the land reservations (bordered red) for the Sandy Gully Channel and secondary drainage channel A. The

lands within the land reservations are those required for the permanent works and may be fenced on completion of the works.

By virtue of the powers conferred under the Flood -water Control Law, 1958, the undertakers of the Scheme have declared the areas extending to 200' on each side of the land reservations (i.e. the areas bordered green and hatched in blue on the enclosed plan) to be the flood-water control area for the Scheme. This means briefly that the undertakers may utilise the lands indicated by the hatched areas for the construction of the works etc. as defined by the Flood water Control Law and so any development which you are intending to undertake should not encroach upon this area pending the completion of the works.

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.

I am, Sir,
Your Obedient Servant,

E. A. Ffolkes

The point of note here is that whatever embarrassment the Riverton City development may suffer was seen as only of a temporary nature and capable of being remedied. On the contrary, however, the plaintiff has sought to place rather heavy reliance on this intervention and to regard it as a frustrating event exonerating it from compliance with its contract obligations. But more of this anon.

The evidence presented does not reveal how far the development had proceeded with reference to the defendant's lots but it is obvious that some work had been done on the sub-division. Letter dated 22/12/61 from the K.S.A.C. to Patrick W. Chung, reveals the condition regarding the roadways then being constructed. I set it out in full:

Sir,

Re: Roadways Riverton City west of Trelawny Avenue.

Referring to previous correspondence in regard to the above, I have to inform you that the City Engineer reports that the following roadways have been satisfactorily constructed and may now be taken over. Consequently, I am directed by His Worship the Mayor to state that the roadways have been accepted and will be placed on the schedule of Parochial Roads by resolution of the Roads and Works

Committee at its next meeting:

Riverton Boulevard from Spanish Town Road
Westbrook Avenue
The Mall
Riverton Crescent
Lakeland Avenue
Clyde Avenue
Westmoreland Avenue
Times Square
Westport Avenue
Belmore Crescent
Belmore Avenue
Surrey Avenue
Bybrook Crescent
Portland Avenue
Tiverton Drive
Brighton Avenue
Newton Road
Statham Avenue
Portlawn Drive
Seabrook Road
Seabrook Crescent
Brentwood Avenue
Trelawny Avenue
The Parkway

I am, Sir,
Your obedient servant,

ACTING TOWN CLERK

At the time of hearing the evidence revealed that many roads in the sub-division no longer appeared as such having been covered over with marl as a result of reclamation works by Government or with mud from flooding. I shall have to return to deal with the implications of the change in the topography.

In the early stages of the transaction the defendant was represented by Messrs. Samuel & Samuel, Solicitors, but there was a change to Messrs. Milholland, Ashenheim & Stone to whom was addressed the following letter dated 25th November, 1963 -

Dear Sirs,

Re: Lots 4 - 16 Block 35, Lots 40 - 48
Block 34, Lots 7 - 15 Block 30 and
Lots 41 - 53 Block 24, Riverton
City Limited.

Titles to the above lots which Mrs. Norma P. Haddad had agreed to purchase from Riverton City are now available, and the balance purchase money of £4,840.00 is therefore now payable.

We presume that you will be acting for Mrs. Norma Haddad in this matter, and if so, we should be

glad to hear from you as soon as possible. "

Yours faithfully,

This letter makes it clear that five years after the sale of the 6 lots to the Government and over two years after the notification of the effect upon the sub-division of the Sandy Gully Scheme the plaintiff still recognised the defendant's entitlement to the remaining 44 lots and in purported compliance with the Contract of Sale was offering to hand over the titles in exchange for the balance of the purchase money. But there was to be no easy passage. Two more letters dated 6/12/63 and 7/1/64 were to pass between the firms of solicitors before the defendants stand, from which she has not resiled, was to be stated with unmistaken clarity. In a letter dated 7/1/64 - 9 years after the sale agreement had been signed - the defendant's solicitors wrote in reply to Messrs. Clinton Hart & Co. who were then representing the plaintiff as follows:

Dear Sirs,

Re: Lots 4 - 16 Block 35; Lots 40 - 48 Block 34; Lots 7 - 15 Block 30; and Lots 41 - 53 Block 24 - Riverton City Ltd. - Your Ref. KC/pr.

"

We acknowledge receipt of your letters dated the 25th November last and 6th December last and are instructed that all the roads and services in the abovementioned sections of Riverton City Subdivision have not been completed and that the various terms and conditions attached to the approval given by the Kingston & St. Andrew Corporation and the Water Commission have not been fulfilled. "

Yours faithfully,

The pace was now quickening. To meet the defendant's challenge, the Plaintiff's solicitors took refuge in the terms of the contract and replied the very next day. The relevant portion of the reply reads:

"We would point out, however, that the Contract clearly states that the balance purchase money is payable on delivery of titles. The titles are now available, and the balance purchase money is therefore due.

We are somewhat surprised that the matter of the

terms and conditions attached to the approval given by the Kingston & St. Andrew Corporation should again be raised. We thought this matter had been conclusively settled in relation to Mr. B. S. Haddad.

Our instructions are, therefore, that unless the balance purchase money is paid to us by the end of this month, we are to file suit without further notice. "

Letter writing on this matter almost became a pre-occupation of the opposing firms of solicitors up to 7/2/64 when the defendant's solicitors wrote -

" The Contract of Sale with our client states quite specifically that as a condition precedent the sale is subject to any terms and conditions attached to the approval of the Kingston & St. Andrew Corporation and the Water Commission. We are instructed that these terms and conditions have not been carried out by your clients and although we have previously written you to this effect, we observe that your letter of the 8th ultimo in no way contradicts our instructions.

We cannot see how the matter relating to Mr. B. S. Haddad has anything to do with the present situation as Mr. Haddad was prepared to complete his sale only because he had made a very profitable resale of the majority of his lots. In any event, we are instructed that the roads and services adjoining Mr. B. S. Haddad's lots were completed but that they have not been completed in the section of the sub-division containing the lots agreed to be purchased by Mrs. Norma Haddad.

In any event, it would appear that our client is clearly under no obligation to complete the sale until your clients have fully complied with the conditions precedent in the agreement and completed all the roads and services required by the sub-division approval and fully complied with all the terms and conditions attached to such approval.

Accordingly, any action which your clients may file will be defended. "

Attitudes were hardening as is clear from the response dated 2/3/64 which reads:

Dear Sirs,

Re: Riverton City Limited and Mrs. Norma P. Haddad

We do not wish to enter into lengthy correspondence in this matter as we are quite satisfied that our client has complied with the terms of the Contract and the balance purchase money is now payable.

We are however instructed to give you a further

seven days to send us a cheque to close this matter. Our client has a firm offer for the sale of three of the lots, and if your client persists in this delay so that the sale is lost, then this will naturally be a subject of a claim for special damages.

We think it is relevant to mention that although your client considers that the purchase money is now not due, she was prepared to accept titles to six lots forming part of the same contract when she was in a position to sub-sell. "

The reply dated 9/3/64 re-stated the defendant's position denying the plaintiff's claim to the balance of the purchase money at that stage, indicated that counsel's opinion was being sought, pleaded for time to obtain same and finally pointed out that the defendant really did not have much of a choice about the condition in which the 6 lots had been sold because the Government had intended to acquire the lots compulsorily.

The next letter dated 11/3/64 makes it quite clear that tempers were peaking and nearing the crest. The plaintiff's solicitors wrote:-

Dear Sirs,

Re: Riverton City Limited and Mrs. Norma P. Haddad. Your reference ECA/pr

We acknowledge receipt of your letter of 9th instant and note the remarks in the first paragraph of your letter under reply and in particular, "that the balance of the purchase money is certainly not now payable."

Our client has extended a great deal of latitude to your client who has in fact requested and received titles for lots which she has sub-sold, but is apparently taking up the position that our client has not performed what you allege to be "a condition precedent" in the Contract with regard to lots for which she does not at the moment wish to pay the balance of purchase money due thereon.

You stated in your letter of 7th ultimo, "the Contract of sale with our client states quite specifically that as a condition precedent the sale is subject to any terms and conditions attached to the approval of the Kingston and Saint Andrew Corporation and the Water Commission". Pursuant thereto, we hereby give you formal notice that your client is put to her election, either of treating the Contract as at an end for the allege breach, or of treating the Contract as being open for further performance.

As you were notified that the titles were available for delivery to your client and the balance of purchase money was requested from as far back as 25th November, 1963,

> we regret that our client is unable to accede to the request contained in the second paragraph of your letter under reply particularly as the circumstances have been explained to you in the past.
>
> Your client is required to notify us of her election within seven days from the date hereof as to which time is made of the essence, failing which our client will take such further action as it may be advised".

Counsel's opinion was received and duly communicated to the plaintiff's solicitors by letter dated 15/6/64 as follows:

> "We have received Counsel's opinion in this matter and Counsel advises that your client should fulfil their obligations under the contract and that our client has a good defence to any action which your client may bring."

Whether the next step by the plaintiff was in any way dictated by counsel's opinion or was a reflection of the plaintiff's previously stated understanding of the matter it is difficult to say. However, that step was to forward by letter dated 26/6/64 the titles to the 44 lots together with the relevant Transfer in favour of the defendant with a threat to sue if the balance of the purchase money was not paid within 7 days. These enclosures were promptly returned and the defendants position re-inforced by Counsel's opinion re-stated.

The result was predictable. The opposing contentions had to be tested. It seemed that the options had run out. Action was filed. The Statement of Claim is dated 29/7/64.

> Paragraph 1 claims the sum of £4,840 as due and owing by the defendant to the plaintiff.
>
> Paragraph 2 recites the fact of the contract in writing for the sale of the 50 lots for a total price of £8,000.
>
> Paragraph 3 sets out the contract provision for payment of the purchase price viz. "on signing £2,500 balance on delivery of title".
>
> Paragraph 4 refers to the sale of the 6 lots to the Chief Secretary and the payment by the defendant of the balance of the purchase price of £660 due on those lots.
>
> Paragraph 5 recites the delivery of the titles to the remaining lots and the demand for payment of the balance of the purchase price.
>
> Paragraph 6 lists the lots by number and
>
> Paragraph 7 states that
>
> > "The Defendant has failed and neglected and refused to pay the amount due to the plaintiff".

Having regard to the thorny history of this transaction the draftsman may well have expected a commendation for so simplyfying matters. But this is not the Statement of Claim on which the case came to trial. It was thought necessary to amend this uncomplicated and straight-forward Statement of Claim 12 years later, namely on 13/7/76, by which time a new generation of lawyers had come on the scene. But the defendant had not been slow in taking up the cudgel. On 14/1/65 Defence and Counter-claim was filed and it is in this document that one finds a more faithful dealing with the events that had filled the intervening 10 years.

The plaintiff's claim to relief was denied as well as the purported compliance with the provisions of the contract for Sale. Then at paragraph 5 the Defence began to sink its teeth:

" Paragraph 5 - The defendant says that it was a term of the contract of sale that the sale was subject to any terms and conditions attached to any approval given by the Kingston & St. Andrew Corporation in respect of the plans of the sub-division of which the said lots formed a part. It was a term and/or condition of the approval of the said plans given by the Kingston & St. Andrew Corporation 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 Plaintiffs have failed to construct the said roadways as required by the Kingston & St. Andrew Corporation and the said roadways have not been taken over by the Corporation.

" Paragraph 6 - The Defendant says also that the Local Improvements Law (Cap. 227) imposed on the plaintiffs as persons sub-dividing land for the purpose of building thereon and/or of sale the obligation to construct the aforesaid roadways in accordance with the specifications, plans and sections (if any) deposited by the Plaintiffs with the Kingston & St. Andrew Corporation and that it was an implied term of the contract of sale between the Plaintiffs and the Defendant that the Plaintiffs would construct the said roadways as aforesaid. The Plaintiffs have failed to construct the said roadways in accordance with the said specifications, plans and sections.

" Paragraph 7 - The Defendant says further that it is an invariable, certain and general usage and/or custom in Jamaica where land in a sub-division is sold that the vendor shall be under an obligation to the purchaser to construct the roadways shown on the plans of the sub-division and that it was an implied term of the contract between the Plaintiffs and the Defendant that the Plaintiffs would construct the aforesaid roadways as shown on the said plans. The Plaintiffs have failed to construct the said roadways as shown on the plans of the sub-division.

" Paragraph 8 - As regards paragraph 4 of the Statement of Claim the Defendant says that the contract of sale of the said 50 lots was severable in relation to the several lots and that the transaction referred to in the said paragraph in no way affected and was never understood by either the Plaintiffs or the Defendant to affect the obligations of the Plaintiffs to the Defendant in relation to the remaining lots.

"Paragraph 9 - Alternatively, the Defendant says that the effect of the transaction referred to in paragraph 4 of the Statement of Claim was to vary the contract for the sale of the said 50 lots by agreement between the Plaintiffs and the Defendant so as to exclude from the said contract the Lots the subject of the said transaction but without affecting the obligations of the Plaintiffs to the Defendant in relation to the remaining lots. "

In paragraph 13 the defendant counter-claims for the reliefs already mentioned.

A full year was to expire before a Reply and Defence to Counter-claim was filed. This has already been adverted to.

On the said day, 14/1/66 Further and Better Particulars of the notification under the Flood Water Control Scheme were required. These were supplied on 25/1/66. It is apparent that the defence solicitors were either not aware of the notification or were just forcing it out into the open so they could for themselves determine whether it had the claimed effect.

The case came on for trial eventually on the pleadings as finally amended. As to the Amended Statement of Claim it faithfully recited the original Statement of Claim and added as paragraph 7 the reply dated 14/1/66 already set out. It then crystallised the Plaintiffs claim thus:

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 dimunition or extinction of the defendants right (if any) to refund the amounts paid under the said contract of his claim being the expenses incurred by the plaintiff before the said contract was discharged by frustration.

5. Further or other relief.

Paragraphs 1 - 12 of the Amended Defence and Counter-claim dated 8/3/78 substantially repeat what had been pleaded in the Defence and Counter-claim filed thirteen years earlier on 14/1/65. The remaining

paragraphs are as follows:-

" 13. The Defendant denies that the remainder of the said lots were embraced, affected or required for the purposes of the Sandy Gully Flood Water Control Scheme as alleged in paragraph 7 of the Amended Statement of Claim or at all and further denies that the remainder of the said lots are or have been involved in the operative effect of the alleged or any notice under the Flood Water Control Act as set out in paragraph 7 of the Amended Statement of Claim or at all.

14. The Defendant says that in any event the equitable estate in all the lots subject to said contract of sale was from the 7th day of January 1955 vested in the Defendant, thus rendering the contract incapable of being frustrated as alleged in the Amended Statement of Claim.

15. The Defendant has at all times been ready, willing and able to complete the sale of the remainder of the said lots on fulfillment by the Plaintiffs of their obligations under the said contract or alternatively on the plaintiffs reducing the balance purchase price payable by the Defendant by an amount commensurate with the costs of the Defendant herself constructing the said roadways.

16. In the premises the Defendant says that the plaintiffs are not entitled to the relief claimed or to any relief.

17. Exeept as herein appears the Defendant denies each and every allegation in the Amended Statement of Claim as if the same were set out herein separately and traversed seriatim.

COUNTERCLAIM

18. By way of Counterclaim the Defendant repeats paragraph 1 - 16 hereof.

19. On or about the 30th day of January 1964 the Defendant lodged a caveat against dealing with the lands subject to the contract of sale.

20. On or about the 20th day of November 1975 the Defendant receiveed a notice dated 17th day of November 1975 from the egistrar of Titles indicating that the plaintiffs had applied for registration of transfer of title to the Minister of Housing in respect of the lots and would proceed to register the transfer unless precluded by an Order of a Judge.

21. The Defendant further says that the said transfer to the Minister of Housing is in breach of the said contract of sale.

22. The plaintiffs threaten unless restrained to proceed with the said transfer to the Minister of Housing.

23. The costs of investigating the plaintiff's title and the other expenses incurred by the Defendant is or about the said purchase together amount to £71.4.0. ($142.40).

AND THE DEFENDANT COUNTERCLAIMS

1. A declaration that the Defendant is entitled to the equitable estate in fee simple in the remainder of the said lots.

2. Specific performance of the said contract of sale.

3. Damages in addition to specific performance.

4. An injunction to restrain the plaintiffs, by their servants or agents or otherwise whomsoever from transferring the remainder of the said lots to the Minister of Housing or at all.

In the alternative to (2) (3) and (4) hereof.

5. Damages for breach of contract.

6. An account of all monies and/or benefits received by the plaintiffs from the Minister of Housing in respect of the said transfer of the land.

7. A declaration that all such monies and/or benefits are received by the plaintiffs as trustees for the Defendant.

8. An account of what is due from the plaintiffs as trustees to the Defendant.

9. An order for payment by the plaintiffs to the defendant of all sums found due upon the taking of such accounts.

In the alternative to (1) to (9) hereof.

10. Repayment of the deposit of £50 paid on each of the forty four remaining lots, being a total amount of £2,200 ($4,400.00) together with interest thereon at the rate of 6 per cent per annum from the 7th day of January, 1955.

11. Damages for breach of contract

12. A liem on the said lots for the said deposits to the plaintiffs together with interest thereon and costs.

In any event

13. Costs.

14. Further or other relief.

An Amended Reply and Defence to Counter-claim filed 13/7/76 was abandoned in favour of one dated 22/7/78 which reads:

REPLY

1. Save that the same consists of admissions, the Plaintiff joins issue with the Defendant in respect of the Defence.

2. In particular the plaintiff says that the approval granted by the K.S.A.C. was in respect of a composite scheme, which by virtue of the Sandy Gully Flood Water Scheme cannot be implemented in compliance with the terms of the application for approval or the approval itself.

3. The provision of the Agreement for Sale relating to the K.S.A.C. approval is uncertain and imposes no valid legal obligation on the Plaintiff.

4. The Defendant repudiated the agreement and cannot now seek to affirm it.

DEFENCE TO COUNTER CLAIM

5. The Plaintiff avers that the K.S.A.C. approval fixed no time within which its conditions should be complied with but left it to the discretion of the Plaintiff. In the circumstances which arose any attempt to complete the roadways would have been unreasonable and when the defendant repudiated the agreement, she terminated any obligation which the Plaintiff might have had to do so.

6. But for the matters aforesaid the Plaintiff was always ready and willing to complete the roads.

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.

The changing positions of the parties over the intervening years, have I hope been sufficiently documented to facilitate the focus of attention thereon.

But before considering the legal implications of the various changes and the claims based thereon it is necessary to document another set of factors which speaks not only of change but of reeking decay.

On 8/8/75 almost a year before the plaintiffs amended Statement of Claim was filed the plaintiffs entered into a contract with the Minister of Housing for the sale of the remaining 44 lots over which the parties were wrangling. The sale price was stated to be $124,049.00 which is the amount shown against "Deposit" with a "nil" balance. Accordingly, the price was to be paid in full. And under "Special conditions" one finds as "B" - 'Full payment in exchange of title in purchasers name'.

On 3/12/75 at a time when, because of the undischarged Caveat lodged by the defendant on 29/1/64 the plaintiff was in no position to issue title in the name of the Minister of Housing, a fact which was ascertainable by the latter, Ministry of Housing cheque no. 0008138 for the full amount of $124,049.00 was issued payable to Riverton City Ltd. who promptly endorsed it payable to "Property Development Ltd." and upon the endorsement of the latter that cheque was negotiated at the Bank of Nova Scotia, Half-way-Tree on 5/12/75. What indecent haste to part with Government funds at a time when the Government could acquire nothing in

return! To me this seems scandalous. But of this alarming turn of events the plaintiff breathed not a word even though the plaintiff filed amended Reply and Defence to Counter-claim as late as 22/3/78. It was the defendant's amended Defence and Counterclaim that alone referred to this dark deed and it was the defendant who supplied the court with copies of the relevant documents. I have no doubt that this transaction largely influenced the manner in which the plaintiffs case was presented owing to the fact that the plaintiff, apparently in its interpretation of the legal positions, had long ago proceeded to enrich itself to the tune of roughly 13 times the balance due from the defendant by the re-sale of the lots. I am left in no doubt that in the public interest the circumstances of this re-sale call for explanation.

To add another element of mystery to this re-sale the Ministry of Housing on 12/1/76 by notice in the Daily Gleaner invited the owners of lots in Riverton City, including the 44 lots for which the Ministry had already paid, to contact the Ministry with a view to selling those lots to the Ministry. If the charge of gross incompetence is not to be added to the suggested charge of corruption so far as the ministry is concerned the only reasonable interpretation of this notice is that prior to its issuance the plaintiff had information of the Ministry's interest and acted on it while the notice was still in the pipe-line or conversely, that the Ministry was merely adding cosmetics to questionable conduct. Be that as it may.

Apart from the evidence contained in the correspondence already referred to the only other evidence adduced by the plaintiff was the evidence of Mr. Melvin Dyce who, though he later qualified as a surveyor, was not so qualified at the time of the creation of the contract and for sometime thereafter. His testimony was that as a surveyor he worked as a government servant on the Riverton City Scheme in 1962 and in a private capacity in 1967. He did not disclose what proportion of the sub-division had been completed and how much remained to be done. Dr. Barnett had said that the sub-division consisting of 1207 lots was being developed in stages but no evidence was presented to this effect, nor of how soon after approval had been granted the development actually commenced.

Shown a copy of the Flood Water Control Order and a plan showing the relation between the Riverton City Sub-division and the Sandy Gully Scheme the witness said that "about 60 or so lots" in the sub-division would be affected by the 20 ft. wide main channel of the Sandy Gully Scheme in Blocks 30 and 29 and another 10 - 12 lots in Blocks 23 and 24 would be affected by the smaller channel. In addition, as the correspondence shows, lands reserved on either side of the channel would, temporarily, not be available for development. The witness worked on the Sandy Gully Scheme and it is his evidence that during construction the entire area was affected by flooding and heavy machinery. Yet there were certain areas marked out on the plan of the area (exhibit 1) as reserved which he said could in fact be used during the course of construction. This was revealed in cross-examination during which he made a greater contribution than in his evidence-in-chief. He did not know that the sub-division had been approved in 1955 but he is aware of the provision of the Local Improvements Act. "In the ordinary course of events", said he "the roadways should have been constructed within 2 - 3 years of the approval of the scheme". On that basis, therefore, in the absence of any evidence of any special difficulties encountered the roadways in this scheme should have been completed several years before the Flood Water Control Order, 1961 was promulgated.

In cross-examination he further revealed that in 1959 the Riverton City lots were being field-checked (i.e. by the Survey Department) and that subsequently as a result of very extensive reclamation work done regarding the Sandy Gully scheme land values in the area greatly appreciated. It was to his knowledge that most of the lots in the sub-division were residential lots. He knew also of the conditions which were attached to the sub-division. These requirements had to be fulfilled to the satisfaction of the City Engineer and thereafter the roadways would be taken over by the K.S.A.C. The title for the roadways shown on the deposited plan had to be handed over to the K.S.A.C. The laying down of water mains is a fundamental requirement for a residential sub-division. The taking-over of the roadways by the K.S.A.C. is fundamental to the use by purchasers of

such roadways. He was asked:

Q: "Are you aware of the practice where titles are issued only after roads and laying of water-mains have been completed?"

He replied:

"My understanding is that titles could be issued to a developer or a Company before this but the titles could not be transferred. Transfers could not be completed before these were completed".

This last bit of evidence coming from the plaintiffs own witness, which remains unchallenged, demonstrates quite clearly that, based upon the contention that the relevant roads and water-mains had not been completed, let alone being taken over by the K.S.A.C., the purported transfer of titles in favour of the Defendant could have produced no legal effect such as is expected of a transfer.

The witness identified Westmoreland Avenue, Portland Avenue, and Trelawny Avenue, which were listed as roads to be taken over as being west of the channel - Trelawny Avenue which runs north - south being 1000 - 1200 ft. west of the channel.

Questioned concerning the present condition of Blocks 30, 24, 34, 35 the witness supplied the following information:

Block 30
Most of Block 30 is dumped with marl (lots 7 - 15)

Block 24

Riverton Boulevard unusable in parts
Trelawny Avenue does not appear as a road but for hydrants.
Much flooding has taken place. The road is covered over with mud.

Lots 41 - 53 - Block 24
The roadway is in same condition as just described.

Block 34
The roads are marled i.e. obliterated - The Ministry of Housing deals with that - everything covered over with marl.

Block 35
Lots 4 - 16 - also marled.

What is clear from this witness' testimony is that the lots in question no longer are identificable as such. The whole topography has been

radically altered by flooding and the endeavours of the Ministry of Housing.

The defendant gave evidence consistent with the contentions in the letters written on her behalf and stated that she first knew of the endeavour to sell the lots to the Ministry of Housing when she received a notice dated 17/11/75 of the plaintiffs attempt to register a transfer of the lots in favour of the Ministry. She thereupon took proceedings to stay the registration.

In addition she called one Allan McCalla, a real estate valuator who put a value of 60¢ per square foot on lands in the blocks in question and so arrived at an overall valuation of $148,859.00. He said the price at which the lots were sold to the Ministry represents a valuation of about 50¢ per square foot.

The other witness called by the defendant was Mr. Rudyard L. Harrison at the time acting Director of Technical Services, Ministry of Construction and Works. He testified that the Sandy Gully scheme was undertaken by his ministry and Raymond Emkay Construction Co. The contract for the scheme was signed in the latter part of 1963, the work began in early 1964 and was completed in 1967. The lands designated as "reserved" to facilitate the work in the Sandy Gully scheme were returned to the owners upon completion of the scheme. The Law, he said provides for compensation for the use of the lands in the "reserved area" resulting from the Sandy Gully scheme. The lands in Riverton City have been protected against flooding which used to occur and developments have taken place notably by the Ministry of Housing which has constructed several housing units there. In cross-examination he confirmed that the Riverton City sub-division, which pre-dated the promulgation of the Flood Water Control Order, would be affected as regards some lots, roads and infrastructural works. That was the extent of the cross-examination. In re-examination he said there would be need for modification of the sub-division in so far as roads and water mains were affected by the channel. It is this factor which is seized upon as a frustrating event inasmuch as the scheme as originally approved could not be carried out. But if this

is a sound argument then frustration would have come about from the time when by the sale of the six lots to the Chief Secretary the sub-division would automatically have been modified by the exclusion of those lots from the approved scheme. I shall have more to say about this.

Such then is the state of the evidence. It includes no information as to why the roads and water mains affecting the lots in question were not done in the six years before the Flood Water Control Order was promulgated nor whether approval of the necessary modification of the sub-division scheme was sought. Indeed, so far as the defendant's lots were concerned there is absolutely no evidence that the plaintiff, apart from seeking the approval of the K.S.A.C. did anything by way of performance of its contract with the defendant apart from forwarding the titles and the transfer and demanding payment.

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 the 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 vs. Foster (1872) L. R. 5 H. L. 321; Howard vs. Miller (1915) A.C. 318, 326, also 3 Hals. Vol. 14 at paras. 1040 - 41. In Lysaght vs. Edwards (1876) 2 Ch. D. 499, 500 Jessel, M.R. had this to say:

> "The moment you have a valid contract for sale the vendor becomes 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, in the absence of express contract as to the time of delivering possession".

On this principle, therefore, and assuming, without deciding for the moment the validity of the contract, on the 7th day of January, 1955 the defendant Haddad became the owner of an equitable estate in the 50 lots (inclusive of the 44 now in question) and the vendor, the plaintiff, became Haddad's trustee. Indeed, the conduct of the parties was predicated on the assumption that the contract was valid and binding. The procedure for the transfer of the 6 lots to the Chief Secretary 5 years after the signing of the contract is abundant proof that the contract was so regarded.

In such circumstances, therefore, the next matter that calls for consideration is the performance by the parties of their respective obligations under the contract. The vendor is obliged to deliver title to the respective lots to the purchaser who must then pay the balance of the purchase money. In addition the purchaser must pay certain stipulated costs and fees which are necessary incidents to procuring registered titles in the purchaser's name. The respective obligations would in the face of the contract appear to be simple and clearly defined. The purchaser is obliged to pay the "balance on delivery of title". And yet, simple as this may appear it is the point of difficulty the solution to which seems so elusive that it has had the parties locked in legal battle for these many years. Neither party demurs from the actual words under consideration but beyond that they are poles apart.

As evidenced by the plaintiff's (vendor's) conduct in forwarding titles in its name together with the transfer to the purchaser (defendant) and demanding payment of the balance of the purchase money the plaintiff holds "title" in the stipulation to mean the vendor's title without any reference to the terms and conditions of approval attached by the K.S.A.C. being fulfilled and it is indeed significant that despite the defendant's refusal to pay the balance of the purchase money until there had been compliance with the aforesaid terms and conditions which were incorporated into the contract the plaintiff neither by evidence in Court nor by any of the several letters over the intervening years claimed performance of any of the requirements in relation to the lots purchased by the defendant. The view is, however, untenable that the incident upon which the defendant would become liable to pay the balance of the purchase money was the completion by the plaintiff of the whole sub-division. It follows therefore that, if the defendant's contention is correct the plaintiff company was at no time even up to the time action was brought, in a position to claim the balance of the purchase money because at no time was it in a position to deliver the title contemplated by the contract. And indeed the facts of this case demonstrate quite clearly what could result were the plaintiff's contention to prevail. At no time, and certainly not in November 1963 (nearly 9 years after the contract had been signed) when the plaintiff was offering the titles and demanding payment, was the plaintiff able to

point to any act of performance relevant to its contract obligations in this residential sub-division. So, had the titles been accepted and the money paid over all that the defendant would have got would be virtually useless bits of paper because the evidence shows that at no time up to the trial of the case, 17 years later, could those titles have been registered in the defendant's name. This must conclude against the plaintiff the contention that by refusing to pay the balance when demanded the defendant was in breach of the contract.

Assuming, still, the validity of the contract, I will now endeavour to arrive at an understanding of its provisions. I am forced to state my approach in this manner because of the manifest conflict in the provisions. As already observed, the words in the contract were not all written with this contract in mind but are the result of amending a printed form without scrupulous care.

It is important to note that the printed form had elaborate provisions or paying the purchase price by several instalments up to a point where a certain amount would be paid. Thereafter the balance of the purchase price could, at the option of the purchaser, remain on mortgage and the printed form provided for the details of such mortgage to be inserted. Even the payments up to this point were envisaged to be spread over several months. It is in those circumstances that the clause providing for completion fit in. It reads:

> "The balance of the purchase money shall be paid in full by the vendor 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 re-take possession of the said land and/or to re-sell 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 re-sale; but any increase in price on any subsequent sale shall be retained by the Vendors".

With the greatest of respect the first sentence under "completion", which states nothing new to the present contract, is all under this heading

which is not manifestly repugnant to the remainder of the contract as signed by the parties. The provision for payment of the balance of the purchase price i.e. "balance on delivery of title" clearly connotes a payment in full on delivery of title. It is obvious that the intention of the parties was to enter into a contract the terms of which represent a departure from the contract which the printed form was designed to effectuate. Such intention clearly did not contemplate the terms included under the heading "completion". These terms are all intended to protect the Vendor who is responsible for their inclusion in the contract and against whom they must be construed. In this contract they represent a mere surplusage and are accordingly denied any effect.

The next clause around which much contention raged was the one headed "Condition Precedent" which states thus:

> "The sale shall be subject to the approval of the Kingston & St. Andrew Corporation and the Water Commission to the sub-division 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 sub-division 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 sub-division 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".

Throughout the protracted period of correspondence on behalf of the parties it is clear that there was a deadlock over the meaning and application of this term - the defendant contending for strict compliance with the provision as a "condition precedent" while the vendor who was burdened with the performance under the clause sought to avoid such a construction.

In the present context the effect of a condition precedent would be to suspend the creation of any contract until the Kingston & St. Andrew Corporation ('the Corporation') and the Water Commission had expressed approval of the sub-division, adding such terms and conditions as they thought necessary. The correspondence discloses that the approval of the corporation was granted on 18th February, 1955. There is no disclosure of the requisite approval of the Water Commission but it seems reasonable to assume such approval having regard especially to the letter from the

Corporation dated 22nd December, 1961 listing the roadways which had been satisfactorily completed and would be taken over and placed on the schedule of Parochial Roads. It is to be noted, however, that several of the terms and conditions attached to the approval and which are included in the schedule to the contract relate not to the formation but to the performance of the contract.

The schedule referred to above specifies that the terms and conditions of approval incorporated into the contract would be restrictive covenants to which the land sold would be subject. These do not in any way affect the formation of a contract. On the contrary to presume a contract otherwise would be to accord these provisions a character they are not capable of sustaining.

The problem here arises from what I may, with great restraint label as sloppy and ill-considered use of legal terminology. The provision is only partially what it calls itself. It is a condition precedent in so far as it relates to the approval by the appropriate authorities but not beyond this point. It is therefore, an understandable error for anyone to have relied on it for all its pretended effects. But such adverse construction must be against the plaintiff whose document it is. The restrictive covenants would have to be endorsed on the titles to be registered in the defendant's name, but that stage had not been reached. Accordingly, that aspect of the approval could not take effect at the time of the formation of the contract. The terms of approval were pre-empted by including in the schedule, which is a part of the contract, terms similar to those included in the approval. It follows, therefore, that this unfortunate accumulation of provisions under the heading "condition precedent" is quite ineffective as such conditions go. See Aberfoyle Plantations Ltd. vs. Cheng (1959) 3 W.L.R. 1011.

The pith of the plaintiff's submission on this knotty point was put thus:

> "Either the defendant is saying there is no contract at all in which case a claim for specific performance would be extraordinary
>
> OR
>
> That there is a contract in which case the paragraph headed "Condition Precedent" cannot be treated as a

> condition precedent. If it can't be so treated then the refusal to pay the balance was a repudiation of the contract as is evidenced by claim for repayment of the deposit".

I have already adverted to the conduct of the parties which is explicable only on the basis that both parties adhered to the view that there was a valid contract. Also, I have, I hope, demonstrated the extent to which the so-called "condition precedent" can properly be so regarded.

But, contends the plaintiff, even if there were in fact a contract imposing obligations it has been frustrated by the Flood Water Control Order under the Flood Water Control Law, Law 25 of 1958. It has already been shown that the application of this Law to the scheme was over 6 years from the signing of the contract. By any mode of rational thought 6 years is a long time in the context of the contract under discussion. A long time in which nothing has been shown to have been done by way of performing the obligations under the contract which both parties regarded as valid and binding.

Quite apart from any legal considerations on frustration of contract the bona fides of the plaintiff is called into question. How can the plaintiff raise such a defence when more than two years after it had knowledge of what it calls the frustration of the contract by the effect of the order made under the Flood Water Control Law it was submitting titles to the defendant and demanding payment of the balance of the purchase money when upon its stated understanding of the order the whole scheme had been aborted? What is the basis, therefore, upon which it pursued its claim for payment up to 29/7/64 when the first statement of claim was filed having threatened by letter dated 26/6/64 -

> "..... and unless this money is sent to us within seven days we propose to file suit immediately for the recovery of the amount due".

The plaintiff must be presumed to have known the claimed effect of the notification of 28/4/61 i.e. frustration of the contract and yet more than three years later was demanding payment with a threat to sue! And what, may one ask, did the plaintiff intend to pass to the defendant in return for the money when from its own confession it knew at the time of the demand that the scheme had been aborted and that with it went the contract and its

obligations? It cannot be heard to say it regarded its obligations as having been effectively terminated but that the defendant's obligations were kept alive.

It is interesting and significant to observe the manner in which the plaintiff treated the information communicated to it on 28/4/61. As stated above it filed statement of claim dated 29/7/64 in its effort to secure payment - nothing is said of this information which it then had for over 3 years. It was not until 3 years later that such knowledge is introduced into the Pleadings via a Reply and Defence to Counterclaim dated 14/1/66 - already referred to. The point attracts notice that while the pleading starts out by referring to an impossibility, which would produce discharge by frustration, it concludes as explanation not of frustration but of delay which from the plaintiff's own pleading was not disabling. In identical form this pleading was repeated 10½ years later in an amended statement of claim dated 13/7/76 upon which the case came to trial. And be it noted that, according to the evidence, the Sandy Gully Flood Water Control Scheme had been completed 9 years earlier in 1967! With the interruption out of the way was anything done to perform the contract? Nothing.

In making this review of the treatment of this issue by the plaintiff I neither carp at nor deny a party's right to amend nor am I unmindful of the effect of an amendment, but I do so because I feel it is relevant to the question of the party's bona fides which is being examined. As is stated in Cheshire & Fifoot's Law of Contract (9th edition) at page 547 referring to the views of Lord Wright in Denny, Mott and Dickson, Ltd. v. James Fraser & Co. Ltd. (1944) A.C. 265 at pp. 274 - 5, "It is perhaps fair to say that this is now the more generally accepted view". Here then are the views of Lord Wright -

> "Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the Court decides the issue and decides it ex post facto on the actual circumstances of the case. The data for decision are on the one hand the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occured. It is the Court which has to decide what is the true position between the parties".

also

> "The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'".

At pages 547 - 8 of the text book under reference it is stated:

> "..... The courts refuse to apply the doctrine of frustration unless they consider that to hold the parties to further performance would in the light of the changed circumstances, alter the fundamental nature of the contract".

Further support for the role of the courts is found in the speech of Lord Radcliffe in Davis Contractors Ltd. v. Fareham U.D.C. (1956) A.C. 696 at pp. 728 - 9 where the learned Lord said -

> "So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises 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 defendant is not requiring the plaintiff to do anything not contracted for nor does the evidence presented demonstrate that the plaintiff, to satisfy the defendant's rights under the contract would, because of the changed circumstances, in which performance is called for, be performing something radically different from that which was undertaken. And what is more the plaintiff has scrupulously avoided any reference to the question of absence of default on its part.

The plaintiff undertook to provide the defendant with building lots in a residential sub-division - building lots meeting certain specifications which were well known to the plaintiff and set out in the schedule to its printed form contract, a contract which is and has been treated by the parties as severable. And it is worthy of note that neither the correspondence which filled the intervening years nor the evidence tendered disclosed what, if any, progress the plaintiff had made in any endeavour to perform or any reason for delay. Indeed I doubt very much that the question of frustration deserves the attention it has received bearing in mind that the incident relied upon arose after a delay of more than twice what the plaintiffs' own witness testifies would be the normal

time in which the sub-division should have been completed - using 2 - 3 years as a reasonable time.

It must also be bourne in mind that reliance cannot be placed on self-induced frustration and it is manifestly a debatable point whether by reason of the inordinate and un-explained delay on the part of the plaintiff its predicament was not self-induced. However, it is not necessary for me to decide this moot point because from the nature and timing of the interruption which occasioned a delay only half the duration of the delay for which the plaintiff has to account it is my considered view that the plea of frustration fails. See also National Carriers Ltd. vs. Panalpina (Northern) Ltd. (1981) 2 W.L.R. 45 in which a non-user of leased premises for almost 2 years was held not to raise a triable issue of frustration.

Rather as a footnote to the discussion on frustration I must point out that on behalf of the defendant it was shown by reference to the Flood Water Control Plan that of the 44 lots in question only lots 1, 2, 3, 4 and 5 in Block 30 were affected by the channel in whole or in part. The lots in Blocks 35, 34 and 24 were far even from the 200 ft. reserved area. The lots which are closer to the channel area but separated from it are lots 7 - 15 in Block 30.

On the question of election support was sought from Scarf v. Jardine (1881 - 5) All E.R. 651 for the proposition that since the defendant had claimed in her pleading a refund of the deposit it was incompetent for her to resile and treat the contract as still subsisting. The headnote to Scarf v. Jardine is instructive. It reads -

> "The appellant and R carried on business in partnership under the style of "R & Co." the partnership was dissolved by consent, and B became partner with R, the style of the firm being unchanged. After the appellant had retired from the firm, but before notice of his retirement had been given to the respondent (with whom the firm had had previous dealings), "R & Co." ordered goods which he supplied to them. After he had notice of the change in the partnership he made no alteration in his books, but kept a continuous account against "R & Co." and took a cheque from the new firm in payment of his whole account. The cheque was dishonoured and he then commenced proceedings against R and B, and upon their going into liquidation brought in a proof against them for his whole debt. He afterwards commenced an action against the appellant

in respect of the goods supplied before he had had notice of the change in the firm.
Held: (i) R and B could be held liable for the goods ordered and received by them;

(ii) the appellant and R could be held liable for the goods supplied before the change had been notified to the respondent;

(iii) Courses (i) and (ii) were inconsistent. Accordingly the respondent was required to elect between them. He could not hold R and B and the appellant jointly liable.

(iv) where a person is put to his election, and has not merely determined to follow one of his remedies, but has also communicated it to the other side in such way as to lead the opposite party to believe that he has made that choice, the election is completed and once made cannot be altered;

(v) the issue of the writ by the respondent against R and B was an election to sue them, and accordingly, the action against the appellant failed.

Dr. Barnett's submission seems to be anchored in point (iv) above which emerged from the speech of Lord Blackburn who at page 658 of the report had this to say:-

> "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 indicated it in some other way, that alone will not bind him; but as 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".

While the principle here stated is not susceptible of doubt I have grave doubts about Dr. Barnett's effort to find support therefrom. In that case there were two separate writs in addition to an affidavit in proof of debt in liquidation. On none of these could the three parties be held jointly liable either on the facts or on the principle of estoppel. So it is clear that the respondent had to elect on which he would proceed. The instant case does not present such a predicament. Pleadings are always liable to amendment and once amended the old pleading is deemed never to have existed. (R.S.C. 020 r r 5 - 8/2). The instant case deals with one writ and the pleadings that flow from it and these are always open to be

amended. To uphold the submission would not only be denying the defendant the benefit and effect of an amendment so many years after it was made but would be flying in the face of the clear provision of the Rules and to hold that the amendment had been improperly granted though no such objection was raised either at the time of grant or any time proximate thereto. It is my considered opinion that the principle does not support the contention.

The remaining matters for attention hinge upon the question of the validity of the contract before the court. Specific provisions governing the sub-division of land into lots for the purpose of building thereon were contained in the Local Improvements Law, chapter 227 of the Revised Laws of Jamaica and it is to that law that I will now turn attention. The Law provided thus:-

> 4. (1) "Every person shall before laying out or sub-dividing land for the purpose of building thereon or for selling the same in lots, deposit with the Board a map of such land; such map shall be drawn to such scale and shall set forth all such particulars as the Board may by regulations prescribe and especially shall exhibit, distinctly delineated, all streets and ways to be formed and laid out and also all lots into which the said land may be divided, marked with distinct numbers, and shall also show the areas and shall if required by the Board be declared to be accurate by a statutory declaration of a Commissioned Surveyor.
>
> (2) Every such person shall also deposit with the Board as respects each street and way as shown on the said map -
>
> (a) A specification showing how such street or way is to be constructed and the nature, location and dimensions of the sewers, water pipes, gas pipes, and lighting mains, hereinafter called street works, to be laid within the boundaries thereof whether for the purposes of the street or way itself or for the use of the buildings adjoining. Such specification shall, if the Board by regulations so prescribe, be accompanied by plans and sections giving such details and drawn to such scales as may be fixed in the regulations.
>
> (b) An estimate of the probable expenses of the street works being done. Such specifications, plans, sections and estimates shall comprise the particulars required by regulations made by the Board.

(3) If the land is situate in the parish of Kingston or in the parish of St. Andrew the specifications for sewers, water pipes and lighting shall bear a certificate signed by the Mayor to the effect that such specifications have received the approval of the Council of the Kingston and St, Andrew Corporation.

(4) For the purposes of this Law a person shall be deemed to lay out or sub-divide land for the purposes of building thereon or of selling the same in lots, if he sells or offers for sale any part of such land whereon a house or other building may be erected, or if he shall form the foundations of a house or other building thereon in such manner and in such position so that such house or other building will or may become one of two or more houses or other buildings erected on such land.

5. .....

6. (1) The Board shall on such deposit as prescribed in section 4 consider the said map, specifications, plans and sections and estimates and shall by resolution within a reasonable time after the receipt of the same, refuse to sanction or sanction subject to such conditions as they may by such resolution prescribe, the sub-division of the said land and the formation and laying out of the said streets by such resolution prescribe, the sub-division of the said estimates of the said street works or may alter or amend the same as to them may seem fit and may prescribe the time within which the said street works shall be completed.

(2) .....

(3) If the land is situate in the parish of Kingston or in the parish of St. Andrew no sandtion hereunder shall be valid unless the specifications and plans for sewers, water pipes and lighting shall have received the approval of the Council of the Kingston and St. Andrew Corporation.

7. If the owner shall fail to execute the street works shewn in the specifications, plans and sections (if any) or as the same may have been altered or amended by the Board or any part thereof within the time prescribed by the Board as provided in the next preceding section the Board may execute the said works or such part thereof as shall not have been executed in accordance with the said specifications, plans and sections and the expenses incurred by the Board in executing such works, together with a commission not exceeding six pounds per centum in addition to the actual cost, shall be recoverable from the owner as a debt due to the Board and shall until payment thereof be a charge on the land shewn in the map deposited as provided in section 6 of this Law in priority to all mortgages, charges, estate and interest created subsequent to the deposit of such map".

It seems clear from the merest reading of section 4 that it would be a breach of the Law to proceed to lay out or sub-divide land for the purpose of building thereon or for sale in lots without depositing the required map and particulars and also obtaining the necessary sanction so to do. The imposition of criminal sanctions by Section 9 puts this question beyond all doubt. The section reads:-

> 9. (a) "Every person who shall lay out or sub-divide land for the purpose of building thereon or for selling the same in lots before depositing with the Board a map of such land provided by this Law;
>
> (b) Every person who shall proceed with or aid or assist in the laying out or sub-dividing of any land before the Board shall have sanctioned the map deposited as provided in this Law;
>
> (c) Every person who shall proceed with or aid or assist in the laying out or sub-dividing of land or building otherwise than in accordance with the sanction of the Board;
>
> (d) Every person depositing a map and obtaining the sanction of the Board and who shall neglect or fail to perform the street works within the time prescribed by the Board;
>
> (e) Every person who shall contravene or fail to comply with any condition prescribed by the Board under section 6 of this Law; and
>
> (f) Every person who shall commit a breach of any regulation made under this Law,
>
> shall be guilty of an offence against this Law and shall on summary conviction be liable to a penalty not exceeding one hundred pounds, or in default of payment, to be imprisoned with or without hard labour for a term not exceeding six months, and in the case of a continuing offence to a further penalty not exceeding ten pounds for each day during which the offence continues, and in default of payment of such penalty to be imprisoned with or without hard labour for a term not exceeding fourteen days. "

No doubt can remain about the intendment of the Law as is here expressed. Its dragnet is very wide and it would be absurd to hold that any of these declared illegal acts could give rise to a valid contract; otherwise the sting would be plucked from the law. It follows, therefore, that the contract between the parties which shows with unmistaken clarity that section 4 of the Law had not been complied with at the time the agreement was signed was at the time of signing an illegal contract. Indeed, the contract was in open defiance of the Law. It promised to do what the law required to have been done before any laying out or sub-dividing into

lots, and,hence, any sale of lots could be undertaken. Clear though the law was, it seems to have been observed if at all, in the breach.

It is a matter of note that the great shivers ran through the land when such contracts were first struck down by the court. See Watkins v. Roblin (1964) 6 W.I.R; 533 . The provisions of the Law are for the protection of the public and cannot be abrogated by agreement between the parties. By an amending Act, Act 36 of 1968 the Legislature sought to remedy the mischief. Penalties under Section 9 (supra) were doubled and specific attention was paid to contracts such as the one now being considered defined under the Amending Act as "sub-division contract". And it is significant to note that the Act was made retroactive to the 1st day of January, 1954 obviously in order to provide relief in the large number of contracts which had been entered into in breach of the law. It added a new section 9A to the principal Act. It reads:

> "9A - (1) The validity of any sub-division contract shall not be affected by reason only of failure, prior to the making of such contract, to comply with any requirement of subsections (1), (2) and (3) of section 4 or to obtain any sanction of the Board under section 6 or section 6A, as the case may be, but such contract shall not be executed by the transfer or conveyance of the land concerned unless and until the sanction of the Board hereinbefore referred to, has been obtained.
>
> (2) Where a sub-division contract cannot be executed because any relevant sanction of the Board is not obtained by the sub-divider of the land, the other party to the contract or any person succeeding to the rights of that other party under the contract may, after the expiration of such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the sub-divider of the land any moneys paid to him under the contract, together with interest thereon at the rate of seven per centum per annum from the date on which such moneys were paid.
>
> (3) In this section -
> "sale" has the meaning ascribed to it in subsection (5) of section 4;
> "a sub-divider", in relation to any land, means any person laying out or subdividing that land for the purpose of building thereon or for sale and any person deemed, pursuant to section 4, to be laying out or subdividing that land for the purpose of building thereon or for sale;
> "sub-division contract" means any contract of sale involving, or made in relation to, the laying out or subdivision of land.

> (4) In relation to any sub-division contract made before application is made to the Board for any sanction required by this Law the provisions of section 7 shall apply as if there were substituted for the words "created subsequent to the deposit of such map" the words "except those existing immediately prior to the sub-division of the land".
>
> (5) Nothing in this section shall affect the operation of section 9."

And what must have warmed the cochles of the hearts of purchasers in the position of the present defendant was enacted in section 3(2) of the Amending Act. It states:

> (2) This section shall be deemed to have come into operation on the 1st day of January, 1954 hereinafter referred to as the "operative day" so, however, that as respects transactions which took place between the operative day and the date of enactment of this Act, the amendment effected in the principal Law by virtue of this section of this Act shall not operate so as to nullify or affect any transfer or conveyance of land effected pursuant to any contract of sale made prior to the date of enactment of this Act."

The radically different view expressed by the legislature on the question of refund of deposit label the contract provisions under "condition precedent" as manifestly unjust. There can be no doubt the purpose of the Act was to purge the illegality of the existing contracts and to make it abundantly clear that the requirements of the Local Improvements Law were to be strictly observed under pain of penalties which were at the time thought to be appropriately severe. Accordingly, the validity of a sub-division contract was not to be affected merely by the non-compliance with sections 4, 6, and Section 6A which had been added by Law 64 of 1955. Inasmuch, therefore, as the illegality of the present contract resulted from such non-compliance this contract has been rescued with the result that the incidents of a valid contract ensue. Therefore, in keeping with the principle stated earlier the defendant obtained an equitable estate at the time the agreement was signed and the plaintiff became the trustee of the defendant. In those circumstances, the plaintiff is precluded from dealing with the property in derogation of the defendant's rights unless the latter is in default which would entitle the plaintiff so to do, or the contract had failed for any of the reasons advanced. But, as I have found, the defendant has not defaulted nor have such reasons prevailed, hence no such rights accrued to the plaintiff. The defendant is therefore

entitled to the declaration sought, namely -

> "that the Defendant is entitled to the equitable estate in fee simple in the remainder of the said lots".

At this point in time the remedy of Specific Performance is not available to the defendant owing -

1. to the lapse of time, and
2. to the disappearance of the lots as a result of the change in the topography resulting in the impracticability of the lots ever being identified as such.

The real situation here is that as trustees for the defendant the plaintiff in an endeavour to oust the defendant's rights disposed of the defendant's property and received money to the tune of $124,049.00 which amount, according to the evidence of the valuator, was not an unreasonable price. But included in that amount was the balance of the purchase price viz. £4,840 i.e. $9,680. For this amount, the plaintiff is not accountable to the defendant. Out of the amount received, therefore, the plaintiff must account to the defendant for the sum of $114,369. Additionally, the plaintiff must account to the defendant for all accessions to this amount up to the time of judgment.

In the result remedies sought at paragraph 23(1),23(6), 23(7), 23(8), and 23(9) of the defendant's counterclaim are granted. Judgment is accordingly entered for the defendant on the claim with costs to be taxed or agreed and on the counterclaim as set out above with costs to be taxed or agreed.