IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. C.L. S 189 of 1991

BETWEEN	LEO STONE	PLAINTIFF
A N D	ST. ANDREW DEVELOPERS LTD.	DEFENDANT

SUIT NO. C.L. S. 212 of 1991

BETWEEN	LEO STONE	PLAINTIFF
A N D	ST. ANDREW DEVELOPERS LTD.	

Garth McBean and Patrick Foster instructed by Dunn Cox and Orrett for the Plaintiff.

Michael Hylton and Alexander Williams instructed by Messrs.Myers Fletcher and Gordon for the Defendant.

Heard on: 3rd & 4th February 1993,
6th April 1994 and
10th June, 1994

JUDGMENT

COURTENAY ORR J.

On 6th April I handed down judgment in this matter and promised to supply a written judgment at a later date.

I am now fulfilling that promise and regret the delay in doing so, which was due to clerical problems.

These cases were tried together by consent as they involved the very same parties and raised identical issues.

In the endorsement to his writ in Suit C.L. S 189 of 1991 the plaintiff claims for:

(1) "A Declaration that pursuant to the terms of an agreement made between the Plaintiffs (sic) and the Defendants for the purchase of lot numbered 228 of Chancery Hall Estate in the parish of Saint Andrew, the Plaintiff is entitled to a quantity surveyor's certificate setting out escalation charges up to the end of September 1989 the date fixed for completion.

(2) A declaration that the final purchase price of the said lot shall not include any increased costs to the Defendants which result from delays in the completion of the infrastructure.

(3) A declaration that the Plaintiff is entitled to details of variations in the plans, specifications and work and the attendant costs.

(4) A declaration that the document captioned "Escalation Certificate' issued by Davidson & Hanna and dated the 22nd February 1991 does not satisfy the terms of the said agreement and is not binding on the Plaintiff.

(5) An order that the Defendants obtain from the Quantity Surveyor a certificate in accordance with the terms of the said agreement as to the escalation in costs up to the date fixed for completion of the agreement for sale to wit the end of September 1989.

(6) A declaration that the Defendants are not entitled to interest as claimed or at all.

(7) A declaration that upon the determination of the proper sum payable by reason of escalation and on payment thereof the Plaintiff is entitled to have a registered title issued to him.

The endorsement to the writ is Suit C.L. 212 of 1991 is the very same but for the number of the lot in paragraph 1; there it is shown as 229.

The following facts were common ground between the parties:

1. By two undated agreements in writing made on or about the 29th day of March, 1988 between the plaintiff and the defendant, the defendant offered to sell and the plaintiff agreed to purchase on the terms and conditions stipulated by the defendant in the said agreements two parcels of land described as lots 228 and 229 on the subdivision plan of land known as Chancery Hall Estate in the parish of Saint Andrew being part of the land comprised in certificate of Title registered at Volume 1054 Folio 665 in the Register Book of Titles.

3. In each of the agreements completion is stated as "on or before the expiration of one and one half years from the date hereof on prior payment in full of the purchase price and other sums payable hereunder."

4. Paragraph 4 of each statement of claim sets out Clause 8 (a) of each agreement which contained a schedule according to which the plaintiff should pay the purchase price and other sums payable. (The details of this schedule are not crucial to the issues to be decided in this case.)

5. Clauses 11 (c)-(g) of each agreement contained the following provisions.

"(c) In arriving at the Purchase Price of the said lot the Vendor has had regard to the fact that the said lot forms part of the project known as "Chancery Hall Estate Phase 1" and has made the following assumptions:-

i) there will be no change in the cost to the Vedor of constructing, installing and (if required maintaining roadways, sewerage, water, street lighting and electrical systems (hereinafter called "Infrastructure") in respect of the Project, including the cost of materials and equipment, rates of hireage of equipment, financing costs and charges (including the cost to the Vendor of borrowing money which cost includes bank interest), and other costs in existence on the 8th day of May 1986; and

the 8th day of May 1986; and

ii) there will be no change in wages and labour rates effective from 8th May 1986 approved by the Joint Industrial Council for the building and construction industry (herein after called "J.I.C.") and

iii) there will be no variations in the plans, specification and work for the project.

(f) The purchase price shall be adjusted upwards at any time during or after completion of the Infrastructure if the cost of construction of the infrastructure is increased to the vendor as a result of:-

i) increases in the costs rates and/or charges in respect of materials and other things and matters mentioned in sub-clause (e) (i) hereof after the dated stated therein and/or

ii) increases in the wages and labour rates mentioned in sub-clause (e) (ii) hereof with the approval of J.I.C.; and/or

iii) variations in the said plans, specifications and work which result in extra work, materials or equipment;

iv) any increased cost to the Contractor as a result of any of the delays caused by forces beyond its control.

(g) Any such increases as aforesaid shall form an addition to the Purchase Price. A certificate from Davidson & Hanna, Quantity Surveyors, or such other Quantity Surveyors as the Vendor shall nominate, as to the amount of such increase in the Purchase Price payable by the Purchaser

shall be final, conclusive and binding on the parties hereto. In arriving at the said increase regard may be had to the fact that the project is being developed in phases.

6. By letter dated 10th April, 1991 the defendant by its attorneys-at-law sent to the plaintiff a statement of Account indicating a balance to complete of $145,567.50 of lot 229 (in suit No. 212 of 1991), and in another letter dated 18th April 1988, the balance in respect of lot 228.

In each of those letters the defendant's Attorneys-at-Law sent to the plaintiff escalation certificates for lots 229 and 228 respectively. The certificates are couched in identical terms and set out the following charges for each lot:

(a)	Variations in the plans, specifications and work	$54,577.00
(b)	Increased costs of wages and labour rates and materials and equipment prices	$14,790.00
(c)	Financing costs and charges including interest payments	$42,051.00
		$111,418.00

7. The plaintiff's Attorney-at-Law then wrote to defendant's Attorneys-at-Law requesting details of the escalation costs of the lots up to the end of September 1989, but this was met with refusal and a demand for payment of the sums alleged to be due.

8. Clause 11(i) of each agreement reads:

> "Notice is hereby expressly given to the Purchaser that the land comprised in the Description of Land herein is described by reference to a provisional plan deposited at the office of the Vendor and that the position, shape and dimensions thereof may be subject

> to variation when the final plan of the said subdivision is completed and deposited in the Office of Titles. In the event of any such variation in position, shape and/or dimensions, same shall not invalidate this Agreement, and the Vendor shall not be liable to pay any compensation or damages whatsoever in respect thereof." (emphasis added)

9. By clause (n) of the agreements it was agreed between the parties that:

> "In the event that there shall be from any cause whatsoever other than the fault of the Vendor any increase in the sums stated in Clause 8 (a) (vi) herein the Purchaser shall pay such increase on demand by the Vendor." (emphasis mine)

In clause 8(a) (vi) of the agreements the Purchaser covenanted "to pay on completion the sums set out below"

Balance Purchase Price 16% of $24,000.00

Half Registration fee on Transfer $

Half Attorney's fee on Transer $

Clause 11 (a) of the Agreements reads thus:

> "For all the purposes of this Agreement time shall be of the essence of the contract in respect of the obligations of the Purchaser hereunder, and on the failure of the Purchaser on the due date to pay any sum or sums payable hereunder the Vendor reserves the right to cancel this Agreement by notice in writing to the Purchaser and to forfeit the deposit paid without further notice to the Purchaser. Thereafter the Vendor shall be entitled to resell the said lot and shall not be liable to account to the Purchaser for any part of the proceeds of such resale, notwithstanding any other provisions of this Agreement."

and by Clause 11 (1) all monies not paid by the Purchaser on due dates shall bear interest at the rate of two percentum (2%) per annum above the prime rate charged by the vendor's commercial bank at the date that interest commences to run and such interest shall be payable on demand.

THE AREAS OF DISPUTE BETWEEN THE PARTIES

The significant points of contention may be summarised as hereunder:

(1) Clause 6 of the agreement reads:

> "COMPLETION
>
> On or before the expiration of one and one half (1½) years from the date hereof on prior payment in full of the purchase price and other sums payable hereunder."

The plaintiff states that it was within the contemplation of the parties that completion would take place on or about the end of September, 1989. The defendant does not admit this.

(ii) The plaintiff alleges that he has paid the sums in accordance with clause 8 (a) (setting out the schedule of payments) and is still ready willing and able to pay the balances properly due under the agreement to complete the purchase. The defendant while admitting the receipt of $126,000.00 in respect of suit no. 189 of 1991 and $30,520.00 for Suit no. 212 of 1991, denies, (in the case of suit 189) that the plaintiff has paid the required sums on completion or the sums by which the purchase price was adjusted upwards. The defendant alleges that the adjustment is in accordance with clause 11 (f) of the agreement, (supra) which allows for such adjustment in certain circumstances. The defendant put the plaintiff to proof on these matters in the case of Suit 212 of 1991.

(iii) The plaintiff contends that the only variations permitted by the agreement are as stipulated in clause 11(i) (supra) and are in respect of and limited to differences in the position, shape, dimension of the said lots between the provisional plan and the final plan. The defendant denies this.

(iv) The plaintiff also alleges that the escalation certificates issued by Messrs. Davidson & Hanna are deficient in that they do not state "the details of the variations in

order to determine whether such variations fell within the said agreement, "and in all the circumstances do not satisfy the terms of the agreement.

(v) The plaintiff further argues that the amount of the variations was not within the contemplation of the parties at the time of making the agreement and that he is entitled to details of any variations and of the lists of any such variations.

There was also a dispute as to whether the interest charged by the defendant was too high; but no evidence was given on which the court could make a finding.

THE EVIDENCE IN SUPPORT OF PLAINTIFF'S CASE.

The plaintiff was the only witness called to substantiate his case. His evidence was brief and much of his testimony was unchallenged. In addition to the facts which are not in dispute and outlined above, the plaintiff gave evidence as follows:

He paid the full amount on each lot as stipulated in the two agreements - $150,000 plus the other fees set out in the contract.

He received a letter from the defendant's lawyers stating that there was an escalation of $111,000 on each lot. He visited the defendant's offices and requested details as to what factors made up the escalation and why it was so high. He was referred to the defendant's attorneys. He was never provided with the information.

In 1991 his attorneys notified him that the agreements had been rescinded and the deposits forfeited. Up to when he gave evidence he had not been notified of the reasons for the delay in completion, although he spoke to employees of the defendant on several occasions. He is still willing to "pay the balance" - reasonable escalation costs. He regarded the certificates supplied by the defendant as unreasonable.

It was his understanding that between the signing of the agreement and the completion, the defendant would put in the necessary infrastructure - roads, water mains, sewerage and electricity.

He contemplated completion of the agreement within 18 months after signing, that is by September 1989.

THE EVIDENCE FOR THE DEFENCE

In addition to correspondence in the agreed bundle the case for the defence consisted of the evidence of two witnesses. The first was Alexander Blair Davidson FRICS a quantity surveyor and partner in the firm of Davidson & Hanna named in clause 11 (g) of the agreement as persons whose certificate as to the amount of increased costs "shall be final, conclusive and binding on the parties thereto."

His testimony was to the following effect:

He was the quantity surveyor involved in the Chancery Hall project of which the two lots in this case are a small part. In the initial stages of the project the work of quantity surveyor involves preparing estimates of construction, bills of quantities specifications, and tender and contract documents.

Once the project starts his duties entail measuring and valuing work, preparing interim recommendations for payment to the contractor; it also required the measuring of variations, checking fluctuations in labour and materials, and preparing a final account of the work completed.

He defined "escalation" as the total increase in cost and said that the rhree factors (a) (b) & (c) set out in this certificate contribute to escalation.

He explained the factors on the certificates as follows:

The First Item: Variations in the plans specifications and work.

Examples of these occurred when the scope of the work was changed. For instance, in the case of the Chancery Hall Project, the storm water drainage was completely redesigned.

There was also a complete reconstruction of the two avenues North Michigan and Cadiz. Originally these roads were in existence but later on in the project the Development authority would not accept them as they were. The drainage roadworks and water suffered a similar fate. The original estimate was done on the assumption that the avenues would be usable and acceptable.

Mr. Davidson s d he calculated all the costs of variations and apportioned them equally between the lots.

The Second Item: Increased costs of wages and labour rates and materials and equipment prices.

The amount shown under this head - $14,790.00 was calculated in 2 sections. Labour and materials were calculated separately. The increased cost of labour paid to the contractor was arrived at, and then in the same way the increased cost of materials paid to the contractor was ascertained, and each of these amounts were apportioned equally between the lots.

The Third Item: Financing Costs and Charges including interest payments.

The sum of $42,051.00 was shown under this head. It was obtained in this way. The accrued amounts of interest on the sums paid to the contractor for escalation (i.e. interest on items 1 and 2 above for the whole project) were calculated at "Bank Interest rates" and then apportioned equally between the lots.

Certificates were issued from time to time as various sections were completed. This meant that those lots in which the infrastructure was completed at an earlier date than those finished later. Thus the later lots would have greater escalation than the earlier lots - as the latter were only charged according to the costs known at the time of the preparation of the certificates issued in respect of relevant lots.

The result of this system is that all the escalation paid by the developer to the contractor was not passed on to the purchasers because owners of earlier lots would not have been asked to pay the full amount. No attempt was made to collect from owners of lots completed later, the amounts which earlier lots had escaped. Indeed at the time he was giving evidence the estimated cost of the project had increased by 250%.

The following correspondence contained in the agreed bundle assisted the defendant's case.

Firstly a letter (Exhibit 1c) dated October 11, 1988 in which the District Manager of the Jamaica Public Service Company Ltd., informed the defendant that because of the devastation of Hurricane Gilbert the company had to suspend all construction work and concentrate on restoring service to its customers.

Another letter (Exhibit 1E) from the same Manager and dated April 3, 1990, suggested that construction of the electrical supply to Chancery Hall, Phase 1 would begin in June 1990 and end in September 1990.

In a letter (Exhibit 1H) dated 7th December 1990 the Chairman of the defendant company wrote complaining that the installation and energising of the electrical supply had not yet been completed. In reply to that letter the Regional Manager of the Jamaica Public Service Co. Ltd. wrote a letter (Exhibit 1I) dated 7th December 1990 in which he promised to complete the primary lines by 19th December 1990 and expressed the hope that the primary supply would be energized by 21st December 1990.

The second witness for the defendant was Roger Arnold, a civil engineer. His evidence was as follows:

He has been employed as an engineer in the Chancery Hall project since 1987. Many problems were encountered in the construction of the infrastructure. These were variations and consequently considerable delays brought about by a number of factors.

Firstly, **Rock Content**: the amount of rock which had to be excavated was far more than originally envisaged. The original contract called for only a small amount of road in a fairly easy section of the development. The development begun in two roads where the rock content was 30% to 40%, but as work progressed it came into areas where the rock content was as much as 100% in some places. This delayed the construction considerably, and the delays and the cost of removing the rock increased the costs. Rock is twelve times more expensive to remove than ordinary soil.

Secondly, **Road Reservations**: These are stipulated by the planning authority. Originally, the requirements was 30 feet. Later with a change in planning authority during the course of the project a new demand of 40 feet was made.

Thirdly, **Retaining Walls**: The increase in road reservations necessitated the erection of substantially more retaining walls than previously planned.

Fourthly, considerable expansion of **existing roads**. Two roads Michigan Avenue and Cadiz, which existed before the start of the project were originally intended to be merely upgraded. Instead, they were extensively improved - the roads had to to be widened for their full length. These roads were further affected in that when the planning authority was changed, the asbestos water mains which had been approved by the previous authority, were condemned and had to be dug up and replaced by P.V.C. Pipes.

Fifthly, **Changes Regarding Water Pumps and Tanks**: Here again the defendant was forced to make variations from the original plan. Water for the project is distributed around a very hilly site by a system of pumps and storage tanks. Directives from the Water Commission compelled the following changes: Access roads to the tanks were made of barbergreen instead of the cheapest form of surface, "chip and spray", the roads were constructed with a lesser gradient, a security fence was erected around the site of each tank, and a substantial wall was built to protect the equipment from the possibility of falling rocks. The lesser gradient in the road was achieved by creating a more circuitous route to the site of the tank.

Sixthly, **Changes in Storm Water Drainage**: The K.S.A.C. had approved a proposal for storm water to be trained to cross the road. When the authority to control such matters was changed, piped culvert crossings under the ground were mandated - A much more expensive procedure.

Seventhly, **Delays in Receiving Electricity**: At the outset it was anticipated that the Jamaica Public Service would install electricity in 1988, but this was not commenced until the end of 1990, due to the effects of Hurricane Gilbert. This meant that the water supply system would not be approved by the Water Commission until electricity was available.

THE SUBMISSIONS ON BEHALF OF THE PLAINTIFF

Both sides were agreed as to what are the fundamental legal issues to be decided. These were identified as whether the following contentions of the plaintiff are correct:

(a) That the escalation certificates are invalid and ineffective, or in the words of the statements of claim, that the certificates do "not satisfy the terms of the agreement;

(b) Alternatively, that because of the delay by the defendant in completing the contracts, the plaintiff should not be saddled with any escalation costs incurred after September 1989.

Mr. McBean, for the plaintiff, accepted that in principle, the rule of law is that in a building contract the certificate of the surveyor is final and conclusive, that one cannot look behind the certificate unless there is fraud or collusion. But he submitted that the authorities for their proposition were all decided on the basis that the certificates were in keeping with the terms of the contract between the parties; and those in the instant case are not.

He argued that this is so because the provisions which make the certificates final and conclusive, must be interpreted in the light of two other clauses, Clause 6 which deals with completion and Clause 11 (f) which contains the stipulation regarding escalation.

Clause 6 reads:

"Completion

On or before the expiration of one and one half (1½) years from the date hereof on prior payment in full of the purchase price and other sums payable hereunder"

Whilst admitting that the contracts did contemplate delays, he suggested that a delay of approximately one year and five months without notification to the plaintiff of any circumstances which would extend the completion period, would make the certificate not binding. In this regard, although Clause 11(f) (iv) provided for escalation changes due to:

"any increased work to the Contractor as a result of delays caused by forces beyond its control"

the certificates did not set out what were the forces beyond its control on which the defendant relies. Nor did the defendants state them in their defence.

Mr. McBean further contended that such variations in the plans as the contracts say would justify escalation costs, are variations between the provisional plan and the final plan, but the final plan would not have been issued at the date of the certificates.

A further submission on behalf of the plaintiff was that the plaintiff could not be said to have agreed to an extension of time.

Finally, the certificates did not indicate what were the increased costs as a result of delays caused by forces beyond its control.

THE SUBMISSIONS ON BEHALF OF THE DEFENDANT

Mr. Hylton on behalf of the defendant made the following submissions:

(i) The relevant date from which escalation was calculated was 8th May, 1986 and not the date of agreement. He supported this statement by referring to Clause 11 (c) of the agreement which states:

> **"In arriving at the Purchase Price of the said lot the Vendor has made the following assumptions -**
>
> **(1)** there will be no change in the cost to the Vendor of constructing, installing (if required) maintaining roadways, sewage water, street lighting and electrical systems (hereinafter called the "Infrastructure") in respect of the Project including the cost of materials and equipment rates of hireage of equipment, financing costs and charges (including the cost to the Vendor of borrowing money which cost includes bank interest) and other costs in existence on the 8th day of May 1986;"
>
> (emphasis supplied).

Further, he pointed out that Mr. Davidson gave evidence that his firm was appointed quantity surveyors of the project in 1986 and he visited the site then.

(ii) In view of the principle of law that the quantity surveyor's certificates are final, the defendant need not have called him as a witness; but the defendant had brought two witnesses to show the details of the specific variations that were taken into account.

(iii) The plaintiff had not shown any mistake in the certificates, nor had he challenged any of the items mentioned in the certificates on the basis that such items did not fall within the ambit of Clause II(g) which provides that such increase shall form an addition to the the Purchase Price and that a certificate by Davidson and Hanna, as to the amount if such increases shall be final conclusive and binding on the parties.

(iv) Although the plaintiff expressed surprise at the rate of escalation because some certificates (including the plaintiff's) had been done before the cost of the whole project was known, the plaintiff would not have paid the full cost of his lot.

(v) The assertion by the plaintiff's attorney that the variations for which escalation was permitted are limited to the position shape and/or dimensions of the lots is quite wrong. Clause 11(i) on which reliance was placed by the plaintiff for that submission does not support the plaintiff's argument. The variations envisaged in the entire project, and involved the putting in of the infrastructure.

(vi) Both the oral uncontradicted evidence of the defence witnesses and the correspondence in the agreed bundle show that there were delays occasioned by circumstances beyond the control of the defendant.

(vii) The escalation in the certificates is up to the date of completion. There is nothing in the agreement which limits it up to 1989 or makes the certificate only binding or conclusive to 1989.

On the contrary, the agreement covers increases incurred during or after completion.

THE COURT'S FINDINGS OF FACT

There was no serious challenge to the evidence given on each side, and so it has been fairly easy to arrive at conclusions as to the facts.

I accept the evidence of the plaintiff as outlined above of the payments he made and his futile efforts to obtain reasons for the delay in completion by the defendant, or details as to what constituted the escalation and why the cost of escalation was so high.

I also find that he is still willing to pay what he terms "reasonable escalation," and that he regards the certificates as unreasonable.

I accept the evidence of Alexander Davidson as to how the escalation was calculated and I agree with his statement that because the lots in question are in Phase 1 they have escaped some of the costs which could be charged to them, because all the time the certificates were calculated those costs had not yet been ascertained. I also find that the evidence shows no fraud or collusion which would enable the Court to declare the certificates invalid, moreover I find that the certificates have been honestly given and that there is nothing to suggest a mistake or that he should have considered, or that he had considered any matter which he ought not to have taken into account.

I accept the evidence of Roger Arnold as to the many factors which increased costs and occasioned delays. I also find, as evidenced by the letters referred to earlier, that there was great delay in obtaining electricity at the site. Accordingly I find that the delays occasioned were delays over which the defendant had no control.

THE DECISION ON THE ISSUES OF LAW

I have already indicated that Mr. McBean accepted the principle laid down in various cases cited by Mr. Mylton, and exemplified in **Jones and Others v Sherwood Computer Services PLC** [1992] 2 All ER 170. In that case it was held that

> "Where the parties to a contract expressly agreed that certain matters arising in relation to the contract were to be determined by an independent expert whose determination was to be 'conclusive and final and binding for all purposes', then in the absence of fraud or collusion the expert's determination could only be challenged on the ground of mistake if it was clear from the evidence (including the determination, the terms of the contract and the letter of instruction) that the expert had departed from his instructions in a material respect."

I shall now deal with the various issues raised in submissions of the plaintiff's counsel.

1. Is the defendant required by law or by the terms of the contract, to supply more details than have been given in the certificates of escalation?

I accept Mr. Mylton's submission that the principles enunciated in cases concerning certificates of architects, surveyors and valuators, are applicable to building contracts such as those in this case.

I hold that the authorities indicate that in law the surveyors are not required to give in their certificates any details of the calculations, or of the variations which contributed to the escalation. It is sufficient that the certificates indicate the various heads or types of variations as outlined in the contract at Clause 11 (f), (i), (ii) and (iii). This has been done.

That there is no obligation in law for the certificates to supply such details may be gleaned from a number of authorities.

In **Campbell vs Edwards** [1976] 1 All ER 785 a lease provided that a price should be fixed by a chartered surveyor and that in assessing the price he should take account of certain matters. In their report the surveyors gave their assessment of the price merely saying that they had considered the matters stipulated in the lease, but gave no reasons for their valuation nor did they set out the calculations by which they arrived at the valuations.

The decision of the English Court of Appeal is adequately summarised in the headnote which reads:

> "Held - Where two parties had agreed that the price of property was to be fixed by a valuer on whom they should agree and the valuer gave his valuation honestly and in good faith in a non-speaking report i.e. one that did not give reasons or calculations, the valuation could not be set aside by either party on the ground that the valuer had made a mistake, for in the absence of fraud or collusion, the valuation was binding on the parties by contractor. Accordingly, as the surveyors' valuation was not a speaking valuation and had been given honestly, and (per Lane L.J) there was nothing to suggest that the surveyors had failed to take into consideration all the matters which they should have taken into consideration the landlord was bound by the valuation and could not allege that it was incorrect." (emphasis supplied)

The certificates in the instant case are non-speaking certificates. The later case of **Jones and others vs Sherwood Computer Services PLC** [1992] 2 All ER 170, followed the decision in **Campbell vs Edwards** (supra).

In **Jones vs Sherwood** (supra) the contract provided that the value of shares to be purchased by the defendant company, should be determined by the parties' accountant; if the accountants could not agree, then the issue should be decided by an independent firm of accountants acting as experts and their determination was to be conclusive and binding for all purpose. The contract also provided that the price of the shares should be computed by reference to the amount of sales of products sold by subsidiaries of the company whose shares were to be purchased.

The independent firm duly calculated the price, but this was challenged by the plaintiff on the ground, inter alia, that the firm had failed to take account of certain transactions which should have been considered. The firm gave no reason for its decision.

On appeal, the English Court of Appeal held that where parties agree to be bound by the report of an expert whether or not the report gave reasons for the determination, it could not be challenged in the Courts on the basis that mistakes had been made in its preparation, unless it could be shown that the expert had departed from his instructions in a material respect. The Court further held that since the firm of accountants had done exactly what they had been asked to do and there was no question of bad faith, their determination would stand.

Dillon L. J. had this to say at page 177:

> "... it is convenient to say a little at this juncture about the distinctions between speaking and non-speaking valuations or certificates which to mind is not a relevant distinction. Even speaking valuations may say much or little; they may be voluble or taciturn if not wholly dumb. The real question is whether it is possible to say from all the evidence which is properly before the Court and not only from the valuation or certificate itself, what the valuer or certifier has done and why he has done it. The less evidence there is available, the more difficult it will be for a party to mount a challenge to the certificate." (emphasis mine)

This passage highlights the error on which the plaintiffs attack is based. He cannot challenge the certificate successfully, because it says little and discloses no error; and when one looks at the certificate together with all the evidence as Dillon L.J. advises, there is really nothing on which the surveyor's certificate may be impeached. He did not take anything into consideration which he should have not considered. I might add that the Court of Appeal in SCCA 17/92 **Woodrow Limited vs Urban Development Corporation** June 2, 1992 (unreported) has applied the principle

laid down in **Jones vs Sherwood** (supra). Moreover a consideration of clause 11 (g) in the light of the authorities cited is apposite. In doing so I am guided by the dictum of Dillon L.J. in **Jones and others vs Sherwood** (supra) at page 179. He said:

> "On principle, the first step must be to see what the parties have agreed to remit to the expert this being ... a matter of contract."

What did the parties agree to remit to the surveyors? The answer lies in clauses 11 (g) and 11 (f). The former reads in part:

> "A certificate from Davidson and Hanna, quantity surveyors or such other quantity surveyors as the vendor shall nominate, as to the amount of such increase in the purchase price payable by the purchaser shall be final conclusive and binding on the parties hereto." (emphasis mine)

One then must ask "To what increase does clause 11 (j) refer?" The explanation is to be found in clauses 11 (g) and 11 (f) as extended by clause 11 (c). Clause 11 (f) provides that the purchase price shall be adjusted upwards if the cost of construction of the infrastructure is increased to the vendor as a result of various factors.

When one compares the items mentioned in the escalation certificates with clause 11 (f) and 11 (c) one finds that they are all within the provisions of those clauses.

The first category stated in the escalation certificates is "variations in the plans, specification and works."

This is taken from clause 11 (f) (iii) which sanctions increases as a result of:-

> "Variations in the said plans, specifications and work which result in extra work materials or equipment"

The second category stated is:-

> "increased costs of wages and labour rates material and equipment prices"

This is a combination of clauses which permit increases as follows:

(a) "**Clause 11 (f) (ii)** increases in the wages labour rates."

(b) **Clause 11 (f) (i)** - increases in the costs in respect of materials and other things and matters mentioned in sub-clause (e) (i).

(c) **Sub-clause (e) (i)** mentions "The cost of material and equipment"

The third category reads thus:

"Financing costs and changes including interest payments"

This head is the combination of **clauses 11 (f) (i)** which speaks of:

> "increases ... in respect of material and other things mentioned in sub-clause (e)(i)

And **sub-clause (e) (i)** which mentions:

> "Financing costs and charges (including the cost to the vendor of borrowing money which cost includes bank interest)"

It is clear therefore that the categories enumerated in the certificates are the matters referred to the surveyors. Similarly it follows that the valuation spoken of by the defence witnesses whose evidence I have accepted, are within the terms of the contract. Further, nowhere in the contract are such details expressly required. I reject Mr. McBean's argument that such a requirement may be implied by interpreting **clause 11 (g)** which says that the certificate of the surveyors "shall be final conclusive and binding on the parties" in the light of **clause** 6 which provides for completion "on or before the expiration of one and one half (1½) years from the date hereof..." and clause 11 (f) which provides that escalation may be charged for certain factors.

It is appropriate to quote the dictum of Lord Denning in **Campbell vs Edwards** [1976] ALL ER 785 at page 788, he said:

> "It is simply the law of contract
> If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith they are bound by it. Even if he has made a mistake they are still bound by it. The reason they are bound is because they have agreed to be bound by it. If there is fraud or collusion, of cause, it would be different. Fraud or collusion unravels everything. It may be that if a valuer gives a speaking valuation, if he gives his reasons or his calculations and you can show on face of them that they are wrong, it might be upset."

Here as in that case, this is not the situation.

The plaintiff should have stipulated in the contract that the details he now seeks should be given, but he failed to do so. Or an equally effective method of obtaining this benefit is that of including an arbitration clause. Indeed in **Turner vs McConnell** [1985] 2 ALL ER. Dillon L.J. pointed out that it is because of the restriction imposed upon looking behind the surveyor's certificate, why some parties prefer arbitration and he referred to an earlier decision of the Court of Appeal in England, in **Northern Regional Health Authority vs Crouch** [1984] 2 ALL ER 175 where the principle that one cannot look behind the certificate was made plain.

These reasons are also sufficient to dispose of the argument that the certificates did not state the factors which were beyond the defendant's control and which caused delay in completion of the project.

2. May the certificate be opened up or held to be invalid on the basis that the amount of valuation stated in the certificates was not in the contemplation of the parties?

Here again the weight of authority is against such a proposition. The plaintiff contracted to pay whatever the surveyor certified and he is bound by the contract.

The case of **Sharpe vs San Paulo Railway Company** Vol. V11 Chancery Appeal Cases 597, is instructive.

The relevant portions of the headnote read as follows:

> "The engineer of a railway company prepared a specification of the works on a proposed railway and certain contractors fixed prices to the several items in the specification and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day at a sum equal to the sum total above mentioned ..... The contract contained provisions making the certificate of the engineer conclusive between the parties; and it was provided that all accounts relating to the contract should be submitted to and settled by the engineer, and that his certificate for the ultimate balance should be final and conclusive; it was further provided that all questions except, such as were to be determined by the engineer, were to be referred to arbitration.
>
> The railway was completed and the engineer gave his final certificate as to the balance due to the contractor ... Held, that although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not maintain any claim against the company on that ground:
>
> Held, that in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties..."

In that case the first ground on which the plaintiff attacked the engineer's certificate was that the earth works were insufficiently calculated, that the engineer had made out the earth works to be two million and odd cubic yards, whereas they were found to be twice as much. Sir W.M. James L.J. in dismissing claim, said at page 607, "but that is precisely the thing which they, the plaintiff company took the chance of." He went on at page 608:

> "But that is one of the things which, in my mind, was clearly intended to be governed by the contract, the company virtually saying, 'whether the earth work is more or whether it is less that is the sum we are to pay'."

In the instant case, by the contract, the plaintiff is virtually saying, "**whatever** the surveyor certifies be it a small sum or a large sum I shall pay." I am fortified in this view by the words of clause 11 (n):

> "In the event that there shall be from any cause whatsoever other than the fault of the vendor any increase in the sums stated in clause 8 (a) (vi) herein (i.e. Balance Purchase Price 16% the Purchaser shall pay such increase on demand by the vendor."

3. Does the delay in completion relieve the plaintiff from paying escalation after the date contemplated for completion?

It was submitted for the plaintiff that a delay of one year and five months beyond the contemplated completion of the project without notification to the plaintiff would made the certificate not binding. Learned counsel for the plaintiff did not advance any authority for this proposition. I do not agree with this submission. The contract does not stipulate for any such notice, and I can find no basis for employing such a requirement. The crucial issue in this area is simply whether the increased cost was in the words of the contract:

> "increased cost to the contractor as a result of any of the delays caused by forces beyond its control."

I hold that, on the facts which I have found, the increased costs arose precisely in this way, and I have already indicated that the **delays** were due to forces beyond the control of the contractor.

Moreover I might add that as Mr. Hylton rightly pointed out delays meant increased costs in establishing the infrastructure - roads, drainage, tanks etc. and clause 11 (f) provides that: "The purchase price shall be adjusted upward at any time during or after completion of the infrastructure if the cost of construction is increased to the vendor as a result of" various circumstances set out thereafter. Further no specific date was fixed up to which escalation should be calculated. (emphasis supplied)

4. Are the only variations permitted by the agreement for sale, variations in the position, shape and dimensions of the lots?

This is the plaintiff's contention. The clause which deals with variations in the position, shape and dimensions of the lots is clause 11 (i) it reads thus:

> "Notice is hereby expressly given to the Purchaser that the land comprised in the description of land herein is described by reference to a provisional plan deposited at the office of the vendor and that the position, shape and dimensions thereof may be subject to variation when the final plan of the said sub-division is completed and deposited in the Office of Titles. In the event of any such variation in position shape and or dimensions same shall not invalidate this agreement and the vendor shall not be liable to pay any compensation or damages whatsoever in respect therof." (emphasis added)

This clause obviously refers to the description of the lot mentioned, and speaks to variations in the position, shape and/or dimensions of the lot. It does not allude in any way to the cost of the lot to the purchaser, but merely provides that if there should be any variations of the kinds described, such variations would not invalidate the agreement.

To ascertain what variations are agreed to be calculated as escalation costs, one must consider clauses 11(c), (iii) and clause 11 (f) (iii). Clause 11 (c) (iii) reads in part:

> In arriving at the Purchase Price of the said lot the Vendor has had regard to the fact that the lot forms part of the project known as Chancery Hall Estate Phase 1 and has made the following assumptions:-
>
> (1).....
>
> (ii) .....
>
> (iii) there will be no variations in the plans specifications and work for the project.

Then follows clause 11 (f), which sets out the conditions under which the price may be increased because of escalation. It reads:

> "The Purchase Price shall be adjusted upwards.. if the cost of construction of the infrastructure is increased to the vendor as a result of:-

(iii) Variations in the said plans, specifications and work which result in extra work, materials or equipment."

Sub-clause (f) (iii) implicitly refers to clause 11 (e) (iii) and quite clearly provides that the variations in the said plans, specifications and work, i.e. the plans, specifications and work of the project, and does not confine the operation of the right to adjust the price to variations in the position shape and dimensions of the lot.

In light of the above the plaintiff has failed to establish any basis for the declarations and order sought. They are therefore refused. Costs to the defendant to be taxed if not agreed.

Before parting with this matter I wish to say two things. Firstly, I regret the delay in delivering this Judgment, and secondly, I wish to thank counsel for the very able way in which they conducted their cases. I also am pleased that the defendant's attorneys made the Court's work easier by presenting written submissions. I hope that this practice will soon gain widespread currency.