JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 46/98

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN:	**GARNETT PALMER**	**APPELLANT**
AND	**PRINCE GOLDING**	**1st DEFENDANT/RESPONDENT**
AND	**ETTA GOLDING (Deceased after litigation commenced)**	**2nd DEFENDANT/RESPONDENT**

Raphael Codlin instructed by Raphael Codlin & Co. for the appellant

Donald Scharschmidt, Q.C. and Leighton Miller instructed by Alton Morgan and Co. for the respondent

February 18, 21, 22, 29, March 2, 3, April 10, 11, 12, 13, 14 and December 20, 2000

DOWNER, J.A.

The principal claim of the appellant Garnett Palmer against the developer Prince Golding is that Golding ought to be obliged to specifically perform the contract of sale allegedly made in December 1984, to transfer to him Lots 19 and 20 of Long's Wharf in the parish of Clarendon. Clarke J., found that the contract was signed by both parties in March 1985. Since the contents of both contracts are identical and undated, in the light of the learned judge's finding, the March date will be used in this judgment. In the Court below, Palmer failed, as the decision went in favour of the developer Golding. So the

appellant Palmer, has appealed to this Court with a prayer to reverse the order of the Supreme Court.

Because of the complexity of the issues raised, and the manner in which it was proposed that the issue should be determined, an appropriate starting point is the order of Record J. which is cited in full below. It reads:

> "BEFORE THE HONOURABLE
> MR. JUSTICE RECKORD
> THE 15th DAY OFOCTOBER 1992
>
> UPON the Notice of Motion dated the 23rd day of September, 1992 coming on for hearing this day and upon hearing Mr. Alton E. Morgan, Attorney-at-Law, instructed by Messrs. Alton E Morgan & Co., Attorneys-at-law, for the Defendants and Mr. Raphael Codlin & Company Attorneys-at-Law for the Plaintiff
>
> **IT IS HEREBY ORDERED BY CONSENT that:-**
>
> **1: The Order made in this action by the Honourable Mr. Justice Patterson on the 12th of February 1992 that;**
>
> 1. The parties hereby agree to a trial by motion for a declaration on the issue of whether or not the Notice to Complete dated the 12th of November, 1990 served on the Plaintiff had the effect of extinguishing the contracts which are the subject matter of this action.
> 2. The Plaintiff be granted leave to file and deliver Statement of Claim within 7 days of the date of this Order
> 3. The Defendants Attorneys are hereby released from their undertaking given on July 22, 1991;
> 4 Injunction granted for preservation of status quo pending hearing of motion
> 5. The Plaintiff undertakes to pay any damage suffered by the Defendants in consequence of injunctions granted or undertakings given by the Defendants in this suit.
> 6. Costs to be costs in the cause.

Be and is hereby vacated.

2. **The matter to proceed to trial on the issues**

3 **Costs to be costs in the cause**

BY THE COURT".

But this is only part of the story, after correspondence between the Attorneys-at-law on both sides caveats were issued at the instance of the appellant in respect of Lots 19 and 20, and another consent order was made before Theobalds J. It reads:

> "IN CHAMBERS
> THE 11th DAY OF FEBRUARY 1993
> BEFORE THE HONOURABLE MR. JUSTICE THEOBALDS
>
> UPON the Summons dated the 2nd day of February 1993 coming on for hearing this day and UPON hearing Mr. Raphael Codlin instructed by Raphael Codlin & Co., Attorneys-at-law for the Plaintiff and Mr. Alton E. Morgan instructed by Alton E. Morgan & Co., Attorneys at law for the Defendants IT IS HEREBY ORDERED BY CONSENT that:
>
> 1. Injunction granted to the Plaintiff restraining the Registrar of Titles from entering any dealings on duplicate Certificates of Title registered at Volume 1197 Folio 589 and Volume 1197 Folio 590 of the Register Book of Titles. Injunction to stand until the 31st July 1993.
>
> 2. The Plaintiff, through his Attorney, agrees to abide any order which the Court may make in respect to damages which might be awarded to the Defendants.
>
> 3. The Defendants at liberty to apply to the Court by Motion to determine any issues that might arise on the pleadings.
>
> 4. Liberty to either party to apply
>
> 5. Costs to be the costs in the cause.

BY THE COURT".

These orders explain in part why frequent references to interlocutory proceedings are necessary and the number of affidavits which were in evidence before the learned trial judge. Further the respondent Golding gave no evidence at the trial, so his story was told by the affidavits admitted into evidence and documents. This is regrettable, because in some instances there was correspondence between Palmer and Golding and Palmer gave evidence of instances of conversations between them which was not refuted. One instance concerned the issue of actual possession and occupancy.

Was there a sub-division contract of sale in Lots 19 and 20 formed in March 1985?

It must be emphasised that the contract in issue is a sub-division contract, consequently, there are certain statutory terms and common law requirements of which this Court must take judicial notice. (See Sec. 21 of the Interpretation Act). There is the impact of the Local Improvements Act (The "Act"), see Section 5 sub section (4)and(5) and 12(d); the doctrine of past consideration, as well as the law of deposit on land transactions as expounded in **Workers Trust and Merchant Bank Ltd. v DoJap Investments Ltd.** (1993) 30 JLR 56 at 58-61.

Ground 2 of The Notice and Grounds of Appeal reads:

> "(2) That the learned Judge misdirected himself in holding that there is significance in the amendment by the Parish Council of the Subdivision Plan when His Lordship himself has conceded that Counsel's submission for the Plaintiff was correct when he states in his Judgment:
>
> Mr. Codlin has submitted that so long as the contract subsists with the plaintiff not in breach, Mr. Golding is obliged to carry out infrastructural work in respect of all four lots before completion. In my opinion Mr. Codlin is correct.

> The learned Judge completely ignored and made no mention of the Local Improvements Act. Section 9 which was submitted to him both in oral and written address which empowers the relevant Minister to approve Subdivision Plan sanctioned by the Parish Council and further provides in Section 9 subsection 8 that:
>
> > 'The decision of the Minister under this section shall be final and not subject to any further right of appeal.'
>
> The provision of the Act therefore, provides clearly that once the Minister has approved the Subdivision Plan sanctioned by the Parish Council, that is the end of the matter, and the Parish Council has no authority to amend a Plan after it has been approved by the Minister".

The omission to take into account the provisions of the Act is a matter of public interest as the provisions of the Act are meant to protect the environment and provide for the orderly development of land. Further the Act ensures that purchasers obtain basic amenities which run with the land. Having regard to these features it ought to have been contended that the contract of 1987 on which the respondent relied was invalid. That contract failed to incorporate the mandatory terms of the 1985 contract and at the time of its formation it was an illegal contract. A contract formed two years after approval was given for the sub-division was illegal because there was an implied prohibition against a formation of such a contract if the infrastructure was not completed. In this case there has been no attempt to commence the infrastructure. The 1987 contract could not replace the March 1985 contract if that contract still subsisted. The other point that should be noted at the outset was that the conditions in the contract were imposed pursuant to the Act. That is the basis for raising the illegality of the 1987 contract. I must say that I have doubts about the finding of the learned judge about the March 1985

date of the contract. Since the learned judge relied on the credibility of Mr Crafton Miller I cannot disturb that finding. It must be pointed out however, that although the learned judge accepted that the affidavits signed by Mr Miller were prepared by Mr Alton Morgan another attorney-at-law, it is not true that Mr Miller had no record to check the facts as the learned judge found. Mr Miller had an office copy of the March contract as the evidence will show. What is noteworthy is that the respondent Golding in an affidavit at page 99 of the record speaks of the December 1984 Agreement.

The relevant averment in the Statement of Claim reads as follows:

> "6. At the time when I signed the Agreement, CONDITION 13 was as it appears on the application for the subdivision granted by the Clarendon Parish Council, that is to say, it provided that no Title shall be issued for the subdivision until the approval of the Parish Council was granted."

There was no proof that there was an amendment to condition 13. Even if there was, no amendment would be valid after the Minister had given his approval. Then the Statement continues thus:

> "7. The Defendants in spite of repeated requests by the Plaintiff failed to provide the infrastructure as provided for in the contract and also failed to complete the contract in respect of lots 19 and 20 according to its terms in that the contract provides that the Defendants should present the duplicate Certificates of Title for the two lots with the Plaintiff's name endorsed thereon, and the Defendants have neither tendered to the Plaintiff nor any representative of the Plaintiff any instrument of Transfer to be signed by the Plaintiff so as to vest the said properties in the Plaintiff.
>
> 8. That on the day of 19 the Plaintiff tendered to the Defendants Attorneys-at-law, Alton E. Morgan & Co. a cheque for $20,000.00 as part payment of the final sum of $57,305.20 and the said cheque was returned to the Plaintiff. The Plaintiff then, through his Attorneys-at-law, tendered to the Defendant's Attorneys-at-

law on the 16th May 1991 a cheque in the sum of $57,305.20 which represents final payment on the said two lots and the Attorney returned the proceeds of the said cheque to the Plaintiff's Attorneys-at-law.

9. That the Defendants have failed to carry out the said Agreement in the following areas:

Water has not been provided for the subdivision as stipulated in paragraph 10 of the said Agreement.

The road has not been provided by the Defendants as required by paragraph 11 of the said Agreement.

The Defendants have failed to carry out the infrastructural conditions laid down by the said Agreement.

10. By reason of the matters aforesaid, the Plaintiff has suffered damage and has incurred expenses and has been put to inconvenience in that the Plaintiff on several occasions worked out schemes of improvement to the property for the rearing of cattle and for otherwise developing the property, but was unable to get the finance in the terms required because although the Plaintiff was in occupation of the property the Plaintiff could not use the duplicate Certificate of Title as collateral for loans because they were not transferred into his name." [Emphasis supplied]

The legal effect of ground 2 of the Notice and grounds of appeal must now be considered.

Having identified the relevant statute pertaining to the contract of sale it is necessary to ascertain how the March 1985 contract came into being. An undisputed piece of evidence is the receipt issued by Crafton Miller & Co., Attorneys-at-law for both parties in this case. The receipt is as follows:

"10. 12. 84
KINGSTON, JAMAICA, W.I.

(CORNER OF DUKE & HARBOUR ST.
1 DUKE STREET

Received from: Mr. Garnett Palmer
The sum of Eleven Thousand Five Hundred Dollars $11,500.00
Re Deposit lot 19 and 20 Long's Wharf from Prince Golding
Pending N.C.B. permission to prepare agreement of sale.

Per. E.Tennant." [Emphasis supplied]

It should be stated at the outset that the emphasised clause could have had no binding effect on Palmer. There was no intention on the part of the appellant Palmer to contract with N.C.B. There was no privity between them. The evidence shows that N.C.B. had a mortgage on the Long's Wharf lands, but that by itself could not prevent the respondent Golding from contracting to sell, subject to the mortgage. One meaning that could be attributed to it was that, the contract was not ready when the receipt was issued. In any event the full deposit had not been paid at that time.

As regards the written contract an important issue will be whether it still exists. It will be assumed initially that the contract still exists and there was no tampering with clause 13 of the contract, although the appellant Palmer insists that there was tampering. The alleged tampering is one of puzzling features of this case.

Turning to the special conditions, the contract in part reads:

"SPECIAL CONDITIONS

3) The title is subject to the following conditions imposed by the Clarendon Parish Council."

...

10. WATER SUPPLY

Water sub-mains shall be of inches in diameter as shown on the plan for that purpose, and shall be of a specification approved by the Bureau of Standards.

Such lot shall be supplied with a ½ inch diameter service pipe connection from the sub-main and carried 3 feet within the boundary of each lot.

Sub-mains shall not be covered before inspection by the superintendent, Roads and Works, or his representatives.

11. ROADWAY

The reserved roadway should be cleaned to extreme width of all vegetation. Scarify road surface and apply selected marl, consolidated in 6 inches layers to a minimum depth of 1'0". Wet and roll to proper camber to a minimum weight of 10 ton roller.

12. The work of the subdivision shall be completed within two (2) years of the date of approval

13. No infra-structure is required to be undertaken by the Vendors."

It must be emphasised apart from Clause 13 the draftsman of the contract realised that the conditions imposed by the Clarendon Parish Council were necessary incidents of the registered title. Because there were terms incorporated pursuant to a statute they would therefore be essential terms of any contract to sell the sub-divided lots. It is important to make this point at this stage as the respondent Golding has sought to rely on a 1987 contract to found a submission that the 1987 contract had the effect of discharging the original 1985 contract.

Be it noted that Clause 13 above was superfluous as the Act makes the developer responsible for providing the infrastructure. It should also be recognised that Clause 13 of the conditions imposed by the Clarendon Parish Council before the alleged amendment stated:

"13. No titles shall be issued from this subdivision until a Certificate of completion of all infra-structure

> works has been issued by the Parish Council to the Registrar of Titles."

The resolution affirming the above condition was passed by the Clarendon Parish Council on 8th March 1984 and is exhibited in the record at page 60. Yet the learned judge found the resolution was passed on 1st February 1984 and amended February 1985. See page 211 of the record. Here are the words of the learned judge at page 211 of the record:

> "(f) Condition imposed by the Clarendon Parish Council on 1st February 1984 was amended in February 1985 to read as follows:
>
> > "No infrastructure is required to be undertaken by the vendors".

This original condition 13 as well as condition 12 was imposed pursuant to sections 5(1) and 8(1) of the Act.

That latter section reads as follows:

> "8(1) Subject to the provisions of section 9, the Council shall on such deposit as prescribed in section 5 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 and ways, and may approve of the map, specification and 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."

and 8(10) reads:

> "The decision of the Minister under this section shall be final and not subject to any right of appeal".

It would seem that the obligations of the developer consonant with the conditions imposed by the Clarendon Parish Council could not be avoided by the substituted Clause 13 as the developer and the draftsman of the contract thought. If the provisions of the Act could be avoided then the legal system would lack an effective means to protect the purchaser and the environment. One complication is that both parties relied on the services of the same Attorneys-at-law. Notwithstanding that, the Court must give full force and effect to the Act and the contract at the instance of the purchaser Palmer. Here is how the learned Judge below found on this issue:

> "I therefore hold that Special Condition 13: 'No infra-structure is required to be undertaken by the Vendors' - cannot by its general words relieve the vendors of their obligation (provided the contract still subsists) to furnish the infrastructure expressly specified in Special Conditions 10 and 11. The general words of Special Condition 13 are therefore, in my judgment, otiose".

As to whether the prohibition in clause 13 of the original condition was incorporated in the 1985 contract, that is an issue that will be addressed. The record is not clear as to what was the amended condition of 1985 as noted. The amendment at page 63 of the record is noted. The date is 6th February 1985. Page 99 of the record shows that the amendments relate to clause 11 which relates to the roadway. These amendments were approved by the Minister as will be seen when his letter of 28th January is cited.

Since there is an issue as to whether the contract of 1987 could replace the 1985 contract, then whether such a contract could be formed without the mandatory provisions imposed by the Parish Council was a live issue before the Court. The further issue is whether if the point was not properly taken by counsel for Palmer, this Court can

of its own motion take the point. There are provisions in the Act to compel the owner to carry out some of his statutory obligations. Section 10 reads:

> "'10. 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 Council or any part thereof within the time prescribed by the Council as provided in section 8, the Council 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 Council in executing such works, together with a commission not *exceeding six per centum* in addition to the actual cost, shall be recoverable from the owner as a debt due to the Council and shall until payment thereof be a charge on the land shewn in the map deposited as provided in section 8 in priority to all mortgages, charges, estate and interest created subsequent to the deposit of such map."

This section is confined to street works shown in the specifications.

Further there are criminal sanctions pursuant to section 12 of the Act. Section 12 in so far as material reads:

> "12.(a) Every person who shall lay out or sub-divide land for the purpose of building thereon or for sale within the meaning of section 5 before depositing with the Council a map of such land provided by the Act".

Then sub-paragraphs (b) and (c) need not detain us. The section continues thus:

> "(d) every person depositing a map and obtaining the sanction of the Council and who shall neglect or fail to perform the street works within the time prescribed by the Council;
>
> (e) every person who shall contravene or fail to comply with any condition prescribed by the Council under section 8 or 9; and
>
> (f) every person who shall commit a breach of any regulation under this Act,

> shall be guilty of an offence against this Act and shall on summary conviction be liable to a penalty not exceeding four hundred dollars, or, in default of payment to be imprisoned with or without hard labour for a term not exceeding twelve months, and in the case of a continuing offence to a further penalty not exceeding forty dollars 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 twenty-eight days".

An important aspect of this case is whether apart from the criminal sanctions which contemplates the Parish Council or the Director of Public Prosecutions instituting proceedings, the purchaser Palmer has a right to the private law remedy of specific performance. A point in his favour is that the criminal sanctions will not assist him in recovering Lots 19 and 20 which he claims. Nor will criminal sanctions enable him to secure the benefits of all the infrastructure contained in the contract.

Dates are of importance at this point. The resolution of the Clarendon Parish Council imposing the conditions on the subdivision as stated previously was dated 8th March 1984. Approval by the Minister was 28th January 1985 and as exhibited at page 290 D of the record. It reads:

> "28th January, 1985
>
> Secretary
> Clarendon Parish Council,
>
> Re: Subdivision – Part of Long Wharf, Clarendon – Prince Golding
>
> We refer to your letter of the 21st instant, ref. No. 109/85-L/4 relating to the application in caption.
>
> In processing this application, the view that this Ministry took was that since the subdivision is for agricultural use, it is not envisaged that vehicular traffic

will be heavy. Hence grouping the entrance 600 feet apart should not pose an traffic hazard.

However, this Ministry will not support direct vehicular access onto the main road from lots 1, 4, 5, 8, 9, 12, 13, 16, 17, 20, 21, 24, 25 and 28. We recommend that titles to these lots be endorsed restricting direct vehicular access onto the main road. They should be granted right of way onto the access strips to the lots at the rear of the subdivision

We are in agreement with the Superintendent's comments at No. 5 of his memorandum. Ideally an internal road running north to south should have been designed to bisect the site, and vehicular access for all lots should be located on the said reserved road. The Superintendent's recommendation is therefore supported.

Sgd/ I. Ang
For Chief Technical Director".

Then there is this further letter from the Town Planning Department. It reads:

"February 4, 1985

Secretary
Clarendon Parish Council
May Pen.

Dear Sir:

Re: Subdivision – Part of Longs Wharf, Clarendon – Prince Golding

Please refer to your letter No. 109/85-L/4 of January 21, 1985 and to the letter from the Chief Technical Director, Ministry of Construction – No. 023013/144 of 28th January, 1985 concerning the above captioned application.

This Department takes the position that in light of the fact that this is an agricultural subdivision and in view of the very high cost of road construction; the "ideal" situation of having an internal road running North-South through the subdivision is unrealistic and unnecessary, at this time.

We take the view that the solution proposed in paragraph three (3) of the Chief Technical Director's letter, referred to above, is a sensible and practical one and we endorse it.

We hope this is of some assistance to you.

Yours faithfully,

Sgd/ Howard Pinnock
for Government Town Planner

c.c. Chief Technical Director".

The amendment ordered by the Ministy letter dated 28th January 1985 was the only amendment exhibited. It concerned condition 11.

So the purported amendment by the Parish Council of 6th February 1985 altering Condition 13 is void. What is puzzling is that the purported amendment by the Parish Council of Condition 13 does not seem to have been exhibited in the Record. How then did the draftsman of Clause 13 in the contract come to insert that Clause. What was the basis legal or otherwise for inserting such a clause? The deposit and part payment on lots 19 and 20 was paid on 10th December 1984. The deposit and part payment on lots 21 and 22 was paid on 18th January 1985. This latter receipt is cited to demonstrate that it was not claused as the initial receipt. It reads:

"KINGSTON, JAMAICA W.I.
(CORNER DUKE 7 HARBOUR ST.)
1 DUKE STREET
18. 1. 1985

Received from Mr Alton Palmer Jarrett the sum of Eleven Thousand five hundred dollars re Deposit lot 21 and 22 Long Wharf St. Catherine. $11,500.00

Thank you

18/1/85 Per. E. Tennant

Since the mortgage on Long's Wharf was registered before the sub-division, it is strange that it was thought necessary to clause the initial receipt and not the second. Furthermore the description of the land, the consideration and the manner of payment suggests one contract for four parcels of land. If one receipt was claused the natural inference was that the other would also have been claused. It is undisputed that when the deposit was paid on 18th January 1985, there was no amendment to Clause 13 of the Parish Council Conditions. A subdivision contract prepared before 18th January 1985, or on that day or up to the 5th of February before the purported amendment must have had Clause 13 of the Parish Council Condition as part of the terms of the contract. In fact a contract drafted at any time would have had to include condition 13 of the Parish Council Conditions as there was no proof that there was ever an amendment to that clause.

It is now important at this stage to set out some other relevant clauses in the contract:

"SCHEDULE

DESCRIPTION OF LAND: All those parcels of land part of Long's Wharf in the Parish of Clarendon being the lots numbered 19, 20, 21 and 22 on the subdivision plan for the said lands registered at parent title Vol. 1171 Folio 241.

Lot 19 comprises 6 acres, 2 2/5 roods and perches
Lot 20 comprise 6 acres, 2 /5 roods, and perches
Lot 21 comprises 6 acres, 2 2/5 and perches
Lot 22 comprises 5 acres, 3/5

		roods and 16.6 perches
		These are subject to minor variation in the pre-checked plan and which will not be subject to any reduction or increase in price.
ENCUMBRANCES:		None save the restrictive covenants (if any) endorsed on the Certificate of Title.
CONSIDERATION:		25 ACRES AT $6,000.00 per acres. Totaling - $150,000.00.
HOW PAYABLE:	a)	Deposit of $23,000.00 on signing of this Agreement
	b)	A further deposit of $20,000.00 on or before the 31/5/85
	c)	Balance on completion"

Before continuing with the relevant terms of the contract it is important to note that the receipts which identified the parcels of land shows that consideration of $23,000 moved from the promisee Palmer (the appellant) to Golding (the respondent). Also to be noted is that the promisor Golding made specific undertakings as detailed in the written agreement.

Further clauses are as follows:

"COMPLETION:	On presentation of Registered Transfer on Duplicate Certificate of Title in the name of the Purchaser and on payment of Balance of Purchase money and half cost of transfer.
COST OF TRANSFER:	To be borne equally by the parties Attorneys-at-Law costs as per Law Society

Scale of Fees. Transfer tax to be borne by the vendor.

COST OF PREPARING AGREEMENT OF SALE — The cost of preparing this Agreement of Sale is $400.00 payable by the Vendor and Purchaser in equal shares, and should this Agreement be terminated by the Purchaser the Vendor's Attorneys shall deduct from the deposit the sum of $200.00 being half the cost of preparing the said Agreement of Sale.

SPECIAL CONDITIONS:

1) It is expected that the Certificate of Title should be available by the latest the day of 1985 and the purchaser will be notified immediately upon receipt by the Vendor of the Certificate of Title and completion should thereupon be fixed for a date days following the date of notification

2) Subject to the Purchaser obtaining a Mortgage loan for $ at a rate of interest of from a reputable financial Institution within 4 weeks from the signing hereof.

3) The title is subject to the following conditions imposed by the Clarendon Parish Council."

If the original clause 13 of the contract was tampered with, or the Clarendon Parish Council purported to alter that condition which prohibited the issuing of titles until the Parish Council issued a Certificate of Completion as regards the infrastructure after

the sanction of the Minister, then both alterations would have been invalid. The learned judge made a surprising finding that there was no tampering with clause 13 of the contract. Even so it was necessary for him to have made a finding of whether it was not mandatory for the original clause 13 to be a term of the contract which was drafted in Mr Miller's chambers. It is significant to say that since it was not made an express term as ordained by the Act, this Court should incorporate the original Clause 13 by necessary implication.

It is essential to follow and examine the learned judge's reasoning on the issue of tampering. At the very commencement of his judgment at page 210 of the record he stated in part

> "It is not disputed that:
> (a) ...
>
> (b) The subdivision approval was subject to a number of conditions including the following numbered conditions:
>
> ...
> '12. The work of the subdivision shall be completed within two (2) years of the date of approval.
>
> 13 No Title shall be issued from this subdivision until a Certificate of Completion of all infrastructure works has been issued by the Parish Council to the Registrar of Titles'."

Then continuing the learned judge said:

> "(e) Under the terms of the agreement for sale the title to the lots was made subject to the conditions imposed by the Parish Council".

Then the learned judge surprisingly said that the following was also not in dispute:

> "(f) Condition 13 imposed by the Clarendon Parish Council on 1st February, 1984 was amended in February 1985 to read as follows:
>
> > "No infrastructure is required to be undertaken by the vendors".

Paragraph (f) was certainly in dispute. The appellant Palmer in evidence stated that this clause was the result of tampering with the contract and that the original Clause 13 of the contract was replaced.

Here is the evidence of Winston Kelly the Superintendent of Roads and Works on the issue of the amendment by the Parish Council. At page 233 of the record it reads:

> "Ques: The plan that was approved in January 1984, was it ever amended?
>
> "Ans: Yes, it was amended on the 6th February 1985 by the Planning and Development Committee of the Clarendon Parish Council.
>
> Ques: Was there any other amendment apart from that one?
>
> Ans: No.
>
> Ques: Were any of the 13 conditions imposed amended on 6th February 1985?
>
> Ans: Only condition 11 was deleted and the (following) condition was added as Condition 11 that I have already referred to.
>
> **By consent** – conditions on page 3 and 4 of Agreed Bundle admitted in evidence as Exhibit 3)
>
> **Also by consent** – Amendment at page 5 of Agreed Bundle admitted in evidence as Exhibit 4)
>
> Ques: Has there ever been and amendment to Condition 13 as imposed in January 1984?

Ans: No".

There is no mention of this evidence in the learned judge's reasoning. This is surprising since Mr Codlin put this evidence to Mr Miller when he cross-examined him. That cross-examination will be adverted to later.

The appellant's evidence on the issue reads thus:

> "Before leaving Mr Miller's office that day he requested me to return in another few days to collect the signed sales agreement because Mr Golding wasn't there to sign his portion of the agreement on that day. Four (4) days after that I returned to Mr Miller's office. I did not then see Mr Miller but Mrs. Richards who work at his office gave me the then signed sales agreement. I saw my signature and Mr. Golding's signature and that of Mrs Richards as witness. I read the agreement and discovered that Clause 13 of the sales agreement was 'white out' with the typist's ink and the wording that I signed to – that in the wording at Clause 13 changed that is it was different from that which I had signed to on the 10th December four days earlier. When I got back the document Clause 13 read 'no infrastructure will be required to be undertaken by the vendors'."

The appellant Palmer continued thus:

> "I read the agreement and discovered that Clause 13 of the sales agreement was 'white out' with the typist's ink and the wording that I signed to – that in the wording at Clause 13 changed that is it was different from that which I had signed to on the 10th December four days earlier. When I got back the document Clause 13 read "no infrastructure will be required to be undertaken by the vendors".
>
> When I signed on the 10th those words were not in Clause 13. When I signed on the 10th the words in Clause 13 of the agreement were "No title shall be issued from the Parish Council until a certificate of completion issued by the Registrar of Titles".
> (By consent document headed Agreement for sale admitted in evidence as Exhibit 9)".

> On the third page of this document (Exhibit 9) I see a writing in ink. It is an initial. That initial was not there when I signed on the 10th. I did not place any initial on the document. After the 10th I was never requested to change what was in that document and even to put something else in it. And I have never done so".

Continuing his evidence on this aspect of the matter the appellant Palmer continued thus:

> "When I got the copy of the Agreement and saw what was on it I spoke to Mrs Richards. This was on the second day that I went to Mr Miller's office, that is on the 14th. I explained to her the 'white out' I saw in Clause 13. I mean I pointed out the white out and asked her what was the reason for the change.
>
> She told me she didn't type it and it must be a typing error. She said she didn't type it and didn't know the reason for that. I asked her to have it corrected at an early date".
>
> "This is a copy of the approved conditions (Exhibit 1)".
>
> "When I signed the agreement of sale it contained all of these conditions in Exhibit 1 which were listed in the agreement for sale which I signed. When I went back on or about 14th December and collected the Agreement all of those conditions were not in the Agreement for sale. It was Clause 13 what was missing when I received it on the 14th".
>
> "This is the plan of the subdivision of Long's Wharf in Clarendon (Exhibit 2)".

Be it noted that the conditions imposed by the Clarendon Parish Council were endorsed on the back of Exhibit 2, the subdivision plan. The original was examined in this Court during the hearing. We examined it again during the preparation of our judgments as it was loaned to the Registrar at our request.

Then on the issue of actual possession and occupancy, here is the appellant's evidence.

> "Ques: How were you put in possession?"

"Ans: I met Mr Golding at his farm on the said property and I showed him the receipt from Mr Miller and we Mr Golding and I drove in my car to the site, that is where the lots are. We walked to the land and he showed me the lots. He showed me the boundaries of my lots. He told me I can go ahead and do what I want to do.

The said day I used a tractor to level out the driveway that take me into the land. No road was built there yet. The place I levelled out with the tractor represented the place where the road was to be built."

"I have constructed a cow pen, a slaughter house on the land. Also I built a large two floor dwelling home on the land. I am still in occupation of the property, that is all four lots. I have been given title for two of the lots, lots 21 and 22. I have not been given title for lots 19 or lot 20.

In 1988 Mr Golding told me why I have not been given title for lots 19 and 20.

I had pointed out to him that one of the clauses of the condition of approval clearly stated that the works of the subdivision should be completed two years from the date of approval".

Here it must be pointed out that a letter from Mr Alton Morgan to Mr Raphael Codlin of 19th December 1990 gave a warning that Palmer was facing eviction from lots 19 and 20. It was exhibited before Clarke J in the Court below and it was part of interlocutory proceedings for lifting the caveat and it was exhibited to the affidavit of the respondent Golding.

This Court is entitled to examine proceedings in the Court below connected with this matter. The letter is exhibited at page 52A of the record.

As regards the purported amendment here is the appellant Palmer's evidence:

> "He told me he is not obligated to install any road or water namely infrastructure. He said he had got an amendment from the Clarendon Parish Council to omit infrastructure from the complete subdivision. Prior to telling me that in 1986 he has never consulted me to agree to an amendment no one else consulted me. I first heard about an amendment in 1986, the day he told me".

Continuing on this aspect the appellant Palmer said:

> "I spoke to him about the road and water that is the infrastructure. The first time was in February 1986. The second time was about a week after we spoke in February 1986. I then told him that I had gone to the Clarendon Parish Council and searched through the file and found the amendment. I pointed out to him the date of the amendment, that it was approximately a year after I had signed the sales agreement. He said that I am an idiot.
>
> He said he got the amendment and that is it, that he is not prepared to fix any road and that the Parish Council are misleading me.
>
> He said I didn't understand the amendment. And I asked him about the surveyor who made the subdivision. He said he didn't know where to find him and that I should go and find him.
>
> I told him that there is no where in Jamaica that sell size land totally 300 and odd acres could be subdivided and approved by the Parish Council with eight (8) roads and the developer is not responsible to fulfill his contract with the Parish Council".

To solve the puzzle we must turn to the evidence of Mr Crafton Miller in whose chambers the amendment was drafted. It will be seen that the copy of the agreement with the initial and "white out" of which Palmer spoke was produced in evidence but the learned judge made no assessment of that aspect of the document nor was any assessment made of the purported amendment to Condition 13 by the Parish Council. Both the purported Condition 13 as 'amended' by the Parish Council and clause 13 of the contract

were in identical words. Both the amendment and Clause 13 of the 1985 contract seemed to be for the benefit of the respondent Golding. The learned judge said that clause 13 in the contract could not relieve the respondent Golding of his statutory and contractual responsibilities for the infrastructure. However he did not make any assessment as to how clause 13 came to be incorporated in the contract.

Here is Mr Miller's evidence on the matter:

> "I don't recall giving Mr Palmer a sale agreement to sign on 10th December 1984 and I didn't do so on 11th December, 1984.
> No it is not true that Mr Palmer signed the agreement for sale and not true that I asked him to return in a few days for his copy.
>
> **(Agreement for sale Exhibit 9 put in witness's hand).**
>
> Three pages to the agreement.
>
> The third page is the page with the signature.
>
> That page has condition 13.
>
> Yes, I see what appears to be an initial to the right of condition 13. A copy of the agreement for sale pertaining to the transaction should be on my file.
>
> I have that file here.
>
> I have on my file a copy of the agreement for sale pertaining to the transaction.
>
> The copy on my file has on it condition 13.
>
> The copy on my file has no initial to the right of condition 13.
>
> **(By consent undated copy of agreement for sale admitted in evidence as Exhibit 37)".**

It will be noted Exhibit 9 which was the copy in circulation has the "white out" and initial. As for the drafting of the agreement here are Mr Miller's own words:

> "Mrs Richards in my office would have typed the agreement for sale. I would have done the drafting. Do you agree with Mr Palmer that in relation to condition 13 the words 'No infrastructure is required to be undertaken by the vendor' were not there when he signed the agreement?
>
> "Ans: These were the words when he signed the agreement and the same is the copy taken from our files. I did not give any instructions to change anything in the sale agreement".

It is true that Exhibit 37, Mr Miller's office copy shows no ambiguity but he admitted the ambiguity in Exhibit 9. There is another copy of the sales agreement at page 355 of the Record. Here is the affidavit by Mr Miller dated 20th September 1993, which introduced the copy with the initials which Mr Palmer spoke of in his evidence.

> "2 That on or about the 10th of December 1984, the First and Second Defendants contracted to sell to the Plaintiff four Lots numbered 19, 20, 21 and 22 on the subdivision plan of the lands registered at Volume 1171 Folio 241 part of Longs Wharf in the parish of Clarendon. This contract was prepared and executed in my office on that day and I exhibit hereto copy of Agreement marked "C.S.M.I." for identification.
>
> 3 That I have seen the Statement of Claim filed by the Plaintiff herein and I refer particularly to paragraph 6 therein and state that when the Plaintiff did sign the Agreement for Sale dated 11th December 1984, Condition 13 did state that no infrastructure was to be undertaken by the Vendors. At no time did the Agreement ever state that no Title shall be issued for the Subdivision until the approval of the Parish Council was granted as is alleged by the Plaintiff.
>
> 4 That I have seen the Affidavit of Garnet Palmer dated 12th July 1991, and I refer particularly to paragraphs 6 and 14 therein and state again that at no time did the said Agreement contain any condition that no title shall be

issued until the approval of the Parish Council was granted. I refer to paragraph 14 therein and categorically state that the said agreement was never 'tampered with' or any additional words inserted, and that the Agreement is the same one in all respects as that executed by the Plaintiff on the 10th day of December 1984 and I exhibit hereto a copy of Affidavit of Garnet Palmer dated 12 July 1991, marked 'C.S.M.2' for identification".

Here is how Clarke J treated this evidence:

"It is to be observed that nowhere in that passage has the first defendant said in terms that the contract was signed on 10th or 11th December, 1984 or, indeed, on any particular date. Nevertheless, Mr Codlin has submitted that Mr Crafton Miller's evidence that the agreement for sale was not signed on 10th or 11th December but after 8th March, 1985, lacks credibility in the light of (a) his previous inconsistent statement when deposing in interlocutory proceedings herein that the contract was made on 10th December, 1984 and (b) attorney-at-law Derrick Russell's assertion in his affidavit in the same proceedings that 'on perusal of the documents received from Messrs Crafton Miller & Co., Attorneys-at-law who had first dealt with the matter, an Agreement for sale of the said premises had been signed on the 10th day of December, 1984 by the parties' ...

Mr Miller gave evidence that those statements are incorrect. He explained that the affidavits were sent to him by another attorney-at-law, Mr Alton Morgan, who then had conduct of the matter and had prepared the affidavits for his signature. He had no discussion with Mr Morgan about the affidavits and had no record to check the facts against. He relied entirely upon the fact that his colleague asked him to execute the documents and he did just that. Likewise, Mr Russell testified that his affidavit was prepared by Mr Morgan and he relied on Mr Morgan's information as accurate.

I accept these explanations and have taken them into account in assessing the credibility of Crafton Miller on this and other aspects of his evidence. In light of this and further factors on this aspect of the matter that I will deal with presently, I find that, consistent with the defence, up to 8th March, 1985, no agreement for sale between the parties had been signed".

It is clear that the learned judge paid no attention to the initials on the copy of the sales agreement adduced by Mr Miller. Palmer the appellant pointed out these initials in his evidence as indicating where the changes in condition 13 were made. Mr Miller gave no explanation as to how these initials came to be in the crucial area which is in dispute as the learned judge made no specific finding on it. Incidentally this exhibit which was certainly before the learned judge was not listed in the Index. I am prepared to find that the sales agreement has evidence of tampering. That tampering had a purpose.

The purported amendment to the Parish Council condition 13 has two aspects. One is factual, did the Parish Council make an amendment to condition 13 as the judge found. No resolution was adduced to demonstrate that. The Superintendent of Roads and Works said there was no such amendment. The sub-division map was examined twice by this Court and it shows no amendment to the condition 13 that was endorsed on the back. This issue is of importance because the splinter titles were presumably obtained on a contract with a misleading condition 13. These splinter titles as well as others which may be equally defective and an environmental hazard may have been created in the whole sub-division. As for the Act Clarke J should have taken judicial notice of it and construed it especially since it was brought to his attention. No amendment would have been legal in February, 1985, since the Minister gave his approval in January 1985. The purported amendment was invalid. So parts of the following finding by Clarke J cannot stand. It reads:

> "So, as pleaded by the defendant, I find that the agreement for sale was signed in or about the month of March 1985. The amendment in February 1985 to the conditions of the Clarendon Parish Council clearly took place before the agreement for sale was signed. I also find that there was no

> tampering or alteration by the defendants or their attorneys-at-law, of Special Condition 13 of the agreement for sale".

For ease of reference paragraph 6 of the Statement of Claim is repeated. It reads:

> "6 At the time when I signed the Agreement, CONDITION 13 was as it appears on the application for the subdivision granted by the Clarendon Parish Council, that is to say, it provided that no Title shall be issued for the subdivision until the approval of the Parish Council was granted".

The response was paragraph 3 of the Defence which reads:

> "3 The Defendants deny paragraphs 6 of the Statement of Claim and say that at all material times special condition 13 of the Agreement for Sale referred to in paragraph 6 of the Statement of Claim was in the following terms: 'No infrastructure is required to be undertaken by the Vendor'. At the trial of this action the Defendants will refer to the said Agreement for Sale for its true terms and effect".

Finally there is the evidence of Mrs Joyce Richards, the secretary to Mr Miller. It ends abruptly as if it was incomplete. There is no indication as to whether there was any re-examination. She was shown Exhibit 9 and she gave interesting evidence. Here it is at page 285 of the record:

> "Ques: What if anything would you have to do with agreement for sale.
>
> Ans: Type the document after getting instructions from Mr Crafton Miller. The document would be typed from a draft. Crafton Miller himself would prepare that draft. After I would have typed the document I would take it back to Mr Miller for him to scrutinize it. Yes I know that gentleman Mr Palmer I have seen him in the office. Also know Mr Golding.
>
> **(Document Exhibit 9 shown to witness).**
>
> Ans: Yes I see condition 13 on page 3 with a whiting out and an initial to the right.

Ques: On the 14th of December 1986 did you have anything to do with Mr Palmer?

Ans: I don't recall.

Ques: 14th December 1986, did you hand Mr Palmer the document (Exhibit 9)?

Ans: I don't recall handing him any document on that date.

No, I did not on any date hand Mr Palmer any document and give him explanation in regard to Condition 13.

No Mr Palmer never spoke to me about a whiting out on page 3 of what document (Exhibit 9).

No I don't agree that I told him that it was a typing error.
No, don't agree that he asked me to correct it at an early date.

No such thing took place."

Under what seems to be an incomplete cross-examination by Mr Codlin the following evidence emerged:

"Yes Exhibit 9 bears my signature.

No I cannot say with any certainty when I put my signature to that document. Can't recall if a cheque paid into my office was sent in by letter or paid in by hand.

Mr Palmer could not have collected the document (Exhibit 9) in the condition from the office.

When I say in the condition I mean with the white out on it.

I do not know who at Mr Miller's office who actually gave Mr Palmer the document (Exhibit 9).

> Yes I know that the document (Exhibit 9) came from Mr Miller's office but I do not know who actually delivered it to Mr Palmer".

I have detailed the evidence of Joyce Richards to emphasize that the initials suggest that some tampering of Exhibit 9 took place and that the learned judge made no mention of this evidence in his evaluation of tampering. The inference is that the original tampered document with clause 13 was presented to the Registrar of Titles to secure the splinter titles of which two were transferred to the appellant Palmer for lots 21 and 22.

As regards special condition 3 some were detailed previously. However there were others under the heading Discrepancies, Agricultural Conservation. What is important is that these conditions were not incorporated in the 1987 contract on which the respondent Golding is relying.

The approval of the subdivision was given by the Ministry of Construction and Works by letter dated 28th January 1985, and in this context the Act is also relevant. Section 8(10) reads:

> "8(10) The decision of the Minister under this section shall be final and not subject to any further right of appeal."

Any alteration of the Sub-division conditions by the Parish Council after the approval by the Minister would have been ultra vires. It should be borne in mind that the sub-division contract for the sale was in March 1985.

As for the date when the contract was formed the following passage from the judgment of Clarke J is instructive. It reads:

> "In support of his allegation that he signed the agreement for sale (Exhibit 9) on 10th December, 1984 the plaintiff tendered in evidence:

(a) the receipt (Exhibit 8) he got when he made his first payment in December 1984;

(b) an undated agreement for sale (Exhibit 9) he alleges he signed in December 1984;

(c) the first defendant's statement, in his affidavit sworn to on 8th October, 1992 (Exhibit 45) that the contract was made on or about the 10th December, 1984:

> 'That in or about the 10th of December 1984 the First Defendant (my late wife now deceased) and I contracted to sell to the Plaintiff four lots numbered 19, 20, 21 and 22 on the subdivision plan of the lands registered at Volume 1171 Folio 241 part of Long's Wharf in the parish of Clarendon. This is the same contract referred to in paragraph 2 of the Statement of Claim dated 14th day of February 1992 ... A signed copy of this contract is now produced and shown to me as exhibited hereto'." (Emphasis supplied)

The learned judge ought to have added the following passage from an affidavit from Mr. Crafton Miller. The affidavit was relied on in interlocutory proceedings and was certainly before Clarke J. The relevant paragraph reads:

> "2. That on or about the 10th of December 1984 the First Defendants contracted to sell to the Plaintiff four Lots numbered 19, 20, 21 and 22 of the subdivision plan of the lands registered at Volume 1171 Folio 241 part of Long's Wharf in the parish of Clarendon. This contract was prepared in my office on that day."

One fact must be noted. If there was tampering in Mr Miller's chambers, the draftsman would have assumed that Clause 13 could be replaced. The important feature to note is that the contract was prepared on or about 10th December 1984. The conditions imposed by the Clarendon Parish Council would be the Condition 13. That condition ought to

have been Condition 13 of the contract. The learned judge found Clause 13 as drafted on the contract was superfluous. The other fact to note is that as regards the signing of the contract, the important signature was that of Golding, the party to be charged and the learned judge found he signed in March 1985. That was a reasonable finding and additionally it forces those responsible to explain how Clause 13 of the contract came into being and what purpose it served.

Moreover, the learned judge in recounting the submissions of Mr. Codlin stated:

> "... (b) attorney-at-law Derrick Russell's assertion in his affidavit in the same proceedings that 'on perusal of the documents received from Messrs Crafton Miller & Co., Attorneys-at-law who had first dealt with the matter, an Agreement for sale of the said premises had been signed on the 10th day of December, 1984 by the parties...'."

The paragraph from the affidavit of Mr. Deryck Russell on which Mr. Codlin based his submission reads:

> "3. That on perusal of the documents received from Messrs. Crafton Miller & Company, Attorneys-at-law, who had first dealt with the matter, an Agreement for the sale of the said premises had been signed on the 10th day of December, 1984, by the parties, but that this contract was terminated because of the non completion of the purchaser, the Plaintiff herein."

Since the contract was not dated, Mr Russell must have formed his opinion from some other document such as two receipts which will be adverted to later. Since the 10th of December was so important to Mr Codlin he ought to have sought discovery of documents or administered interrogatories.

As to whether this contract was ever terminated will be one of the principal issues to be so determined in this case. As to the date on which the contract was signed by the developer Golding there is a difficulty. The contract was undated. We were told

by Mr Codlin who has had much experience in these matters that it is a tax efficient method of preparing contracts. Penalties are imposed if the tax is not paid within thirty days of signing so the practice is not to date the agreement. At page 60 of the **Dojap** case (supra), there is some support for Mr. Codlin's submission.

Perhaps I should register a complaint at this stage about the state of the record. It was incomplete in part, it was made up neither on the basis of chronological order, or on the basis of subject matter. It was beautifully bound but the arrangement of the contents leaves much to be desired. For example, exhibits (1) (3) (4) (7) were neither listed nor produced and the motions for which there are affidavits of the Attorneys-at-law Deryck Russell and Crafton Miller are mentioned and not disclosed. In addition some of the affidavits which are of vital importance to this case, were not referred to in either oral or written submissions so it compelled this Court to institute a search to track down the relevant evidence. The pleadings instead of being together are scattered over the record. One index is at the beginning and the other in the middle of the record. The vital cross-examination of Joyce Richards appears to be incomplete. The sub-division map was exhibited but not the conditions endorsed on the back. That is a vital aspect of this case. Those conditions should be made part of the record if there is a further appeal. A record properly prepared saves time and costs in this Court. It also serves the interests of justice in re-hearing the case on appeal.

It is now pertinent to cite the following passage from the judgment. The learned judge said in the relation to the respondent Golding's affidavit evidence (supra):

> "It is to be observed that nowhere in that passage has the first defendant said in terms that the contract was signed on 10th or 11th December, 1984 or, indeed, on any particular date. Nevertheless, Mr. Codlin has submitted that Mr.

> Crafton Miller's evidence that the agreement for sale was not signed on 10th or 11th December but after 8th March, 1985, lacks credibility in the light of (a) his previous inconsistent statements when deposing in interlocutory proceedings herein that the contract was made on 10th December, 19984 and (b) attorney-at-law Derrick Russell's assertion in his affidavit in the same proceedings that 'on perusal of the documents received from Messrs Crafton Miller & Co., Attorneys-at-law who had first dealt with the matter, a Agreement for sale of the said premises had been signed on the 10th day of December, 1984 by the parties'."

However, the learned judge was impressed with the following passage from the evidence of Mr. Crafton Miller:

> "Ques Looking at all the documents I have looked at so far, the provision that a deposit of $23,000 to be paid on the signing of the agreement, the letter I wrote on 8th March, 1985 inviting Mr. Palmer to come in and sign, the fact that $11,500 was paid on 10th or 11th December 1984 and the $11,500 on 18th January 1985 all these facts would assist me in determining when agreement for sale was signed.
>
> The agreement for sale was signed any time after 8th March 1985. On 10th December 1984 a sum of $11,500 was paid. Yes the contract provided for a deposit of $23,000. I would not where only a part of the deposit was paid prepare an agreement for sale and have it signed.
>
> Having seen the receipt (Exhibit 8) I accept that Mr. Palmer paid $11,500 on either 10th or 11th December 1984.
>
> I don't recall giving Mr. Palmer a sale agreement to sign on 10th December 1984 and I didn't do so on 11th December, 1984.
>
> No it is not true that Mr. Palmer signed the agreement for sale and not true that I asked him to return in a few days for his copy.

(Agreement for sale Exhibit 9 put in witness's hand)

Three pages to the agreement. The third page is the page with the signature. That page has condition 13. That page has condition 13. Yes, I see what appears to be an initial to the right of condition 13. A copy of the agreement for sale pertaining to the transaction should be on my file. I have that file here.

I have on my file a copy of the agreement for sale pertaining to the transaction. The copy on my file has on it condition 13. The copy on my file has no initial to the right of condition 13.

(By consent undated copy of agreement for sale admitted in evidence as Exhibit 37)." (Emphasis supplied)

The initial which is visible on the photocopy (Exhibit 37) was never explained although the appellant's case was that, there was evidence of tampering which resulted in the new clause 13 in the contract which did not correspond with clause 13 imposed by the Clarendon Parish Council. In any event on what basis was clause 13 of the contract drafted?

The letter of 8th March is of importance so the material term must be cited. It reads in part:

March 8th 1985

Mr Garnett Palmer,
70 East Street
Old Harbour
St. Catherine

Dear Sir:

Re Purchase of Lots 19,20,21 and 22 Long's Wharf - Clarendon from Mr Prince Golding et ux

> The Agreement of Sale for the above lots have been prepared for your signature. Will you be good enough to come into our office and sign same. We have also computed the amounts necessary to complete this transaction as can be seen below:"

So at this stage Mr Miller is assuming full responsibility for the Agreement. Mr Scharschmidt Q.C. made the point, that Clarke J was correct to find that the contract was signed by both parties some time in March 1985. The circumstances which support that finding of fact are that the complete deposit of $23,000.00 was paid on 18th January 1985, when the second payment of $11,500.00 was made. There is a clause in the contract which states that the deposit of $23,000.00 was to be paid on signing the Agreement so it was correct for Clarke J. to find that the contract was signed by the party to be charged i.e. the developer Golding in March 1985. It is therefore instructive to set out in full the learned judge's findings in this regard. It reads:

> "Furthermore, the following are additional and powerful reasons in support of the defendant's contention that the agreement for sale was not signed by the parties on 10th December 1984, but after the amendment of the conditions of the Clarendon Parish Council took place in February 1985:
>
> 1. The plaintiff acknowledged receiving a letter dated 8th March 1985 from Crafton Miller & Co. to Mr Garnett Palmer. It is a letter in respect of lots 19, 20, 21 and 22 Long's Wharf. It begins thus:
> 'The Agreement for Sale for the above lots have been prepared for your signature.
>
> Will you be so good enough as to come into our office and sign same'.
>
> The agreement referred to in this letter is obviously Exhibit 9".

When did the amendment to condition 13 imposed by the Parish Council take place? As pointed out previously there was an amendment to Condition 11 imposed by the Ministry but no other amendment is disclosed in the evidence.

In this Court Mr Codlin attempted to adduce a response by Palmer to the letter of 8th March 1985. It was not presented in the Court below and Mr Scharschmidt Q.C. rightly objected. The learned judge continued thus:

> "2. The agreement provides for a down-payment of $23,000.00 on the signing thereof.
>
> On 10th December 1984, the plaintiff paid $11,500.00. So it is highly improbable that Mr Crafton Miller, an attorney-at-law of 26 years standing, would have the plaintiff sign the agreement on 10th December 1984, and give the plaintiff a copy of that agreement on 14th December 1984, representing that $23,000.00 had been paid when it had not."

Be it noted that even if Palmer had signed in December unless Golding, the party to be charged had also then signed, Palmer would not have had an enforceable contract for the sale of land.

So, as pleaded by the defendant, I find that the Agreement for Sale was signed in or about the month of March 1985. The purported amendment in February 1985, to the conditions of the Clarendon Parish Council clearly took place before the Agreement for Sale was signed but after the Minister's approval of 28th January 1985. The connected issue of tampering presents a difficulty. A copy of the document retained by Crafton S. Miller & Co. on their file was admitted in evidence (Exhibit 37). Yet although Special Condition 13 of the Agreement for Sale was in the following terms, "no infrastructure is required to be undertaken by the Vendors" an issue must arise as to whether the

defendants were obliged to carry out the infrastructural work specified in the Agreement for Sale, so long as same has not been terminated by the parties. It is essential to cite the amendments exhibited in the record at page 61 to demonstrate that condition 13 was not mentioned therein. It reads:

> "**Amendment dated February 6, 1985**
>
> At a meeting of the Planning and Development Committee of the Clarendon Parish Council on **February 6, 1985** it was approved that the following Amendment be made to the foregoing condition passed on February 1, 1984:
>
> Condition No 11 to be deleted:
>
> THE FOLLOWING CONDITION TO BE ADDED AS CONDITION 11
>
> Titles to lots 1, 4, 5, 8, 9, 12, 13, 20, 24, 25, and 28 to be endorsed, restricting direct vehicular access on the main road. These lots are to be granted right of way onto the access strips to the lot to the rear of the subdivision".

It is convenient at this stage to set out Special Conditions 10 to 13 of the Agreement for Sale (Exhibit 9):

> "The title is subject to the following conditions imposed by the Clarendon Parish Council ...
>
> 10. WATER SUPPLY
>
> Water sub-mains shall be of 4 inches in diameter as shown on the plan for that purpose, and shall be of a specification approved by the Bureau of Standards.
>
> Each lot shall be supplied with a ½ inch diameter service pipe connection from the sub-main and carried 3 feet within the boundary of each lot.

> Sub-mains shall not be covered before inspection by the Superintendent, Roads and Works or his representatives.
>
> 11. ROADWAY:
>
> The reserved roadway shall be cleaned to extreme width of all vegetation. Scarify road surface and apply selected marl, consolidated in 6 inches layers to a minimum depth of 1' 0". Wet and roll to proper camber to a minimum weight of 10 ton roller.
>
> 12. The work of the subdivision shall be completed within two (2) years of the date of approval.
>
> 13. No infrastructure is required to be undertaken by the vendors".

Since the contract was signed in March 1985, then the undertaking was that the infrastructure was to be completed by 7th March 1986 since the Parish Council approval was on 8th March 1984. So it follows that the contract of 16th December 1987 on which the respondent Golding relies was prohibited as it is common ground that the work of the sub-division has not been completed. Nor was there a Certificate of Completion issued by the Clarendon Parish Council to the Registrar of Titles.

As regards condition 13 above it is still one of the areas which was never resolved in the Court below. Who gave the draftsman of Clause 13, the authority to insert that term in the contract?

The Further Amended Defence reads:

> **"1a Paragraph 3 of the Statement of Claim is denied and the Defendant says that the Agreement for sale was signed in or about the month of March 1985.**
>
> 2. Save and except that the defendant denies that the Plaintiff is buyer in possession, the Defendant admits to paragraph 4 of the Statement of Claim.

> 2a. **As to paragraph 5 of the Statement of Claim the Defendant admits that he entered into a contract with the Plaintiff which said contract contains the terms recited in the said paragraph 5. The Defendant says however that the contract was entered into in the month of March 1985. The Defendant denies that lots 21 and 22 were transferred to the Plaintiff in accordance with the terms of the alleged contract of December 1984 and says the lots were transferred in accordance with the terms of written contracts entered into between the Plaintiff and the Defendant on the 16th day of December 1987."**

So here the respondent Golding is stating his reliance on the contract of 16th December, 1987. If that sub-division contract makes no mention of the mandatory terms stipulated by the Clarendon Parish Council ought this Court to enforce such a contract? There is also another issue here. Mr Deryck Russell the attorney-at-law from the National Commercial Bank ("N.C.B.") told the Court below that he prepared the 1987 contracts and had them stamped and registered. It was never explained on what basis those transfers were presented to the Registrar of Titles without the mandatory provisions being terms of the contract . Counsel may ignore this aspect of the case. This Court cannot adopt such a stance. Also there is a letter from Mr Crafton Miller dated 29th January 1987 which will be referred to later. It makes Mr Russell's actions seem strange. This is how paragraph 5 of the then Statement of Claim reads:

> "5 On the 15th June and 18th January 1988 [16th December 1987] respectively lots 21 and 22 were transferred to the Plaintiff according to the terms of the said contract. The contract contained among other things, the following terms".

Lots 21 and 22 were transferred on 16th December 1987 so the pleader is in error as to the dates.

The "following terms" were the terms of the contract of March 1985, (Exhibit 9) although the purchaser pleaded December 1984, and gave evidence to that effect. The defendant Golding however relies on the contract of 16th December 1987 as the contract which effected the transfer. The plaintiff Palmer says or ought to have said of this contract that once the contract is challenged it will be found to be void. Palmer certainly avers that the March 1985 contract is still in force and since the infrastructure is still to be completed he has the right to claim specific performance. Further he claims that he has the right to claim the transfer of lots 19 and 20. This is the heart of the dispute in this case. Which contract exists? Or to put it another way, was the March 1985 contract terminated?

The appellant Palmer realised the importance of this issue and raised it in ground 3 of the notice and ground of appeal thus:

> "3 The learned judge clearly misdirected himself in saying that the parties agreed to enter into new contracts to replace the former contract and abrogate the parties rights thereunder, when the Plaintiff/Appellant has stated on diverse occasions that he was relying on the old contract which he had signed and nowhere has he stated that he had agreed to abandon the contract which he had signed in place of another new contract."

He reiterated it in a different form in his additional ground of appeal thus:

> "(1) That findings made by the learned Judge are in conflict with his conclusion, inter alia, the following ways:
>
> (d) That the learned Judge misdirected himself in holding that in order for a party to sue on a contract it must be shown that the contract is extant when in the instant case, the Plaintiff did not treat the contract as

> discharged but hold the Defendant to his bargain and sue for relief."

It will be very important to the outcome of this case to determine whether the initial contract was at an end as the respondent, Golding contends or it is still extant as the appellant Palmer has averred. The learned judge below found for the respondent in this regard. Before examining the issue of whether the contract of March 1985 was terminated, it is pertinent to reiterate that initially Mr Crafton Miller acted for both parties. So did Mr Derryck Russell. It was open to the appellant Palmer to say in both instances that both attorneys-at-law put the interests of the respondent Golding above that of the appellant Palmer. In **Smith v Minse** [1962] 3 All ER 857 at page 859-860 Dankwerts L.J. had this to say of solicitors acting for both parties and it is pertinent to the circumstances of this case:

> "This is a shocking example of the trouble and expense which can arise from the employment (under a mistaken idea of saving time and expense) by the two parties to a sale of a solicitor who is already the solicitor of one of the parties.
>
> The defendant vendor was a builder, whose regular solicitor in his transactions was the solicitor so employed. It seems to me impossible for a solicitor in such circumstances to act fairly for both of the parties. The plaintiff purchaser was obviously a person quite inexperienced in the matter of buying and selling land. The position in the present case was aggravated by the mistaken idea of the solicitor in question that it was legally possible for the process of 'exchanging contracts' between two solicitors acting for the respective parties to be applied to a single document prepared by the only solicitor. Quite a lot of the trouble which has occurred has been caused by the misapplication of this idea to the circumstances of the present case. Of Course, if the whole transaction goes happily to a satisfactory conclusion, nothing goes wrong, but that is not really a justification for a practice which invites disaster. I think that in the present case the common

> solicitor paid undue attention to the directions which he received from his regular client (I am sure without any conscious bias), and the result is that the unfortunate purchaser found himself without the house which he thought that he was buying, and the vendor was left free to sell the house at an advanced price - if the decision of the learned judge was right".

In an earlier case of **Goody v Baring** [1956] 2 All ER 11 at 12 Dankwerts J said:

> "It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both a vendor and a purchaser. The position has been pointed out very plainly by Scrutton, L.J., in **Moody v Cox & Hatt** [1917] 2 Ch. 71 at p. 91):
>
> It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as a solicitor for him. It will be his fault for mixing himself up with a transaction in which he had two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them".

It is nearly forty years since those words were said by Scrutton, L.J., and it appears that they have still not been properly appreciated by some solicitors. Perhaps they have never been read by many of them.

In addition the parties corresponded on the transactions, here is how it emerged on the evidence of the appellant Palmer:

" After I signed the agreement for sale in 1984, (1985) I loaned Mr Golding $10,000.00 . This was made in three sums. I was given three promissory notes for these sums. They were signed by Mr Golding

(By consent Receipt dated 23/1/1985 for $2,000.00, Receipt dated 15/2/1985 for $4,000.00, Receipt dated 28th February 1985, for $4,000.00 admitted in evidence as Exhibits 12, 13, 14 respectively).

Mr Golding requested that these advances be made.

The sums represented by these advances have not been paid.

I am willing to pay the balance of the purchase money as soon as the roads and water have been installed. "

Be it noted that Palmer may have signed in December 1984, but the 1985 date is important because that is the date Clarke J found that the respondent Golding signed and he is the party to be charged.

Incidentally, the wording of these transactions are of importance so I will set them out in full. The first reads at page 300 of the record:

"P.O. Box 65
Old Harbour

23rd January, 1985

Received from Mr Alton Palmer the sum of Two Thousand Dollars being a loan until on land transaction on Long's Wharf Sub division Cock Pitt Clarendon. Repayment when final arrangements are made to take over possession of the lots. ($2,000.00

Sgd/ Prince A Golding".

Then the record reads at page 299

> "15th February, 85
>
> Advanced the sum of Four Thousand Dollars ($4,000.00) to Mr Prince Golding on Long's Wharf property, as deposit on transaction.
> T.P.C. cheque # 0001554.
> Received
>
> P.A. Golding
> Signature "

Then the third receipt is a duplication of the first and not the receipt of 28th February 1985 as stated in the evidence on page 246 of the record. It is an example of the way the record was compiled. It was a full record, but it was not properly arranged.

Was the initial contract of March 1985, terminated by the notice making time of the essence?

The first issue to be determined was whether the initial contract of March 1985 was terminated and then at a later stage turn to the issue of the status of the new contract of 1987. The notice of cancellation of the original contract (Exhibit 44) is stated in the affidavit evidence of Mr. Crafton Miller, an experienced Attorney-at-law. Here are the relevant passages:

> "3. That my firm obtained Certificates of Title under the Registration of Titles Act on or about the 24th of March 1986, for the said Lots 19,20,21 & 22 at Volume 1197 Folios 589, 590, 591 & 592 respectively
>
> In May of 1986 I advised the Plaintiff that the said titles to the lots were ready and that he was obliged to pay or give a guarantee for payment of the balance of the purchase money and transfer costs then due of $106,305.20 to complete the contract"

An investigation ought to be made by the Parish Council or the Director of Public Prosecutions as to the basis on which these titles were issued. Condition 13 of the terms imposed by the Parish Council stated that:

> "No title shall be issued from this sub-division until a Certificate of Completion of all infrastructure work has been issued by the Parish Council to the Registrar of Titles".

This condition is endorsed on the map of the sub-division. The 1985 contract presumably relied on to obtain the splinter titles contains a replacement clause 13. The 1987 contract has none of the conditions stipulated by the Clarendon Parish Council. This case raises important issues of public law involving the Parish Council, the Registrar of Titles and the conduct of those public servants who issued the titles. Then the affidavit continues thus:

> "4. That on the 8th of October 1986 I issued to the Plaintiff a Notice making time of the essence under the contract requiring the Plaintiff to complete within FIFTEEN days of the Notice the sale under the contract made on the 10th of December 1984. This Notice was issued by my firm and sent by post to the Plaintiff at 70 East Street, Old Harbour in the parish of Saint Catherine. A copy of this Notice bearing my signature is now produced and shown to me and exhibited hereto marked "CSM 1" for identity.
>
> 5. That on November 3 1986 the Plaintiff attended at my office and acknowledged receiving the Notice dated October 8, 1986 and he was advised that the contract made on the 10th of December 1984 was thereby cancelled.
>
> 6. That the Plaintiff then explained to me that he did not have the money to complete the sale and tendered a cheque No. 2905482 drawn on the Bank of Nova Scotia for Thirty Thousand Dollars. $30,000.00 and asked that he be allowed twelve months in which to find the remainder of the money to salvage the contract. Without prejudice to the

> effect of the Notice, the money tendered by the Plaintiff was put in escrow pending instructions from the Defendants.
>
> 7. That on January 29, 1987 with the consent of the Plaintiff and the Defendants I transferred the conduct of the transaction to Mr. Deryck Russell Attorney-at-Law of the National Commercial Bank Legal Department. A copy of my letter of January 29, 1987 to National Commercial Bank Legal Department, Attention Mr. Deryck Russell is now produced and shown to me and exhibited hereto marked "CSM 2" for identity."

The learned judge rightly found this Notice to be ineffective because Golding had not performed his part of the bargain. Although Carfton Miller and Company was acting for both parties their minds were concentrated on the interests of the respondent Golding. This is another aspect of the case which was not explained below or in this Court. It is powerful support for the appellant's contention that the 1985 contracts are alive. If Mr Miller's firm obtained the Certificates of the splinter Titles in 1986, did Mr Russell do another transfer in 1987 without examining the basis of this initial transfer? The letter mentioned earlier is of such importance that it must be quoted in full:

> "29th January, 1987
>
> National Commercial Bank Jamaica Limited
> Legal Department
> 77 King Street
> Kingston
>
> Attention: Mr Dereck Russell
>
> Dear Sirs:
>
> Re: Long's Wharf, Clarendon – Prince
> Golding et ux to Garnett Palmer
> Sale of Lots 19, 20, 21 & 22

We have now received written instructions from Mr. Garnett Palmer, the remaining outstanding Purchaser of lots from Mr. & Mrs, Prince Golding to forward all monies held by us with respect to his transaction and all documents to your department.

Therefore, please find enclosed herewith the following:

1. Our Bank of Nova Scotia Jamaica cheque No. 0086199 for $48,025.00 as per attached statement and the enclosed copy letter dated the 8th March 1985 with full Purchaser's statement on each lot.

2. The Statement referred to in 1 above.

3. The copy letter referred to in 1 above.

4. Four (4) partial Discharges of Mortgage with respect to each of the four lots.

5. Four (4) un-executed Transfers for the four Lots.

6. Duplicate Certificate of Title at Volume 1197 Folio 589 for Lot 19.

7. Duplicate Certificate of Title at Volume 1197 Folio 590 for Lot 20.

8. Duplicate Certificate of Title at Volume 1197 Folio 591 for Lot 21.

9. Duplicate Certificate of Title at Volume 1197 Folio 592 for Lot 22.

10. Duly executed Agreement for Sale.

Kindly acknowledge receipt of all these documents on the enclosed copy of this letter.

The enclosed Statement and copy of the Purchaser's Statement sent to him from March, 1985 will give all the details of purchase price and costs. In summary, the Purchaser, Mr. Palmer needs the following to complete this transaction:

S T A T E M E N T

Re: Garnett Palmer – Purchase of Lots
19, 20, 21, & 22 Long's Wharf Clarendon

LOT	PURCHASE PRICE	½ COSTS	COST OF SALE AGREEMENT	ATTORNEY'S FEES
19	$ 36,600.00	$2,421.00	$ 400.00	$1,015.00
20	36,600.00	2,302.32	400.00	942.50
21	38,640.00	2,387.75	400.00	992.50
22	35,100.00	2,254.13	400.00	922.50
	$149,940.00	$9,365.20	$1, 600.00	$ 3,872.50

Payments made by Garnett Palmer

10/12/84	$11,500.00	
18/1/85	11,500.00	
29/7/85	30,000.00	
4/11/86	30,000.00	$83,000.00
Less payment to National Commercial Bank on 22/8/85		32,000.00
		$51,000.00

Less our costs

From the balance held by us, we now deduct the costs of the Agreement for Sale – listed at $400.00 per Lot, in fact only Agreement was drafted	$ 400.00	
As we have brought this matter up to the point where all the preparation has been done save and except for the execution and stamping of the Transfers, we have deducted as our fees two-thirds of the Attorneys fees as above (i.e) 2/3 x 3,862.50	2,575.00	2,975.00
Balance to National Commercial Bank		$48,025.00

29th January, 1987

CRAFTON S. MILLER & CO.
Attorney-at-Law

Per: Sign:_____
CRAFTON S. MILLER".

Turning to the evidence of Mr. Crafton Miller before Clarke J it reads:

> "There is no specific provisions in the sales agreement regarding possession. I started acting in the matter in 1984 for a number of years until I was asked to send the papers to another attorney, Mr. Alton Morgan. Before that I dealt with Mr. Derrick Russell of the National Commercial bank re this matter. [Emphasis supplied]
>
> In the course of acting I wrote to Mr.Palmer from time to time. (letter dated 3/11/96, Exhibit 18, shown to witness) Yes that letter addressed to Mr. Golding and copied to me. Recall receiving that letter. I see there that Mr. Palmer is asking for another 12 months.
>
> Yes I recall having written him before that date. (Document shown to witness)Yes I can identify that document. It is addressed to Mr. Palmer from me. (By consent document admitted in evidence as Exhibit 38)
>
> Yes in that document I was making time of the essence. I would have sent that letter by registered post. (Document shown to witness) Yes, I can identify it. That is the notice making time of the essence."

So from this evidence Mr Crafton Miller had dealings firstly with Mr Deryck Russell who apparently was not given all the papers connected with the transaction and then to Mr Alton Morgan who was given additional documents.

Exhibit 10 concerns the issue of possession. It is necessary to quote it in full, particularly as the issue was mentioned earlier. Further it is another instance of direct correspondence between the parties.

> "70 EAST STREET,
> OLD HARBOUR
> ST. CATHERINE.

3rd November, 1986

Mr. Prince Golding
Long's Wharf Estate
Clarendon.

Dear Sir:

Re Purshase of Lots 19, 20 21 and 22 –
Long's Wharf, Clarendon – from
Prince Golding et al

We write in respect of our telephone conversation on 18/10/86, concerning balance of payment on the captioned.

As you are aware that our Bankers are still looking in the possibilities of facilitating our request; while this is being looked into, I am advancing a further deposit of THIRTY THOUSAND DOLLARS ($30,000.00) – BNS #2905482 in the amount of TWENTY SEVEN THOUSAND DOLLARS and BOC 00433 THREE THOUSAND DOLLARS respectively) instant and hereby asking for a period of twelve (12) months to settle the balance.

Upon receipt of this deposit, I am reminding you of your promise to allow us full possession of the said property.

N.B. It is my intention to settle outstanding balance at a much earlier date.

Thank you for your cooperation.

Very truly yours,

.....

G. PALMER
c.c. CRAFTON S. MILLER"

There was an earlier letter to Mr. Crafton Miller on the issue of possesssion. It is as follows:

"70 East Street
Old Harbour P.O.,
St. Catherine,

July 26, 1985

Mr. Crafton S. Miller & Co.,
Attorney at Law,
1a Duke Street,
Kingston

Dear Mr. Miller,

Enclosed please find Bank of Nova Scotia cheque #B373701, in the sum of thirty thousand dollars ($30,000.00), representing a further deposit on purchase of lands at Long Wharf Subdivision, lots 19-22, in the Parish of Clarendon; from Prince and Etta Golding.

On receipt of my cheque, I would appreciate if you would send me your letter, granting permission for me to take possession of the lands; as per our agreement.

Yours truly,

Garnett Palmer".

Further here are exhibits 38 and 39 referred to in the evidence of Mr. Crafton Miller:

"7th October, 1986

Mr. Garnet Palmer,
70 East Street
Old Harbour
Saint Catherine

Dear Sir,

Re: Purchase of Lots 19, 20, 21 & 22
Long's Wharf, Clarendon, from Prince Golding et al

Please find enclosed with this letter a NOTICE MAKING TIME OF THE ESSENCE.

We anticipate hearing from you promptly.

Yours faithfully,
CRAFTON S. MILLER & CO.,

PER ; CRAFTON S. MILLER

c.c. Prince Golding"

Here is the Notice:

"TO: GARNET PALMER
70 EAST STREET
Old Harbour
St. CATHERINE.

WE HEREBY GIVE you NOTICE on behalf of our clients PRINCE ALBERT GOLDING and ETTA E.GOLDING, Vendors of Lots 19, 20, 21 and 22 Long's Wharf, Clarendon registered at Volume 1197 Folios 589-592 respectively of the Register Book of Titles contracted to be sold to you by an Agreement of sale that the day thereby fixed from completion having now past and the VENDORS being ready willing and able to complete REQUIRE you within FIFTEEN DAYS from the date hereof (and in respect of this demand makes time of the essence of the contract) to complete the said Contract and to pay the balance of purchase money and half costs of transfer to us.

WE FURTHER GIVE YOU NOTICE that if you fail to complete, and persist in your refusal to carry out the contract, that the Agreement can be rescinded on the expiration of the time herein mentioned by the VENDORS.

DATED THE 8th DAY OF OCTOBER 1986

CRAFTON S. MILLER & CO.,
ATTORNEY-AT-LAW FOR THE VENDORS

PER CRAFTON S. MILLER"

Before Mr. Crafton Miller's letter and Notice to the appellant Palmer, on 3rd. November 1986, there was a letter from Palmer which is of vital importance in

understanding this issue in the case. While Mr. Crafton Miller was invoking the principle that time was of the essence, Palmer was pointing out that the conditions in the contract for sale which obliged the developer Golding to perform his part of the bargain were not fulfilled.

In this context be it recalled that at this stage Mr. Crafton Miller was acting on behalf of both parties. Here is the letter:

> "70 East Street
> Old Harbour
> St. Catherine
> March 3, 1986
>
> Mr. Crafton Miller & Co.
> Duke Street
> Kingston
>
> Dear Sir:
>
> Enclosed please find my Bank of Commerce cheque for Three Thousand Dollars ($3,000) cheque #00433 as a further deposit on my account for lots – 19, 20, 21 and 22 of Longs Wharf, Clarendon. Please acknowledge this by your receipt at an early date.
>
> This is my second letter of protest to you about the interference and changes of Clause 13 of which was rewritten to be different from what I signed for on the 11th December, 1984. --- "

Here it is to be pointed out that the first letter was never presented in the Court below. There was an attempt to have it admitted by agreement in this Court which failed. The letter continues thus:

> "Please note that I did not affix my signature to the said Clause 13 of the Said Sales Agreement
>
> When I investigated the reason for such changes of Clause 13, your Mrs. Richards explained that the interference and changes were typing errors and promised to have it corrected when the balance of money was paid on completion.

> Protest #2 re Amendment. What was the reason for such changes after I have made my first deposit on the 11th December 1984. This is strange to me at this late stage against that I have already visited the Clarendon Parish Council and examined the Said approved Sub-division Plan with all the apparent conditions and was assured by the Parish Council that no change was in force (re Amendment).
>
> I was not informed by the Developer, Mr. Golding or the Parish Council or any one else of the late and new change. I, therefore, will not agree to any of these changes after the 11th December 1984 the date I made my first deposit and signed the Said Agreement.
>
> On the matter of Completion, I am fully aware that this is a cash transaction and is willing to fulfill all my obligations as explained to you and Mr. Golding, but if there is any changes with two Banks that I have made agreement with for the balance of payments, I am pleased to inform you that I have made other arrangement with my families who have guaranteed me the full amount of money for completion.
>
> From this assurance to me, this is my undertaking to you that as soon as all the approved conditions that was agreed to by the Parish Council and the Developer are fully met.
>
> Please go ahead and complete our sales Agreement.
>
> G. Palmer" (Emphasis supplied)

If at this stage of the proceedings, the legal issues had been examined, this prolonged and expensive law suit would never have been instituted. The essence of Palmer's claim was this; How can the respondent Golding rely on time being of the essence when he had not fulfilled his obligations concerning the infrastructure? Also there does not appear to be any response to this powerful stricture. I repeat them for emphasis. Firstly, the infrastructure was not complete. Mrs Richards, an employee of

Crafton Miller & Co. Ltd., does not respond. The issue of the purported amendment of clause 13 of the Clarendon Parish Council's amendment is ignored.

Although there is no evidence of a reply to the letter there are some answers from Mr Miller to Mr Codlin under cross examination which does not seem to enter into the learned judge's findings. They must be quoted in full. Here they are:

> "Ques: You were conversant with the conditions imposed by the Parish Council in granting the subdivision approval to Mr Golding?
>
> Ans: In so far as those conditions have been stated on the copy agreement of sale that was kept in our records on file.
>
> **(Exhibit 3 and 9 shown to witness")**

Exhibit 3 is not referred to in the list of Exhibits at page 289 of the record but it is clear from the evidence of Winston Kelly at page 234 of the record cited previously, that Exhibit 3 referred to the original conditions imposed by the Clarendon Parish Council. Exhibit 4 also not listed on page 289 of the record is the amendment to condition 11 imposed by the Parish Council. Incidentally this is the cross-examination which was referred to earlier put by Mr Codlin by Mr Crafton Miller. I had earlier stated that I would refer to it as it demonstrates how Mr Miller handled the issues at the heart of this case. His evidence on the issue of clause 13 is in marked contrast to that of Winston Kelly.

> "Ques: Had you extracted at least 12 of the conditions and incorporated them into the agreement for sale which you drafted?
>
> Ans: The copy agreement of sale which we have on file shows that we copied the 12 conditions imposed by the Parish Council.

Condition 13 which we copied had nothing about certificate of title.

It had this "no infrastructure required to be undertaken by the vendors". Yes I agree that conditions 1 to 12 in Exhibit 9 were contained in the subdivision approval that I saw.

Ques: Do you know who were required to fulfil that condition 1 to 12?

Ans: That would be the vendors.

Ques: Were you aware of any amendment to the subdivision approved plan?

Ans: I cannot recall if there was an amendment but it could have been.

Can't recall if I made any application on behalf of Mr Golding for an amendment to the approved plan.

Yes I told the Court this morning that I cannot say particularly when the agreement for sale was signed".

There was no re-examination. These answers pose the question as to where condition 13 outlined by Mr Miller is to be found among the resolutions of the Clarendon Parish Council. Certainly if there was such a resolution it ought to have been produced. It must be emphasized that Mr Winston Kelly knew of no resolution by the Clarendon Parish Council which corresponds with Condition 13 as found in the contract (Exhibit 9).

In his careful judgment on this aspect of the matter, Clarke J. ruled thus:

"Mr. Codlin has submitted that so long as the contract subsists with the plaintiff not in breach, Mr. Golding is obliged to carry out infrastructural work in respect of all four lots before completion. In my opinion Mr. Codlin is correct. Special Condition 12 says that '(t) he work of the

> subdivision shall be completed within two (2) years of the date of approval. Special Conditions 10 and 11 are specific and detailed. The infrastructural specifications must have been understood by the parties to be part of the work of the subdivision to be completed within two years of the date of approval. The parties must have intended by the terms of the contract that the specified infrastructural work, by its very nature, would be performed by the vendors as susbdividers of the land described in the contract as part of Long's Wharf of which the four lots in question are numbered 19, 20, 21 and 22 on the subdivision plan for same'." (Emphasis supplied)

Then the learned judge continues thus:

> "I therefore hold that Special Condition 13: 'No infrastructure is required to be undertaken by the Vendors' – cannot by its general words relieve the vendors of their obligation (provided the contract still subsists) to furnish the infrastructure expressly specified in Special Conditions 10 and 11. The general words of special Condition 13 are therefore, in my judgment, otiose.
>
> Therefore, so long as the infrastructural work was not performed, the vendors could not have effectually made time of the essence of the contract as they purported to do on 14th October,1987 through their attorneys. They failed to provide the infrastructure called for in the contract and so could not have been ready willing and able to complete. The agreement for sale was therefore not terminated by reason of the failure of the plaintiff to comply with the 'Notice to Complete sale and Making Time Of The Essence' (Exhibit 39) which was in the result ineffectual."

This excellent analysis of the legal issues is correct. It is perhaps necessary to reiterate that the contract referred to by the learned judge was the contract of March 1985. There are however, two omissions which are of importance to the outcome of this case. If the sub-division ought to have been completed in two years, on what basis did Mr Deryck Russell prepare new contracts for sale in December 1987 in respect of lots 21 and 22 which were part of the March 1985 contracts? Also, the learned judge did not

stress that certain terms in the contract were mandatory as they were stipulations pursuant to the Act. There is an interesting letter from the appellant Palmer to Mr Russell. The following extract is significant:

> "On 18th January 1985 on my second deposit, I discovered an interference on clause 13 of the said Sales Agreement differed from what I signed on my first deposit dated 11th December 1984. I then pointed it out to Mr Miller's Secretary – Mrs Richards who told me that it was a typing error and promised me she will have this corrected as soon as the titles are ready to be transferred in my name upon completion.
>
> Please note that I never put my signature to the said Clause 13. With regards to Amendment of the Subdivision, I also discovered that an amendment was granted on the 6th of February 1986 to the Developer.
>
> I was not informed by the Developer - Mr Golding nor the Clarendon Parish Council. I would like to know why all these late changes when I had already signed and deposit monies and start very costly development three (3) years ago.
>
> Now that you are the new lawyer acting on behalf of the Goldings', I am protesting and informing you of all the interference and changes and my disagreement – re amendment of the said subdivision and the Sales Agreement. Please take the necessary steps and have all these changes rectify before completion.
>
> Please note that the subdivision should be completed within two (2) years from the date of approval.
>
> Enclosed please find a copy of my letter of protest to Mr Miller re interference and change to Clause 13 and my guarantee of balance of purchase money subjecting to Mr Golding fulfilling all the conditions".

By virtue of the Act these were obligatory conditions to be expressly included or implied in terms of the contract and this issue must be addressed. It was not addressed

directly by the learned judge below, though it is agreed that general submissions were made on the Act. It was not properly addressed by Mr Codlin although this Court brought it to his attention. So the ground of appeal 1 which reads:

> "(1) That the Learned Judge misdirected himself in interpreting the evidence of Mr. Golding on page two (2) of his Judgment by holding that nowhere in the passage has Mr. Golding stated in terms that the contract was signed on the 10th or 11th December, 1984. Mr. Golding in fact has clearly stated:
>
> 'That in or about the 10th December, 1984 the First Defendant (my late wife now deceased) and I contracted to sell to the Plaintiff four lots numbered 19, 20, 21 and 22 on the subdivision plan of the lands, regisetered at Volume 1171 Folio 241 part of Long's Wharf in the parish of Clarendon...'
>
> The learned Judge thus ignored the principle that:
>
> (a) A contract can be made before it is signed.
>
> (b) That in the same passage quoted by the learned Judge, Mr. Golding identified the contract which was presented to him and which has been exhibited in the case presented by the Plaintiff/Appellant, thus leaving no doubt as to what contract was being referred to." [Emphasis supplied]

has not been successful in part in the light of the foregoing analysis. There is no direct evidence that Mr Golding signed the contract in 1984. However the contract of March 1985 was not terminated by the notice making time of the essence. Further the contract for which specific performance is sought is clearly identified in this ground of appeal.

Did the clause on the receipt dated 10th December, 1984 indicate that before a contract could be formed permission had to be granted by N.C.B?

The first thought that must be taken into consideration is that there is no privity between the appellant Palmer and N.C.B. The following passage from the judgment of Clarke J. must be cited.

> "Observe that the following words appear in a prominent position on the face of Exhibit 8.
>
> > 'Received from Mr. Garnett Palmer the sum of Eleven Thousand Five Hundred Dollars Re Deposit lot 19 and 20 Long wharf from Prince Golding pending N.C.B. permission to prepare agreement of sale.
> >
> > Per E. Tennant '
>
> I agree with Mr. Scharschmidt Q.C. that the clear and obvious meaning of the words 'pending N.C.B. permission to prepare agreement of sale' is that the attorney-at-law involved, Mr. Crafton Miller, needed to obtain the permission of National Commercial Bank before preparation of the agreement for sale and that no agreement for sale had been prepared and a fortiori no agreement for sale was signed by the plaintiff on 10th December, 1984."

Then His Lordship continues thus:

> "Mrs. Ethel Tennant testified that it was she who wrote the words and that she did so on the instructions of Mr.Crafton Miller. Mr. Miller testified that the lots, the subject matter of the sale, formed a part of a piece of land that had been mortgaged to National Commercial Bank and that the Bank held the title as security and that it was necessary for him to get the Bank's permission to prepare the agreement for sale. Mr. Derrick Russell, attorney-at-law employed to the Bank, also gave evidence of the existence of the mortgage in question. Also it is to be noted that it was not suggested to either Mr. Miller or to Mr. Russell that the land, the subject matter of the sale, had not been mortgaged to National Commercial Bank, (N.C.B.)".

Turning to his findings which he treated as a matter of fact, instead of one of mixed fact and law, His Lordship said:

> "Again, I agree that it is extremely improbable that Mr. Miller who knew that the permission of N.C.B. was necessary would have prepared an agreement for sale and had same signed by the plaintiff while at the same time instructing Mrs. Tennant to make the notation on the receipt that the permission of N.C.B. to prepare the agreement for sale was necessary."

Be it noted that nothing prevented the respondent developer, Prince Golding from entering into a contract to sell lots 19 and 20. The relevant endorsement on the title reads as follows:

> "PRINCE ALBERT GOLDING and ETTA ELOUISE GOLDING both of 6 East Charlemont Drive, Kingston 6 in the parish of Saint Andrew, Farmer and Housewife respectively are now the proprietors of an estate as joint tennants in fee simple subject to the incumbrances notified hereunder in ALL THAT parcel of land part of LONG'S WHARF in the parish of CLARENDON being the Lot numbered TWENTY on the plan of Long's Wharf aforesaid deposited in the Office of Titles on the 22nd day of October, 1985 of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered at Volume 1171 Folio 241.
>
> DATED this 24th day of March One Thousand Nine Hundred and Eighty-six.
>
> Deputy Registrar of Titles.
>
> Incumrances above referred to:-
>
> The restrictive covenants set out hereunder shall run with the land above-described hereinafter called "the said land and shall bind as well the registered proprietors their heirs personal representatives and transferees as the registered proprietors and shall enure to the benefit of and be enforceable by the registered proprietors for the time being of the lands or any position thereof comprised in Certificate of Title registered at Volume 537 Folio 24.

1. There shall be no sub-division of the said land without the prior approval of the Parish Council of Clarendon."

Then there is an easement and mortgage on the Register Book of Titles thus:

> "The registered proprietor of the land comprised in this Certificate of Title shall have a right of way on to the access strip of the land comprised in Certificate of Title registered at Volume 1198 Folio 589.
>
> Dep. Registrar of Titles.
>
> Mortgage No. 410472 registered 10th February 1983 to NATIONAL COMMERCIAL BANK JAMAICA LIMITED at 77 King Street, Kingston to secure the moneys mentioned in the Mortgage stamped to cover Two Hundred Thousand Dollars with interest by this and several others. Consent for Caveat No. 78788.
>
> Dep. Registrar of Titles".

Then Clause 12 of the conditions imposed by the Clarendon Parish Council pursuant to the Local Improvement Act reads:

> "12. The work of the subdivision shall be completed within two (2) years of the date of approval."

The natural inference would be that the developer Prince Golding, the respondent would clear the mortgage so that transfers of Titles would be made to purchasers such as Palmer, freed of the mortgage. One of the clauses in the Agreement for Sale was that there were no encumbrances save the restrictive covenants (if any) endorsed on the Certificate of Title.

Could a new contract for lots 21 and 22 illegal on its face formed in December 1987 discharge the original contract of March 1985?

The statutory powers pursuant to the Act enabled the Clarendon Parish Council to impose mandatory conditions on the sub-division for its orderly development. These

conditions were to be expressly incorporated in any contract for the sale of land in the sub-division. For such conditions are also for the benefit of the purchasers. The attempt by the vendor to ignore these conditions in respect of Lots 21 and 22 cannot be supported by any court. Without the conditions being expressed in the contract it was illegal as formed. Further, those obligations run with the land. In this context the affidavit of Mr. Deryck Russell is of importance because it demonstrates the problems when an Attorney-at-law acts for both parties in a contract for sale of land. In this case Mr. Russell was also employed to N.C.B. Here are the relevant passages from his affidavit:

> "I, DERYCK RUSSEL, being duly sworn make oath and say as follows:
>
> 1. That I reside and have my true place of abode and postal address at Apartment 2Q Ocean Towers, 8 Ocean Boulevard, in the Parish of Kingston, and I am an Attorney-at-Law and Assistant Legal Officer for National Commercial Bank (Jamaica) Limited.
>
> 2. That in or about January 1987, I had the carriage of sale of transactions involving the sale of 4 Lots numberedd19, 20 21 and 22 being lands registered at Volume 1197 Folios 589, 590, 591 and 592 in the Register Book of Titles respectively wherein the registered proprietors Prince and Etta Golding, the Defendants herein agreed to sell the said properties to Garnett Palmer, the Plaintiff herein.
>
> 3 That on perusal of the documents received from Messrs. Crafton Miller & Company, Attorneys-at-Law, who had first dealt with the matter, an Agreement for the sale of the said premises had been signed on the 10th day of December, 1984, by the parties, but that this contract was terminated because of the non-completion of the purchaser, the Plaintiff herein".

There are two points for notice. Firstly, the contract in issue is the 1985 contract, and secondly, that contract was not terminated as Mr Russell asserts. Further these new contracts purport to ignore the conditions imposed by the Clarendon Parish Council and to that extent they are invalid. However because of the provisions of the Registration of Titles Act the entry on the Register is conclusive as to ownership in most instances so the lots were effectively transferred to Palmer and he made no complaint about this. There is another point to note. Before Mr Russell drafted the 1987 agreement he would have had the 1985 agreement before him. He could if he cared to, have examined that sub-division contract, and realised the implications for the mandatory provisions which were incorporated in that contract. One fact scarcely noticed below as well as in this Court is that there is no dispute that Palmer has been in occupancy of lots 21 and 22 since 16th December 1987. There are two of the lots which form the subject matter of the March 1985 contract. This March 1985 contract was signed by the respondent Golding 'the party to be charged'. Also possession by Palmer of lots 21 and 22 gave him the additional right to rely on the doctrine of part-performance to support his claim for specific performance. In this contract it must be borne in mind that Palmer stated in the Court below that he was put in actual possession since 1984 by Golding. Golding gave no evidence on possession. Mr Miller said at page 282 of the record:

> "And I cannot recall whether possession was given because we did not complete the transaction".

If the appellant Palmer had an independent legal opinion he would have challenged these two contracts of 1987 earlier. The important legal issue to be determined

is whether the 1987 contract for lots 21 and 22 discharged the 1985 contract. One of the 1987 contracts is set out for easy reference as they are identical in form.

"AGREEMENT

THIS AGREEMENT is made the 16th day of December, 1987

BETWEEN PRINCE A. GOLDING, Retired Teacher, and ETTA E. GOLDING, Housewife, both of Old Harbour in the Parish of St. Catherine (hereinafter called the "Vendors") and GARNETT PALMER, Mechanic of 70 East Street, Old Harbour in the Parish of Saint Catherine (hereinafter called the "the Purchaser") WHEREBY the Vendors agree to sell and the Purchaser to purchase ALL THAT parcel of land more particularly described in the Schedule hereto upon the terms set out therein.

SCHEDULE

DESCRIPTION OF LAND	All that parcel of land part of Long's Wharf in the Parish of Clarendon being the Lot numbered 22, on the subdivision Volume 1197 Folio 592.
ENCUMBRANCES:	None save the restrictive covenant (if any) endorsed on the Certificate of Title.
CONSIDERATION;	THIRTY-FIVE THOUSAND ONE HUNDRED DOLLAR: ($35,100.00).
HOW PAYABLE:	Deposit of 15% on execution hereof Balance on completion.
COMPLETION:	On presentation of Registered Transfer in Duplicate Certificate of Title in the name of the Purchaser and on payment of Balance of Purchase money and half cost of transfer.

COST OF TRANSFER:	To be borne equally by the parties, Attorney-at-Law costs as per Law Society Scale of Fees. Transfer Tax to be borne by the Vendor.
TAXES, WATER RATES, INSURANCE	To be apportioned to date of possession
COST OF PREPARING AGREEMENT OF SALE:	The cost of preparing this Agreement is $100.00 payable by the Vendor and Purchaser in equal shares.
SPECIAL CONDITIONS:	The Purchaser hereby authorises the Vendor's Attorneys to pay the stamp duty and transfer tax from the deposit and should the sale not complete the Vendor shall return to the Purchaser the stamped Instrument and the Transfer tax certificate with the notation 'Cancelled' and the purchaser will be free to recover the duty and Tax... from the Commissioner of Stamp."

Transfer date 16/12/87

It is to be inferred that no proper advice was tendered to the appellant Palmer as to the terms which ought to have been included in this new contract. It was a contract drafted with the developer's interests in mind. The illegality of this contract will be addressed later. The developer Golding was the Bank's client. Both Palmer and Golding might have been in a contractual or fiduciary relationship with Deryck Russell as they were his clients. The relationship might have also given rise to a duty of care in negligence.

Any redress that the appellant Palmer or the respondent Golding may seek or might have sought in law or equity might involve Attorneys-at-law who drafted these contracts. See **Nocton v Ashburton** [1914] A.C. 932 and **Henderson and others v Merrett Syndicates Ltd** (1994) 3 All ER 506. Continuing Deryck Russell's affidavit it reads thus:

> "4. That by agreement and on the instructions of both parties, I drew up four new contracts for the sale of Lots 19, 20, 21 and 22, which were duly executed by the parties on the 16th day of December, 1987. By agreement the funds amounting to $92,000.00 which Mr. Palmer had paid by way of deposit and installments under the terminated agreement of the 10th day of December, 1987 were to be applied against the sale price of Lots 19, 20, 21 and 22 with the sum of $81,177.00 being credited towards the purchase price and the purchaser's costs of transfer of Lots 21 and 22 and remainder of $10,823.00 was to be applied as a deposit on Lots 19 and 20." [Emphasis supplied]

Mr Scharschmidt Q.C., relied on this passage to demonstrate that the parties had discharged the 1985 contract. The missing link in that submission is the invalidity of the 1987 contracts. In any event he contended that the invalidity must be pleaded and it was not. Then the affidavit continues thus:

> "5. That to the best of my recollection all 4 contracts were in the same form as the contracts for Lots 21 and 22, save for the prices.
>
> 8. That the 4 contracts for Lots 19, 20, 21 and 22 were all forwarded to the Plaintiff for execution. Contracts for lots 19 and 20 were never returned.
>
> 9. That the Transactions with respect to Lots 20 and 21 were completed in accordance with the 1987 contracts and Mr. Palmer was duly endorsed on the Certificates of Title, registered at Volumes 1197 Folios 591 and 592 as proprietor in fee simple.

> 10. That Mr. Palmer did not tender any further sums to me on the Vendors behalf and his non return of the Agreement for sale for lots 19 and 20 indicated to me that he was no longer interested in the purchase of those lots.
>
> 11. That I discontinued my handling of this matter in or about October, 1989; when the file was handed over to Messrs. Alton E. Morgan & Company, Attorneys-at-law of No. 1 Norwood Avenue, Kingston 5."

The file handed over to Mr Russell was incomplete. We have it from Mr Crafton Miller that he also turned over papers to Mr Alton Morgan at a later date.

Much play was made of the Caveat registered against Lots 19 and 20 specifically referred to in the 1987 contract. It is best to set out one of them to ascertain the effect, if any, they have on these proceedings.

> "CAVEAT against the REGISTRATION of any CHANGE in the PROPRIETORSHIP or of any DEALING
>
> TO THE REGISTRAR OF TITLES (1)
>
> TAKE NOTICE that I GARNETT PALMER of 70 East Street, Old Harbour, St. Catherine
>
> Claim an estate or interest in ALL THAT parcel of land part of LONG'S WHARF in the parish of CLARENDON being the Lot numbered TWENTY REGISTERED AT Volume 1197 Folio 590, to the value of $414,130.00 based on an agreement for sale dated 16th December 1987 between PRINCE and ETTA GOLDING and GARNETT PALMER.
>
> In the land comprised in the Certificate of Title registered in Volume 1197 Folio 590 of the Register Book and I forbid the Registration of any person as Transferee or Proprietor and of any instrument affecting such estate or interest until after notice of the intended registration or dealing be given to me, or unless such instrument be expressed to be subject to my said claim

> I appoint **RAPHAEL CODLIN & CO**
> **ATTORNEYS AT LAW**
> **64 DUKE STREET**
> **KINGSTON**
>
> as the place at which notices and proceedings relating hereto may be served.
>
> Dated this 30th day of November 1990." (Emphasis supplied)

The caveat in respect of lot 19 was in similar terms. The inference is clear that for the first time the appellant Palmer had the services of a lawyer who was also not retained by the respondent, Golding. So the reality was that to protect the appellant Palmer's interest, his Attorney-at-law prayed in aid the 1987 contract. However, such reliance does not preclude the appellant, Palmer, from challenging the validity of the 1987 contract in this or other proceedings.

It may be that because he relied on the 1987 contract to lodge the caveat Mr Codlin was reluctant to raise the issue of its invalidity on appeal. Section 13 of the Local Improvements Act was specifically brought to his attention by this Court. As for the status of a caveat in **Rose Hall Ltd v Reeves (1975) 13 JLR 30** at page 35 Lord Willberforce said:

> "One final argument may be mentioned. The respondent had, as has been stated, registered a caveat on December 11, 1967, with the Registrar of Titles, Jamaica. This of course had the effect of preventing any dealings with the land while it remained effective. The appellant's contention was that this caveat was void, since at the date when it was lodged, the appellant had no interest to protect: consequently the rights of the parties should be dealt with as if it had never existed. Their Lordships cannot accept this. In the first place the concept of a void caveat is novel and difficult to comprehend and was not explained by the appellant. A caveat is simply a fact – it may be justified in

> law or not – and whether it is either must be decided through the procedure laid down in the Registration of Titles Law. Even if, which appears probable, it could have been removed, prior to August 22, 1968, or subsequently, it was not so removed. Its existence, moreover, only had the effect that on September 13, 1968, when the transfer to North Western was presented, the Registrar refused to register the latter. But by that time the amending Act of 1968 had taken effect. Their Lordships therefore cannot accept that the lodging of the caveat, valid or invalid, has any bearing on the critical issue in the case."
>
> [Emphasis supplied]

There must be a decision as to whether the 1987 contracts in respect of Lots 21 and 22 are void. If they are void they cannot replace the 1985 contract as regards Lots 19 and 20, 21 and 22. They are void because they ignored the conditions of the 1985 contract with respect to the statutory obligations imposed on the developer Golding.

There is a case which deals with the principle of invalidity of subdivision contracts involving the Act. It also gives the legislative history of section 9A now section 13 of the Act. In **Rose and Hanchard v. Chung & Patrick City Ltd.**(1978) 16 J.L.R. 141 at 143- 144 Allen J. said:

> "On or about February 6, 1967, at the trial of issues arising between the First and Second Defendants on the one hand, and their assign, Farmers and Merchants Trust Company Limited on the other (see **Farmers & Merchants Trust Company Limited v. Chung et al** 1970, 15 W.I.R. 366), Mr. Justice Kenneth Smith (as he was then) found, inter alia, that contracts for sale of land for which sub-division approval has not been obtained were made in breach of the Local Improvements Law (Cap. 227 of the Revised laws of Jamaica) and were illegal and unenforceable. It is common ground that the contract dated May 18, 1957 fell into this category.
>
> The decision affected a great number of purchasers who had invested moneys in subdivision schemes which had not been approved by the Board of the relevant local authority prior to their contracts with the vendors. Not only did they

> lose their equitable interest in the land they purported to purchase but also stood to lose the monies paid to the vendors on an illegal contract. Many vendors took the stand that such contracts were illegal and that the deposits were not recoverable, and as owners of the legal interest proceed to re-sell more often than not at a higher price than that paid by the first purchaser.
>
> As a result of public reaction, the *Local Improvements (Amendment) Act* (Act No. 36 of 1968) was passed with retroactive effect to validate the contracts so negotiated in breach of the law, and to protect the rights of property which had accrued to purchasers between January 1, 1954 and the date of enactment of the amending Act August 22, 1968."

See also **Farmers and Merchants Trust Company Limited v Chung and Patrick Limited** (1970) 11 JLR 470 on appeal for the outcome of those legal proceedings. Then the judgment continues thus:

> "The relevant provisions are set out below:
>
> **The Local Improvements (Amendment) Act 1968**
> **Section 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 herein before referred to, has been obtained'." [Emphasis supplied]

One inescapable inference of this amendment is that apart from failure to obtain the sanction of the Parish Council, there are other circumstances which could give rise to the invalidity of a sub-division contract. The conditions that a Parish Council may

impose pursuant to the Act cannot be predicted. That issue is addressed by that common law principle of contracts prohibited by Statute. There will be a ruling on this issue later.

Allen J., at p. 145 continued her judgment thus:

> "The land, the subject of this suit, was proved to be registered land to which the provisions of the Registration of Titles Law apply, and under which, once title to the land is registered, such registration is unassailable save in the case of fraud. This system follows the "Torrens" system of registration of title to land which is in force throughout Australia and in other countries as well, and has been adopted in Jamaica. In the case of **Abigail v Lapin** (1934) ALL E.R. P.C. 720 at page 725A, Lord Wright describes it thus:
> ' ... It is a system for the registration of titles, not of deeds; the statutory form of transfer, gives title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferror as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, is to pass to the transferee ...'."

Then the learned judge continued thus:

> "Section 3 (2) of Act 36/68 is therefore entirely consistent with the system of registering Titles to land in Jamaica for the purpose of passing the legal interest in land. Thus, the interest of a subsequent purchaser to whom the legal interest in the land has been conveyed or transferred during the transitional period was protected – fraud apart. This was the decision upheld by the Privy Council; in the case of **Rose Hall Limited v Elizabeth Lovejoy Reeves** (1975) 13 JLR 30, where it was held, inter alia:
>
> > '... that the retroactive effect of S. 9A(1) of Cap. 227 achieved by S. 3(2) of the 1968 Act was to protect rights of property which had accrued between January 1, 1954, and the date of enactment of the 1968 Act – August 22, 1968 – and the words "transfer or conveyance' in S 3 (2) both taken singly, and when read together, referred only to legal interests in land brought about, in the case of registered land, by transfer. It followed that the

> equitable interest arising under the contract of May of June 1968, remained unprotected since no transfer had been 'effected pursuant to' that contract. The decision of the Court of Appeal was therefore right'."

Before an examination of the status of the two contracts of 1987 is commenced it is necessary to make some preliminary remarks. The relevant paragraphs in the Statement of Claim concerning the contract of March 1985, and Lots 19 and 20 are as follows:

> 3. "On or about the 11th day of December 1984, [March 1985] the Plaintiff and the Defendants entered into a written Agreement whereby the Defendants would sell and the Purchaser would purchase lots 19, 20,21 and 22 on the plan of Long Wharf as is evidenced by the Sale Agreement".

Here I must reiterate that the learned judge below rightly found the relevant date is March 1985, in respect of the contract. The terms of both 1987 contracts are identical.

The other paragraph reads:

> "5. On the 15 June and 18th January 1988 respectively lots 21 and 22 were transferred to the Plaintiff according to the terms of the said contract. The contract contained among other things, the following terms:"

The following terms have already been quoted previously.

Then paragraph 7 reads:

> "7. The Defendants in spite of repeated requests by the Plaintiff failed to complete the contract in respect of lots 19 and 20 according to its terms in that the contract provides that the Defendants should present the duplicate Certificates of Title for the two lots with the Plaintiff's name endorsed thereon, and the Defendants have neither tendered to the Plaintiff or any representative of the Plaintiff any instrument of transfer to be signed by the Plaintiff so as to vest the said properties in the Plaintiff ."

It must be stated that Mr Scharschmidt in his very helpful submission, pointed out that the contract specified in the Statement of Claim for which specific performance is sought is alleged to be dated 11th December 1984. However Clarke J. found that the contract was signed by both parties in March 1985 and this finding as previously stated is affirmed. The contract is not dated and so it must be this contract appellant Palmer relies on for specific performance.

Mr Codlin spent six days in this Court without advancing the appellant's case significantly so during the interval the Registrar on behalf of the Court asked counsel on both sides to answer the following questions:

(1) Did the failure to incorporate the conditions stipulated by the Clarendon Parish Council render the sub-division contract of 16th December 1987 invalid pursuant to Section 13 of the Local Improvements Act?

(2) Was consideration passed from the promissee Palmer to the promissor Golding in relation to the sub-division contract of 16th December 1987? If the answer is in the negative, is the sub-division contract valid?

A list of authorities was also provided which for ease of reference I quote.

On the Local Improvements Act:

1. **Rose (Albert and Hanchard v Chung and Patrick City Limited** (1977) 16 J L R 141

2. **Rose Hall Limited v Elizabeth Lovejoy Reeves** (1975) 13 JLR 30 P.C

3. **Rose Hall Limited v Reeves** (1972) 12 JLR 782 C.A.

On the doctrine of consideration:

(1) **United Dominion Corporation (Jamaica Ltd.) v Shoucair** (1964) 9 JLR 361 (CA)

(2) **United Dominion Corporation (Jamaica) Ltd v Shoucair.** (1962) 10 JLR 500 (PC).

(3) **Pao v Lau Yiu** (1979) 3 All ER 65.

We have always managed costs in this way in an effort to save time and costs. Mr Codlin complained that the questions and authorities favoured him and only belatedly produced the authorities. He did not advance any oral arguments on them. On 14th April 2000, the last day of hearing he produced a written submission which half summarised issues which were put to him during his submissions. In view of his correct stand that there was no amendment to condition 13 imposed by the Parish Council he ought to have joined the Registrar of Titles in these proceedings.

Mr Scharschmidt Q.C. acknowledged that the Local Improvements Act was cited below and mentioned in the grounds of appeal, but that the issue of the invalidity of the 1987 contract was never in issue. If that issue was to be raised he contended it ought to have been pleaded and he cited Section 178 of the Judicature (Civil Procedure Code) Law which reads thus:

> "178. The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

If however it is patent on the face of the 1987 contracts that obligatory terms pursuant to the Local Improvements Act were absent it is arguable that this Court on its own motion could decide that issue. This is especially so when the Court has invited counsel to address the issue and make submissions on the matter.

Even in **North Western Salt Company Ltd. v Electrolytic Alkali Company Ltd** where the counter-part of section 178 of the Civil Procedure Code Law was applied Lord Moulton said at page 476:

> "... if the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not ex facie illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting".

And again at 477 he said:

> "One special case should perhaps be noticed. It is possible to conceive a case in which a fact comes to light in the course of the trial which of itself renders an agreement illegal on grounds which nothing could cure. In such a case the Court would act upon it. But this is no exception to the general rule. Amendments of the pleadings and permission to the plaintiff to call evidence would ex hypothesi be useless in such a case, because the fact is conclusive of the illegality".

In the instant case the 1987 contract is conclusive of the illegality. Lord Parker was of the same mind, see page 474. Then Viscount Haldane said at page 469:

> "My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he

> may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

How the issue of illegality of the 1987 contracts ought to be determined in this case

As the counter-claim by Golding was abandoned, it is necessary to concentrate on the amended defence. Paragraph (1a) is instructive. It reads:

> "1a. Paragraph 3 of the Statement of Claim is denied and the Defendant says that the Agreement for sale was signed in or about the month of March 1985."

So it is clear that the contract of March 1985 is relied on by the respondent Golding. Then paragraph (2a) reads:

> "2a. As to paragraph 5 of the Statement of Claim the Defendant admits that he entered into a contract with the Plaintiff which said contract contains the terms recited in the said paragraph 5. The Defendant says however that the contract was entered into in the month of March 1985. The Defendant denies that lots 21 and 22 were transferred to the Plaintiff in accordance with the terms of the alleged contract of December 1984 and says the lots were transferred in accordance with the terms of written contracts entered into between the Plaintiff and the Defendant on the 16th day of December 1987."

Paragraph 7 of the amended defence is of great importance. It reads:

> "7. That subsequent to the termination in October 1987 of the said Agreement made in 1985 the Plaintiff and the Defendant entered into four separate new contracts for the sale of the Lots numbered 19, 20, 21 & 22 which had been the subject matter of the agreement of March 1985. It was agreed between

> the Plaintiff and the Defendants that the sums paid under the Agreement would be applied to the purchase price and cost of the lots. It was further agreed that of the sum of $92,000.00 which had already been paid, the sum of $81,177.00 was to be applied in payment of the purchase price and costs of lots 21 and 22. The balance of $10,823.00 was to be applied as a deposit with respect to lots 19 and 20. Certificates of title had been obtained with respect to the said lots. The sum of $81,177.00 mentioned above was applied as agreed and in consequence of the agreements and the matters recited herein lots 21 and 22 were transferred. At the trial of this action the Defendants will refer to the Agreement for their true terms and effect."

So this is the issue and the question is whether as a matter of law the new contracts of 1987 were valid as was raised by the respondent Golding. Here is how the appellant Palmer replied to paragraph 7 above:

> "12. The plaintiff will say in answer to paragraph 7 that in 1987 the Plaintiff was requested by a different Attorney-at-Law to sign two (2) and not four (4) new contracts. The Plaintiff was given a reason for being requested to sign the new contracts and that reason was not that the contract made in 1984 had been terminated. The Plaintiff denies that the Plaintiff and the Defendant made any agreement in March 1985 and repeats paragraph 3 of the Statement of Claim."

To put paragraph 12 in its context it is useful to refer to three preceding paragraphs:

> "9. The Plaintiff will say in answer to paragraph 6 of the Further Amended Defence and Counter-claim, that the Defendant failed to carry out the agreement according to its terms and was, therefore, not in a position to grant any extension.
>
> 10. The Plaintiff will also say that the said Agreement was never terminated.
>
> 11. The Plaintiff will say that entirely without prejudice to the Plaintiff's rights, the Plaintiff made payment of the

> balance of the purchase money to the defendant whose Attorney-at-law returned the said payment."

If it could not be said that the appellant Palmer's pleadings satisfied section 178 of the Judicature (Civil Procedure Code) Law, there is another approach to the issue of illegality and it must be examined to ascertain if Palmer can rely on that approach. For completeness, paragraph 13 of the Statement of Claim reads:

> "13. The Plaintiff does not deny the rest of paragraph 7 of the Further Amended Defence and Counter-Claim."

The specific authority which gives guidance on the issue is **Rose Hall Ltd. v. Reeves** (1975) 13 JLR 30 and Section 5(4) and (5) and section 13 of the Act and the mandatory terms of the 1985 contract incorporated pursuant to the Act.

The principle which emerges from the above authority and statutory provisions is that a sub-division contract formed without incorporating the mandatory terms imposed by the local authority made pursuant to the Local Improvements Act is illegal and so void. So we must now examine how this principle emerged in the circumstances of this case.

Section 5 of the Local Improvements Act stipulates provisions with which a developer must comply. Section 5(1) reads:

> "5(1) Every person shall, before laying out or subdividing land for the purpose of building thereon or for sale, deposit with the Council a map of such land; such map shall be drawn to such scale and shall set forth all such particulars as the Council 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 Council be declared to be accurate by a statutory declaration of a Commissioned Surveyor".

Then 5(2) imposes further obligations on the developer thus

> "(2) Every such person shall also deposit with the Council as respect 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 Council 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."

This estimate is of importance for there are provisions in the Act enabling the Parish Council to undertake such works if the developer fails to carry them out.

Turning to the important sub-sections which pertain to the developer who undertakes to sell any part of the subdivided land Section 5(4) states:

> "5(4) For the purposes of this Act a person shall be deemed to lay out or sub-divide land for the purposes of building thereon or of sale, 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".

Then 5(5) states:

> "For the purpose of this section "sale" includes exchange, gift or other disposition

> affecting the fee simple, and lease for any term (including renewals thereunder) or any letting or any licence whereby the land may be used for building purposes; and also includes any disposition affecting the leasehold interest under any such lease as aforesaid."

All the conditions imposed on the developer are for the orderly development of the environment and for the benefit of purchasers who will be the new owners. The conditions were imposed pursuant to Section 5 of the Act which ordains that "such map shall be drawn to scale and shall set forth all such particulars as the Council may by regulations prescribe". If a contract for sale or the map omits to specify the terms in the contract on the back of the map which are imposed by the local authority then such a contract is invalid if the Certificate of Completion by the Parish Council was not obtained. It would be contrary to public policy to entertain it . Exhibit 9 which is the contract the appellant is relying on for specific performance incorporates the mandatory terms. One term which it should also have incorporated is condition 13 imposed by the Clarendon Parish Council. That term ought to have been expressly stated in the contract. That term could not have been amended after the Minister gave his approval. If there was a purported amendment it is null and void. It remains one of the riddles in this case as to the basis on which the draftsman incorporated Clause 13 in the 1985 contract, which sought to excuse the respondent Golding from his statutory obligations.

Then there is Section 13 of the Act which reads:

> "(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 5 or to obtain any sanction of the Council under

> section 8 or section 9, 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 Council hereinbefore referred to, has been obtained".

Be it noted that Section 5(1) and (2) are conditions relating to the map of the sub-division.

Rose Hall Ltd v Reeves (supra) had already decided that failure to obtain sub-division approval rendered a subdivision contract invalid. Reference has previously been made to the history of Section 13(1). It is clear that Section 13(1) of the Act contemplates other reasons which would render a sub-division contract invalid. The specific omission to mention Section 5(4) or 5(5) supra in Section 13(1) is a clear indication that to offer for sale or to build is prohibited unless there is compliance with the conditions imposed by the Parish Council. In this context Section 11 of the Act reads:

> "11. It shall be lawful for the Council to make regulations for carrying this Act into effect and any regulations so made shall when approved by the Minister have effect as if enacted in this Act".

This Section demonstrates that the conditions imposed by the Parish Council have statutory effect.

Apart from **Rose Hall** two further cases illustrate how the Courts approach contracts prohibited by statute. **Mahmoud v Ispahani** (1921) 2 KB 716 and **Chai San Yin v Lieni Knee Sam** (1962) A.C. 304.

The statements of principle in **Mahmoud** are instructive. Here is how Bankes L.J. put it at page 724:

> "The Order is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into. The respondent had a licence; the appellant had no licence. The respondent contends that, as he had a licence, the appellant cannot be heard to say that in the circumstances he had not a licence. I cannot assent to that proposition. I do not think there is any authority for it, and as the language of the Order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract."

Scrutton L.J. was equally emphatic. At page 728 he ruled as follows:

> "I think the law is laid down in **Cope v Rowlands** 2 M &W 157 where Parke B delivering the judgment of the Court, said: 'It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, **Bartlett v Vinor** (Carth 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?' If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract."

Then the learned Lord Justice continues thus:

> "As I understand, two reasons are given why in this case the Court should enforce this contract. First of all, it is said that the Court will not listen to a person who says, "Protect me from my own illegality." In my view the Court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was

> guilty of the illegality, or whether its knowledge comes from outside sources. The Court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a contract."

There are two points to note about these two passages. First, if there is penalty that implies a prohibition. In the instant case there are prohibitions in Section 12(a),(c) and (d) which impose a penalty relevant to this contract.

They read :

> "12 (a) Every person who shall lay out or sub-divide land for the purpose of building thereon or for sale within the meaning of section 5 before depositing with the Council a map of such land provided by the Act;
>
> ...
>
> (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 Council;
>
> (d) every person depositing a map and obtaining the sanction of the Council and who shall neglect or fail to perform the street works within the time prescribed by the Council;
>
> shall be guilty of an offence ..."

The contract was made 16th December, 1987. The approval by the Parish Council was 8th March 1984. It is clear that the above statutory provisions prohibited a contract formed after 7th March 1986, where the infrastructure was not completed. It is for the Resident Magistrate Court in Clarendon to decide whether Golding and Mr Russell the Attorney-at-Law are guilty of an offence against this Act.

To reiterate the March 1985 contract has the following conditions:

> "ROADWAY The reserved roadway should be cleaned to extreme width of all vegetation. Scarify road surface

> and apply selected marl, consolidated in 6 inches layers to a depth of 1'0". Wet and roll to proper camber to a minimum weight of 10 ton roller
>
> 12 The work of the sub-division shall be completed within two (2) years of the date of approval".

These mandatory conditions are not mentioned in the 1987 contracts.

The second point is an answer to Mr Scharschmidt's pleading point. Scrutton L.J. makes it plain that once the court knows of the illegality of the contract it does not enforce it. Here the source of this Court's knowledge came from the judgment of the Court below which was cited earlier:

> "I therefore hold that Special Condition 13: "No infra-structure is required to be undertaken by the Vendors" – cannot by its general words relieve the vendors of their obligation (provided the contract still subsists) to furnish the infrastructure expressly specified in Special Condition 10 and 11. The general words of Special Condition 13 are therefore, in my judgment, otiose.
>
> Therefore, so long as the infrastructural work was not performed, the vendors could not have effectually made time of the essence of the contract as they purported to do on 14th October 1987 through their attorneys. They failed to provide the infrastructure called for in the contract and so could not have been ready willing and able to complete. The agreement for sale was therefore not terminated by reason of the failure of the plaintiff to comply with the "Notice to Complete Sale And Making Time of the Essence" Exhibit 39) which was in the result ineffectual."

The point about special condition 13 is, apart from being superfluous, it attempts to replace the terms incorporated pursuant to a statute. This draftsman would be responsible for presenting the March 1985 contract to the Registrar of Titles for transfer with this clause 13. It attempts to excuse the developer from his statutory obligations. If titles were to be obtained by misleading the Registrar of Titles then

Section 178 of the Registration of Titles Act might come into play. See the important letter from Mr Crafton Miller to Deryck Russell of January 1987 cited earlier.

The respondent Golding has not challenged this finding by Clarke J on the issue above. It only remains to cite the examination of Winston Kelly the Superintendent of Roads and Works of the Clarendon Parish Council. It reads thus:

> **"RE-EXAMINED**
>
> Ques: As far as you are aware has the infrastructure been installed?
>
> **Mr Scharschmidt** objects on the basis of his evidence Mr. Kelly knows nothing about what condition existed when the contracts were signed.
>
> Mr Codlin says that the witness has certified that he visited the sub-division and has stated to the state of the sub-division.
>
> **Court upheld objection.**
>
> Ans: Yes I saw the approved plan which included the amendment.
>
> Quest: Have roadways been installed in the subdivision according to the approval plan?
>
> Ans: It is not done.
>
> On application of MR CODLIN further part-heard and adjourned for a date to be fixed by the Registrar.
>
> Recommended that trial continue in the second week of January 1997."

Then Atkin L.J. the third judge in **Mahmoud** made equally effective statements of principle. At page 731 the Lord Justice said:

> "When the Court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or

> it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty upon the individual."

In view of this important statement it is appropriate to revisit Section 12(d) of the Act which imposes the penalty. It reads:

> "(d) every person depositing a map and obtaining the sanction of the Council and who shall neglect or fail to perform the street works within the time prescribed by the Council;
>
> shall be guilty of an offence against this Act and shall on summary conviction be liable to a penalty not exceeding four hundred dollars, or, in default of payment, to be imprisoned with or without hard labour for a term not exceeding twelve months, and in the case of a continuing offence to a further penalty not exceeding forty dollars 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 twenty-eight days".

Bear in mind the time prescribed by the Council was two years to complete street works. The 1987 contract was formed outside that period. Mr Russell admitted that he drafted those contracts

The other important case **Chai Sau Yin v Liew Kwee Sam** (1962) A.C 304 which comes from the Privy Council is important in this context as it approved Scrutton L.J. statement of principle thus at page 311:

> "If on the other hand, the contracts were prohibited by law and the prohibition was made in the public interest, no claim can be entertained: "The court must enforce the prohibition even though the person breaking the law relies upon his own "illegality": see In re **Mahmoud and Ispahani**."

There is a third case which is of equal importance. In **Amar Singh v Kulubya** (1964) A.C. 142 at 154 Lord Morris said at page 152:

> "In his judgment in **Scott v Brown, Doering, McNab & Co.** [1945] K.B. 65 70 Lindley L.J. thus expressed a well-established principle of law:
>
> > 'Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expressed a clear and well recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to rise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality or whether he had not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.' Lindley L.J. added: 'Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced.' A.L. Smith L.J. said: 'If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the court will not assist him in his cause of action'. "

Then Lord Morris continued thus at page 154:

> "In his judgment in **Browning v Morris** [1778] 2 CWP 790 Lord Mansfield said:
>
> > 'But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of those statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.' So in **Kearley v Thomson** (1890) 24 QBD 742.745 Fry L.J. referred to the case of oppressor and oppressed '...in which case usually the oppressed party may

> recover the money back from the oppressor. In that class of cases the delictum is not par, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract'."

See also **Kirri v Cotton Co. Ltd. v Dewani** [1960] 1 All ER 177 where there is a similar statement of principle by Lord Denning.

In this case the appellant Palmer relies on the valid contract Exhibit 9. It is the respondent Golding who prays in aid the illegal 1987 contract. The Local Improvements Act was for the public interest and for purchasers of sub-divided lots. Palmer was not in pari delicto with Golding nor Mr Russell the Attorney-at-Law for N.C.B. The statute was partly for Palmer's protection. Moreover, the appellant Palmer is relying on the contract of March 1985 to enforce specific performance of that contract

On this analysis it could not have been successfully contended that the conduct of Palmer in signing the illegal agreement of 1987 demonstrated that the 1985 contract was rescinded and the passages in Halsbury 4th Edition paragraphs 560-563 cited by Mr Scharschmidt to say that contract of March 1985 has been discharged are not relevant to the circumstances of this case where the 1987 contracts are illegal and void.

Past consideration

There is another aspect of the case which was also brought to the attention of counsel which he ignored. It concerns the doctrine of past consideration. The appellant has the right to insist as he has done in ground 3 of the Notice and Grounds of Appeal to claim that the 1984 [1985] contract still exists. The additional ground of appeal which reads:

> "(1) that findings made by the learned Judge are in conflict with his conclusion in, inter alia, the following ways:
>
> (a) His Lordship found that the Defendant could not rely on a Notice making time of the essence to perform the original contract, because the Defendant was in breach of that contract in failing to install the infrastructure in two years yet his Lordship dismissed the Plaintiff's claim for specific performance and did not in anyway address that breach."

has been successful.

Turning to the evidence of Mr. Deryck Russell in Court, it does not seem that he advised the appellant Palmer to seek an independent opinion from counsel. Here is his evidence:

> "Live Apt 2Q Ocean Towers, Kingston
> Attorney-at-law since 1979 – 18 years. Employed to National Commercial Bank. I am legal counsel for the Bank approximately 18 years. In my employment to the Bank I have had dealings with Mr. Garnett Palmer and Mr.Prince Golding.
>
> I know Mr. Golding and have probably met Mr. Palmer once or twice. In 1987 I acted in a transaction involving the sale of land involving both men. Before acting in that transaction I acted prior to that in connection with the Bank as mortgagee of the land

> I was aware that Mr. Crafton Miller had been acting in the matter between both men before I came into it. I was asked by Mr. Prince Golding to act in the matter. I subsequently met Mr. Palmer. He came to my office at 77 King Street. He came alone. This would have been about the year 1987.
>
> At the time Mr. Palmer attended my office he came to collect the agreements for sale that I had been instructed by Mr. Golding to prepare in respect of the four (4) lots.I had prepared four (4) agreements for sale for four lots of land Mr. Golding was selling. Mr. Palmer came and took the four agreements for sale. I recall getting two of the agreements for sale back from Mr. Palmer."

From Mr Russell's own mouth he was instructed by Mr Golding. He seems to have made no enquiries as regards the legal requirements of a sub-division contract nor does it seem that he considered the issue of past consideration. He made no reference to the important letter of 29th January 1987 addressed to him by Mr Crafton Miller. Transfers of realty are so deceptively easy under the Torrens system that it is sometimes forgotten that there are laws and previous transactions to be considered before a contract is drafted.

On the vital issue of consideration here is the learned attorney-at-law's evidence:

> "The consideration was part of a cheque that was sent to me by Mr. Crafton Miller. So in terms of actually receiving a cheque from Mr. Palmer at the time I did not receive any from him in relation to lot 21 and lot 22. I kept a file on this matter." [Emphasis supplied]

As for the appellant Palmer on this issue here is his evidence under cross-examination from Mr. Donald Scharschmidt, Q.C:

> "Ans. I signed two contracts in front of Mr. Golding and Mr. Russell at Mr. Russell's office. I mean I signed two pieces of paper in front of Mr. Russell. Mr. Golding signed first and I signed later. No lot number was involved, no writing was on the two papers.

> They were blank papers. Mr. Golding and I signed the blank papers in front of Mr. Russell.Yes, two lots were transferred to me. Those lots were 21 and 22."

As to why he signed, this is his evidence:

> "Seeing that I say that it was two open contract that I signed to. I signed two blank papers for the purpose of transferring two titles only, that is for lots 19 and 20 as agreed on my receipt of 1984. I signed for the transfer of two lots.
>
> No, the purpose of the transfer of the two lots were both for the purpose of securing collateral. I was to transfer the money held in escrow to Mr. Golding's account.
>
> No up to December 1987 I had no title for any of the four lots. Yes, I might have said that because of the failure to transfer I could not use the duplicate certificate for collateral (I might have signed those words but I did it deliberately).
>
> If I used those words I was only stalling time so that Mr. Golding could do something toward the infrastructure."

Again, under cross-examination the appellant Palmer said:

> "Ques: The sums recited in the agreement of 16th December 1987 where did those sums come from?
>
> Ans: All the money come from the moneys I paid to Mr.Miller. Yes I had made payments to Mr. Miller amounting to $83,000. Yes then I made a payment of $9,000 to Mr. Russell. Yes that amounted to $92,000. Yes the lots were transferred to me on the basis that I had paid for them but with an understanding that all monies held in the account with Mr. Russell should be released to Mr. Golding's account. A letter to that effect was given to Mr. Russell otherwise the money could not be transferred."

The point of law which must be repeated is that the contracts of 1987 drafted by Mr Russell were invalid contracts so no monies could have made those contracts valid.

Here it is pertinent to cite the case of **United Dominions Corporation (Jamaica) Ltd. v. Shoucair** (1964) 9 JLR 361 to emphasise that without consideration an agreement will be of no effect. Lewis J.A. at 378 said:

> "Learned counsel for U.D.C. submitted that the plaintiff must show that not-withstanding the agreement as to payment of fixed weekly installments U.D.C. would probably have called in the loan had the plaintiff refused to pay the new rate. Looking at the facts in a business way I think it is reasonable inference that had Mr. Neale received on September 7 a letter of refusal instead of an acceptance he would probably have moved promptly to call in the loan. It is unlikely that U.D.C. would have been content to allow the money to remain at the lower and unremunerative rate with a debtor in whom they had lost confidence and whose account they considered unsatisfactory. But in my opinion, once the connection between pressure, promise to pay the increased rate of interest and forbearance is established, it is not necessary for the plaintiff to exclude any possible effect that the promise of weekly payments may have had concurrently. That connection is sufficient to establish consideration for the agreement and I can see no reason in principle why the presence of some other factor should deprive it of its legal effect.
>
> I think that this part of the case is really concluded by the reasoning in **The Alliance Bank v. Broom (1864), 2 Drew & Sm. 289;** where KINDERSLEY, V.-C. says:
>
> > 'Now, what is the effect of the letter written by the defendants? It appears to me that when a creditor demands payment of a debt, and the debtor, in consequence of that application, agrees to give a certain security, although there is no promise by the creditor to abstain from suing for any given time, yet the effect is that the creditor does in fact give, or must be assumed to give, and the debtor receives, or must be assumed to receive, the benefit of some degree of forbearance, although for no definite or fixed period. If the debtor had refused to give any security at all, the creditor might of course, have taken immediate steps to enforce payment, but in consequence of the promise to hypothecate, the debtor does receive some degree of forbearance'."

Henriques J.A. took a similar approach as well as Douglas J in the Supreme Court. Duffus, P. dissented on this point. In the Privy Council Lord Devlin delivering the opinion of the Board said at page 503 of (1968) 10 J.L.R:

> "There was no provision in the mortgage entitling the appellants to raise the rate of interest to correspond with bank rate. What was proposed in the letter of July 31 was therefore a variation of the mortgage terms which the borrower might have been expected to reject if it were not for the fact that the debt was repayable on demand. Their Lordships have heard argument about whether there was good consideration for the borrower's acceptance of the increased rate. Both the courts below held that there was and their Lordships will, without deciding the point, assume this to be correct. On this assumption the matter to be determined by the Board is the effect on the whole transaction of s. 8 of the Moneylending law."

The monies paid under the 1987 contract was past consideration. It was properly to be attributed to the March 1985 contract. See also **Pao On v Lau Yiu** [1979] 3 All ER 65.

Turning to another Notice making time of the essence this time from Mr. Alton Morgan the Attorney-at-law for the respondent Golding, it reads:

> "TO: GARNETT PALMER
> 70 East Street
> Old Harbour
> ST CATHERINE
>
> WE, ALTON E. MORGAN & Co.,of 1 Norwood Avenue, Kingston 5 in the parish of St. Andrew as Attorneys-at-Law for and on behalf of PRINCE ALBERT GOLDING and ETTA GOLDING both of 6 East Charlemont Avenue, Kingston 6, in the parish of saint Andrew HEREBY GIVE YOU NOTICE:
>
> 1. That the said PRINCE ALBERT GOLDING and ETTA ELOUISE GOLDING as vendors are ready and willing to complete the sale of the premises known as Lots 19 and 20 part of Long's Wharf in the parish of Clarendon and being

the lands registered at Volume 1197 Folio 589 and Volume 1197 Folio 590 respectively of the Register Book of Titles the subject of an Agreement for sale between the Vendors and yourself dated the 16th day of December, 1987.

1. That the said Vendors now require you to complete this sale by registration of the Transfer and payment of the sum of Seventy-One Thousand Four Hundred and Nine Dollars and Twenty-Five Cents ($71,409.25) being the balance purchase price.

3. That the said Vendors HEREBY MAKES TIME OF THE ESSENCE of the agreement and requires you to complete this sale as last abovementioned within FOURTEEN DAYS (14) of the date of this Notice.

4. If you fail to comply with this Notice within the said FOURTEEN (14) DAYS your deposit will be forfeited to the said Vendor who will rescind the contract and may re-sell the premises and claim from you the deficiency in price (if any) on such re-sale and all expenses attending the re-sale and any attempted re-sale and all cost, loss, damages and expenses incurred by them by reason of your delay or default in performing the said Agreement.

Dated the day of 1990

ALTON E. MORGAN & Co.
ATTORNEYS-AT-LAW FOR PRINCE GOLDING
AND ETTA GOLDING"

A point of law which does not appear to have been addressed in the Court below was that consideration must move from the promisee for there to be a valid contract. The promisee was the appellant Palmer. The promissor was the respondent, Golding. The promisee gave no consideration for the new 1987 contracts. The consideration from Mr. Crafton Miller the attorney-at-law was consideration paid under the initial contract of 1985 which is still subsisting. This is an issue of law. The new contract was invalid. So the payment of $9,000 made by the appellant Palmer to Mr. Russell must be credited to the existing contract.. The new contract was effective to institute the transfer of lot

21 and 22 because it was not then challenged. It was presumed to be valid then, but once it is being challenged it can be declared invalid and this has a retrospective effect. Also the notice issued by Mr. Alton Morgan & Co., is also invalid. It was issued on the basis of an invalid contract and the consideration for that contract was past consideration..

Why did Clarke J. decide in favour of the respondent Golding?

His reasoning is based on the following passage:

> "The original contract, having been made in respect of all four lots, did not, in my judgment, survive and could not have survived in respect of lots 19 and 20 and I find that new contracts were entered into by the parties in respect of these lots. As has been tellingly put on behalf of the defendants, the plaintiff relied on these contracts as the basis of obtaining caveats (Exhibits 26 and 26A) in which the plaintiff says that he entered into contracts in respect of lots 19 and 20 on 16th December, 1987.
>
> In this connection I accept Mr. Russell's evidence that he prepared four contracts in respect of the lots which were the subject matter of the original contract. And I note that it was not suggested to Mr. Russell that no contracts were entered into in respect of lots 19 and 20 on 16th December, 1987. He indicated that the contracts in respect of lots 19 and 20 would have been in terms similar to the contracts in respect of lots 20 and 21 (Exhibits 16 and 17)"

Then the learned judge continued thus:

> "So, I find on the basis of the foregoing that the parties terminated the said original contract and entered into new contracts on 16th December, 1987 it being agreed by the parties that the sums paid under the original agreement would be applied to the purchase price and costs of the lots. I further find that so much of the sum of $92,000.00 as was necessary, which had already been paid was applied in payment of the purchase price and costs of lots 21 and 22. (see agreements for sale (Exhibits 16 and 17) copies of which together with a copy of Exhibit 9 are appended to

> this judgment). The balance was applied as a deposit with respect to lots 19 and 20.
>
> The plaintiffs action must accordingly fail, predicated, as it is, on the original contract being in force at the time of action brought. As that contract was terminated by the parties in December 1987 the plaintiff is not entitled to any of the reliefs claimed."

The learned judge did not take into consideration that the monies paid to the Attorney-at-law on his own admission was the consideration of the March 1985 contract. That contract is enforceable and still to be performed. Secondly, the special condition on this new 1987 contracts were not in compliance with the mandatory provision laid down by the Act. In fact the contract deliberately sought to avoid those conditions. These contracts as previously explained were illegal and void. They could not discharge the contracts of March 1985.

The appellant is to be commended for invoking the jurisdiction of the Court to establish his right to lots 19 and 20. In so doing he may well have assisted other purchasers to establish their rights also. The Clarendon Parish Council have a duty to administer the Local Improvements Act so as to ensure the orderly development of land and to protect the environment and the public purse. Developers must ensure that amenities are in place in accordance with the statutory conditions laid down by the Parish Council or they will be liable to criminal and civil sanctions. Those lawyers who specialise in land transfers must tender the appropriate advice to their clients. Aggrieved parties as the appellant Palmer ought to come to the Courts so that justice can be done.

Conclusion

The appellant has succeeded on the three grounds of appeal so the issue remains as to what is to be done. The Order made in the Court below is set aside. The matter

should be remitted to the Supreme Court before Clarke, J., in the light of submissions made before him or permitted at the hearing for the reliefs prayed for in the Statement of Claim. The Attorney General should be invited to intervene at the resumed hearing because of the involvement of the Registrar of Titles on the issuing of the previous titles and the other titles to be issued to the appellant Palmer. One aspect that Clarke J. must examine is whether the splinter or subdivision titles issued pursuant to the representations of the Attorneys-at-Law, Mr Crafton Miller and Mr Deryck Russell were in compliance with the statutory Certificate of Compliance sanctioned by the Clarendon Parish Council. It is a matter of importance to the appellant Palmer. Additionally, it is a matter in the public interest. The reliefs are to be determined promptly, in accordance with this judgment. The reliefs sought were as follows:

> "WHEREFORE THE PLAINTIFF CLAIMS:
>
> 1. Specific performance of the contract made in March 1985.
>
> 2. Damages in addition to or in lieu of specific performance
>
> 3. Relief under the Vendors and Purchasers Act.
> 4. Such other equitable relief as the Honourable Court may seem just.
> 5. Damages and costs".

During the hearing before Clarke J. the Superintendent of Roads and Works for the Clarendon Parish Council stated emphatically that the roads as part of the infrastructure were not constructed. As regards the claim in (1) above, the learned judge should bear in mind section 158 of the Registration of Titles Act for the full extent of his powers. As regards the claim in (2.) and (3.) above the hearing is to be completed in the court below.

The Registrar should forward a copy of this judgment to the Clarendon Parish Council and the Director of Public Prosecutions so that they consider what steps may be taken against any person who may be liable in the light of the Local Improvements Act or the Registration of Titles Act. The failure to enforce the provisions of both these Acts can have disastrous effects on the environment and prove costly to the public purse.

There should be liberty to apply for both parties. On the issue of costs, the initial six days Mr. Codlin made little or no progress in dealing with the principal issues on appeal. On the resumption, although he was given specific directions by this court, he paid little heed to them. It was only on the 14th April in his reply to Mr. Scharschmidt's reply that he made a slight reference to the issues in a further written submission but cited no pertinent authorities other than those referred to him by this court. In those circumstances, the usual order for costs that follow the event is not appropriate.

The order should be:

(1) Order below set aside.

(2) Matter remitted to Clarke, J for completion in the light of reasons given by this court. In particular, specific performance of the March 1985 contract is ordered or alternatively the court should exercise its powers pursuant to section 158 of the Registration of Titles Act, when the Court is satisfied that the appellant Palmer has paid the respondent or into Court the balance on his account.

(3) Registrar to forward copy of this judgment to the Clarendon Parish Council and The Director of Public Prosecutions for their consideration with respect to the Local Improvements Act and the Registration of Titles Act.

(4) Registrar to forward copy of this judgment to the Honourable Attorney General.

(5) Liberty to apply.

(6) The appellant is entitled to the costs both here and below

HARRISON, J.A.:

This appeal is from the judgment of Clarke, J., on March 13, 1998, dismissing the appellant's claim for specific performance of a contract made on December 10, 1984, between the parties and entering judgment for the respondents. The learned trial judge held that the said contract was made, on the contrary, in March 1985 thereby relieving the respondents of their obligations, and was discharged by mutual agreement of the parties and new agreements entered into in 1987.

The relevant facts are that on December 10, 1984, the appellant visited the offices of Crafton Miller and Company, then the attorneys-at-law for the respondents, in respect of the sale of lots in a sub-division development of land being undertaken by the respondents at Long's Wharf in the parish of Clarendon. The appellant on that said date made a "partial" deposit of $11,500 on lots 19 and 20 (see exhibit 8) in respect of the purchase of four lots numbers 19, 20, 21 and 22 together comprising 25 acres. The total purchase price was for the sum of $150,000 at a price of $6,000 per acre. The agreement between the parties provided for a "deposit of $23,000 on signing of this agreement." The second payment of $11,500 to complete the deposit was made on January 19, 1985, in respect of lots 21 and 22. An agreement for sale was signed by both parties. The appellant contended that on December 10, 1984, he was shown and subsequently signed the said agreement. The respondents maintained that no agreement was prepared nor signed prior to January 1985, nor was it signed by the parties up to March 8, 1995. The said agreement (exhibit 9), undated, contained certain special conditions imposed by

the Clarendon Parish Council when the latter granted its approval of the said development on February 1, 1984. The relevant conditions are numbers 10 to 13 and read:

> "10. WATER SUPPLY
> Water sub-mains shall be of inches in diameter as shown on the plan for that purpose, and shall be of a specification approved by the Bureau of Standards.
>
> Each lot shall be supplied with a ½ inch diameter service pipe connection from the sub-main and carried 3 feet within the boundary of each lot.
>
> Sub-mains shall not be covered before inspection by the superintendent, Roads and Works, or his representatives.
>
> 11. ROADWAY:
> The reserved roadway should be cleaned to extreme width of all vegetation. Scarify road surface and apply selected marl, consolidated in 6 inches layers to a minimum depth of 1' 0". Wet and roll to proper camber to a minimum weight of 10 ton roller.
>
> 12. The work of the subdivision shall be completed within two (2) years of the date of approval.
>
> 13. No infra-structure is required to be undertaken by the Vendors."

The appellant also maintained that when he saw and signed the agreement (exhibit 9) on December 10, 1984, condition 13 read:

> "13. No Title shall be issued from this subdivision until a certificate of completion of all infra-structure works has been issued by the Parish Council to the Registrar of Titles."

The receipt, exhibit 8, for the partial payment on December 10, 1984, reads:

> "Received from Mr. Garnett Palmer the sum of Eleven Thousand Five Hundred Dollars Re Deposit lot 19 and 20 Long

> Wharf from Prince Golding pending N.C.B. permission to prepare agreement of sale.
>
> Per E. Tennant"

The words "pending N.C.B. permission to prepare agreement for sale" were written by a witness Mrs. Ethel Tennant on the instructions of Mr. Crafton Miller, attorney-at-law for the respondent. Mr. Miller gave evidence that the land being mortgaged to N.C.B. he would have to obtain the latter's permission to prepare the agreements for sale.

On March 8, 1985, Crafton Miller and Company wrote to the appellant:

> "The Agreement for Sale for the above lots have been prepared for your signature.
>
> Will you be so good enough as to come into our office and sign same."

The respondent, Prince Golding, in his affidavit of October 8, 1992 (exhibit 45) swore that the said contract was made "...in or about the 10th of December 1984...". Mr. Crafton Miller in his affidavit dated October 7, 1992, said at paragraph 2:

> "2. That on or about the 10th of December 1984, the First Defendants contracted to sell to the Plaintiff four Lots numbers 19, 20, 21 and 22 on the subdivision plan of the lands registered at Volume 1171 Folio 241 part of Longs Wharf in the parish of Clarendon. This contract was prepared and executed in my office on that day."

However, at the trial, he said that without verifying the facts he signed that latter affidavit prepared and sent to him by Mr. Alton Morgan, attorney-at-law, then representing the respondents, and that the contract was in fact signed after March 8, 1985.

The learned trial judge found that "...the agreement for sale was signed in or about the month of March 1985."

The appellant made several further payments towards the total purchase price of the said lots. In November 1991 the balance of the said purchase price was $57,305.20 which the respondents claimed by letter dated November 14, 1991.

The agreement for sale, exhibit 9, provided for completion:

> "**COMPLETION:** On presentation of Registered Transfer on Duplicate Certificate of Title in the name of the Purchaser and on payment of Balance of Purchase money and half cost of transfer."

In May 1986, Mr. Crafton Miller advised the appellant that his firm had obtained certificates of title under the Registration of Titles Act on March 24, 1986, in respect of the said lots and that he the appellant was "obliged to pay or give a guarantee for payment of the balance of the purchase money and transfer costs."

By notice dated October 8, 1986 to the appellant, Crafton Miller and Company, on behalf of the respondents, sought to make time of the essence of the contract. It reads, inter alia:

> "...the day thereby fixed for completion having now past and the VENDORS being ready willing and able to complete REQUIRE you within FIFTEEN DAYS from the date hereof (and in respect of this demand makes time of the essence of the contract) to complete the said Contract and to pay the balance of purchase money and half costs of Transfer to us."

Previously, in February 1986, the respondent told the appellant that he, the respondent, was "not obligated to install any road or water namely infrastructure...he got an amendment from the Clarendon Parish Council to omit infrastructure from the complete subdivision."

The appellant by letter dated March 3, 1986, in forwarding a further payment on the said lots, protested "...about the interference and changes of clause 13 of which was rewritten different from what I signed for on the 11th December, 1984."

Clarke, J., quite correctly found, in his judgment, at page 218 of the record:

> "...so long as the infrastructual work was not performed, the vendors could not have effectually made time of the essence of the contract as they purported to do in October 1986 through their attorneys. They failed to provide the infrastructure called for in the contract and so could not have been ready willing and able to complete. The agreement for sale was therefore not terminated by reason of the failure of the plaintiff to comply with the 'Notice to Complete Sale And Making Time Of The Essence' (Exhibit 39) which was in the result ineffectual."

In January 1987, Mr. Deryck Russell of the National Commercial Bank's legal department, then the attorney-at-law acting for the respondents, received from Crafton Miller and Company all monies and documents pertaining to the purchase of the said four lots, by letter dated January 29, 1987. This letter recited the written instructions from the appellant to Crafton Miller and Company, "...to forward all monies held by us with respect to his transaction and all documents to your department." It continued:

> "...please find enclosed herewith the following:
>
> 4. Four (4) partial Discharges of Mortgage with respect to each of the four lots.

5. Four (4) unexecuted Transfers for the four Lots.

6. Duplicate Certificate of Title at Volume 1197 Folio 589 for Lot 19.

7. Duplicate Certificate of Title at Volume 1197 Folio 590 for Lot 20.

8. Duplicate Certificate of Title at Volume 1197 Folio 591 for Lot 21.

9. Duplicate Certificate of Title at Volume 1197 Folio 592 for Lot 22.

10. Duly executed Agreement for Sale."

Mr. Deryck Russell prepared in December 1987 four new agreements for sale of the said four lots "...by agreement and on instructions from both parties." These 1987 contracts did not contain the original clause 13, namely:

> "No title shall be issued from the subdivision until a certificate of completion of all infrastructure works has been issued by the Parish Council to the Registrar of Titles."

They contained instead, as clause 13, the recital of the fact that no infra-structural work was required to be done.

The appellant also protested to Mr. Russell that changes were made "to clause 13 of the Sales Agreement", and advised him as "...the new lawyer acting on behalf of the Goldings..." of "...the interference and changes and my disagreement - re amendment of the said subdivision." In addition, the appellant sent to Mr. Russell a copy of his letter to Mr. Crafton Miller objecting to the "change to clause 13."

Mr. Russell told the appellant that the reason why he Russell had drafted four new contracts for him to sign was that "the file with the agreement was lost." Russell, in evidence, confirmed this.

Consequently, both the 1985 contract, drafted by Crafton Miller and Company, Attorneys-at-law (1984, as contended by the appellant) and the 1987 contracts, drafted by Mr. Deryck Russell, attorney-at-law, contained as clause 13:

> "13. No infrastructure is required to be undertaken by the vendors."

The appellant, on his unchallenged evidence, signed the new contracts on December 16, 1987, in respect of lots 21 and 22 of the sub-division. The respondent also signed them in the presence of Mr. Russell who subsequently stamped and registered them. The said two lots (Volume 1197 Folios 591 and 592) were transferred to the appellant who has been in actual possession since December 16, 1987.

Mr. Deryck Russell continued in the matter until October 1989 when he handed over the conduct of the matter to Mr. Alton Morgan, attorney-at-law. Mr. Crafton Miller thereafter communicated with Mr. Morgan, to whom he also sent further documents concerned with the transaction.

The said Mr. Morgan himself, by notice undated in 1990 and served on the appellant, made time of the essence to:

> "...complete the sale of the premises known as lots 19 and 20 part of Long's Wharf in the parish of Clarendon and being the lands registered at Volume 1197 Folio 589 and Volume 1197 Folio 590 respectively...the subject of an agreement for sale

> between the Vendors and yourself dated the 16th day of December 1987."

The said notice demanded the payment of "$71,409.25 being the balance purchase price", and recited the readiness and willingness of the vendors to complete.

The appellant thereafter engaged the services of his present attorney-at-law, Mr. Raphael Codlin, who filed with the Registrar of Titles caveats dated November 30, 1990, in respect of each of lots 19 and 20 relying on the 1987 contracts signed by the parties.

The appellant tendered the sum of $20,000 as part-payment of the balance of purchase price on lots 19 and 20, but it was returned by the vendor's attorney-at-law. On May 16, 1991, the appellant again tendered the sum of $57,305.20 "...the final payment on the said two lots." Mr. Morgan, the vendor's attorney-at-law, returned the said proceeds to the appellant.

The application for sub-division approval of the said lands was made by the respondents, as vendor, on March 14, 1983, to the Clarendon Parish Council and approved by the said Council on February 1, 1984, that is, "...lands part of Long's Wharf, Clarendon, registered at Volume 1171 Folio 241 consisting of approximately 238 acres of land belonging to Prince Golding, into thirty-one lots for agricultural purposes." This approval was subject to specific conditions imposed by the said Council pursuant to the provisions of the Land Improvements Act (the "Act"). Thirteen conditions were imposed on the vendor. Prior to such consideration for approval, the said Council by letter dated January 13, 1984, sent to the respondent, detailed the said thirteen conditions under which the

Council would approve the sub-division (exhibit 1). The resolution was signed by the officers and affixed with the common seal of the Council on March 8, 1984.

On February 6, 1985, an amendment was made to the said approval of February 1, 1984. Condition 11 was amended by deletion and the substitution of a new condition 11 to allow vehicular access to roads other than onto the main road. This latter resolution was signed and sealed by the Council on February 14, 1985 (pages 59-63 of the record).

No resolution was exhibited evidencing any amendment to condition 13 of the conditions laid down by the Parish Council.

As a consequence of the above events, the appellant filed suit against the respondent claiming, inter alia, the specific performance of the contract of 1984, in respect of Lots 19 and 20 of the said sub-division.

Mr. Codlin for the appellant argued as his grounds of appeal, summarized, that the learned trial judge:

(a) erred in finding that the respondent did not assert that he contracted to sell the said lots on December 10, 1984, when he in fact did and identified the said contract, as exhibit 9;

(b) having found that the respondent was obliged to carry out infrastructural work on the said lots, erred in placing some significance on the amendment by the Parish Council of the sub-division plan and failing to consider that the Local Improvements Act permitted no such amendment after approval by the Minister;

(c) misdirected himself in finding that the parties had agreed to enter into new agreements, despite the evidence of the appellant's assertion that he was relying on the original contract.

He submitted that because of the admissions by Messrs. Crafton Miller and Deryck Russell that the agreement was made in December 1984, it was not open to the learned trial judge to find that it was made on a different date, namely, March 8, 1985. Because the infra-structural work was not completed within two years of the approval and because the respondent was in breach of most of the conditions of sale, the party not in breach could enforce his rights which accrued under the contract and the respondent could not validly make time of the essence of the contract. The new contracts were entered into because it was contended that the original file with the unstamped contract could not be found and if found would attract a penalty of one hundred percent on the transfer tax and stamp duty. The Local Improvements Act governs schemes of development of land for the protection of the public and once the Parish Council approves the application and imposes conditions, it is submitted to the Minister for approval. After the Minister has given his approval, no further amendment can be effected by the Parish Council. The conditions imposed have the force of regulations, breach of which attract penal consequences to which both the respondent and the Parish Council will be subject. No contracts thereafter for the sale of land could validly be made, and if made were void. The Parish Council has a duty to complete the infrastructure, a condition imposed by the said Act, where the developer fails to do so. The appellant is entitled to succeed in this appeal and to recover damages to be assessed.

Mr. Scharschmidt, Q.C., for the respondent argued that the case advanced by the appellant before the learned trial judge sought specific performance of a contract

allegedly signed by the appellant on December 11, 1984. The dates of payment of the deposit reveal that no such contract existed prior to March 8, 1985, on which date the appellant was requested to sign. The said contract was never signed by the vendor "...the party to be charged." The learned trial judge was wrong to attribute to the appellant a contract made in 1985 which he did not say he made. The respondent's contention that a contract for the sale of the said lots was made in 1985 is supported by the evidence. By the agreement of the parties, the said contract was terminated, four new contracts entered into in December 1987 in respect of the said four lots, and the lots were transferred on the basis of the said 1987 contracts, the new agreement. The notice making time of the essence in respect of lots 19 and 20, demonstrates that it is referrable to the agreement for sale of December 1987 and not the "agreement" comprising the four lots together, which latter agreement was no longer in existence. Even if there were deficiencies in the 1987 contracts, the appellant, having failed to establish that he entered into a contract in 1984, the learned trial judge correctly found that the appellant's claim had failed. He concluded that once a contract has been rescinded by agreement it cannot thereafter be resurrected by one of the parties.

A contract for the sale of land attracts the stricture that it is unenforceable by action "...unless the agreement is in writing, and signed by the party to be charged..." (Statute of Frauds, 1677). This evidential requirement merely means that at the time that an action is brought to enforce such a contract, the documentary proof must be in existence, signed by the party to be charged, that is, the defendant.

The payment of a deposit does not necessarily constitute the existence of an enforceable contract.

In the instant case, the payment of the partial deposit of $11,500 on November 10, 1984, on lots 19 and 20 would not bring the contract into existence. The appellant purchaser would then be initially in breach of a fundamental term of the contract, namely, failing to pay the full deposit. However, it is evident that the parties then contemplated the emergence of a contract subsequently. The further payment of $11,500 on January 19, 1985, on lots 21 and 22 completed the payment of the deposit. This is the earliest date on which an agreement would have come into existence. In any event, the respondents had signed no contract, to be described as having signed as "the party to be charged." The appellant had no enforceable contract in relation to the respondent up to January 1985. A contract enforceable against the respondents came into existence in March 1985. Although the appellant sought specific performance of an agreement signed in December 1984, Clarke J. correctly found that:

> "...the agreement for sale was signed in or about the month of March 1985."

Mr. Scharschmidt, Q.C., for the respondent submitted that this court should strictly observe that the appellant sought specific performance of agreement signed on "10th December, 1984."

It is clearly evident that up to that date the respondent vendor had not signed, but a payment of $11,500 had been made by the appellant. It is pursuant to that transaction

in December 1984, that an enforceable contract between the parties came into existence in March 1985.

This agreement for sale of March 1985 (exhibit 9), in respect of the four lots, 19, 20, 21, 22 in the said sub-division, was subject to certain special conditions. These conditions were imposed by the Clarendon Parish Council when it approved the sub-division on February 1, 1984, under the provisions of the Local Improvements Act. The relevant conditions endorsed on exhibit 9 are numbers 10 to 13. The document reads:

> "The title is subject to the following conditions imposed by the Clarendon Parish Council...
>
> 10. WATER SUPPLY
> Water sub-mains shall be of inches in diameter as shown on the plan for that purpose, and shall be of a specification approved by the Bureau of Standards.
>
> Each lot shall be supplied with a ½ inch diameter service pipe connection from the sub-main and carried 3 feet within the boundary of each lot.
>
> Sub-mains shall not be covered before inspection by the superintendent, Roads and Works, or his representatives.
>
> 11. ROADWAY:
> The reserved roadway should be cleaned to extreme width of all vegetation. Scarify road surface and apply selected marl, consolidated in 6 inches layers to a minimum depth of 1' 0". Wet and roll to proper camber to a minimum weight of 10 ton roller.
>
> 12. The work of the subdivision shall be completed within two (2) years of the date of approval.
>
> 13. No infra-structure is required to be undertaken by the vendors."

The appellant maintains that condition 13 was changed from what it read when he was shown the document in December 1984. He consistently asserts that it read originally:

> "No title shall be issued for the subdivision until the approval of the Parish Council was granted."

If the appellant is correct, there would have occurred an unlawful act, namely, the tampering of the document in order to defeat the statutory provisions of the Local Improvements Act.

The Local Improvements Act exists primarily for the orderly regulation of dealings with land for the benefit of the general public. It provides that a person seeking to sub-divide land for sale shall deposit a detailed map with the Parish Council, authenticated by a commissioned land surveyor (section 5). On such deposit, the Council considers the map and, in section 8:

> "**8.—(1)** ...shall, by resolution ...sanction <u>subject to such conditions as they may by such resolution prescribe</u>, the sub-division of the land ...and <u>may prescribe the time within which the said street works shall be completed</u>." [Emphasis added].

The Council, thereafter, is required to report their decision to the Minister (section 8(4)), who may confirm the Council's decision to sanction the sub-division (section 8(5)) and inform the Council of his decision (section 8(7)). The Council is then required to "alter or modify their decision ...so as to be in conformity with the decision of the Minister", and section 8(10) provides:

> "8.—(10) The decision of the Minister under this section shall be final and not subject to any right of appeal."

Section 12 imposes a criminal sanction on any person who contravenes the provisions of the Act. It reads, inter alia:

> "12.(f) every person who shall commit a breach of any regulation made under this Act, shall be guilty of an offence against this Act and shall on summary conviction be liable to a penalty not exceeding four hundred dollars, or, in default of payment, to be imprisoned with or without hard labour for a term not exceeding twelve months, and in the case of a continuing offence to a further penalty not exceeding forty dollars 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 twenty-eight days."

Formerly, failure to obtain the sanction of the Council, prior to entering into contractual arrangements for the sale of lands in a sub-division, rendered such contracts illegal and void (***Rose v. Chung*** (1977) 16 J.L.R. 141). However, section 13 of the said Act validates such omissions. Section 13(1) reads:

> "13.—(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 5 or to obtain any sanction of the Council under section 8 or section 9, 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 Council hereinbefore referred to, has been obtained."

Although section 13 saves certain contracts entered into before planning permission is obtained, no such validation exists where the provision of such basic amenities, as water, roads and general infra-structure are required to be effected prior

to the issue of title to land, as prescribed. The Act expressly imposes on a developer these obligations for the benefit of the public and the orderly development of the locality, and in particular, the health and well-being of purchasers of lots in such a sub-division.

In the instant case, the Clarendon Parish Council granted its approval of the said sub-division on February 1, 1984. It reads (page 59 of the record):

> "The Parish Council of Clarendon at its Planning and Development Committee Meeting held on February 1, 1984, approved by Resolution, the subdivision of lands, part of Long's Wharf, Clarendon, registered at Volume 1171 Folio 241, consisting of approximately 238 Acres of land, belonging to Prince Golding, into thirty-one (31) lots for agricultural purposes, subject to the following conditions:"

Thereafter, the resolution cited the conditions, including conditions 12 and 13, which read:

> "12. The work of the subdivision shall be completed within two (2) years of a date of approval.
>
> 13. No Title shall be issued from this subdivision until a Certificate of Completion of all infra-structure works has been issued by the Parish Council to the Registrar of Titles."

Conditions 10 and 11 required the provision of water and roads, respectively, to the said sub-division. Ministerial approval was granted. On February 6, 1985, there was an amendment to condition 11 "restricting direct vehicular access on the main road." The Minister's letter dated January 28, 1985, approved the said amendment.

There is no documentary evidence of any amendment to condition 13. No such evidence was tendered at the trial and no such evidence appears on the record before this court.

The appellant's witness Winston Kelly, Superintendent of Roads and Works for the parish of Clarendon "from 1984" revealed that fact in evidence at page 233 of the record, in this way:

> **Ques:** The plan that was approved in January 1984 was it ever amended?
>
> **Ans:** Yes, it was amended on the 6th February 1985 by the Planning and Development Committee of the Clarendon Parish Council.
>
> **Ques:** Was there any other amendment apart from that one?
>
> **Ans:** No.
>
> **Ques:** Were any of the 13 conditions imposed amended on 6th February 1985?
>
> **Ans:** Only condition 11 was deleted and the (following) condition was added as Condition 11 that I have already referred to."

This witness had earlier said in evidence, at page 231 of the record:

> "After the Clarendon Parish Council has approved a subdivision and imposed conditions it is the duty of the Superintendent to see that the conditions are carried through."

He also said that he visited the sub-division as a result of the Council having received "several complaints from one Mr. Garnett Palmer" and he observed on his first visit in 1992 that condition 10, in respect of the water supply, had not been complied with. On his second visit in 1993, the said condition was still not complied with, neither were any access roads constructed as required. This witness Kelly further said at page 233:

> "...after my second 1993 visit I saw and spoke to Mr. Golding. He attended my office after my second 1993 visit. When he

> came to my office he spoke to me. I then spoke to him in relation to the sub-division I told him of my findings when I visited the subdivision and to see how best this matter could have been resolved because of the failure of complying with the infrastructure that is failure to put in the infrastructure. He responded. He said it was not his responsibility. He told me of the amendment that was done as regards the reserved road.
>
> I then told him that the access strips would have to be his responsibility. I also informed him that he should contact Mr. Palmer to see how best they would work out the situation.
>
> When I mentioned the access strips he said he and Mr. Palmer would meet and something would be resolved." [Emphasis added]

This witness also referred to a letter from the Clarendon Parish Council to the Registrar of Titles advising that individual titles to lots 29, 30 and 31 in the said sub-division could be issued; there was a letter of recommendation from the Superintendent of Roads and Works (not this witness) for the "release of lots 29, 30 and 31." He said further, at page 235:

> "...there is another letter from the Clarendon Parish Council advising the Registrar of Titles to issue individual titles. That is dated 15th April, 1985. That letter concerns the other lots in the subdivision that had not been issued."

And he said, in relation to lots 19, 20, 21 and 22, and others:

> "There is no evidence from the Superintendent that he made any recommendation for the rest."

The evidence of this witness Kelly was uncontradicted. The respondent Golding did not give evidence.

The appellant Palmer said in evidence that he himself had to install roads and water on his lots, 21 and 22, and he spoke to the respondent Golding in February 1986. The appellant's evidence of his conversation with Golding reads at page 241:

> "He told me he is not obligated to install any road or water namely infrastructure. He said he had got an amendment from the Clarendon Parish Council to omit infrastructure from the complete subdivision." [Emphasis added]

Clarke, J., agreed with the submissions of counsel for the appellant that while the contract of 1985 exists, the respondent is obliged to carry out the infra-structural work. The learned trial judge correctly found, on page 217, that:

> "The infrastructural specifications must have been understood by the parties to be part of the work of the subdivision to be completed within two years of the date of approval. The parties must have intended by the terms of the contract that the specified infrastructural work, by its very nature, would be performed by the vendors as subdividers of the lands described in the contract as part of Long's Wharf of which the four lots in question are numbered 19, 20, 21 and 22 on the subdivision plan for same.
>
> I therefore hold that Special Condition 13: 'No infra-structure is required to be undertaken by the Vendors' - cannot by its general words relieve the vendors of their obligation (provided the contract still subsists) to furnish the infrastructure expressly specified in Special Conditions 10 and 11. The general words of Special Condition 13 are therefore, in my judgment, otiose."

However, in so far as Clarke, J. found that, on page 215:

> "...there was no tampering or alteration by the defendants or their attorneys-at-law, of Special Condition 13 of the agreement for sale."

he was in error.

The only amendment to the said conditions imposed by the Clarendon Parish Council was the amendment to condition 11, on February 6, 1985.

The appellant Palmer was probably quite correct when he said that in December 1984 the document he was shown in the office of Crafton Miller and Company recited as condition 13 that the infrastructure should have been put in by the vendor. The fact that the agreement for sale of 1985 had an initialling and "white out" adjacent to condition 13, is some further evidence supporting the appellant that there was an unlawful change effected.

The fact that condition 13 read that "no infrastructure is required to be undertaken by the vendors", is clear evidence that there was a tampering with the agreement. That undated agreement, exhibit 9, prepared by Crafton Miller and Company with condition 13 in those terms was clearly in breach of the obligations imposed by the Clarendon Parish Council under the provisions of the Land Improvements Act.

In December 1987, when Mr. Deryck Russell, attorney-at-law, prepared the four new agreements for the said lots, he was equally in breach of the said Act, not to have incorporated the said conditions 10 and 13, and in particular condition 13, in its unamended form.

Mr. Scharschmidt, Q.C., for the respondent argued that the contract of March 1985 was terminated by the agreement of the parties and four new contracts entered into in 1987.

The status of the contract of 1985 and the contracts of 1987 is of major importance.

Devlin, J. (as he then was) in ***St. John Shipping Corporation. v. Joseph Rank Limited*** [1957] 1 Q.B. 267 said, at page 283:

> "...a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and if unilateral, it is unenforceable at the suit of the party who is proved to have it."

Both the contract of 1985 and the contracts of 1987 in their formation sought to avoid the express conditions sanctioned by the Council under the statutory provision of the Local Improvements Act. Section 13 of the Act expressly validates some contracts, but does not validate these said contracts.

In the ***Law of Contract*** by Cheshire Fifoot and Furmston, 11th edition, the authors, in discussing contracts prohibited by statute, said at page 334:

> "Where it is alleged that the prohibition is implied the court is presented with a problem the solution of which depends upon the construction of the statute. What must be ascertained is whether the object of the legislature is to forbid the contract. ...On the other hand, <u>if even one of the objects is the protection of the public or the furtherance of some other aspect of public policy, a contract that fails to comply with the statute may be implicitly prohibited</u>. But no one test is decisive, for in every case the purpose of the legislature must be considered in the light of all the relevant facts and circumstances." [Emphasis added]

The Local Improvements Act is undoubtedly intended by the legislature, to regulate the conduct of developers of land, for the protection of members of the public, authorising the Council to impose conditions to require the provision of amenities such as roads and water, as basic infrastructure. Section 12 makes it a criminal offence for:

> "...every person who shall contravene or fail to comply with any condition prescribed by the Council under section 8..."

Whereas section 13 of the Act validates a contract for the sale of land entered into prior to the obtaining of the sanction of the Council under section 8, it does not embrace contracts which are entered into with the express purpose of circumventing the obligations imposed upon a developer under the provisions of the Act for the benefit of the purchasing public.

Parties cannot agree to contract out of the statute, specifically effected for the protection of the public. That would be contrary to public policy.

In that regard, it is my view that the four contracts of December 1987 prepared by Mr. Deryck Russell, not having themselves contained the special conditions 10 to 13 stipulated by the Council was an attempt to circumvent the Act, and were, therefore, illegal and void. The contract of 1985 remained valid and enforceable. The attempt to substitute the amended condition 13 is of no effect and must be read, in terms of its original form, namely:

> "13. No Title shall be issued from this sub-division until a Certificate of Completion of all infrastructure works has been issued by the Parish Council to the Registrar of Titles."

There is no basis for the inclusion in the 1985 contract by Crafton Miller and Company of a condition 13, in terms to excuse the respondent Golding from satisfying his obligations under the Act, to provide the requisite infra-structural work.

Neither is there any basis for Deryck Russell in drafting the 1987 contracts "on the instructions of Mr. Golding" to similarly favour the respondent, by non-inclusion of the said conditions 10 to 13 in the agreements, contrary to the provisions of the Act. The only condition therein inserted was:

> "**SPECIAL CONDITIONS:** The Purchaser hereby authorises the Vendor Attorneys to pay the stamp duty and Transfer tax from the deposit and should the sale not complete the Vendors' shall return to the Purchaser the stamped Instrument and the Transfer Tax certificate with the notation "Cancelled" and the purchaser will be free to recover the duty and Tax paid from the Commissioner of Stamp."

There was obviously some wrongdoing within the Clarendon Parish Council, in that a letter dated April 15, 1985, was issued authorising the Registrar of Titles to issue titles for lots, including lots 19, 20, 21 and 22, in circumstances where no infra-structure had yet been completed in relation to these lots, nor was any certificate yet issued by the relevant Superintendent of Roads and Works that such works had been completed. The respondent sought to mislead the appellant as to his obligation to put in the infra-structure when he told the appellant that he was not obliged to do so and was, therefore, probably aware of the irregularities. A further question arises. On what legal basis did

the Registrar of Titles issue splinter titles in respect of the said lots to Mr. Crafton Miller on March 24, 1986, and in particular, lots 19 and 20. The said Registrar of Titles must have had a copy of the sub-division plan with the said conditions 10 to 13, endorsed thereon, showing no amendment to condition 13 and must have been aware that no certificate had been issued by the Superintendent of Roads and Works indicating that the infra-structural work was complete. The transactions point to a studied conspiracy. The said Registrar was certainly aware of and was bound by the provisions of section 126 of the Registration of Titles Act, which read:

> "126. Any proprietor subdividing any land under the operation of this Act for the purpose of selling the same in allotments shall deposit with the Registrar a map or diagram of such land exhibiting distinctly delineated all roads, streets, passages, thoroughfares, squares or reserves, appropriated or set apart for the use of purchasers and also all allotments into which the said land may be divided, marked with distinct marks or symbols, and showing the areas and declared to be accurate by a statutory declaration of a Commissioned Land Surveyor:
>
> Provided always that when any such land is situated within any portion of a parish to which the provisions of the Local Improvements Act and any enactment amending the same shall apply the proprietor shall deposit with the Registrar copies, certified by the Clerk of the Board under that Act, of the map deposited with the Board and the resolution of the Board sanctioning the subdivision, and no transfer or other instrument effecting a subdivision of any such land otherwise than in accordance with the sanction of the Board shall be registered." [Emphasis added].

The appellant Palmer was not in *pari delicto* with the respondent, nor the attorneys-at-law in these affairs, and is therefore not debarred from pursuing his claims. The transfer of lots 21 and 22 into the name of the appellant, although ostensibly by way of

the "agreements" of 1987, is nonetheless valid and indefeasible being adequately protected and validated by the provisions of the Registration of Titles Act.

The respondent, being in breach of contract to date, was not entitled at any time to serve on the appellant notice making time of the essence to complete either the contract of 1985, as Mr. Crafton Miller sought to do on October 8, 1986, or the contracts of 1987, as Mr. Alton Morgan, Attorney-at-law, sought to do on November 12, 1990. Clarke, J., was therefore correct when he so found. He said, at page 218:

> "...so long as the infrastructural work was not performed, the vendors could not have effectually made time of the essence of the contract as they purported to do in October 1986 through their attorneys. They failed to provide the infrastructure called for in the contract and so could not have been ready willing and able to complete. The agreement for sale was therefore not terminated by reason of the failure of the plaintiff to comply with the 'Notice to Complete Sale And Making Time Of The Essence' (Exhibit 39) which was in the result ineffectual."

The facts and circumstances of these transactions highlight the inadvisable but accepted practice in Jamaica of one attorney-at-law acting for both parties in a transaction involving the transfer of land. Until Mr. Codlin represented the appellant Palmer in the matter, he, the appellant, was at a clear disadvantage, at the mercy of all, with no one paying any serious attention to his just protestations and complaints. The interests of the respondent seemed more important. In ***Smith v. Mansi*** [1962] 3 All E.R. 857, it was stated that it is impossible for one solicitor to act for both parties. In ***Goody v. Baring*** [1956] 2 All E.R. 11, similar sentiments were expressed. Danckwerts, J. said at page 12:

> "It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both a vendor and a purchaser. The position has been pointed out very plainly by Scrutton, L.J., in ***Moody v. Cox & Hatt*** (1) ([1917] 2 Ch. 71 at p. 91):
>
> > 'It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them.'
>
> It is nearly forty years since those words were said by Scrutton, L.J., and it appears that they have still not been properly appreciated by some solicitors. Perhaps they have never been read by many of them."

The instant case demonstrates that the practice of one attorney-at-law appearing for both parties should be re-considered.

In all the circumstances, Clarke, J. was in error to find that the contract of 1985 was discharged by the agreements of December 16, 1987. The latter agreements were clearly illegal and void and of no effect. Accordingly, the contract signed by "the party to be charged" in March 1985 is valid and in force.

It is my view that the appeal should be allowed and specific performance ordered in respect of lots 21 and 22 of the said sub-division. In view, however, of the peculiar circumstances of the infrastructure still not yet installed, I agree that the matter be returned to Clarke, J. for enquiry and the order for specific performance.

It is worthy of note that infrastructure was required to be installed within two years of the date of approval on March 8, 1984. The respondent is undoubtedly in breach of this obligation in view of the provisions of section 12 of the Act. However, section 10 of the Act authorises the Council to execute the works and recover the costs from the developer. Section 10 reads:

> "**10.** 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 Council or any part thereof within the time prescribed by the Council as provided in section 8, the Council 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 Council in executing such works, together with a commission not exceeding six *per centum* in addition to the actual cost, shall be recoverable from the owner as a debt due to the Council and shall until payment thereof be a charge on the land shewn in the map deposited as provided in section 8 in priority to all mortgages, charges, estate and interest created subsequent to the deposit of such map."

In view of the less than diligent action of the Clarendon Parish Council, that Council may well deem it just to be guided by the provisions of section 10 of the Act.

No court can justifiably ignore the improper acts committed in the instant transaction. I agree with Downer, J.A. that the matters be referred to the said authorities for examination and the appropriate action taken.

I would allow the appellant the costs in this court and in the court below.

LANGRIN, J.A.:

I have had the advantage of reading in draft the judgment of my brothers. For the reasons given, I would allow the appeal.