(2013 JMSC CIV12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 /HCV 1884

BETWEEN	CARICOM INVESTMENTS LIMITED	1ST CLAIMANT
AND	CARICOM HOTELS LIMITED	2ND CLAIMANT
AND	CARICOM PROPERTIES LIMITED	3RD CLAIMANT
AND	NATIONAL COMMERCIAL BANK LIMITED	1ST DEFENDNAT
AND	RIO BLANCO DEVELOPMENT LIMITED	2ND DEFENDANT
	(In Receivership)	
AND	KARL AIRD	3RD DEFENDANT
	(Receiver of Rio Blanco Development Company Limited)	

Heard May 3,4,5,6, 2010; March 28, 2011; May 30, 31, 2011; June 2,3,6,7,8,9,10, 20 and 21, 2011, July 5,6, 2011, Submissions received August and September 2011; decision handed down September 20, 2013

Sale of Land by Receiver under powers of sale in debenture and mortgage; Registration of Titles Act section 125; Agreement for the Sale of Land mutually contingent upon Agreement for Sale of Chattels; Failure to provide duplicate certificates of title although purchaser registered on original certificates; sections 81 and 82 of the Registration of Titles Act; whether failure to provide duplicate certificates of title is repudiatory breach; whether failure to provide duplicates "encumbers" the remaining 49 titles involved in transaction; whether remedy available is rescission of the contract; whether when there are mutually contingent agreements, it would be possible to rescind the one without rescinding the other; whether the Rule in Bain v Fothergill applies; Whether bank mortgagee is "vendor" by virtue of conduct after "completion" of sale; whether there is any breach of warranties contained in agreement for sale; whether bank may become liable by "accepting responsibility" to try to secure duplicates; whether person may become vicariously liable for conduct of another after the purported agent

was not his agent when the act being called into question was done; whether if there is a breach of implied term what damages are payable and by whom

Appearances: Richard Small, Esq, Mrs. Denise Kitson, Mrs Suzanne Risden-Foster and Ms. Sherise Gayle, instructed by Grant, Stewart, Phillips and Co for the Claimants; Charles Piper Esq., Ms Carlene Larmond and Ms. Marsha Locke instructed by Charles E. Piper for the Defendants

ANDERSON J.

In this litigation, hearing dates for which were spread over fifteen months, the basic facts giving rise to the suit took place way back in May 1993, over twenty years ago. At that time, the first claimant ("Investments") entered into two (2) agreements, one for sale and purchase certain real property on which certain buildings stood, and the other for the purchase of chattels and other property. It is these agreements which are at the heart of the dispute between the parties and it may be appropriate, at the outset, to identify the dramatis personae. All three claimant companies, hereinafter referred to respectively as "Investments", "Hotels" and "Properties" are and were at all material companies with, according to the Particulars of Claim, "common shareholders and directors". I accept that based upon the evidence led before me that they were all controlled by businessman, Mr. Richard Lake ("Lake"), the main witness for the claimants. The first defendant ("NCB") is a commercial bank duly licensed under the Banking Act and is one of the two (2) largest commercial banks operating in Jamaica. The second defendant, ("Rio Blanco") was a company previously indebted to NCB, allegedly under the terms of a mortgage and also a debenture, and had been put into Receivership pursuant to powers under the terms of the debenture held by NCB over property of the said company. The third defendant, ("Aird") was an employee of NCB and at the material time the person appointed under the powers in the debenture to carry out the duties as Receiver of Rio Blanco.

It is worth noting that while there are some limited disputes as to facts, many facts are not in contention and the issues turn largely upon an interpretation to be accorded the

terms of the agreement for sale and the consequent behaviour of the parties. It will be necessary in due course to focus on the terms of the agreement for sale and, in particular, the provisions thereof which have been so furiously contested by the respective counsel.

It is perhaps the correct place to start by setting out, in extensu, the pleadings of the parties as they stood at the commencement of the hearings. The Claimants' "Finally Amended Claim and Particulars of Claim" are in the following terms and I set these out verbatim.

> The Claimants, **CARICOM INVESTMENT LIMITED**, **CARICOM HOTELS LIMITED, and CARICOM PROPERTIES LIMITED** all of 20 Hope Road, Kingston 10 in the parish of Saint Andrew claims (sic) against the Defendants, a company incorporated under the laws of Jamaica, 20 Hope Road, **NATIONAL COMMERCIAL BANK LIMITED** of 32 Trafalgar Road, Kingston 10, **RIO BLANCO DEVELOPMENT LIMITED** (In Receivership) of Marcliffe, White River in the parish of Saint Ann and **KARL AIRD** (Receiver) of 82 Hope Road, Kingston 10 in the parish of Saint Andrew, the following relief and orders, namely:
>
> > Specific performance of Agreements for sale dated the 3rd day of May 1993 between the 1st Claimant and the 2nd Defendant, who acted through the 3rd Defendant, the 3rd Defendant having been appointed receiver of the 2nd Defendant by the 1st Defendant pursuant to a Debenture of the 1st Defendant.
> >
> > Damages for breach of contract and of warranty and for the loss of bargain, expenses incurred, interest and charges and losses connected with the acquisition of real property, fixtures and fittings and chattels and all other items and costs set out and described in the said Agreement for Sale of Land and the Agreement for Sale of Property and Chattels dated the 3rd day of May 1993.

AND THE CLAIMANTS CLAIM AGAINST THE DEFENDANTS FOR:

1. Specific performance of Agreements for Sale dated the 3rd day of May 1993.
2. Damages for breach of Contract.
3. Damages for Breach of Warranty.
4. An Order that the Claimants be indemnified for all loses suffered as a result of the suit brought by Rio Blanco Development Limited against the 1st and 3rd Defendants; and the caveat lodged against the Certificate of Title comprised in volume 1229 Folio 161 registered in the name of the 3rd Claimant.
5. Interest thereon at one percentage (1%) point above the prime commercial lending rate for such period as this Honourable Court shall think fit in the circumstances of this case.
6. Costs and Attorneys' costs.
7. Such further and other relief and orders as this Honourable Court shall think fit in the circumstances of the case.

Dated the 6th day of **July 2005**

I certify that all facts set out in this Amended Claim Form are true to the best of my knowledge, information and belief.

PARTICULARS OF CLAIM

2. The 1st Defendant is a commercial bank operating from 32 Trafalgar Road, Kingston 10 in the parish of Saint Andrew. The 1st Defendant was at all material times the holder of a debenture over the assets of Rio Blanco Development Company Limited and the Mortgagee of certain properties registered in the name of Rio Blanco Development Company Limited.

3. Pursuant to the said Debenture the 1st Defendant appointed the 3rd Defendant Receiver Manager of Rio Blanco Development Company Limited.

4. On or about the 3rd day of May 1993 the 3rd Defendant, acting as the Receiver of the 2nd Defendant executed two (2) Agreements with the 1st Claimant, namely;

   I) an Agreement for Sale of Land dated the 3rd day of May 1993, and

   II) an Agreement for the Sale of Chattels and Property.

5. At all material times, the 3rd Defendant acted as the agent and/or servant of the 1st and 2nd Defendants in executing the said Agreements.

6. With regard to the Agreement for the Sale of Land, the Defendants agreed to sell and the 1st Claimant agreed to buy the properties described in the Schedule to the said Agreement as follows:

The under-mentioned Certificates of Titles which now make up the HOTEL PROPERTY were FORMERLY comprised in Certificate of Title registered at Volume 1220 Folio 922 of the Register Book of Titles which covered Lots 2 and 3 on the plan part of White River.

ALL THOSE PARCELS of land part of White River in the parish of SAINT MARY being the Strata Lots numbered One Hundred and Sixty-Four on the Strata Plan numbered Four Hundred and Forty-One and Three undivided 1/350th shares in the common property therein respectively and now being all the lands now comprised in Certificates of Title registered at **Volume 1230 Folios 761,762,763,764,765,766,767,768,771, 778,780,781,782,783,784,785,786,787,788,793,794,795,796,797,798,799 ,800,802,803,804,805,806,807,808,809,810,813,814,815,817,818,819,82 0,821,822,823 and 824 of the Register Book of Titles** (as are not already disposed of as identified by the expression 'sold' in the Schedule of Apartments annexed hereto and marked "A").

ALL THAT parcel of land part of White River in the parish of Saint Mary being the lot numbered One on the plan of part of White River and being

ALL the land now comprised in Certificate of Titles registered at Volume 1220 Folio 921 of the Register Book of Titles.

ALL THAT parcel of land part of White River in the parish of Saint Mary being the lot numbered Forty-One on the plan of part of White River and being ALL the land now comprised in Certificate of Title registered at Volume 1230 Folio 801 of the Register Book of Titles.

ALL THAT parcel of land part of White River in the parish of Saint Mary being the lot numbered Fifty-One on the plan of White River and being ALL the land now comprised in Certificate of the Title registered at Volume 1230 Folio 811 of the Register Book of Titles.

ALL THAT parcel of land part of white River in the parish of Saint Mary being the lot numbered Fifty-Two on the plan of the part of White River and being ALL the land now comprised in Certificate of Title registered at Volume 1230 Folio 812 of the Register Book of Titles.

OTHER PROPERTY

ALL THOSE PARCELS of land parts of White River situate in the parishes of Saint Ann and Saint Mary together containing by survey Twenty-Nine Acres and being the lands now comprised in Certificates of Title registered at Volume 1229 Folio 161 of the Register Book of Titles.

(Hereafter the properties listed in paragraph 6 will be referred to and called "the said lands" collectively).

The 3rd Claimant was at the material time the nominee of the 1st Claimant and Title for the premises registered at Volume 1129 Folio 161 of the Register Book of Titles was registered in the name of the 3rd Claimant. The 2nd Claimant was at the material time the nominee of the 1st Claimant and Title for the remainder of the premises, the subject of the Agreement

for was registered in the name of the 2nd Claimant. The Claimants are associated companies and have common Directors and shareholders.

7. At the time of purchasing the lands, the purchase price was **SIXTY-ONE MILLION FIVE hundred thousand dollars ($61,500,000.00), and the purchase price of the chattels being THREE MILLION FIVE HUNDRED THOUSAND ($3,500,00.00)**

8. At the time of purchasing the said lands the Defendants represented to the 1st Claimant, as hereinafter set out, that the Defendants would eventually deliver to the 1st Claimant all Duplicate Certificates of Title relative to the said lands, free of encumbrances save except the restrictive covenants endorsed on the Certificates of Title.

9. Special conditions 3, 4 and 5 of the Agreement for Sale of Land in respect of the said lands require that transfer of certain lots of the said lands be undertaken by way of dispensation with the production of the Duplicate Certificates of Title and that registration of the transfer would be effected pursuant to Section 81 of the Registration of Title Act. Further, by way of letter dated September 15, 1993 the Defendants indicated that a search was being undertaken to locate certain Duplicate Certificates of Title, the subject of the Agreement, and that if not located, replacement of the said Certificates of title would be dealt with by the Defendants. The 1st Claimant maintains that there was no indication in the Agreement for Sale or otherwise that any adverse claims were being made in respect of the said Duplicate Certificates of Title to preclude their eventual delivery to the 1st Claimant once the sale had been concluded.

10. Failure to deliver the respective Duplicate Certificates of Title in respect of the said lots was a breach by the Defendants of the Agreement for Sale of Land in respect of the said lands.

11. In Special Condition 12 of the Agreement for Sale of Land in respect of the said lands the vendor (Rio Blanco Development Company Limited (In Receivership)) represented and warranted that it was the beneficial owner of the property and had the right to sell the property.

12. In Special Condition 13 of the Agreement for Sale of Land in respect of the said lands, it was understood and agreed between the parties, that the vendor specifically undertook and agreed to indemnify and hold the purchaser (1st Claimant) harmless from and against all claims, demands, actions and/or proceedings made or brought by any person against the purchaser in respect of the purchase by the purchaser of the property pursuant to the Agreement for Sale of Land in respect of the said lands and Agreement for Sale of the Chattels and Property and the vendor's representation of its rights to sell the property, the subject of both Agreements, inter alia.

13. Special Condition 15 of the Agreement for Sale of Land in respect of the said lands indicates that immediately after registration of the ownership by the purchaser of the lands comprised in the Certificates of Title referred to in Special Conditions 4 and 5 hereinbefore mentioned, the vendor shall at its expense apply for new Certificates of Title to be issued for those lands which Certificates of Title shall be duly registered in the purchaser's name.

14. The 1st Claimant has since paid the full purchase price to the Defendants, their agents and/or servants, in respect of the lands and chattels pursuant to the

Agreement for Sale of Land and the Agreement for Sale of Chattels and Property dated the 3rd May 1993.

15. Prior to the 3rd Defendant being appointed Receiver of the 1st Defendant, (*This seems to be an error and should have read "Receiver of the 2nd Defendant")* 1st Defendant was the mortgagee of all the lands referred to and mentioned in paragraph 6 hereof. Pursuant to its said mortgage over the said lands, the 1st Defendant ought to have retained all the Duplicate Certificates of Title to the said lands as mortgagee of the Rio Blanco Development Company Limited. That upon the purchase of the said lands by the 1st Claimant, the 1st Defendant financed the purchase of the same and retained the Duplicate Certificates of Title as mortgagee of the 1st Claimant.

16. The 1st Claimant paid off the mortgage due to the 1st Defendant in or about July 1999. On or about the 12th July 1999 the 1st Claimant became aware that the Certificates of Title registered at Volume 1230 Folios 801, 811, 812 and Volume 1220 Folio 921 and Volume 1229 Folio 161 of the Register Book of Titles were the subject of a suit between Rio Blanco Development Company Limited and the 1st and 3rd Defendants herein **(C.L. 1994/R.021).**

17. As a consequence, although the 2nd Claimant's name has been registered on the original Certificates of Title at the Office of the Registrar of Titles, the Defendants have refused and/or neglected to deliver to the 1st Claimant or its nominees the Duplicate Certificates of Title for the lands registered at Volume 1230 Folios 801, 811, 812 and Volume 1220 Folio 921 and/or to obtain replacement titles in accordance with Special Condition 15 aforesaid. The 1st Claimant was further advised by Messrs. Crafton Miller & Co., Attorneys-at-Law for Rio Blanco Development Limited in **Suit C.L. 1994/R. 021**, that Caveat No. 1060272 had been lodged against the Certificate of Title registered at Volume 1229 Folio 161.

18. By the Judgment of Mr. Justice James in **Suit No. C.L. R. 021/1994; Rio Blanco Development Bank Company Ltd. v National Commercial Bank (Jamaica) Ltd. and Karl Aird** in which the Claimants were not parties thereto, he found that the parcels of land registered at Volume 1220 Folio 921 and those registered at Volume 1230 Folios 801, 811, 812 and 860 did not form part of the security given to the 1st Defendant. It was also realized that the sewage plant for the hotel is situate on premises which Court had determined that the Defendants did not have the right to sell. Notwithstanding the same the Defendant's have failed and/or refused to deliver and/or are incapable of delivering the said Duplicate Certificates of title to the Claimants.

19. The Defendants have therefore breached several conditions of the Agreement for Sale of Land in respect of the said lands as certain Duplicate Certificates of Title have not been delivered to the 1st Claimant contrary to its warranty of beneficial ownership in relation thereto and its undertaking to do so and the 1st Claimant must therefore be indemnified by the Defendants in respect of any losses attendant therewith, accordingly.

20. The failure of the Defendants to deliver up the respective Duplicate Certificates of Title registered at Volume 1230 Folio 801, 811, 812 and Volume 1220 Folio 921 or the replacement therefor and to cause the release of the Caveat No. 1060272 Register Book of Titles, has precluded the 1st Claimant from utilizing fully and/or meaningfully its investment and/or to realize a proper profit on its investment.

21. The Claimants have issued a Notice requiring completion and making time of the essence of the contracts to the Defendants. Notwithstanding the issuance of the said Notice, to date the Defendants have not delivered up possession and/or provided replacement for the Duplicate Certificates of Title registered at Volume 1230 Folios 801,811,812 and Volume 1220 Folio 921 of the Register Book of Titles to the Claimants. Further, the Defendants have not taken any step to

secure the removal and/or discharge of Caveat No. 1060272 endorsed on the Certificate of Title registered at Volume 1229 Folio 161 of the Register Book of Titles.

22. The Claimants further say that the Defendant NCB failed to deliver what it had agreed to deliver and continues in default to date as follows:

    (a) NCB failed to deliver that which it advertised and described in the offer For Sale.

    (b) NCB failed to deliver a property which the Claimants in turn could develop as a Time Share property, as was its intention for resale to the public. Further the breach is aggravated by the fact that the sewage plant for the property is located on the property not owned or controlled by NCB, but which is subject of a lawsuit to determine ownership.

    (c) NCB knowingly and intentionally put the Claimants in a position where it received the purchase price, had the full use of it and had failed to deliver the agreed property for the Claimants to benefit from the purchase.

    (d) NCB failed to take steps to remove the caveat lodged on the property.

23. Further the Claimants aver that a significant portion of the purchase price for the subject lands were (sic) obtained from a mortgage loan facility provided by the 1st Defendant, NCB and secured by, inter alia, an instrument of mortgage dated 6th June, 1994 in favour of the 3rd Claimant. The said instrument of mortgage evidencing the loan agreement between the parties included; (i) Clause 1 (a) which required the 3rd Claimant to repay the 1st Defendant all sums advanced together with interest at the rate specified in the Schedule; (ii) Clause 2(e) which entitled the 1st Defendant to charge compound interest on sums owing to the 1st Defendant on daily balances with monthly rests at the rate charged from time to time; and (iii) the original rate of interest specified in the Schedule at the rate of

20% above prime rate. The 1st Defendant has therefore had the use and benefit of the purchase price since same was paid and consequentially, the Claimants are entitled to compensatory damages arising from breach of contract and/or unjust enrichment including compound interest to be calculated on the said purchase price on the basis of the value of that money over the period of time during which it had been retained and on-loaned by the 1st defendant to its customers and to the exclusion of the Claimants.

24. Further, the claimants aver that as the Defendants cannot now establish wavier of Special Condition 15 as a defence, the Claimants are now entitled to cancel the Agreement for Sale of land in accordance with Clause 5 of the Agreement and or treat the same as repudiated and the Claimants are entitled to claim

    a. Refund of all monies in the amount of $77,452,885.00 paid by the Claimants to the 1st Defendant up to the time of cancellation of the Agreement together with interest calculated "at a rate equivalent to the best deposit rate of National Commercial Bank Jamaica Limited then prevailing on deposits as to amount similar to the amount being refunded the Purchaser" being $8,993,967,420.00 and continuing.
    b. Additional interest based on average Bank of Jamaica's lending rate compounded monthly less the amount computed in item (a) above.
    c. The sum equivalent to the difference between the sums paid plus interest at the lending rates charged by the Claimants' Investors who the Claimants had to repay less the amount refunded n respect of the purchase price and costs attendant on the sale of the property together with interest calculated at the Bank of Jamaica average lending rate which amounts to $13,677,214,145.00 and continuing.

25. That the Defendants have breached Special Conditions 3,4,5,12,13 and 15 of the Agreement for Sale of Land dated 3rd May, 1993, and as a consequence, the Claimants accept the Defendants' repudiatory breach

and thereby elect to treat the said Agreement for Sale of Land dated 3rd May 1993 as rescinded at the Trial of this action.

26. The Claimants therefore say they are entitled to be indemnified and or compensated for loss and damage sustained which would include but is not limited to the following.

(a) Interest incurred and or lost on the purchase price at the average lending rate as published by the Bank of Jamaica compounded monthly, and continuing.

(b) Operational losses and capital expenses incurred by having to hold and maintain the property rather than to develop and sell, as was its intention, together with interest as calculated in (a) incurred in respect of those operational losses.

(c) Loss of opportunity in the development of the property and the use of the property and the free and unrestricted use of the property as an asset.

(d) by reason of the Defendant's breach of Special Conditions 3, 4, 5, 12, 13 and 15 of the Agreement for Sale dated 3rd May, 1993, the Claimants have incurred loss and/or damage in the amount of $8,690,173,177.00 in addition to opportunity losses associated with the Claimants being unable to use the Title registered at Volume 1229 Folio 161 to the said lands in the amount of US$600,000.00 or JA$52,800,000.00 (at an exchange rate of JA$88.00: US$1.00)

SPECIAL DAMAGES

Operational Losses:	$32,531,069.
Interest Costs on Operating Losses:	$1,043,623,555.00 (and continuing)

Capital Expenditure on Hotel Property:	$24,761,390.00
Interest Cost on Capital Expenditure:	$1,578,857,163.00 (and continuing)
Opportunity Losses Associated with Inability to Use Titles:	US$600,000.00 JA$52,800,000,00
(at an exchange rate of JA$88.00 US$1.00)	
Losses Incurred in Being Unable to Implement Time Share Development as planned:	$5,957,600,000.00
TOTAL SPECIAL DAMAGES:	$8,690,173,177.00

(e) In the premises the Claimant humbly pray that this Honourable Court will grant the relief and orders sought herein.

AND THE CLAIMANTS CLAIM:

1) In relation to the 1st Claimant, Specific performance of Agreements for Sale dated the 3rd day of May 1993 between the 1st Claimant and the 2nd Defendant, who acted through the 3rd Defendant, the 3rd Defendant having been appointed Receiver of the 2nd Defendant by the 1st Defendant pursuant to a Debenture of the 1st Defendant.

2) Further or in the alternative that in the event that specific performance is not possible, a declaration that the 2nd Defendant has wrongfully refused and/or neglected to hand over the Duplicate Certificates of Title in respect of the parcels of land registered at Volume 120 Folio 921 and those registered at Volume 1230

Folios 801, 811, 812 and 860 in breach of its obligations contained in the said Agreements for Sale;

3) An order that the Claimants are therefore entitled to cancellation and/or rescission of the Agreement for Sale of Land dated 3rd May, 1993 in accordance with Clause 5 of the said Agreement together with damages in lieu of specific performance; and/or Damages for breach of Contract.

4) Damages for Breach of Warranty.

5) Special Damages in the amount of $8,690,173,177.00 and continuing.

6) A refund of all monies in the amount of $77,452,885.00 paid by the Claimants to the 1st Defendant up to the time of cancellation of the Agreement together with interest calculated "at a rate equivalent to the best deposit rate of National Commercial Bank Jamaica Limited then prevailing on deposits as to amounts similar to the amount being refunded the Purchaser" $8,993,967,420.00 and continuing.

7) Additional interest based on average Bank of Jamaica's lending rate compounded monthly less the amount computed in item (6) above, $13,677,214,145.00 and continuing.

8) An order that the Claimants be indemnified for all losses suffered as a result of the suit brought by Rio Blanco Development Limited against the 1st and 3rd Defendants; and the caveat lodged against the Certificate of Title comprised in Volume 1229 Folio 161 registered in the name of the 3rd Claimant.

9) Costs and Attorneys' costs.

10) Such further and other relief and orders as this Honourable Court shall think fit in the circumstances of the case.

In response to that pleading, the defendants filed an amended Defence which, for convenience, is also set out below.

The Defendants dispute the claim on the following grounds:

1. We admit paragraph 1 of the Further Amended Particulars of Claim.

2. Except that the First Defendant also operates from various branches throughout the Island, paragraph 2 of the Further Amended Particulars of Claim is admitted.

3. Paragraphs 3 and 4 of the Further Amended Particulars of Claim are admitted.

4. With respect to paragraph 5 of the Further Amended Particulars of Claim, the Defendants say that the Third Defendant executed the said Agreements as Receiver of the Second Defendant duly appointed by the First Defendant.

5. Except that the Defendants do not know whether or not the Claimants have common shareholders and directors, paragraph 6 of the Further Amended Particulars of Claim is admitted.

6. Paragraph 7 of the Further Amended Particulars of Claim is admitted.

7. With respect to paragraphs 8 and 9 of the Further Amended Particulars of Claim, the Defendants say that the Agreement for Sale of Land set out the terms and conditions under which the said lands were being sold and the representations that were made by the Third Defendant.

8. Further with respect to paragraphs 8 and 9 of the Further Amended Particulars of Claim the Defendants say that by the Agreement for Sale of Land the Third Defendant, as Receiver for the Second Defendant, sold the said lands on terms as to completion which, on a true construction thereof, provided that completion would occur:

   (a) At least 7 days after the Second Defendant provided the notice referred to in Special Condition 3 of the Agreement for Sale of Land;

   (b) On payment of **all outstanding amounts payable** by the First Claimant in exchange for proof of the ownership by the First Claimant of Lots 41, registered at Volume 1230 Folio 801, Lot 1 registered at Volume 1220 Folio 921, Lot 51 registered at Volume 1230 Folio 811 and Lot 52 registered a Volume 1230 Folio 812 of the Register Book of Titles;

   (c) In exchange for the duplicate Certificates of Title for **the remaining lands,** together with Instruments of Transfer in relation thereto, capable of registration at the Office of Titles effecting a change in ownership in favour of the Purchaser or its nominees.

9. Further, the Defendants say that by Special Conditions (3) of the Agreement for Sale of Land the First Claimant and the Third Defendant agreed that transfer would be effected:

   (a) as soon as the Third Defendant was in a position to provide duplicate certificates of title for the various parcels of land **other than** Lots 41, registered at Volume 1230 Folio 801, Lot 1 registered at Volume 1220 Folio 921, Lot 51 registered at Volume 1230 Folio 811 and Lot 52 registered at Volume 1230 Folio 812, together with Instruments of Transfer capable of being registered; and

   (b) in relation to Lots 41, registered at Volume 1230 Folio 801, Lot 1 registered at Volume 1220 Folio 921, Lot 51 registered at Volume 1230 Folio 811 and Lot 52 registered at Volume 1230 Folio 812 of

the Register Book of Titles to procure the agreement of the Registrar of Titles to dispense with registering the transfer on the duplicate Certificates of Title therefor and registering the transfer thereof on the **original** of these Certificates of Title only.

10. Further Special Condition (3) provided that after the matters set out in paragraphs 8 and 9 hereof, the Third Defendant would give to the First Claimant Notice of his readiness to complete and require the First Claimant to pay the balance purchase price within 7 days of service of the said Notice.

11. The Defendants say that the Third Defendant effected transfer in accordance with the said terms of the Agreement for Sale of Land, notified the First Claimant by letter dated September 15, 1993 from his Attorney-at-Law to the First Claimant's then Attorneys-at-Law and called upon the First Claimant to pay the balance purchase price.

12. Further with respect to paragraphs 8 and 9 of the Further Amended Particulars of Claim, the Defendants say that by letters dated March 4, 1993 and May 21, 1993 Messrs. Robinson, Phillips & Whitehorne alerted the Third Defendant of actual or potential claims to the lands which are the subject of these proceedings. The said claims were communicated to the Claimants' then Attorneys-at-Law during the course of negotiations for the purchase of the said lands.

13. The Defendants say that the completion clause and Special Conditions 3, 4 and 5 of the Agreement for Sale of Land show that the parties to the said Agreement were concerned as to whether the Third Defendant would be in a position to procure that the Transfer to the Claimants could be registered on the duplicate Certificate of Title for Lot 41, registered at Volume 1230 Folio 801, Lot 1 registered at Volume 1220 Folio 921, Lot 51 registered at Volume 1230 Folio 811 and Lot 52 registered at Volume 1230 Folio 812 of the Register Book of Titles.

14. On a true construction of Special Conditions 3, 4, and 5 of the Agreement for Sale of Land:

a) The parties to the said contract made special arrangements with respect to the duplicate Certificates of Title for the lands mentioned and described in Special Conditions (4) and (5) of the said Agreement;

b) the special arrangements reflected the fact that the Vendor may not have been able, on completion, to:

(i) procure that the Purchaser be registered on the duplicate Certificate of Title as the proprietor of Lot 41;

(ii) procure a transfer of the lands registered at Volume 1220 Folio 921 and Volume 1230 Folios 811 and 812 of the Register Book of Titles;

(iii) secure registration of the lands described in special conditions (4) and (5) of the Agreement for Sale of Land, on the duplicate Certificates of Title therefor, and, for that reason, the Purchaser would accept **transfer** and registration of change of ownership endorsed on the original Certificates of Title for the said lands.

15. Further, the said Agreements for Sale were prepared with the full participation of the Purchasers Attorneys-at-Law, Messrs. Myers Fletcher & Gordon and the terms of the Agreement for Sale of Land mentioned and described in paragraphs 8 to 14 inclusive hereof were included because of the matters set out in the said paragraphs of this Further Amended Defence.

16. The words used in the letter dated September 15, 1993 referred to in paragraph 9 of the Further Amended Particulars of Claim regarding a search being undertaken and replacement of titles, are as follows:

"Titles at Volume 1230 Folios 823 and 824 were mislaid at the Titles Office when the Transfers were lodged and dispensation application had to be done to enable the Transfers to be registered. A search is being undertaken to locate these Titles. Replacement of the other Titles will have to be dealt with and I will communicate with you further regarding this aspect."

Accordingly, the Defendants deny the allegation made in paragraph 9 of the Amended Particulars of Claim that letter dated September 15, 1993 indicated that, if not located, replacement of the "other" Certificates of Title referred to in the said letter would be dealt with by the Defendants.

17. Still further as to paragraphs 8 and 9 of the Further Amended Particulars of Claim the Defendants say that:

a) by letter dated November 3, 1993 Messrs. Myers, Fletcher & Gordon, Attorneys-at-Law for the First Claimant under the said Agreement for Sale of Land, to Ms Sharon Evans Attorney-at-Law for the Vendor, stated that:

"For the time being, we will limit any application to securing new Certificates of Title. However, we would be obliged to request the Titles from Messrs. Robinson, Phillips & Whitehorne"; and

b) by letter dated January 4, 1994 from Messrs. Myers, Fletcher & Gordon to Ms Sharon Evans aforesaid, it was stated among other things that:

"As we had indicated, we understand our involvement to be limited to securing new Certificates of Title for the properties already transferred. If Mr. Whitehorne refuses to forward the Certificates, then an application for new Certificates to be issued or an Order compelling him to forward same has to be made. We did not wish to approach Messrs. Robinson,

Phillips and Whitehorne before the Receiver had accounted, as we do not expect a favourable response."

18. The Defendants say that the foregoing indicates that the First Claimant, through its Attorneys Messrs. Myers, Fletcher & Gordon:

a) agreed to make application to the Registrar of Titles regarding the duplicate Certificates of Title which could not be located;

b) committed to limiting any application regarding the said duplicate Certificates of Title to that of securing new Certificates of Title;

c) recognized their obligation to request the Titles from Messrs. Robinson, Phillips & Whitehorne which firm was known to represent Rio Blanco Development Co. Limited (hereafter referred to as "the said Company"), then the owners of the subject lands, and which firm had acted for the said Company in the development and sale of some of the lots in the said sub-division; and

d) recognised that the matter of procuring and obtaining the duplicate Certificates of Title for the lands referred to in Special Conditions (4) and (5) of the Agreement for Sale of Land or of obtaining new Certificates of Title therefor, was likely to be contentious.

19. Still further as to paragraphs 8 and 9 of the Further Amended Particulars of Claim, the Defendants say that the First Claimant had actual notice of adverse claims or potentially adverse claims to the lands the subject of these proceedings, by the following clauses of the Agreement for Sale of Land:

a) The clause describing the Vendor;

b) The clauses relating to "Completion" and "Possession";

c) The clause relating to "Incumbrances, Reservations, Restrictions and Easements"; and

e) Special Conditions (3), (4), (5), (15) and (16) of the Agreement for Sale of Land.

20. Paragraph 10 of the Further Amended Particulars of Claim is denied for the reasons set out in paragraphs 1 to 19 of this Amended Defence, which are repeated.

21. Paragraph 11 of the Further Amended Particulars of Claim is admitted and the Defendants say that, consistently with the terms and conditions of the said Agreement for Sale of Land, the Third Defendant:

a) on or about May 10 1993 the Third Defendant gave possession of all the assets which were the subject of the said sale to the Claimants;

b) effected transfer of the lands comprised in all of the Certificates of Titles referred to in paragraph 6 of the Amended Particulars of Claim, to the Claimants;

c) obtained the confirmation of the Registrar of Titles that dispensation with the production of duplicate Certificates of Title for the lands referred to in Special Conditions (4) and (5) of the Agreement for Sale of Land would be approved and procured the registration of the Claimants or either of them as proprietor on the Certificate of Title therefor; and

d) delivered to the Claimants the duplicate Certificates of Title to all of the lands referred to in paragraph 6 of the Particulars of Claim except for those the subject of Special Conditions (4) and (5) of the Agreement for Sale of Lands by the terms of which, delivery of the said duplicate Certificates of Title was not required upon completion of the said sale.

22. Paragraph 12 of the Further Amended Particulars of Claim is admitted.

23. Paragraph 13 of the Further Amended Particulars of Claim is admitted and the Defendants repeat paragraphs 1 to 22 inclusive of this Further Amended Defence and say that:

a) by reason of the matters set out in paragraphs 17 and 18 hereof, the First Claimant, by its Attorneys-at-Law Messrs. Myers, Fletcher & Gordon, waived the terms and conditions of Special Condition (15) of the Agreement for Sale of Land by committing to making the application for new Certificates of Title in relation to the lands the subject of Special Conditions (4) and (5) thereof;

b) even if the First Claimant had not waived Special Condition (15) as aforesaid, Special Condition (15) aforesaid became incapable of performance in accordance with its terms because of the facts that:

(i) the First and Third Defendants were advised by the Attorneys-at-Law for the Second Defendant that they were in possession of the duplicate Certificates of Title for the lands referred to in Special Conditions (4) and (5) of the Agreement for Sale of Land;

(ii) after completion of the sale the Second Defendant's principals included in proceedings commenced by them, against the Defendants among other things, a claim for declarations that the Second Defendant is the owner of the lands the subject of these proceedings and for delivery to them of the Titles therefor free of

encumbrance on grounds which include alleged fraud; and

(iii) the proceedings mentioned in paragraph 23(b) (ii) namely, Suit No. C. L. R 021 of 1994 - Rio Blanco Development Company Ltd. v National Commercial Bank Jamaica Limited and Karl Aird - is still pending in this Honourable Court as at the date of this Further Amended Defence.

24. With respect to paragraph 14 of the Further Amended Particulars of Claim, the Defendants say that after being registered as the proprietors of all of the lands mentioned and described in paragraph 6 of the Further Amended Particulars of Claim and on or about the 6th May, 1994, the First Claimant paid the balance purchase price. Except as aforesaid, paragraph 14 of the Further Amended Particulars of Claim is admitted.

25. With respect to paragraph 15 of the Further Amended Particulars of Claim, the Defendants admit that:

a) at the time of the appointment of the Third Defendant as Receiver and Manager of the said Company, the First Defendant was the mortgagee of the lands mentioned and described in paragraph 6 of the Further Amended Particulars of Claim;

b) As mortgagee of the said lands, the First Defendant was entitled to retain all of the duplicate Certificates of Title for the said lands; and

c) Upon the purchase of the said lands by the First Claimant, the First Defendant financed the same.

Except as set out in sub-paragraphs (a) to (c) of this paragraph, paragraph 15 of the Further Amended Particulars of Claim is denied.

26. In relation to the remaining allegations in paragraph 15 and in relation to paragraph 16 of the Further Amended Particulars of Claim, the Defendants say that:

a) The lands the subject of the Mortgage referred to therein were, at all material times, the subject of a subdivision in which Messrs. Robinson, Phillips & Whitehorne acted as Attorneys-at-Law for the Second Defendant;

b) Messrs. Robinson, Phillips & Whitehorne also acted for the Second Defendant with respect to the procuring of splinter titles for and the sale of lots within the said subdivision;

c) Upon the grant of subdivision approval and having regard to the terms on which the said mortgage was granted, Messrs. Robinson, Phillips & Whitehorne was under an obligation to deliver to the First Defendant the duplicate Certificates of Title for the lands the subject of the said Mortgage, including the lands the subject of these proceedings;

d) If the Titles for the lands the subject of these proceedings were not endorsed with the Mortgage mentioned and referred to in paragraph 15 of the Amended Particulars of Claim, then they were the subject of a Debenture dated the 7th day of August, 1989 given by the Second Defendant to the First Defendant in respect of its fixed and floating assets, which include the lands the subject of these proceedings;

e) Upon the purchase of the lands comprised in the said Mortgage and the said Debenture the First Defendant agreed to finance the purchase by the First Claimant of the lands the subject of the Agreement for Sale of Lands and retained so many of the duplicate Certificates of Title as were delivered to it by Messrs. Robinson, Phillips & Whitehorne aforesaid;

(f) the First Claimant's mortgage to the First Defendant having been sold and assigned to FINSAC Limited in September,

1997, the Defendants do not know whether or not same has been repaid as alleged or at all;

(g) The proceedings in Suit No. C.L R 021 of 1994 were amended in or about March, 1999 to allege fraud and to include claims for the declarations referred to in paragraph 23(b)(ii) hereof and for delivery up of the duplicate Certificates of Title for, among others, the lands referred to in Special Conditions (4) and (5) of the Agreement for Sale of Land.

27. With respect to paragraph 17 of the Further Amended Particulars of Claim, the Defendants repeat the matters set out in paragraphs 1 to 26 inclusive of this Further Amended Defence and say that:

a) the Claimants were registered on the original Certificates of Title pursuant to the terms of the Agreement for Sale of Land;

b) none of the Defendants have refused or neglected to deliver to the Claimants the duplicate Certificates of Title to the lands referred to whether as alleged or at all;

c) none of the Defendants have refused or neglected to obtain replacement titles whether as provided for in Special Condition 15 of the Agreement for Sale of Land or at all;

d) none of the Defendants know the date or time when the Claimants became aware that any of the Certificates of Title were the subject of the caveat referred to;

e) none of the Defendants were responsible for the lodging of the caveat or the institution of the law suit referred to; and

(f) none of the Defendants knew when the caveat referred to was lodged, by whom it was lodged, the reason for it being lodged or against which title it was lodged, until during the

conduct of the proceedings in the action Suit No. C. L R 021 of 1994.

28. With respect to paragraph 18 of the Further Amended Particulars of Claim the Defendants say that:

a) by incomplete Reasons for Judgment given on the 25th January, 2006 the Honourable Mr. Justice James (now retired), although finding that the First and Third Defendants exercised their powers of sale under a Debenture over the Second Defendant's fixed and floating assets nonetheless determined that the parcels of land all registered in the Second Defendant's name at Volume 1220 Folio 921 and Volume 1230 Folios 801, 811, 812 and 860, did not form part of the security given by the Second Defendant to the First Defendant;

b) the Honourable Mr. Justice James also found that the First Claimant being a purchaser for value without notice would have acquired good title;

c) there was not the alleged or any finding that the Defendants did not have the right to sell the said parcels of land;

d) by virtue of having inspected the lands, researched the Titles and procured surveyors identification report, at all material times the Claimants knew or ought reasonably to have known the location of the sewage treatment plant and made no objection with respect thereto prior to completion in accordance with the terms of the Agreement for Sale of the said lands. For clarity the Defendants state that no issue as to the situation of the sewage treatment plant was raised nor addressed in the incomplete judgment of Mr. Justice James; and

e) final judgment has not been delivered in the said Claim No C. L. R 021 of 1994 in which the Honourable Mr. Justice James delivered the said incomplete Reasons for Judgment;

29. Further with respect to paragraph 18 of the Further Amended Particulars of Claim for the reasons set out in paragraphs 1 to 28 and the following paragraphs of this Further Amended Defence the Defendants deny that they have refused or are incapable of delivering the Duplicate Certificates of Title to the Claimants. The Defendants say that the Second Defendant's principals have, by the proceedings referred to at paragraph 28 above, caused the delay on their part in delivering the said Duplicate Certificates of Title to the Claimants.

30. Paragraph 19 of the Further Amended Particulars of Claim is denied for the reasons set out in paragraphs 1 to 29 inclusive hereof, which are repeated.

31. Further and particularly with respect to paragraph 19 of the Further Amended Particulars of Claim, the Defendants say that the Agreement for Sale of Lands did not require the delivery to the First Claimant of the Duplicate Certificates of Title for the lands referred to in Special Conditions (4) and (5) of the Agreement for Sale of Land. The delivery of the said duplicate Certificates of Title did not form any part of the warranty of beneficial ownership or indemnity referred to in Special Conditions 12 and 13 of the Agreement for Sale of Lands and, to the best of their knowledge, information and belief, no person has made or brought any claims or demands or instituted any action or proceedings against the Claimants or any of them in respect of any of the matters referred to in Special Condition (13) of the said Agreement for Sale of Land.

32. Paragraph 20 of the Further Amended Particulars of Claim is denied for the reasons set out in paragraphs 1 to 29 inclusive of this Further Amended Defence.

33. With respect to paragraph 21 of the Further Amended Particulars of Claim the Defendants admit that:

a) by letters dated April 11, 2003 and August 19, 2003 to the First Defendant the First Claimant commenced making claims

with respect to the purchase by it of the lands comprised in the Certificates of Title referred to in paragraph 6 of the Further Amended Particulars of Claim;

b) by letter dated October 14, 2003 the First Defendant's Attorneys responded to the Claimants' Attorneys setting out the circumstances surrounding the First Defendant's inability to deliver to the Claimants the duplicate Certificates of Title to the lands the subject of these proceedings;

c) Notice Requiring Completion of the Agreements for Sale and Making Time of the Essence of the Contract dated March 10, 2005 was issued by Messrs. Grant, Stewart, Phillips & Co. the Attorneys-at-Law presently on record for the Claimants;

d) by letter dated March 18, 2005 the Defendants' Attorneys advised the Claimants' present Attorneys of the circumstances surrounding the inability of the Third Defendant to deliver the duplicate Certificates of Title, the subject of these proceedings, to the Claimants; and

e) the proceedings relating to the claim by the principals of the Second Defendant to the lands the subject of this action is yet to be determined.

34. The Defendants say that by reason of the facts set out in paragraphs 1 to 33 inclusive of this Further Amended Defence the Defendants did not have the basis in law or in fact to secure the removal or discharge of the alleged or any caveat from the Title to the lands registered at Volume 1229 Folio 161 of the Register Book of Titles, whether as alleged in paragraph 21 of the Further Amended Particulars of Claim or at all.

35. Further, in relation to the allegations made in paragraph 21 of the Further Amended Particulars of Claim, the Defendants repeat paragraphs 1 to 34 of this Further Amended Defence and say that in the circumstances indicated therein, which have been communicated to the Claimants, the Defendants have not been

in a position to deliver up possession of or to provide the Claimants with replacement duplicate Certificates of Title for the lands referred to in the said paragraph 21 of the Further Amended Particulars of Claim.

36. The Defendants deny each allegation which has been made in Paragraph 22 of the Further Amended Particulars of Claim except in so far as same is specifically admitted in this Further Amended Defence and the Defendants repeat the matters set out in paragraphs 1 to 35 inclusive of this Further Amended Defence.

37. With respect to paragraph 23 of the Further Amended Particulars of Claim for the reasons set out in paragraphs 1 to 36 inclusive of this Further Amended Defence the Defendants deny the alleged or any breach of contract and/or unjust enrichment and say as follows:

a) by special condition 10 of the Agreement for Sale of Land, the First Claimant agreed to deliver to the Third Claimant an irrevocable guarantee undertaking or a commitment in writing from the First Defendant guaranteeing or committing to pay the balance purchase price on completion;

b) the instrument of mortgage mentioned and described in paragraph 23 of the Further Amended Particulars of Claim was a part of the security documentation to facilitate the purchase by the First Claimant of the lands the subject of the Agreement for Sale of Land; and

c) the net proceeds of sale of the lands the subject of the Agreement for Sale of Land was applied to reduce the liability of the Second Defendant to the First Defendant and for no other purpose.

38. The Defendants join issue with the Claimants' assertions in paragraph 24 of the Further Amended Particulars of Claim and deny, for the reasons set out in paragraphs 1 to 37 of this Further Amended Defence, that the Claimants or any of them are/is entitled to the relief claimed in the said paragraph 24.

39. The Defendants deny that they or any of them have/has breached the Agreement for Sale of Land whether as alleged in paragraphs 25 and 26 of the Further Amended Particulars of Claim or at all, for the reasons set out in paragraphs 1 to 38 inclusive of this Further Amended Particulars of Claim which are repeated. The Defendants further deny that the Claimants or any of them are/is entitled to make any election as per paragraph 25 of the Further Amended Particulars of Claim and also denies that the Claimants or any of them are/is entitled to the relief claimed in paragraph 26.

40. Further with respect to paragraphs 25 and 26 of the Further Amended Particulars of Claim the Defendants say that:

a) as is evident from the terms of the Agreement for Sale of Land and the Agreement for Sale of Chattels , the transaction was that of a sale of land and chattels and not that of a business whether as a going concern or otherwise;

b) the property the subject of the proceedings is made up of strata units, some of which are owned by individuals unconnected with the Claimants;

c) the First Claimant was given possession of the lands the subject of the Agreement for Sale of Land with effect from May 3, 1993, has retained possession thereof since and has allegedly operated same in conjunction with the other Claimants as a hotel from that date to the present, without interference by the Defendants or any of the Defendants; and that

d) during the period of the First Claimant's operation of the said property as a hotel to the date of discharge of its said Mortgage to the First Defendant, the First Claimant was obligated by the terms of its said mortgage to honour the terms thereof.

41. For the reasons set out in paragraphs 1 to 40 inclusive of this Further Amended Defence the Defendants deny that the Claimants or any of them have/has sustained the alleged or any injury, loss or damage and, for the same reasons, the Defendants say that the Claimants are not entitled to the relief claimed.

The Witnesses.

The evidence in these proceedings is contained in the witness statements and oral testimonies of Mr. Richard Lake, principal of the claimant companies, Mr. Donovan Jackson, attorney at law, formerly an associate of the law firm Myers Fletcher and Gordon; Mr. Illonis Jones, a Commissioned Land Surveyor and an accountant, Mr. Dalma James, expert witness for the Claimants. For the defendants, the evidence was provided by Mr. Karl Aird, the Receiver of the Second Defendant appointed by the First Defendant (and himself the third Defendant); Mr. Joseph Shoucair, the Bank's General Counsel at the time of the contract; and Mr. Wayne Strachan, an accountant, and expert witness in relation to damages and losses sustained by the Claimants or any of them.

In seeking to unravel and make sense of the issues raised in this matter, and to ease smoothly into a consideration of those issues and their consequences, I have formed the view that it is appropriate to start by setting out some of the major provisions of the contract

1. As noted above, the dispute arises out of the terms of two Agreements, one for the sale of real estate and the other for the sale of chattels entered into between the first claimant, as purchaser and the third defendant, Aird, the Receiver appointed Receiver of Rio Blanco by NCB, pursuant to powers purportedly enjoyed by NCB under a mortgage and/or a debenture held by NCB in respect of loans extended by NCB to Rio Blanco, the letter being the Vendor. As I understand the pleadings, there is no complaint in respect the Chattel Agreement. However, Investments, Hotels and Properties, (the latter two claimants being nominees of the first claimant to receive some of the properties

the subject of the sale of lands agreement) seek certain reliefs in respect of the alleged failure to deliver certain duplicate certificates of title.

2. There is no issue as to the fact that there were two (2) agreements entered into between the parties, to wit, Investments and Aird, acting as Receiver of Rio Blanco and appointed to that position by NCB as noted above. It is clear that both agreements were part of one transaction, as special condition 1 of the Agreement for Sale of Chattels and Property provided that "This agreement for sale is specifically contingent on the completion of a Memorandum of Sale dated contemporaneously herewith and made between the parties hereto in respect of all those parcels of land more particularly described in the Schedule to the Memorandum of Sale aforesaid and the one agreement shall not be completed without the other". There is a parallel provision in the Agreement for the Sale of Chattels and property and I believe that if either agreement is to be rescinded, it must also be that the other would be rescinded as well. It will be noted from the introductory words to the claim as set out above that the claimants are claiming:

> Specific performance of *Agreements for Sale* dated the 3rd day of May 1993 between the 1st Claimant and the 2nd Defendant, who acted through the 3rd Defendant, the 3rd Defendant having been appointed receiver of the 2nd Defendant by the 1st Defendant pursuant to a Debenture of the 1st Defendant.
>
> Damages for breach of contract and of warranty and for the loss of bargain, expenses incurred, interest and charges and losses connected with the acquisition of real property, fixtures and fittings and chattels and all other items and costs set out and described in the *said Agreement for Sale of Land and the Agreement for Sale of Property and Chattels dated the 3rd day of May 1993.*

3. It seems that the first issue which the Court must determine is whether there has been a breach of the agreements or whether there has been a breach of any warranty for which the defendants are liable to the claimants. The subsequent

issue is: If indeed there has been any breach, what is the effect of such breach and what remedies are available to the claimants? Finally, if damages are payable to the claimants, what ought to be the extent of such damages?

4. In order to be clear what is at stake, it might be useful to start with the closing submissions of the Claimants filed herein. It was submitted that:

> "..... at the heart of this claim is the unchallengeable fact *that the Defendants breached the covenant that the properties sold to the Claimants would be free from encumbrances other that restrictive covenants and easements which are obvious and further breached their warranty that it was the beneficial owner of the properties and had the right to sell the properties.*
>
> This *breach arises from the fact that all certificates of title the subject of the sale are rendered encumbered by reason of a defect of title in relation to the properties arising from the inchoate judgment of Mr. Justice James in Suit No. C.L. R 021/1994 Rio Blanco Development Company Limited v National Commercial Bank Jamaica Limited and Karl Aird in which he found that the subject properties registered at Volume 1220 Folio 921 and those registered at Volume 1230 Folios 801, 811, 812 and 860 did not form part of the securities given to the 1st Defendant and consequently the 1st Defendant had no lawful authority to dispose of and transfer the said 4 Titles to the Claimants.*

5. The issues in this case are perhaps to some extent impacted by the fact that a separate action to which reference is made in the submissions above, was filed by Rio Blanco against NCB. In that action, Rio Blanco as claimant challenged the right of NCB to transfer or otherwise alienate certain properties on the basis that those properties did not form a part of the security given NCB under the terms of the mortgage or debenture which secured certain loans. The learned judge found that the subject properties registered at Volume 1220 Folio 921 and those registered at Volume 1230 Folios 801, 811, 812 and 860 did not form part of the securities given to the 1st Defendant and consequently the 1st Defendant had no lawful authority to dispose of and transfer the said 4 Titles (it had purportedly transferred by virtue of the Agreement for Sale dated May 3, 1993) to the Claimants. In that matter, the evidence was concluded on July 30, 2004, written submissions were filed and a "partial judgment" delivered by the learned Judge on January 25, 2006. This partial judgment gave directions to the parties

to file certain affidavits to facilitate the delivery of Final Judgment. It is not clear from the evidence before me whether the required affidavits in that action have ever been filed. However, final Judgment has not yet been delivered. It seems that both claimants and defendants in this matter agree that notwithstanding the handing down of the "partial judgment", there were matters which were still to be resolved. Indeed, the claimants' submissions refer to the judgment as "inchoate" while the term "partial judgment" is used by the defendants.

6. It is common ground that the Agreement for the Sale of Lands contained provisions in special conditions 4 and 5, which referred specifically to four (4) lots of land which were included in that agreement. It is as well to refer to these provisions at this time as they are, I believe, fundamental to any understanding of the issues. The lots in question are lot 41 registered at Volume 1230 Folio 801 and Lots 1, 51 and 52 registered at Volume 1220 Folio 921, Volume 1230 Folio 811 and 812 respectively. The Claimants' submitted that pursuant to the Agreement for the Sale of Land, the vendor had contracted to sell certain premises comprised in 53 Duplicate Certificates of Title free of encumbrances. According to the submissions, the language of the contract specifically stated that the titles must be:

> ....free from incumbrances other than the restrictive covenants and easements (if any) endorsed on the Certificates of Title and such easement as are obvious and apparent.

7. It was also a term of the contract as set out in Special Condition (15) that the Vendor, immediately after transfer, apply for the new certificate of titles for the four (4) titles that the Defendants have now failed to deliver. (Lots 1, 41, 51 and 52). The burden of the Claimants' arguments is that the titles in respect of which they have not been provided duplicate certificates of title were, according to Justice James' judgment, bot a part of the security given by Rio Blanco to NCB and accordingly, the bank had no authority to sell or transfer those properties. Moreover, those lots and in particular lot 1 on which the entrance to the hotel and the sewage facilities are located, remain "encumbered" by Rio Blanco's claim (as vindicated in the inchoate judgment), in breach of the warranty given by the

vendor. It is accordingly argued that the Defendants' warranty and representation to the effect that the Vendor was the beneficial owner of the properties and had the right to sell the properties is and was untrue giving rise to a defect of title. This fact precludes the Defendants "from furnishing the 4 Duplicate Certificates of Title thereby encumbering all certificates of title and thus preventing the contract from being concluded".

8. Before embarking upon an analysis of the claim, I set out hereunder the provisions contained in special conditions 3, 4, 5 and 15; I also set out the terms of the provision dealing with "Completion" and sections 81 and 82 of the Registration of Titles Act.

Special Condition 3 provides as follows:

> Subject to the provisions of special conditions (4) and (5) the Vendor hereby covenants and undertakes to effect a transfer of ownership in the property to the Purchaser pursuant to the terms hereof .
> As soon as the Vendor is in a position to provide
> a) The duplicate certificates of title for the various parcels of land (other than the parcels of land comprised in Certificates of Title referred to in Special Conditions (4) and (5) making up the property together with instruments of transfer of land capable of registration at the Office of Titles; and
>
> b) The Purchaser's attorneys-at-law with confirmation from the Registrar of Titles, of her agreement to dispense with the production of the duplicate certificates of title referred to in special conditions (4) and (5) and to register pursuant to section 81 of the Registration of Titles Act a transfer of the parcels of land comprised in the Certificates of Title aforesaid in favour of the Purchaser by endorsement on the original Certificates of Title for the respective parcels of land,
>
> so as to effect a change in the ownership of the property in favour of the Purchaser the Vendor shall by notice to the Purchaser delivered at its address herein stated advise the Purchaser of the readiness to complete the sale hereunder and the Vendor shall require the Purchaser to pay the balance of the purchase payable hereunder within seven (7) days of the date of the service of such notice.

Special Condition 4 and 5 are as follows:

Special Condition 4

Notwithstanding any provision to the contrary in this agreement, if the Vendor is unable to transfer lot 41 registered at Volume 1230 Folio 801 to the Purchaser within 45 days of the date hereof, the Vendor may require that the Purchaser pay such part of the price as shall not include the amount of $950,000.00, representing the market value of Lot 41 aforesaid and the Purchaser shall not be required to account for this amount unless and until the Vendor shall be in a position to procure that the Purchaser be registered as the proprietors of Lot 41 aforesaid under the Registration of Titles Act

Special Condition 5.

a) Notwithstanding any provision to the contrary in this agreement, if the Vendor is unable to:

   (i) Transfer Lots 1, 51 and 52 registered at Volume 1220 Folio 921, Volume 1230 Folio 811 and 812 respectively; and/or

   (ii) Procure that the occupants of the cottage on lands comprised in Certificate of Title Volume 1229 Folio 161 deliver up possession of the cottage aforesaid,

   To the Purchaser within 45 (or any greater period as the parties may agree in writing) days from the date hereof, the Purchaser may elect to cancel this Agreement for Sale by giving the Vendor seven (7) days' notice in writing of cancellation whereupon all monies paid herein by the Purchaser shall be refunded to the Purchaser and further, the Vendor shall pay to the Purchaser interest (net of withholding taxes) on all monies (save any amount applied for the payment of Transfer Tax and Stamp Duty on this Agreement) paid hereunder by the Purchaser to the Vendor up to the time of cancellation of this Agreement calculated at a rate equivalent to the best deposit rate of National Commercial Bank Jamaica Limited then prevailing on deposits as to amount similar to the amount being refunded the Purchaser.

b) In the event that the Purchaser fails and/or neglects to serve on the Vendor a notice of cancellation of this Agreement as contemplated by paragraph (a) of this Special Condition, then the Vendor may require the Purchaser to pay such part of the price for the property

as shall not include the market value of such of the lands referred to in paragraph (a) aforesaid as the Vendor shall be unable to transfer at the time fixed for Completion, and for the purposes of this provision the market value of these lots are agreed as follows:

Lot 1	$2,000,000.00
Lot 51	$1,200,000.00
Lot 52	$ 950,000.00

The Purchaser shall not be required to account for the amounts declared to be market value of these lots or any of them unless and until the Vendor shall be in a position to procure that the Purchaser be registered as the proprietor of the respective lot(s) aforesaid under the Registration of Titles Act.

Special Condition 15 is in the following terms:

Immediately after registration of the ownership by the Purchaser of the lands comprised in the Certificates of Titles referred to in Special Condition (4) and (5) the Vendor shall, at its expense, apply for new Certificates of titles to be issued for these lands which Certificates of Titles shall be duly registered in the Purchaser's name.

Section 81 of the Registration of Titles Act

1) Wherever any transaction or transmission under this Act is proposed to be registered and it is required by this act that a memorandum of such transaction or transmission shall be endorsed upon the duplicate certificate of title, the Registrar may dispense with the production of such duplicate and the making of such endorsement thereon.
2) In every such case, upon the registration of such transaction or transmission, the Registrar shall notify in the memorandum in the Register Book that no entry of such memorandum has been made on the duplicate, and such transaction or transmission shall thereupon be as valid and effectual as if such memorandum had been endorsed thereon.

Provided always that the Registrar before registering such transaction or transmission shall require proof to his satisfaction by statutory declaration that the duplicate is not deposited or held as security or otherwise, and whether it is subject to any lien, and shall give at least

fourteen days' notice of his intention to register such transaction or transmission in at least one newspaper and such other notice if any as he thinks fit.

Section 82 of the RTA

82.-(1) Whenever a duplicate certificate of title or title being special certificate of title is lost or destroyed, the registered proprietor of the land or some person claiming through him may apply to the Registrar to cancel the certificate of title and to register a new certificate in duplicate in the name of the registered proprietor or his transferee in place of such certificate and duplicate or special certificate. On proof being furnished to his satisfaction of such loss or destruction, and on such requisitions, if any, which he may make being complied with, and on the expiration of the notice to be given as hereinafter provided without sufficient cause having been shown against the application, the Registrar shall cancel the certificate and register a new certificate in duplicate in the name of the registered proprietor or his transferee in place of the former certificate and duplicate or special certificate both of which shall thereupon be deemed to be cancelled.

(2) Before disposing of the application the Registrar shall give at least fourteen days' notice thereof in at least one newspaper and such other notice, if any, as he may think fit.

(3) An application under this section may be combined with an application under section 81 to dispense with the production of a duplicate certificate.

Finally, I set out the terms of the paragraph from the Agreement for the Sale of Land dealing with" Completion".

On or before the expiration of seven (7) days from the Vendor providing to the Purchaser the notice referred to in Special Condition 3 hereof on payment of all outstanding amounts payable by the Purchaser hereunder in exchange for proof of the ownership by the Purchaser of the parcels of land comprised in the Certificates of Title referred to in Special conditions 4 and 5 and the duplicate certificates of title for the remaining lands part of the property together with instruments of transfer of land capable of registration at the Office of Titles effecting a change in the ownership of these lands part of the property and each part thereof in favour of the Purchaser or its nominee(s).

9. The evidence which is before me and which is undisputed is that the vendor has secured the names of the claimants to be put on the Original Certificates of Title at the Registrar's Office. The claimant had borrowed from NCB on a mortgage in order to finance the purchase and, according to the claimants, the mortgage has been paid off. However, the duplicate certificates to which they would otherwise be entitled have not been forthcoming, and in light of the decision of James J. may not now be forthcoming. The claimants claim that in the circumstances they are entitled to relief in the form of an order for specific performance of the Agreement for Sale or rescission and/or damages.

10. It is to be recalled that in the pleadings, the claimants stated that the defendants had breached several provisions of the Agreement for sale. In particular, the claimants referred to special conditions 3, 4, 5, 12, 13 and 15 which are all set out elsewhere in this judgment. They said the defendants had failed to deliver what they had advertised in its offer for sale; had failed to deliver a property which the first claimant could develop as a time share as was its intention what asked for an order of specific performance. The first defendant, NCB had also "knowingly and intentionally put the Claimants in a position where it received the purchase price, had the full use of it and had failed to deliver the agreed property for the Claimants to benefit from the purchase". In light of these breaches, the Claimants had issued a Notice to Complete to the defendants and had made time the essence of the notice. Notwithstanding this, the (first defendant) had "refused and/or neglected" to provide the duplicate certificates or replacements and accordingly, the claimants were entitled to specific performance.

11. Despite the claim for specific performance, the claimant submitted that while the Court in its Equity jurisdiction had the power to order specific performance, it believed that its alternative prayer for relief by way of rescission of the contract on the basis of the "defendant's repudiatory breach" which the claimants accept, together with an award of damages sufficient to restore the claimants to their position before the breach, would be more appropriate. In this regard, it cited authorities including **Halsbury's Laws of England 4th Edition, Volume 42 paragraph 259** in support of the proposition that there are cases where the court

will not order specific performance as being inappropriate to deal with the circumstances, or incapable of being given effect to. Thus for example, where a joint tenant has fraudulently purported to sell property as if it were in his sole ownership, specific performance will not be ordered. Indeed, where a vendor cannot make good title, the remedy is unavailable. In the case of **Watson v Burton** [1956] 3 All ER 929, specific performance at the instance of a vendor was refused and rescission ordered where the difference between the area of the property contracted for and what was in fact being conveyed was a "substantial" 1,560 square yards or about 40% less than bargained for. **Faruqi v English Real Estates** [1979] W.L.R. 963 was cited as being authority for the proposition that where there is a *defect in the title known to the vendor*, specific performance will not be ordered against the purchaser. I am struck by a submission of the claimants in regard to this case.

12. The claimants in the instant matter, in support of the proposition that specific performance should not be ordered but rather rescission, point to the dicta of Walton J in **Faruqi** referenced above. The learned judge stated:

> ".....in the present case *there is no attempt whatsoever, either in the special conditions or in the general conditions, at saying that there is a particular difficulty and snag with the title here*, namely, that the whole of the property is subject to something that cannot even be hinted at. That being so, it appears to me quite clear that this title is not such a one as equity would ever force upon an unwilling purchaser..... (Emphasis mine) ...So it seems to me that, consistent with the whole way in which equity has always approached these matters, this is not a contract of which the court would ever enforce specific performance.

It may be noted, en passant, that there may very well be a need to look at the words of the learned judge carefully for it may be argued that the core of the problem in that case was the *absence of any hint of any potential difficulty either in the general or special conditions*. The question may then legitimately be asked whether the mutual decision to include special conditions 4 and 5 as well as 15 was not an acknowledgment by the parties of the possibility and even

probability of a problem and, as suggested by the defendants' submissions, is the imperative of those provisions.

13. The claimants, in addition to **Faruqi**, cite a New Zealand case, **Landco Albany Ltd v Fu Hao Construction** 2005 NZCA 293, and a Canadian case **Semelhago v. Paramadevan** [1996] 2 SCR 415, as authority for the proposition that the old Common Law view of parcels of land being unique in character, which formed the basis for specific performance in land sale cases, was now giving way to a more pragmatic treatment of land as being similar to any other commodity, particular where it was shown that the land was being bought for investment. Accordingly, they submit that this is an appropriate case for the court to exercise its Equity jurisdiction and grant an order for rescission rather than its original prayer for specific performance. The submissions then proceed to examine the bases for rescission in the instant case.
14. The submissions recognize that the basis of the equitable doctrine of rescission is *restitutio in integrum*. This of course means that the parties should be put back into the position they were if the circumstance giving rise to the claim for rescission had never occurred. The claimants' starting point is correctly Halsbury's proposition that "Unless restitutio in integrum can substantially be made, the purchaser cannot exercise his right of rescission on the ground of the vendor's default". They then proceed to suggest that this is not an absolute principle and cite in support a text, "The Law of Rescission" by Sullivan, Elliot and Zakrzewski (Oxford University Press) which seeks to make a qualification in the following terms: "Restoring the parties to their original positions does not involve restoring them to those positions in all respects, but only 'as regards the rights and obligations created by contract, have returned to them any advantages transferred under the contract, and are indemnified for any detriments incurred pursuant to the contract". Further it was submitted that this means "the parties should be placed in positions sufficiently equivalent to their original positions that no injustice is suffered".

15. This submission devolves into a proposition that all that is required to facilitate rescission is the court achieving "practical justice". The claimants then cite **Halpern v Halpern**, [2007] EWCA 291 and the decision of Carnwath LJ in which he cited Lord Blackburn in **Erlanger v New Sombrero Phosphate Company** (1878) 3 App.Cas.1218, 1278, as being the fount of the doctrine of "practical justice". The submissions also call in aid the decision in **O'Sullivan v Management Agency and Music Limited** [1985] 1 QB 428 (see p 458 per Dunn LJ) referred to by Carnwath LJ. who also adopts Professor Treitel's view that "the essential point is that the representee should not be unduly enriched at the representor's expense; that the representor should not be unduly prejudiced is a "secondary consideration" which is only taken into account when some benefit has been received by the representee".

16. With respect to this principle of practical justice, the claimants make two (2) further submissions which they glean from the "The Law of Rescission" (op.cit) The first is that the fact that the representee has possessed, used or occupied the property does not, of itself, render rescission impossible. Another factor which must be considered by the court is whether the defendant has so irreversibly changed his position that to order rescission would be unjustifiably prejudicial. In **Lipkin Gorman (A Firm) v Karnaple**, Lord Goff of Chieveley stated that the defence of change of position was available to a person who has so changed his position that it would be inequitable to require him to make restitution in full or at all. In the instant case, the claimants say that the defendants would not be prejudiced as the premises are all in the same condition or better than when they were first transferred as "new roofs" have been put on. The defendants have not advanced a defence of "change of position" and this need not be considered further.

17. The claimants further submit that if the court is minded to grant an order for rescission, and it submits that it can and should, the effect would be that all properties transferred pursuant to the Agreement for Sale would be re-transferred to Rio Blanco (In Receivership). All monies paid under the

agreement would be refunded with compound interest. The claimants would need to be indemnified against *ANY* and *ALL* obligations undertaken during the period of possession. The claimants should also be allowed to recover compensatory damages for all expenses including losses incurred during the period in which they were in occupation. A purchaser under a failed contract is entitled to a refund of monies paid thereunder (**McDonald v Dennys Lascelles Ltd**. [1933] 48 CLR 457.

18. The claimants also submit that they are entitled to compound interest on any sums which the court may find are payable to them. They rely upon the case of **Sempra Metals Ltd. v TRC and Anor** [2007] 2 W.L.R. 354. It should be noted that the opinion of Lord Nicholls of Birkenhead on which reliance is placed refers to compound interest on "debts paid late".

19. The claimants further submit that in cases where the remedies of damages, specific performance and injunction are not adequate, the remedy of rescission is available to the court. **Attorney General v Blake** (House of Lords) 2001 1AC 268. In that case Lord Nicholls suggested that there were cases in which the defendant should retain no benefit from his breach. "When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach". This case was referred to in **Esso Petroleum v Niad Ltd** [2001] EWHC 458. In this latter case the defendant secured certain benefits of a marketing scheme devised by the claimant for its suppliers. It did not pass on the benefits to its customers and it was held that the claimant could take action to recover the benefit which Niad had wrongfully secured. On the basis of these cases the claimants submit that "this case is of an exceptional nature which allows for the application of the Blake case and further, damages is not an adequate remedy herein.

20. The claimants also allege that there has been unjust enrichment of NCB by virtue of the fact that there has been a total failure of consideration. They submit that support for this proposition is found in **Giedo Van Der Garde BV and Giedo Gisbertus Gerrit Van Der Garde v Force India Formula One team Limited (Formerly Spyker F1 Team Limited (England)** 2010 EWHC2373 (QBD) which establishes that the starting point of the analysis is that there must be *total failure*. However, "consideration" is based upon merely whether there has been a fulfillment of the promise undertaken in the contract. It is submitted that *"if performance fails, the inducement which brought about the payment is not fulfilled"*. (**Fibrosa Spolka Akevina v Fairbairn Lawson Combe Barbour Limited** 1943 AC 32 per Viscount Simon L.C. at page 48.) Out of this the claimants purport to derive the principle that the true test is not the benefit that is received by the claimant but the performance by the defendant. In this submission, the claimants find support in the dictum of Lord Goff of Chieveley who suggested that the test was "not whether the promise has received a specific benefit but rather whether the promisor has performed any part of the contractual duties in respect of which payment is due". It was accordingly submitted that total failure of consideration could be established in an appropriate case by asking whether the promisee had received *anything* of the promisor's promise. The claimants cite in support of these propositions paragraph 264 of the **Giedo** judgment, cited above. It is, perhaps, instructive that the claimants do not refer to paragraph 265 of the said judgment. There the learned judge Stadlen J, stated: "In **Whincup v Hughes**, Bovill C.J. held: "The general rule of law is that where a contract has been in part performed, no part of the money paid under such contract can be recovered back".. Stadlen J. also referred to the judgment of Montague Smith in the same case to the effect that " the rule of law that an action for money had and received can only be brought where there is a total failure of consideration with the exception of a few cases which, on being analysed hardly prove to be exceptions. ..... Moreover, it appears to me clear that the action for money received cannot lie where the contract has been partly performed on both sides....."

21. The claimants then purport to argue that while the general rule is as stated above, there are qualifications in principle. The first relates to the question of apportionment: that is whether it is possible to apportion the extent of fulfillment of the promise by the promisor; and secondly what is the nature of the benefit received by the promisee, in this case, the claimants, and whether they can be disregarded. In this regard, it is conceded that the titles in question are now in the names of the claimants, although they have not been provided with the duplicate certificates of title therefor. However, the lots represented thereby include one on which the entrance to the hotel and the sewage disposal facilities are located and which are thereby so critical that it renders the entire purchase of land "encumbered". This therefore is a "total failure of consideration". Citing the case of Rover International and the dictum of Kerr L.J. it was submitted that: "The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract". Thus, what must be proved is receipt of "any part of the benefit bargained for under the contract or purported contract". I understand the claimants to say the lack of duplicate certificates of title effectively sterilized the entire range of assets purchased in the two agreements and so they have not received the benefit of anything promised by the promisor, NCB. It is conceded that if the promise received the whole or part of the main benefit bargained for, there cannot be a total failure of consideration. Notwithstanding that concession, it is stated that where the benefit received is merely incidental to what was bargained for, there is a total failure of consideration. The claimants have not got what they bargained for by not getting the four duplicate certificates of title.
22. The claimants also submitted that an "unjust factor" which supports rescission is the claimants' mistake as to the availability of the four duplicate certificates of title.
23. As an alternative to rescission, the claimants claim that they are entitled to damages for

    a. the inability of the Claimants to fully utilize the property as an investment and/or being able to realise a proper profit has resulted in the Claimants suffering substantial loss and damage.

The evidence clearly shows that the Claimants were hampered in their use of the property and were unable to develop the land as intended for a Time Share project of which the Defendants were well aware from at the latest 1996. It is submitted that this warrants compensation as claimed in the Particulars of Claim and detailed in Volume 8A page 35 as $5,957,600,000.00; together with interest thereon in accordance with the Bank of Jamaica lending rates over the period; and

b. the failure of the Defendants to provide the titles in question resulted in the Claimants' loss of the use of the titles as security in respect for a loan secured through the BRC Company Limited to trade in steel and thus realise a profit which was detrimental to the business operations of the Claimants. It is therefore submitted that the Claimants are also entitled to compensation representing the lost opportunity in the sum of US$550,000.00 together with interest as this Honourable Court deems just.

24. While the above sets out the substantive legal issues upon which the claimants seek relief and the nature of the relief claimed, it should also be noted that the claimants asserted that the 3rd defendant, Mr. Aird, was the agent of the NCB. Several authorities are cited which seek to establish that while in security documentation the Receiver under the documentation is stated to be the agent of the mortgagor, there are cases where, for example, the mortgagee interferes with the Work of the Receiver or gives instructions, then and in such cases, the Receiver becomes the agent of the mortgagee. It was submitted that in the instant case, the relationship between the Receiver and the bank to which he was employed and whose instructions he agreed in evidence he had to follow, makes Aird the agent of the mortgagee bank.

25. It is argued further, that based upon the authority of cases such as **Bernard v The Attorney General of Jamaica** [2004] UKPC 47, the bank was vicariously liable for any breach of contract by the 3rd defendant. It followed that the bank was therefore responsible for any breach of the terms of the Agreement for Sale dated May 3, 1993. It was submitted that the "primary obligation placed on the Bank under the terms of the Agreement for Sale was for the Bank to deliver 53 Duplicate Certificates of Title free from encumbrances". "...in particular Special Condition 15 of the Agreement for Sale expressly provided that immediately after

registration of ownership on the parent title that **the Bank** was to take steps to furnish to the Claimants with the Duplicate Certificates of Title for the 4 lots of land detailed in Special Conditions 4 and 5 of the said Agreement for Sale". Further, they alleged breach of warranty as to the absence of any encumbrances other than easements and restrictive covenants endorsed on the title, that warranty having been given by the vendor as Receiver, must also be imputed to the 1st defendant in its capacity of principal for its agent, Mr. Aird. The principal (bank) must therefore be responsible for the breach, which the claimants aver is a continuing breach, by the Receiver/Vendor. Moreover, the claimants argue that all certificates of title the subject of the sale are "rendered encumbered" by reason of a defect of title in relation to the properties arising from the inchoate judgment of Mr. Justice James.

26. One other assertion made in the claimants' submissions is that even at the time of the advertisement there was *"misrepresentation"* as the property was advertised as "suitable for resort development". Regretfully, it is not clear why it is stated that this was a misrepresentation. There is no evidence that the property was "not suitable for resort development". If what is being claimed is that the valuation of Allison Pitter had suggested that lot 1 should be brought within the control of strata lot 441 because of its importance, this is a far cry from saying that the land was "not suitable for resort development".

27. The submissions for the defendants take issue with each and every proposition of law if not of facts asserted by the claimants' counsel. Those submissions are to be found in the defendants' Skeleton Opening Submissions, Skeleton Closing Submissions as to Damages and other Reliefs Claimed and the Defendants' Further Closing Submissions and the Defendants' Response to the Claimants' Authorities.

28. The first submission of the defendants is that on a true construction of the words in the provision dealing with "completion", a term not otherwise described in the agreement for sale of land, completion has, in fact, taken place.

29. It was submitted that in March 1993, that is some two (2) months prior to the entry into the agreement for sale of land, (May 3, 1993) the then attorneys-at-law for the 2nd defendant wrote to the 3rd defendant protesting that certain lots, those the subject of dispute in these proceedings, did not form part of the security for the loan made by the 1st defendant to the 3nd defendant. It was submitted that this provided the context in which the provision on completion and special conditions 3, 4 and 5 were included in the agreement in the terms they were.

30. According to the defendants' submissions, by letters dated November 3, 1993 and January 4, 1994, the claimants' attorneys-at-law wrote to the defendants attorney-at-law indicating that they knew where the duplicate certificates of title at issue were and that they would make application for new titles after requesting them from Robinson Phillips & Whitehorne, the then attorneys for the principals of Rio Blanco. This is put forward as the basis for the proposition that the claimants had waived their rights under the agreement to receive the duplicate certificates of title for the properties which are the subject of these proceedings.

31. The defendants submitted in their Skeleton Opening Submissions, that among the issues to be determined are the following:

    a. What is the meaning and effect of the completion clause in the Agreement for the Sale of Land?
    b. What was the reason for structuring the Completion clause and Special Conditions 3, 4, 5 in the manner adopted in the Agreement for Sale of Lands?
    c. In the circumstances of the case, could the Defendants or anyone, reasonably have applied for new Duplicate Certificates of Title after registration of the lots referred to in Special Conditions 4 and 5 of the Agreement for Sale of Land as is required by Special Condition 15 thereof, prior to the resolution of the issues in Claim No. C. L R 021 of 1994?
    d. Did the Defendants or any of them commit any breach of warranty in respect of the Agreements for Sale?
    e. In the event that there was the alleged or any breach of the provisions of the Agreement for Sale of Land, what is the remedy to which the Claimant is entitled?
    f. What order should be made regarding costs of the proceedings?

While it is not immediately clear that these are *the* issues which the court has to determine, they are questions which, in due course, do arise for consideration in one shape or another.

32. The defendants also submit that upon a proper construction of the terms of the agreement for the sale of land, there has not been a breach of any warranty by the defendants. It was submitted that the Agreement for Sale of Land was purposely structured in the way it was because the first claimant and the third defendant were conscious of the potential difficulties which were attendant upon the attempts to secure the duplicate certificates of title for the lots the subject of these proceedings.

33. It was conceded that the provision set out in special condition 15 had not been carried out by the defendant(s) but also submitted that given the circumstances revealed in the evidence in the case, there could be no basis for accepting the claimants' assertion that there had been a "wilful or wrongful refusal or neglect to deliver the duplicate certificates of title nor any breach in failing to provide good title. The evidence, according to the defendants' counsel, showed that at all material times the first defendant had striven to secure the duplicate certificates and had, in fact, organized the placing of the claimant's name on the original certificates of title at the office of the Registrar...

34. Counsel for the defendants further submitted that even if the Court were to find that there had been an actionable breach, the circumstances revealed by the evidence indicated that the rule in **Flureau v Thornhill** 2 Black. W. 1078 (XCVI ER 635) and **Bain v Fothergill** [1874] LR 7 HL 158 applied. It was submitted that the claim for special damages flies in the face of the rule adverted to and is therefore not sustainable. It was further submitted that with respect to the claim for damages for loss of bargain, in the absence of proof of wilful or wrongful refusal or neglect to deliver the duplicates and where there is no averment of fraud or deceit, this claim was also unsustainable.

35. The defendants further submit that the claim to a right to rescind the contract is misguided and is not supported by the authorities. In this regard the defendants submit that the guiding principles where there has been a breach of a simple contract for sale, is to be found in the decision of Dixon J. in the Australian case of **McDonald v Dennys Lascelles Ltd.** (1933) 48 C.L.R. 457, 476-477. It cites the dicta of the learned judge to the following effect:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged that have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."

The defendants also argue that this view of the law has been accepted as being correct in other cases by the House of Lords and the United Kingdom Court of Appeal in **Johnson v Agnew** [1980] A.C. 367, 396; **Damion Compania Naviera S.A** [1985 1 W.L.R. 435, 450; **Rover International Ltd and others v Cannon Film Sales Ltd**. [1989] 1 W.L.R 912, 932; and **Bank of Boston Connecticut v European Grain and Shipping Ltd.** [1989] 1 A.C. 1056, 1064, 1089.

36. The defendants submit that they have not, at any event, accepted the repudiation of the contract if that is what the claimants are now saying they have done and submit that in the circumstances the claimants have no right to rescind. But they argue that even if the claimants may have potentially acquired such a right, in the

circumstances of the case, the court in its equitable jurisdiction should exercise its discretion against the grant of such relief.

Analysis of the Claim

37. The point of departure in analysing how this matter should be considered is, I believe, to first determine whether there has, in fact, been a breach of the Agreement for Sale of Land. It is, of course, this allegation of breach which founds this action. In order to do this one must begin by looking at the provisions of that agreement and the submissions of the parties against that background. It will be recalled that the claimants' claim is that there has been:-

    1) a breach of the contract because.
        a. There has been a failure to deliver the duplicate certificates of title for the lots referenced in special conditions 4 and 5; and
        b. effectively this denies them the benefit contracted for, which is the free unencumbered property rights in all the property titles covered by the agreement for sale of land dated May 3, 1993;
    2) a breach of warranties given by the 3rd defendant that:-
        a. the properties sold to the Claimants would be free from encumbrances other that restrictive covenants and easements which are obvious; and
        b. it was the beneficial owner of the properties and had the right to sell the properties.

38. The claimants now say that in light of the ruling by James J in the Suit C.L. R – 021 of 1994, where he held that the subject properties were not part of the securities given to the 1st defendant by the Rio Blanco Development Co Ltd., it is clear that there has been a breach of the warranties. Thus they claim for specific performance and say further that now that remedy is no longer appropriate and instead, they are entitled to rescission of the contract. The submission is that the

first claimant entered into the agreement with the 3rd defendant under a "unilateral mistake".

39. The defendants, on the other hand, deny that there has been any breach as alleged or at all. They say that when one properly construes the provisions of the Agreement for Sale of Land, it is clear that "completion" has in fact, taken place within the meaning of the provision in the agreement. It is also argued that the contract was written in the way it was precisely because the parties to it, (that is the first claimant and the third defendant) were aware that there were potential difficulties in fulfilling the obligation to deliver the duplicate certificates of title for the lots covered by the special conditions (4) and (5). Further, that the delay is not, in all the circumstances, unreasonable.

40. In furtherance of the alternate claim for the relief of rescission, in paragraph 80 of the Claimants' submissions, they explore with the benefit of the text, **Law of Rescission** by O'Sullivan, Elliott and Zakrzewski, the effect of unilateral mistake and set out the principles upon which that remedy would be appropriately applicable. Thus the mistake must

    (a) not be one the risk of which has been specifically allocated by the contract. **William Syndall v Cambridgeshire County Council;** [1993] EWCA Civ 14;
    (b) concern a matter of real importance to the complainant in the context of the transaction;
    (c) concern a matter existing before or at the formation of the contract;
    (d) not simply be an error of judgment;
    (e) go to the subject matter or terms of the contract as opposed to its commercial consequences and effect.

41. The defendants also say that although special condition 15 has not been fulfilled, the claimants are registered on all the relevant properties as the legal owner and the circumstances in which the duplicate certificates have not been provided

make it clear that there has been no "wilful and/or wrongful refusal to deliver the duplicate certificates nor indeed any neglect on the part of the defendants.

42. With respect to the proposition that the agreements were drafted in the way they were because of the common understanding of the parties, (a proposition implicitly denied by the first claimant) defendants' counsel referred to two letters dated March 4, 1993 from Robinson Phillips & Whitehorne, the then attorneys-at-law for the 2nd defendant. Those letters which are in Exhibit 2 at pages 65 and 66 indicated that Rio Blanco was disputing the suggestion that certain lots were in fact part of the security held by NCB by way of mortgage and/or the debenture over its fixed and floating assets.. The evidence which is not disputed, is that the premises had been put up for sale by public auction under powers of sale contained in the security documentation held by the first defendant. However, on the occasion of the auction, February 11, 1993, while the first claimant was the highest bidder, its bid did not reach the reserve price and so the sale was not effected. Subsequently, Mr. Richard Lake, the managing director of the first claimant, wrote to the bank on February 26, 1993 and indicated the first claimant's continuing interest in purchasing the property. This letter was followed by letters of April 2 and April 5, 1993 setting out a revised offer for the property which was accepted. I accept that discussions between representatives of the bank on the one hand, and the claimant through its managing director and his then attorney at law. Mr. Arthur Hamilton in the law firm Myers, Fletcher and Gordon took place and a decision was taken to enter into an agreement for sale of land pursuant to which the Receiver (the third defendant) undertook to sell the property for $61,500,000.00 to the first claimant. The agreement was executed on May 3, 1993 and on the same day the same parties entered into an agreement for Sale of Chattels with a stipulated purchase price of $3,500,000.00.

43. I pause here to note that although the first (of three) witness statements by Mr. Lake for the first claimant speaks of the Receiver, Aird, as representing the second defendant (Rio Blanco Development Co. Ltd, In Receivership), it was the submission of the claimants' counsel that at all material times, the receiver acted

as an agent of NCB who had put the second defendant into receivership. It was urged here by the claimants that despite the wording of the debenture, the actions of the Receiver were always done at the behest of the bank to which he was employed, and so he was the bank's agent and it was vicariously responsible for his actions. This is at first blush an attractive argument but I believe it needs some further consideration before one can come to the conclusion to which it is invited by the claimants' counsel.

44. I wish to note here, *en passant,* a provision in the Agreement for the Sale of Chattels and Property to which I adverted briefly above in making the observation that the Sale of Lands Agreement had been stated to be contingent upon the Sale of Chattels Agreement. Special condition (1) of the Agreement for the Sale of Chattels is in the following terms:

> "This Agreement for Sale is specifically contingent upon the completion of a Memorandum of Sale dated contemporaneously herewith and made between the parties hereto in respect of all those parcels of land more particularly described in the Schedule to the Memorandum of Sale aforesaid and the one agreement shall not be completed without the other"

45. In light of the contrasting submissions on breach from the parties, it is now necessary, as a first step, to consider the Agreement for Sale of Land and, in particular, specific provisions of the said agreement. As noted, the claimants in their pleadings in the further amended particulars of claim, have alleged breaches of particular provisions to wit: special provisions 3, 4, 5, 12, 13, and 15. We need to examine these provisions to see what they say and to determine whether any evidence has been led in relation to each of them or whether any inferences may be drawn from the evidence in relation to the provisions.

46. I start by considering special condition (3) the terms of which I have already set out in full above. I am prepared to hold that pursuant to that provision the vendor undertook the following obligations.

a. Subject to special conditions 4 and 5, the vendor covenanted and undertook to effect a "transfer of ownership of the property".

b. The vendor was to provide duplicate certificates of title for the properties other than those mentioned in special conditions (4) and (5); and then

c. To provide the Purchaser's attorney-at-law with confirmation from the Registrar of Titles of her agreement to dispense with the production of the duplicate certificates of title referred to in special conditions (4) and (5); and

d. to register (pursuant to section 81 of the Registration of Titles Act), a transfer of the parcels of land comprised in the certificates of title aforesaid in favour of the purchaser by endorsement on the Original Certificates of Title for the respective parcels of land (in special conditions (4) and (5). Upon the occurrence of (b), (c) and (d) the transfer would have been completed.

The Vendor was then to serve a Notice of readiness to complete which would require the purchaser to make the complete payment due under the agreement within seven (7) days. As I understand the evidence, each of these obligations was in fact carried out leading to the purchaser paying over the purchase price. It cannot be said that there has been a breach of this provision.

What the agreement said about "Completion" is also of relevance in this discussion and it may be useful at this stage to set out the terms of the provision dealing with 'Completion". That provision states the following.

> On or before the expiration of seven (7) days from the Vendor providing to the Purchaser the notice referred to in Special Condition 3 hereof on payment of all outstanding amounts payable by the Purchaser hereunder in exchange for proof of the ownership by the Purchaser of the parcels of land comprised in the Certificates of Title referred to in Special conditions 4 and 5 and the duplicate certificates of title for the remaining lands part of the property together with instruments of transfer of land capable of registration at the Office of Titles effecting a change in the ownership of these lands part of the

property and each part thereof in favour of the Purchaser or its nominee(s).

It would seem that "Completion" would therefore have taken place once the events stipulated in the provision had occurred. This meant that a) the notice in special condition 3 had to be served; b) payment made by the purchaser of all outstanding amounts payable by the purchaser in exchange for c) provide proof of ownership of lands comprised in the titles referred to in special conditions (4) and (5); and d) duplicate certificates of title and registrable instruments of transfer in relation to the remaining titles. The evidence which the court accepts in this regard, is that all these conditions were satisfied and there seems to be no dispute thereto.

47. Special conditions (4) and (5), also already set out above, then listed the lots, the production of duplicate certificates of title for which was *not required* to trigger the "Notice of Readiness to Complete" in special condition (3). In particular, special condition (4) entitled the purchaser to withhold the sum of $950,000.00 in the event that the property at lot 41 was not registered in the purchaser's name within forty-five (45) days of the date of execution of the agreement. .Special condition 5 also dealt with the obligation on the part of the vendor to recover and deliver possession to the purchaser, of a cottage which was occupied. These special conditions also contemplated circumstances in which the vendor was unable to "transfer" the titles subject of those special conditions and gave the purchaser the right to certain abatements and also a right to give notice of cancellation in the event the transfers were not effected within the time frame set out in special condition (5). However, it was also provided that if the purchaser failed to serve the notice of cancellation, the vendor would be entitled to require the purchaser to pay the price due less the agreed market values of the lots in question. Those market values were stated to be for Lot 41, $950,000.00; lot 1, $2,000,000.00; Lot 51, for $1,200,000.00 and Lot 52, the sum of $950,000.00. There is no averment that the purchaser served any such notice of cancellation.

48. By special condition 12, "The vendor represents and warrants that it is the beneficial owner of the property and has a right to sell the property". This is one of the warranties which the claimants claim has been breached by the vendor. The question which may well be asked here is: "Who is the VENDOR"? It will be recalled that the Agreement for Sale of Lands was, *ex facie*, between the first claimant as purchaser and the 3rd defendant, in his capacity as Receiver of the 2nd defendant, vendor. It seems to me that a warranty of "beneficial ownership" could only be given by the 2nd defendant and NOT by the 1st defendant. Through the Receiver, the 2nd defendant retained the legal and beneficial interest in the lands, albeit subject to the claims of its creditor under the mortgage and/or the debenture. Neither the existence of the mortgage nor the debenture, nor powers of sale contained therein could divest the 2nd defendant of its beneficial interest. This is borne out by the fact that it is trite law that in the event that the properties were sold for more than the indebtedness of the debtor, the mortgagee would be obliged to account to the debtor for the excess. If that reasoning is correct, then it must also be true that it could only be the Receiver, as representative of the 2nd defendant that would be able to warrant that it had a right to sell the subject properties. The 1st defendant is NOT the vendor. The implication is clear that there could not have been any breach of special condition 12 by the 1st defendant. Further, according to James J in his inchoate judgment, the properties in special conditions (4) and (5) did not form part of NCB's security and, therefore, by logical deduction, remained the property of the 2nd defendant.

49. Special condition 13 is a long provision but it is necessary to set it out here as well:

> (13) It is understood and agreed between the parties that:-
>
> (a) The purchase is made and the property will be conveyed subject to and with the benefits of the things specified in the Agreement for Sale of Chattels and Property.
>
> (b) (i) All profits and receipts, and losses and expenses earned or incurred prior and up to the date of possession in relation to the property shall belong to the vendor; and

(ii) All profits and receipts and losses, and expenses earned or incurred after the date of possession shall belong to the Purchaser.

(c) The Vendor hereby specifically undertakes and agrees to indemnify and hold the Purchaser harmless from and against all claims, demands, actions and/or proceedings (including costs and Attorney's costs on a full indemnity basis) made or brought by any person against the Purchaser in respect of:-

(i) All and any such losses and expenses referred to in Special Condition 13(b) (i);

(ii) Any damage or injury whether to person or property suffered by any person in the use of the property agreed to be sold and/or the provision of any service offered by the Vendor on or in the said property and/or by reason of the operation of the business of the Vendor on the said property where such damage and/or injury occurred prior to the date of possession and notwithstanding that such damage or injury is made manifest after the date of possession;

(iii) The purchase by the Purchaser of the property pursuant to this Agreement for Sale and the Chattels and other property pursuant to the Agreement for Sale of Chattels and Property and the Vendor's representation of its right to sell the Property the subject of both Agreements.

(d) Subject to Special Condition (13) (c) all liabilities incurred subsequent to possession by the Purchaser shall be for the Purchaser shall be for the Purchaser's account and the Purchaser shall indemnify the Vendor against same.

(e) If Purchaser is granted possession prior to completion, the Purchaser shall be obliged to maintain the property the subject of this Agreement in the same condition as it is at the date of possession until completion.

(f) (i) If the Purchaser is granted possession prior to completion, the Purchaser shall, in respect of the period commencing on the date of possession and expiring on completion of this Agreement, account to the Vendor for ten **per cent (10%)** of all revenues from time to time actually but whenever collected by the Purchaser from or in respect of use of the property and without limitation from paying quests, invitees and licensees making use of the facilities on the property and the Purchaser shall supply the Vendor with such documentary proof as may reasonably be requested and permit the Vendor to inspect the Purchaser's Books of Account in relation to such revenues for the purpose of ascertaining the correctness of any monies paid to the Vendor by the Purchaser pursuant to this Special Condition.

(iii) For the avoidance of all doubt and provided that the Purchaser has complied with the provisions of Special Condition 13 (f) (i) the Purchaser shall not be required prior to completion to pay nor shall the Vendor demand interest on the balance purchase price in the event that possession of the property is delivered to the Purchaser prior to completion hereunder.

50. With respect to this special condition, it seems clear that there are very limited warranties, if any, given hereunder. In particular, there is an undertaking given in 13 (c) to indemnify the purchaser in respect losses or expenses occurring up to the time that the purchaser took possession; indemnification for damage or injury whether to person or property suffered by any person in the use of the property agreed to be sold and/or the provision of any <u>service offered by the Vendor</u> (*My emphasis*) on or in the said property and/or by reason of the operation of the business of the Vendor on the said property where such damage and/or injury occurred prior to the date of possession". It would seem to be clear that it was the contemplation of the parties to the agreements that the vendor was in fact the "operator" of the hotel facility which was Rio Blanco. It was the only person offering services at the property in respect of which liability for damage to person or property could have arisen. Thus, the contract provided for indemnification of the purchaser against loss or damage caused by the "offering of services" by the

vendor. Indeed, as observed by Mr. Lake in his testimony, he noted a difference between the person offering the property for sale in the advertisement of the auction and the vendor in the agreement for sale which he signed. Incidentally, it is worth mentioning here for reasons to which I will advert later, that the Agreement for Sale of Land specifically provided in this special condition 13 that the agreement is made "subject to and with the benefits of the things specified in the agreement for the sale of chattels and property". It should also be recognized that the Agreement for the Sale of Chattels and Property has a similar provision at special condition (1) of that agreement (also set out above at paragraph 44) which makes that agreement contingent upon the sale of lands agreement. It would seem that in those circumstances, they stand or fall together, an issue to which I return later.

51. It would seem to me that in all the circumstances it is not an unreasonable inference to be drawn that both parties would agree to the inclusion of special conditions 4, 5, and 15 to facilitate "completion" despite the fact that duplicate certificates of title might not be immediately forthcoming in circumstances where:-

    a. the mortgagee had appointed a Receiver pursuant to its security interests; and

    b. that Receiver was selling a major asset;

    c. the purchaser was a corporation whose principal had been a businessman for many years and indeed sat on the board of one of the bank's subsidiaries;

    d. the time between the date of the unsuccessful auction and the execution of the agreements for sale by the parties hereto by private treaty was less than three (3) months and there was much pressure to sell; and

    e. Each party had legal representation.

This would explain the provision allowing registration of the transfer on the original certificates of title. Mr. Lake's evidence about his "insistence" (his word) upon particularly the inclusion of special provisions in the agreement to address the issue of "lost titles" seems to support drawing this inference.

52. Given that the claimants have submitted that the first claimant entered into the Agreement for the Sale of Lands under a "unilateral mistake", the issue of what the first claimant, through its managing director, knew and when he knew it, is central to the claims being made herein. Much of that evidence was given by Mr. Lake and it is as well to consider some of that evidence here.

53. The evidence of Mr. Lake in this regard is not that he was told by anyone, least of all Mr. Ivan (Mitch) Stephenson with whom he did have negotiations, that the titles were "lost". At paragraph 11 of his third witness statement, he avers that after putting his offer to purchase to the bank on February 26, 1993, he met with Mr. Stephenson who "advised that there were a few titles that they could not locate".. However, at paragraph 15 of his first witness statement made in 2009 and filed June 2, 2011, he said that the National Commercial Bank "at no time advised the claimant nor the claimant's attorneys-at-law, *verbally or in writing*, that they did not have the Duplicate certificates of Title registered at Volume 1230 Folios 801, 811 and 812, Volume 1220 Folio 921 and Volume 1229 Folio 161 and were unable to forward same to the claimant under the Agreement for Sale". (I note without elaborating on this aspect that in the circumstances of a major property transfer involving several titles, I find it curious that the purchaser's attorneys did not insist upon having sight of the duplicate certificates, but that may be an issue for somewhere else). In paragraph 20 of his first witness statement, Mr. Lake said that it was in July 1999 when "it was discovered that some duplicate certificate of title.....were unavailable". However, in paragraph 16 of his further witness statement, he said the following which is undoubtedly inconsistent. ".....the Claimants' attorneys-at-law and I were aware of the fact (*prior to the execution of the sale agreement)* that there were lost titles, *hence my insistence on the sale agreement including special*

conditions to address this difficulty....." Mr. Lake also confirmed that "the agreement submitted for my signature met all my instructions".

54. Based upon an examination of the provisions allegedly breached by the defendants, I am unable to say that there has been any breach of those provisions or any of them by "the vendor". *None of these provisions concern any warranty or undertaking to provide duplicate certificates of title in respect of lots 1, 41, 51 or 52. I so hold.*

55. I turn now to consider special condition 15 the terms of which had been already been set out but for ease of reference are set out again below.

> "Immediately after registration of the ownership by the Purchaser of the lands comprised in the Certificates of Titles referred to in Special Condition (4) and (5) the Vendor shall at its expense apply for new Certificates of titles to be issued for these lands which Certificates of Titles shall be duly registered in the Purchaser's name".

56. The words and meaning of this clause are clear and unambiguous. They impose an obligation on the Vendor, *NOT the Bank, as the claimants assert*, at its expense, to apply for duplicate certificates "immediately after registration of the ownership of the lands comprised in the certificates of title referred to in special conditions (4) and (5)". It is not in dispute that the claimants have been registered on the original certificates of title for the relevant lots at the office of the Registrar of Titles from in or around June or July 1993. However, duplicate certificates for the lots in question have yet to be provided by the vendor. It is this lack of duplicate certificates of title for the lands referenced in special conditions (4) and (6), of which the claimants primarily complain.

57. The claimants aver that, in all the circumstances, there has been a "wilful and wrongful refusal or neglect" to deliver the said duplicate certificates. The claimants further submit that this is not just a breach but a repudiation of the agreement by the defendants which it is entitled to accept and thereafter to treat the agreement as at an end. The defendants, on the other hand, submitted that

"the circumstances in which special condition 15 of the Agreement for Sale of Land has not been performed are clear and ought not to give rise to a finding that there has been the alleged or any breach, whether by way of wilful or wrongful refusal or neglect to deliver the duplicate certificates of title, or by way of any alleged failure to make good title".

58. The defendants also argue that far from being a repudiatory breach, the clear inference to be drawn from the inclusion of special conditions (4), (5) and (15), was that there was an understanding by the parties to the Agreement for Sale of Land, based upon discussions, that the relevant duplicate certificates would not be immediately available. The first claimant denies that there was any such understanding. Rather, it asserted that the special condition (15) "is not capable of accommodating an argument that the Claimants had been notified of any dispute in relation thereto" and was "only explicable" on the basis that "the defendants had asserted that the titles were lost". It is clear however, that special condition (15) contemplated that an application would be made for those duplicates, "immediately after" the registration on the original certificates. .

59. In addition to denying that there had been a breach, the defendants also have sought to plead in the Further Amended Defence that the first claimant, through "its attorneys-at-law, Messrs Myers, Fletcher" and Gordon, had "waived" the performance of the obligation imposed by special condition (15) and had itself undertaken to make application for the aforesaid duplicates of title. This was based upon the proposition that the said law firm through one of its then partners, Mr. Arthur Hamilton had before the signing of the agreement for sale, been acting for the first claimant. It was pointed out that by letters dated November 3, 1993 and January 4, 1994, Mr. Donovan Jackson, then an associate at the same law firm, had written to the first defendant through its attorney, Ms. Sharon Evans recommending alternative approaches to be adopted in seeking to secure replacements for the missing duplicate certificates for the claimant. These are cited by the defendants as evidence that the law firm was, in fact, representing the claimant. However, Mr. Donovan Jackson in the course of his oral evidence

confirmed that he was acting on behalf of the bank and on its instructions. I accept that evidence as it makes sense in the context of the mass of documentary evidence. However, I believe that it must be noted that it was singularly unfortunate that in a transaction of this size, attorneys from the same law firm were representing the different and opposing parties.

60. Notwithstanding this context, I do, however, accept the evidence of Mr. Jackson that he was acting on behalf of the bank and on its instructions. Unfortunately it led to questions being raised about possible conflict between Mr. Jackson's Witness Statement in which he noted that his involvement had been through working with Mr. Hamilton and his evidence in oral testimony disavowing that part of his witness statement. This has implications for the issue of whether and when the claimants through their attorneys may have been aware that there could be difficulties with the duplicate certificates.

61. In his January 4, 1994 letter referred to above, Mr. Jackson had suggested that either an application for new titles to be issued should be made, or an application for an Order from the court compelling the attorneys for the principals of the second defendant to surrender the duplicates. According to the documents agreed between the parties herein, there was a prayer for relief by way of an order from the Court in the Counterclaim by the bank and the Receiver, defendants in Suit No C.L 021 of 1994. In that counterclaim the defendants therein sought a declaration that the Receiver was entitled to have the duplicate certificates, and an order that they be handed over. (See Exhibit 2 page 329) The judge did not make such an order. Save for this attempt, the application has not been made and it appears that this may amount to a breach of an obligation undertaken by the vendor, the 3rd defendant. Certainly, if the meaning of the special condition was that the claimant was to be provided with the duplicate certificates, although no time was given, it would be possible to infer that this should be done in a reasonable time. The fact that some twenty years after the obligation arose this has not been done, would suggest a breach of this term of the agreement.

Has there been repudiation of the contract or waiver of the breach?

62. The questions are whether there has been repudiation of the contract and whether the claimant has waived any breach of any obligation. The place to start must be a recognition that the agreement was between the third defendant (the Receiver of the second defendant) as vendor, and the first claimant as purchaser. It is axiomatic that in order to find that there has been a repudiation of the agreement, the acts being called into question must be the acts of either of these parties. In its submissions, the claimants say that they are "entitled to accept the defendants repudiatory breach" and treat the agreement for sale of land as rescinded as at the trial of this action. *(It is not clear whether defendant's or defendants' is intended in the submissions as the apostrophe is missing)* In any event, I understand the submission to mean that the nature of the breach of special condition 15 alleged by the claimants is such that it goes to the root of the agreement, thus entitling the first claimant to accept the breach and treat the contract as ended. This argument is buttressed by the further proposition that the fact that the defendant(s) had been unable to deliver the duplicate certificates of title some seventeen (17) years after the signing of the agreement must amount to repudiation. This formulation, however, seems to equate "inability" with "refusal".

63. On the other hand, the submissions for the defendants contend that in order for there to be a repudiatory breach, there must be an "absolute refusal to go on which is necessary to arrive at a conclusion that an agreement which is a solemn written document like this, has been entirely repudiated": per Lord Harman LJ in **Sweet & Maxwell Ltd v Universal News Services Ltd.** [1964] 2 Q.B 699, 729. In the response to the defendants' authorities, the claimants' counsel does not dissent from this proposition.

64. In discussing the concept of repudiation, Lord Woolf in **Vaswani v Italian Motors** [1996] 1 WLR 279 (Privy Council) had this to say: "

> The position is accurately set out by Lord Wilberforce **in Woodar Investment Development Ltd v Wimpey Construction UK Ltd**, [1980] 1 WLR 277; [1980] 1All ER 571, where he also warned that: 'Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations'.
>
> While therefore here the request for the payment of an excessive price would not in itself amount to a repudiation, if the conduct relied on went beyond the assertion of a genuinely held view of the effect of the contract, the conduct could amount to a repudiation. *This is the position if the conduct is inconsistent with the continuance of the contract*

65. In a case decided very recently, **Telford Homes (Creekside) Ltd v Ampurius NU Homes Holdings Ltd** [2013] EWCA Civ 577, [2013] WLR (D) 202; the Court of Appeal confirmed that an actual breach of contract that could potentially amount to a repudiatory breach may be capable of remedy before the innocent party purports to terminate the contract, meaning that the breach is not repudiatory and that the innocent party's right to terminate the contract does not arise. *In such a case, the actions of the party in breach between the date the breach occurred and the date the innocent party purported to terminate the contract will be taken into account by the court*.

66. In **Telford Homes**, the Court of Appeal, in applying the dicta of Diplock LJ in **Hong Kong Fir Shipping v Kawasaki Kisen Kaisha** [1962] 2 QB 26, held that previous cases had used as the relevant test whether the breach had deprived the injured party of "*substantially the whole benefit*" of the contract, which is the same test as that applicable to frustration. The court also referred to other cases where the question posed by the court was whether the breach deprived the "*injured party of a substantial part of the benefit to which he is entitled under the contract*". On the face of it there is a tension between whether the breach deprives the innocent party of "*substantially the whole benefit*" or "*a substantial part of the benefit*". However, the Court of Appeal referred to the dicta of Lord Wilberforce in **Federal Commerce & Navigation Co Ltd v Molena Alpha Inc**

(The Nanfri) [1979] AC 757 where he held that the difference between the two tests does not reflect a divergence of principle, but represents "*applications to different contracts, of the common principle that, to amount to repudiation a breach, must go to the root of the contract*".

67. It seems to me that whatever may be said about the success or otherwise of the efforts to secure the duplicate certificates of title for the subject properties, there has not been an *"absolute refusal" to perform a condition*, given the efforts at securing duplicate certificates, albeit, efforts led by the first defendant. According to this case, the conduct of a defendant is to be considered in determining whether there has been repudiation. The evidence in this case is that there have been continuing efforts to see how the duplicate certificates of title could be secured for the claimants. This must negate a finding of "absolute refusal". Having come to the view that there has not been an absolute refusal, it would seem to settle the question of whether there has been repudiation by the vendor and I hold there has not been such a refusal. Further, it is not at all clear that the alleged breach would be considered to be of such a nature as to go to the root of the contract using whichever of the formulations above, that is, "substantially the whole benefit" or "a substantial part of the benefit".

68. At the same time, I find that there has not been a waiver by the claimant of the breach by the defendants of special condition 15. Despite the unfortunate scenario of two attorneys at the same firm acting for opposing parties without any obvious construction of Chinese Walls to insulate each from the other, I accept that the instructions received by Mr. Jackson were intended to have him act on behalf of the bank and/or the Receiver in securing the duplicate certificates. His conduct ought not therefore to be interpreted as that of the claimants.

69. If, indeed, there is a breach of special condition 15, the question arises what is the relief to which the claimants are entitled. It will be recalled that the claimants assert "at the core of the case" is the fact that the defendant vendor breached the warranty that the only encumbrances are the easements and restrictive

covenants endorsed on the titles and further that it was the beneficial owner of the properties and had a right to sell the properties. The claimant says that the breach arises because all the other titles are "rendered encumbered" by reason of the "defect in title of the subject lots" consequent upon the partial judgment of James J in the **Rio Blanco v NCB Suit** C.L. R – 021 of 1994. I do not accept the view expressed in the claimants' submission that the failure to deliver the duplicate certificates for the subject lots means that all the other titles of the property are "encumbered". No authority is cited for that proposition. In fact, it is not at all clear that what we are dealing with is properly a "defect in title" or that not providing the duplicates results in "defects in title".

70. In this regard, it is to be noted that in his inchoate judgment in Suit C.L. R 021 of 1994, his lordship James J. specifically found that the claimants were bona fide purchasers for value without notice and accordingly had good title. It is difficult to differ from that proposition of law and fact found by the learned judge. In the circumstances where his lordship had arrived at this considered view of the claimants' position, although the claimants were not parties to that suit, I find that it would be wrong to characterize the lack of the duplicate certificate as being a defect in title or an encumbrance on the remaining forty-nine (49) titles

The Remedy of Rescission

71. It will be recalled that the claimants had originally sought an order for specific performance of the agreement for sale. Their submissions now are that this is a case where it would not be an adequate or appropriate remedy. For example, the claimants say that the authorities suggest that specific performance will not be ordered where the defendant "cannot give good title". They submit that since the defendant has not been able to provide "good title" after all this extended period and in light of the judgment of James J, the appropriate remedy is rescission. They say that the inability to remedy the breach even after a notice to specifically perform the contract is a repudiation of the agreement, entitling them

to rescind. They cite **Halsbury's** 4th Edition, Volume 42 and paragraphs 249 where it is stated:

> In the absence of any express stipulation as to title, a contract for the sale of land implies an agreement on the part of the vendor to make a good, that is, marketable title to the property sold. He discharges this obligation when he shows that he, or some other person or persons whose concurrence he can require, can convey to the purchaser the whole legal and equitable interest in the land sold.
>
> In general, it is sufficient if the vendor shows that he has a good title by the time fixed for completion, but, if it appears before that time that he has not a title, and is not in a position to obtain one, the purchaser may repudiate the contract.

72. It seems to me that the cited passage speaks of the possibility of repudiation where *before completion* it becomes apparent that the vendor does not have good title and is not in a position to obtain one. The provision which defines "completion" in this agreement is discussed above and it is pellucid that completion had already taken place by the time the issues of the duplicate certificates arose. As noted above, I do not accept that based upon any breach of special condition 15, a right to repudiate arises and that is dealt with in earlier paragraphs.
73. Rescission involves "unwinding" a contract so that the parties are placed in the position they would have been in had the contract not been made. In the context of a purchase agreement, this means the seller returning the consideration and the property being returned to the seller. As noted at paragraph 14 above, this is said in the claimants' submissions to be subject to the qualification that "the parties should be placed in positions sufficiently equivalent to their original positions that no injustice is suffered". In other words, the court will order rescission where in doing so it can achieve "practical justice". (See the cases **Halpern, Erlanger** and **O'Sullivan** cited in the claimants' submissions and referred to above at paragraph 15 hereof)
74. In addition to a claim to rescind on the basis of the defendants' repudiatory breach, the claimants, as noted, have also advanced the submission that the agreement for sale of land was entered into under a unilateral mistake and that

this fact also entitles the claimants to rescind. They cited in support the judgment of Andrew Smith J in **Huyton S.A. v. Distribuidora Internacional de Productos Agricolos S.A de C.V.,** [2002] EWHC 2088. That judgment is said to provide support for the submission that the claimants are entitled to rescind the contract on the basis of unilateral mistake induced by the non-disclosure and the acts and omissions of the defendants. The claimants also submitted that where a party entered into a contract by mistake induced by the false representation or non-disclosure of a relevant fact, this amounts to an "unjust factor" which warrants the reversal of the unjust enrichment. The "unjust factor" which triggers the restitutionary rescission is the mistake where induced by misrepresentation or where there was a duty of disclosure. The defendants submit that the claimants have no right to rescind for unilateral mistake. In fact, as I emphasize below, there is certainly no pleading that there was misrepresentation which induced the first claimant to enter into the contract and, definitely, no pleading of fraud which must be specifically pleaded and proven.

75. The recent decision of **Aikens J** in **Statoil ASA v Louis Dreyfus Energy Services LP** [2008] EWHC 2257 (Comm) makes clear that a party can only avoid a contract on the ground of a unilateral mistake, which mistake is known to the other party, where that mistake is *as to the terms of the contract*. Where one party has made a mistake as to a fact or state of affairs which forms the basis upon which the terms of the contract were agreed, *but that assumption does not become a part of the contract, the contract is binding even if the other party knew of the mistake and decided to keep quiet about it*.

76. The case was analyzed in an article, "**Unilateral Mistakes in English Courts: Re-asserting the traditional approach**" by John Cartwright, Professor of the Law of Contract University of Oxford and Professor of Anglo American law at the University of Leiden, published in the Singapore Journal of Legal Studies (2006) pages 226 -234. The facts were that in a claim for demurrage, the claimant mistakenly calculated the date as being eleven (11) days less than it should have been. The defendant was aware of the mistake and the claimant's representative admitted that had he paid sufficient attention to the details in the

documentation provided, he would have realized his mistake. It was also the evidence that the representative for the defendant *knew of the claimant representative's mistake, discussed it with his colleagues but it was decided that the mistake should not be brought to the attention of the claimant.* The mistake was not only unilateral but was known to the other party who failed to disclose it. The claimant argued that the agreement was not binding as being either void or voidable. The judge, Aikens J. held that the claimant could not avoid the contract. He held that there was no jurisdiction to avoid a contract in these circumstances at common law and that there was no equitable jurisdiction to avoid a contract for a mistake of this kind.

77. In so deciding the learned judge applied the reasoning of the well-known case **Smith v Hughes**] 1871] L.R. Q.B. 597. He said:

> 87. ... The general rule at common law is that if one party has made a mistake *as to the terms of the contract* and that mistake is known to the other party, then the contract is not binding. The reasoning is that although the parties appear, objectively, to have agreed terms, it is clear that they are not in agreement. Therefore the normal rule of looking only at the objective agreement of the parties is displaced and the court admits evidence to show what each side subjectively intended to agree by way of terms. If it is clear from such evidence that there was not consensus, then there can be no contract, because the parties have not truly agreed on the terms. Some of the cases talk of such a contract being "void", but I think it is clearer to say that there was never a contract at all.
>
> 88. However, if one party has made a mistake *about a fact on which he bases his decision to enter into the contract*, (My emphasis) but that fact does not form a term of the contract itself, then, even if the other party knows that the first is mistaken as to this fact, the contract will be binding. That was the effect of the decision of the Court of Queen's Bench, on appeal from the County Court, in ***Smith v. Hughes*** (1871) L.R. 6 Q.B. 597; see particularly at 603 per Cockburn C.J., and 607 per Blackburn J. The correctness of that decision and the analysis in it has (sic) never been doubted.

78. In the instant case, based upon the decision in **Statoil** the mistake which is alleged here is that duplicate certificates of title for the subject lots would be

available. There is no term of the Agreement for Sale of Land to this effect. The learned professor in the article cited above also stated, and I adopt it as correct:

> The second argument put by counsel for Statoil was that, even if the mistake was not sufficient to render the contract void at common law, it was still sufficient to enable the court in its equitable discretion to rescind the contract. The argument was that "if there is a unilateral mistake by one party as to a fundamental assumption he has made, which mistake is known to the other party as being the basis for concluding the contract then, even if that assumption does not become a term of the contract, this unilateral mistake will give rise to a jurisdiction of the court, in equity, to grant rescission of the contract." Aikens J. gave this argument short shrift. In so far as it appeared to have the support of statements of Andrew Smith J. in the earlier case of **Huyton S.A. v. Distribuidora Internacional de Productos Agricolos S.A.**, those statements were wrong, and there was no authority for the existence of an equitable jurisdiction in this context—and the approach taken by the Court of Appeal in **Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd. ("The Great Peace")** [2002] EWCA (Civ) 1407, indicated that there should be no such jurisdiction.

79. In addition to the above, I also adopt the reasoning of the learned Professor Cartwright as expressed in the following part of his article.

> ....., a major plank in the reasoning of Aikens J. in rejecting any general equitable jurisdiction for unilateral mistakes of fact was the approach taken by the Court of Appeal in **The Great Peace**. That case disapproved expressly the decision in **Solle** not only on the basis that Denning L.J.'s assertion that there was an equitable jurisdiction to rescind a contract for a common fundamental mistake of fact was contrary to authority (and, in particular, contrary to the decision of the House of Lords in *Bell*), but also that there *should* be no such jurisdiction because it undermined the policy of the common law which is reluctant to allow mistakes to invalidate a contract. As Aikens J. said, "If there is no such jurisdiction in the case of a common mistake, I fear I am unable to see how, in logic, one can devise a rationale for an equitable jurisdiction in the case of a unilateral mistake, at least where there has been no misrepresentation by the other party".

80. It is instructive that even on the claimants' submissions, rescission does not lie. It will be recalled that the claimants submitted that: "Although at common law a mere unilateral mistake by one party to a contract is not sufficient to rescind that contract, if that unilateral mistake is accompanied by knowledge and conduct of the non-mistaken party that will give rise to a ground for rescission". It is said that: "Specifically, the authorities for England and Wales confirm that rescission will be permitted if:- a) an operative mistake was made; b) the other party knew of the mistake; and c) there was sharp practice or other unconscionable conduct in connection with the mistake by the non-mistaken party". This it is submitted is the proposition from the publication, **The Law of Rescission**. As we have seen from the above, these are not sustainable propositions in light of the **Statoil** case.

81. In addition, there has been no pleading in this case of any misrepresentation, fraudulent or otherwise, and it is clear that the authorities do not support a claim for rescission where there was non-disclosure. I also hold that there has not been, in any event, any sharp practice or unconscionable conduct by the defendants. In that regard, I regret that I cannot rely upon the evidence of Mr. Lake about whether he was told that the duplicate certificates had been "mislaid". Indeed, as will be seen from an analysis of his evidence dealt with below, that evidence is not a reliable basis for such a conclusion.

82. Quite apart from the unavailability of rescission as a remedy for unilateral mistake, there are at least two (2) other bases for denying the claimants' alternative claim for that remedy. The evidence of Mr. Lake was that prior to the execution of the contract on May 3, 1993, the claimants had not sought a surveyor's report on the property being purchased. There is also no evidence that the attorneys-at-law made a request to actually view the duplicate certificates. I accept that in these circumstances the maxim, *caveat emptor*, is applicable and the purchaser has not done what any reasonable purchaser ought to have done.

Can Restitutio in Integrum be achieved?

83. It is trite law that rescission will be ordered where *restitutio in integrum* is possible. The parties must be put back into the positions they had been before the contract was entered into. The text "The Law of Rescission" which has been cited by the claimants adverts to the possibility of the court exercising its discretion where "substantial *restitutio in integrum* can be achieved. The claimants had also suggested that mere possession of the asset for some time did not preclude restitution and that, further, if there had been alteration, compensation could be ordered by the court. It should be noted that in this case the claimants have been in possession and occupation of all the subject properties for almost twenty years and there is no evidence as to the status of the chattels transferred under the Sale of Chattels and Property Agreement. The claimants advert to a roof which was repaired or replaced and some other capital expenditure which they claim to have incurred as a basis for considering compensation as part of the order of rescission. But even the least discerning will appreciate that the increase in value of the property is not necessarily the sum of the total of expenditure on "improvements". In these circumstances, these submissions are unhelpful in the extreme. Moreover, in the instant case, as I have noted above, there were two (2) contracts entered into on May 3, 1993 and, by their terms, they are expressed to be "contingent upon each other". It stands to reason that if the contract for the sale of lands were to be rescinded, the contract for the sale of chattels and other property must also be rescinded. The chattels, to the extent that they still exist and are identifiable, are now twenty (20) years older than they were in 1993 and may very well have past the limit of their useful lives. How could such assets, should they be returned, and there is no evidence that they even exist, be equivalent of the assets transferred in 1993? It is not possible to see how the discretionary remedy of rescission could be ordered in this case within the principles of "practical justice".

84. The case of **Howard-Jones v Tate** [2011] EWCA (Civ) 1330 provides a timely reminder of what are the implications of the remedy of rescission. The facts of the case are nicely summarised by Kitchin L.J. in the following passage taken from his lordship's judgment.

"On 1 November 2007, Mr Howard-Jones agreed to buy a warehouse and outbuildings at Odder Farm, Saxilby in Lincolnshire ("the Property") from Mr Tate for the sum of £140,000. The Property lies to the north of Odder Farmhouse, which at that time was owned by Mr Tate's son. The remainder of Odder Farm, including a barn which lies to the west of the Property, remained in the ownership of Mr Tate.

Prior to the agreement, the Property was supplied with water and electricity from Odder Farm. The arrangements for the supply of these services were, by their nature, temporary and accordingly, Mr Howard-Jones agreed to buy the Property on the basis that Mr Tate would arrange, at his own expense, for the Property to be provided with a new directly metered electricity supply and a separately metered mains water supply. The contract of sale provided, by special condition 12:

> "The seller [Mr Tate] shall at his own expense and no later than six months from the Completion Date:
>
> (a) provide a new directly metered single phase electricity supply to the building [the warehouse] forming part of the Property;
>
> (b) provide a separately metered water supply (mains) to the building forming part of the Property."

Completion took place on the same day, that is to say 1 November 2007, but by 1 May 2008, Mr Howard-Jones was of the view Mr Tate had still not provided the services in accordance with his obligations under special condition 12 of the contract. Mr Howard-Jones' solicitors therefore wrote to Mr Tate by letter dated 22 May 2008 requesting that the necessary works be completed within seven days. No reply to that letter was ever received and so, by letter dated 6 June 2008, Mr Howard-Jones' solicitors wrote again, giving formal notice that if Mr Tate did not comply with his obligations by 30 June 2008, Mr Howard-Jones would rescind the contract and issue proceedings claiming return of the purchase price of £140,000 and costs and damages. No further work was carried out by 30 June 2008 and, by letter dated 2 July 2008, Mr Howard-Jones' solicitors purported to give notice that the contract was rescinded.

85. I pause here to note the ironic coincidence of the fact that "special condition 12" of the agreement in that case is also the number of one of the special conditions

at issue in the instant case and, further, the condition by the vendor to undertake an obligation "at its expense" is also similar to that complained of here.

86. At first instance, the recorder at the County Court concluded that Mr Tate had breached a condition that went to the root of the contract, on the basis that without water and electricity, the land would have been worthless to Mr Howard-Jones. In determining the correct remedy for the breach, the recorder ruled that Mr Howard-Jones was not entitled to rescind the contract, but should be awarded damages. He held that Mr Howard-Jones was entitled to damages amounting to the purchase price of the property, plus compensation for expenses related to the purchase, such as surveyor fees, mortgage interest and council tax. But as a corollary, he ordered Mr Howard-Jones to return the property to Mr Tate.

87. Both parties appealed. Mr. Howard-Jones appealed on the basis that he should have been granted rescission and Mr. Tate on the basis that the Recorder had erred in calculating the damages as if there had been a rescission. Mr. Tate accepted the Recorder's position that the breach went to the root of the contract, but he contended that the Recorder had, in the assessment of damages, wrongly proceeded on the basis that the contract was rescinded. The Court of Appeal agreed that rescission was unavailable in the circumstances but also held that damages had been calculated wrongly. Kitchin L.J. said:

> ".....this is not a case where Mr Tate was in repudiatory breach of a condition which became operative on completion. Mr Tate was not obliged to provide a separately metered water supply and a directly metered single phase electricity supply until six months after completion, that is to say by 1 May 2008. *It is therefore a case where Mr Tate failed to comply with a post-completion obligation.* In such a case, I believe there can be no justification for failing to apply the principles explained by the House of Lords in **Johnson v Agnew** and, more recently, in **Photo Productions v Securicor Transport**. In my judgment, the Recorder was right to say that Mr Tate's repudiatory breaches rendered him liable in damages but did not entitle Mr Howard-Jones to rescind the contract *ab initio*".

88. The learned Lord Justice placed great reliance upon **Johnson v Agnew**, [1980] A.C. 367 a decision of the House of Lords which he judge said explained the

difference between rescission and discharge by beach. In doing so he reviewed a number of authorities and, if I may be permitted, I set out *in extensu* a section of his lordship's judgment as I do not believe a succinct summary will do it justice. He started off by summarizing the facts of **Johnson v Agnew** which has interesting parallels with the instant matter although from a vendor's perspective. However as noted by Lord Wilberforce below, the arguments are equally applicable whether from the point of view of the vendor or the purchaser. He said:

> The case concerned a contract for the sale of land which was the subject of a number of mortgages. The price which the purchaser agreed to pay was in excess of the sums required to discharge the mortgages and a loan raised by the vendors to enable them to buy another property. The purchasers failed to complete and the vendors obtained an order for specific performance. However, before the order for specific performance was carried out, the mortgagees of the property enforced their securities by selling the properties. The vendors therefore went back to court and asked for the order of specific performance to be dissolved, for the contract to be terminated or rescinded, and for an order for damages.
>
> The House of Lords held that although the vendors had secured an order for specific performance, if the order was not complied with, they were entitled to damages for breach. In this connection, **Lord Wilberforce** stated the following propositions of law at pages 392-393:
>
> > "In this situation, it is possible to state at least some uncontroversial propositions of law.
> >
> > First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can *either* treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; *or* he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.

Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.

Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.

At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission ab initio". I need only quote one passage to establish these propositions.

In **Heyman v Darwins Ltd** [1942] A.C. 356 Lord Porter said, at p. 399:

> "To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance

> and may bring an action for damages, but the contract itself is not rescinded.""

A little later, Lord Wilberforce again emphasised the distinction between rescission and discharge by breach in approving, at page 396, the following passage in the judgment of Dixon J in **McDonald v Dennys Lascelles** *Ltd* (1933) 48 CLR 457 at pages 476 to 477:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. ..... But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."
>
> (NOTE THAT THE FULL QUOTATION FROM DIXON J BY LORD WILBERFORCE IS ALREADY SET OUT AT PARA 35 OF THIS JUDGMENT)

It is, therefore, clear that rescission *ab initio* is very different from a failure of performance which entitles the innocent party to treat the contract as discharged. This latter situation, though still sometimes referred to as "rescission" does not have the consequence that the contract is treated as never having come into existence. Rather, the parties are absolved from future performance and the innocent party may claim damages for breach. In **Photo Productions v Securicor Transport Ltd** [1980] AC 827, **Lord Diplock** explained the position of the innocent party who elects to treat the contract as discharged in the following terms (at page 849):

> "Where such an election is made (a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged."

89. **Howard-Jones**, therefore, in my view, helps to clarify the circumstances in which rescission is available, and the distinction to be made between situations where the contract is to be treated as not having come into existence with those where the parties have simply been released of their future obligations. The decision confirms the historic common law reluctance to set aside a contract that has been concluded where it can fairly be dealt with in the provision of damages. It provides compelling reasons why the claimants in this case cannot succeed in a claim for rescission. Further, it leads very directly into the issue of the defence by virtue of the "Rule in **Bain v Fothergill**" [1874] L.R. 158

What is the Rule in Bain v Fothergill and does it apply here?

90. The defendants contend that no liability for any breach, repudiatory or otherwise, can be established against them and particularly not against the first defendant. They submit that if any such liability for any breach of contract or breach of warranty or condition is established, the redress of the claimants in terms of damages is specifically limited by the Rule in **Bain v Fothergill**. The rule derives from the decision in **Flureau v Thornhill** 2 Black W 1078 (Vol XCVI E.R. 635). There it was stated, per DeGray CJ, that:

> "Upon a contract for a purchase, if the title proves bad and the vendor is, (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost".

91. It is fair to say that the rule was accepted but re-stated in **Bain v Fothergill** where it is said that:

> "Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain"

92. The dicta of Lord Chelmsford in articulating his understanding of the rule is important.

> "I think that the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."

The learned Law Lord is quite emphatic in asserting that even where the vendor has entered into the agreement for sale of land "knowing he has no title to it nor any means of acquiring it", the damages are limited to "expenses he has incurred by an action for breach of contract" and other damages are only obtainable "by an action for deceit".

93. In further support of the proposition that the rule in **Bain v Fothergill** applies, the defendants submit that that rule has been affirmed in a number of subsequent cases including **Ray v Druce**, [1985] 3 W.L.R 39 in the United Kingdom; **June Perreault v Derrick Fearon and Arlene Gaynor** (unreported decision of McDonald Bishop J (Ag). as she then was) judgement delivered November 24, 2006 in Suit No C.L. - P 078/2002; and the Jamaican Court of Appeal decision in **Bevad Ltd. v Oman Limited** SCCA No 133/05 delivered July 18, 2008..

94. In response the claimants say that while no issue is taken to the rule, they reiterate their submission that in this case, the conduct and non-disclosure of the defendants has "induced the claimant into a unilateral mistake as to the availability of titles which were free from encumbrances and accordingly this factor takes it outside of the rule in Bain v Fothergill". It seems to me that the rule specifically excludes only cases where there has been a wilful refusal to make good title or there has been deceit or fraud. The claimants have made no averment as to fraud nor led any evidence thereto. In that regard, the dicta of Aikens.J. In **Statoil v Dreyfus** referred to at paragraph 73 above is apt. His lordship at paragraph 88 of that judgment stated the following:

> However, if one party has made a mistake about a fact on which he bases his decision to enter into the contract, but that fact does not form a term of the contract itself, then, even if the other party knows

> that the first is mistaken as to this fact, the contract will be binding. That was the effect of the decision of the Court of Queen's Bench, on appeal from the County Court, in **Smith v Hughes** [1871] LR 6 QB 597, see particularly at **603 per Cockburn CJ,** and **607 per Blackburn J.** The correctness of that decision and the analysis in it has never been doubted.

It is clear from the foregoing that mere non-disclosure, even if the non-mistaken party is aware, will not be sufficient to avoid **Bain v Fothergill**, for it does not permit unilateral mistake in the present circumstances, to give rise to a right to rescind. There is no evidence that the decision to enter into the Agreement for the Sale of Land was based upon any fact which became a term of the contract. I am strengthened in this view by my finding of fact that at the time of entry into the agreement, the first claimant through its managing director was aware that there were issues with the duplicate certificates of title which could delay the production until *after completion*. This is the only explanation for the evidence from Mr. Lake that *he* insisted upon the agreement being drafted with the terms it was.

Just to be clear on this point, I refer to the submission made by claimants' counsel (at paragraph 76 above) that the judgment of Andrew Smith J in **Huyton S.A.** supported the view that there was a general equitable jurisdiction to grant rescission for unilateral mistake. I refer again to the words of Aikens J in **Statoil.**

> With respect to Andrew Smith J., I must disagree with his conclusion that there is an equitable jurisdiction to grant rescission of a contract where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the terms of the contract are agreed, but that assumption does not become a term of the contract. None of the cases he cites at paragraph 455 of his judgment is authority for the existence of that jurisdiction. The **Great Peace** decision strongly suggests that there is no such jurisdiction in the case of a unilateral mistake. If there is no such jurisdiction in the case of a common mistake, I fear I am unable to see how, in logic, one can devise a rationale for an equitable jurisdiction in the case of a unilateral mistake, at least where there has been no misrepresentation by the other party

Accordingly, I hold that the rule in **Bain v Fothergill** applies to deny a claim for special damages for loss of bargain.

95. Given the claimants' claim for rescission and for damages for loss of bargain, it is relevant here to deal briefly with the aspect of what are the consequences of a fundamental breach in the circumstances of a sale of land agreement, such breach giving rise to a right to repudiate. The defendants say that the claimants have not sought damages pursuant to the rule in **Bain v Fothergill** but have proceeded to claim a right of rescission and to claim damages. They say that even where there is such a breach, the contract is discharged in so far as it is executory only but does not affect rights which have already crystallised and so rescission is not an option. The claimants, for their part, say that they do not dispute the proposition that where there is such a fundamental breach, "rescission" only operates to relieve the parties of obligations left outstanding and will not have the effect of declaring the contract void *ab initio*. (Note that although the claimants' submission talks of "rescission" here, in light of **Howard-Jones** and the authorities cited therein, the proper term should be "repudiation"). But, say the claimants, "we are claiming that there has been a unilateral mistake". Which is what entitles us to rescission and claims for loss of bargain. The discussion of **Howard-Jones** and **Statoil S.A**. above will have already have put paid to that argument.

96. It is worth noting that the defendants cited the case of **McDonald v Dennys Lascelles Ltd.**, as authority for the proposition set out in the previous paragraph. The dicta of Dixon J. which provides support for the proposition, has also been set out above at paragraph 35 and is referenced again in paragraph 80 of this judgment, quoting the judgment of Kitchin L.J. in **Howard-Jones**, where he cites Lord Wilberforce in **Johnson v Agnew.** I think it is extremely instructive to note that Kitchin L.J. in **Howard- Jones** dealing with a breach of a condition subsequent and damages arising therefrom, found support in Dixon J's dicta in **McDonald v Dennys Lascelles**, as did Lord Wilberforce in the House of Lords in **Johnson v Agnew**.

97. Another limb upon which the claimant sought rescission and *restitutio in integrum* by way of refund of the purchase price with compound interest, compounded monthly over the period from 1993, as well as damages for loss of bargain etc., was that there had been a total failure of consideration and therefore the defendant(s) had been unjustly enriched and ought to disgorge their unjust enrichment. One of the things the court had to determine in **Howard-Jones**, was the issue of damages payable by the defendant where it was agreed for the purposes of that appeal, that there had been a repudiatory breach, albeit of a condition subsequent. In relation to damages and whether there had been a total failure of consideration the court stated at paragraphs 29 and 30:

> 29. ".....this is not a case where Mr Tate was in repudiatory breach of a condition which became operative on completion. Mr Tate was not obliged to provide a separately metered water supply and a directly metered single phase electricity supply until six months after completion, that is to say by 1 May 2008.
>
> 30. It is therefore a case where Mr Tate failed to comply with a post-completion obligation. In such a case, I believe there can be no justification for failing to apply the principles explained by the House of Lords in **Johnson v Agnew** and, more recently, in **Photo Productions v Securicor Transport**.[1980] A.C. 827; [1980] 2 W.L.R. 283. In my judgment, the Recorder was right to say that Mr Tate's repudiatory breaches rendered him liable in damages but did not entitle Mr Howard-Jones to rescind the contract *ab initio*.
>
> Nor do I accept Mr Hedley's submission that this result is manifestly unjust. Upon completion, Mr Howard-Jones became the owner of precisely what he had bargained for, namely the Property without a directly metered electricity supply or a separately metered water supply. Mr Tate was not in breach of his obligation to provide the appropriate water and electricity supplies until six months later. Upon breach of that obligation, which it is accepted for the purposes of this appeal went to the root of the contract, Mr Howard-Jones became entitled to treat himself as discharged. After discharge, he was no longer bound to accept the further performance by Mr Tate of his obligations. But he was not entitled to recover all the moneys he had paid under the contract unless he could say that the consideration for his payment had wholly failed. That he has not

> sought to do. Nor, in my judgment, could he properly have done so. The Property has been used by Mr Howard-Jones to store some vehicles. Further, the Property plainly has some value and Mr Howard-Jones can arrange for the directly metered electricity and separately metered water supplies necessary for his business to be installed. In so far as it may be necessary to have a service pipe laid across Mr Tate's land for the purposes of the water supply or access to Mr Tate's land for the purposes of the electricity supply, these are not matters to which Mr Tate can properly object. In so far as he has objected and, indeed, continues to object, then that should be reflected in the assessment of the damage Mr Howard-Jones has suffered.

98. The following dicta from Lloyd L. J. in **Howard-Jones** at paragraph 39 of the judgment is also worth noting in connection with the foregoing:

> On the face of it, the idea that a contract can be discharged retrospectively, after completion, on the ground of the vendor's fundamental breach of contract seems to be inconsistent with the decision of the House of Lords in **Johnson v Agnew**, cited by Kitchin LJ. It appears to hark back to the use of the word rescission which Lord Wilberforce deprecated in his speech in **Johnson v Agnew** because it confuses a remedy available only for such wrongs as misrepresentation, under which what had already been done might be undone, with the case of discharge for breach on the basis of accepting a repudiation of the contract, which can only operate prospectively.

99. I find as a fact that the claimants got what they bargained for under the terms of the agreements for sale; that they have been in beneficial occupation of the property for the period since May 1993; they have had their name(s) registered on the original certificates of titles from June or July 1993; that any breach in relation to *the failure to deliver the duplicate certificates of title*, if there was such, occurred post completion; that the breach is not repudiatory and is not wilful and does not entitle the claimants to rescind.

100. The claim in unjust enrichment for moneys "paid to the bank" plus interest on that money is also inconsistent with the analysis of that principle in **Sempra Metald Ltd. v IRC** [2007] 2 WLR 354. There must be actual enrichment not notional. The claimants would have to establish that the defendants had actually profited to the extent alleged and not that they could have benefited. In any

event, **Sempra** proceeds on the basis that a claimant has established a sustainable claim for rescission of a contract on the basis of mistake and restitution in terms of money paid. As is apparent from my rulings herein this is not the case here. One of the blocks to rescission also is where a third party has acquired rights. In the instant case, there has been acquisition of such rights by way of mortgage over property at Vol 1229 Folio 161 as recorded on the certificate of title. Nor do I find assistance in either of the cases the **Attorney General v Blake** [2001] 1 AC 268 or **Esso Petroleum Company Limited v Niad Limited** [2001] EWHC 458, cited by the claimants' counsel in regard to unjust enrichment.

101. I hold therefore that the claimants have failed to show a total failure of consideration and the claim in unjust enrichment must fail.

102. I wish to make some other general but relevant observations in relation to this matter before closing. One of the defences to liability put forward by the defendants is the principle "caveat emptor". The principle is well known and the question here is whether it has any application. It seems that where a contract does not specifically allocate a risk to one party, the default position must be *caveat emptor.* In **Associated Japanese Bank [International] Ltd. v Credit Du Nord S.A**. [1989] 1 WLR 255, Steyn J. spoke of the need to determine first, when considering mistake, whether the contract by itself by express or implied condition precedent or otherwise provides who bears the risk of the relevant mistake. Thus an implied term in a sale agreement in the absence of specific term to the contrary, is caveat emptor. In relation to the mistake under which the claimants' managing director said it laboured, there is no provision which specifically deals with it and it is therefore fair to presume that the rule caveat emptor, applies.

103. In this connection, I am struck by the fact that at the time of purchase no surveyor's report was sought or obtained. Mr Illonis Jones, a surveyor who gave evidence on behalf of the claimants said he did a survey in 2009. There is no reference to him doing one in 1993. Mr. Lake said he had personally gone and inspected the property. There is no indication that at the time of him doing so he

would have been unable to determine that the sewage disposal facilities were located on Lot 1. It is, in my view, equally questionable that at no time did the purchaser's attorneys-at-law ask to see the duplicate certificates of title, a curiousity to which I adverted earlier, and this in spite of knowing that the proposed sale involved fifty three (53) titles in a property which was being sold under powers of sale contained in a debenture. The buyer must be taken to have assumed the risk in these circumstances. The claimants' attorneys-at-law say that the rule *caveat emptor* is not applicable here in light of the defendants' expressed warranties as to title free of encumbrances and right to sell. There are two answers to this comment. Firstly, the Receiver who was the vendor in the instant transaction undoubtedly has the right to sell. Secondly, I find as a fact that the difficulties with the duplicate certificates of title in question ought not to be held to "encumber" all the other properties.

104. I hold that the failure to provide the duplicate certificates of title does not amount to a repudiatory breach as it did not go to the root of the contract. The purchaser has in fact got what he bargained for.

The Evidence

105. I wish to comment briefly upon the evidence of the witnesses who appeared in these proceedings. They were Mr. Richard Lake, Mr. Donovan Jackson, attorney-at-law and Mr. Illonis Jones, a land surveyor and Mr. Dalma James, accountant, expert for the claimants and Mr. Joseph Shoucair, former general counsel for NCB; Mr. Wayne Strachan of Strachan, LaFayette and Associates, Chartered Accountants, expert witness for the defendants. As I have noted elsewhere, while there has been great effort by counsel on both sides to establish their respective cases, the fundamental facts are not in dispute. Rather, the dispute turns on what is the meaning of the terms in the agreements for sale and what are the implications of any alleged breach of any or all of those terms?

106. The main witness for the claimants was Mr. Lake, the managing director of the first claimant and its associated companies, the second and third claimants. He provided three (3) Witness Statements, the first and second respectively dated May 1, 2009, April 6, 2010 and the third filed on June 2, 2011 when the

trial had been underway for several days. In addition, Mr. Lake gave oral evidence and was subject to extensive cross examination on June 2 and 3, 2011. Among the persons giving evidence, he is the person, along with Aird, the 3rd defendant, who had the most intimate knowledge of the events of 1993 leading up to the execution of the agreements on May 3, of that year. There were instances where his oral evidence was at variance with the documentary evidence adduced on significant issues. Some of these relate to what was the agreement with respect to the area of land in the title at Volume 1229 Folio 161 (the "undeveloped land"). He said in oral evidence that there was an agreement to place the sum of $1,000,000.00 in escrow. However, the documents at pages 245 to 246 in Exhibit 2 indicate an agreement for a payment in respect of diminution of the acreage from the amount bargained for at a per acre figure.

107. Indeed, on the central point of the claim, whether the first claimant was aware that there were difficulties with the duplicate certificates which were the subject of special conditions (4) and (5), it cannot be said that the first claimant's managing director's evidence has established on a balance of probabilities, that he was ever told that the titles were mislaid or lost as he has sought to assert here. In particular, it is difficult to reconcile his statements that

a) At no time was he or his attorneys-at-law ever advised verbally or in writing that the bank did not have the duplicate certificates in question;
b) He discovered in July 1999 that the titles were not available;
c) Prior to the execution of the agreements, he and his attorneys were aware that there were lost titles; and
d) In paragraph 11 of his third Witness Statement, that during negotiations he had been advised by Mr. Stephenson that there were some titles that could not be located.

108. He is also incorrect in asserting in his evidence that the titles were registered in the name of "Caricom Investments Limited". In fact, the properties transferred were all transferred to Investment's nominee, "Caricom Hotels Limited". Of note is his evidence that the contracts as signed met all his instructions. Given the terms and the special conditions, it would seem that this would properly give rise to an appropriate inference that there had been some

discussion concerning the possibility of not being able to provide the duplicate certificates at the time of completion, and this is what was provided for in special conditions (4) and (5). This is an inference I am prepared to draw. The Court is particularly concerned that it was not until the sitting of June 2, 2011, that it was to hear that critical documents which formed the basis for some of the damage claims and computations were not available because they had been destroyed by a hurricane. I would characterize Mr. Lake's evidence as, at best, uneven and not reliable.

109. As far as the other witnesses were concerned, I have already commented above on Mr. Donovan Jackson's evidence. As indicated, I am concerned that in a matter of this size and given the issue of conflict which has now clearly arisen, that the law firm is found to be representing opposing parties.

110. Mr. Joseph Shoucair, in my view, adds nothing of substance to the issues which the Court must decide while Mr. Aird, who was both a witness and a defendant, provided little by way of useful evidence. Indeed, the claimants have sought to characterize his testimony as supporting the proposition that he was the "agent" of the NCB or that "the Receiver and the Bank are one". It seems to me however, that whatever Mr. Aird's own opinion on that question, that is a matter of law which I have to decide in light of all the circumstances of this case.

111. Notwithstanding the above, I must confess to having serious reservations as to whether in this case the Receiver and the National Commercial Bank ought not to have had a separate representation given the potential for conflict between the defences upon which they may have sought to rely.

The Expert Evidence

112. The so-called experts are of little help in this matter. Firstly, in my view, their involvement has been primarily if not exclusively to support the case of the party on whose behalf each was called rather than being a witness for the Court as is required by CPR Rule 32.3 (1) and (2). Secondly, essentially all of their evidence is in relation to the question of damages and interest and methodologies of calculations which, on my finding have become irrelevant. Thirdly, and in any event, it is clear that neither report was "the independent

product of the expert witness uninfluenced as to form or content by the demands of the litigation" as required by the CPR. Rather each made comments upon the appropriateness of certain methodologies in computations by the respective parties rather than indicating what they had found in their investigations. In this regard, it is difficult to give any credence to the experts' reports when they seemed not to have been provided with the basic data upon which to base their expert opinions. The lack of any audited or at least credible financial statements for the period between 1993 and 2010 must be fatal to a claim in excess of Twenty nine billion dollars ($29,000,000,000.00) covering damages spanning a period of eighteen (18) years. If there is any doubt about the inadequacy of what the experts were asked to review, I refer to Exhibit 20A, a letter from Strachan, LaFayette and Associates dated January 31, 2011 which says that the "preliminary report" had been submitted but there was need for additional information/documents as follows:

- Audited financial statements for Caricom Investments and its subsidiaries for the years 1993 to 2010.
- Details of related parties, related party transactions and nature of the relationship, eg. Management services.
- Detailed fixed assets register or fixed assets movement summary for the period;
- Details of payment to insurance company;
- Details of management contract;
- Evidence of operating cash flow deficits for the period.

113. These details have not been provided and Exhibit 20C contains the response to these requests. (It is a letter from the claimants' counsel). It *does not provide any of the documents required for independent verification*, but provides "explanations" which are to be accepted by the requesting expert and presumably by the Court. Particularly egregious is the answer in relation to "evidence of operating cash flow". The response in my view, verges on the facetious, as it merely states: "Our client is requesting that you specify the evidence you require as if the expense is there and the capital is not there in

equity to cover the loss, the difference must be from loan funding or other liabilities". It hardly needs stating that whatever the validity of the proposition advanced by "the client", it is a worthless exercise unless the loss can be verified by properly verified financial statements. After all, it must be remembered that in **Bonham Carter v Hyde Park Hotel Ltd. [1984** 64 T.L.R. 177 (per Lord Goddard at page 178) it was said in relation to damages:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: "This is what I have lost; I ask you to give me these damages." They have to prove it."'

114. Further it is difficult to understand how rescission could be advanced when under the Sale of Chattels and Property, if rescinded as it would have to be, there would need to be an accounting for the assets transferred under that agreement, in 1993. There is an apparent lack of recognition of the fact that the Agreement for Sale of Land was one of two mutually contingent agreements. Another egregious non-answer is in relation to "Details of payment to the Insurance Company": The answer given is that "Insurance is arranged through AMATEX, a company incorporated in Grand Cayman". There is no offer to provide the contract or contact or any details of such insurance including whether the alleged company is a "captive insurance company" to which premiums are paid.

115. I hold that these expert reports do not assist me in what I have to decide.

116. Before dealing with the implications arising from my determination that the rule In **Bain v Fothergill** applies I want to make a few general comments about the claim herein and especially the claim for damages.

117. At paragraph 268 of their submissions counsel for the claimants say that if the court finds that the claimants are not entitled to rescission as is asserted, they should be compensated in damages for an inability to *utilize fully* the property as an investment; and/or being able to realize a *"proper profit"*; inability to develop the property as a time share resulting in putative losses to the tune of J$5,957,600,000.00 together with interest. The evidence to support this claim of

US$67,700,000.00 is a one page document developed by Mr. Lake at page 35 of Exhibit 8A which provides no assumptions, no verifiable projections; speculation as to prospective profits of US$500,000.00 on each of "one hundred (100) ungraded units" to be developed in "phase 3". There are no costings; there are no drawings; there are no economic projections which purport to articulate the nature of the expertise upon which they are based. As noted above, as far as the time share is concerned, there is no evidence that the defendants were aware of any plans to develop a time share at the time the contract was made, and as economic loss, it could only arise if they did. {See the Rule in **Hadley v Baxendale** [1854] 9 Exch. 341; 156 Eng. Rep, 145} There would be no basis for this claim and its cavalier presentation raises questions about its sincerity.

118. Part b) of the said paragraph 268 of the submissions also claim the sum of US$ 550,000.00 on the basis that the unavailability of the duplicate certificates in circumstances where a loan secured through "an associated company, BRC Limited to trade in steel", led to a lost opportunity for one of the claimants to make a profit. This is supported by a nine line document prepared by Mr. Lake which states:

> "In April 2008 our associated company BRC Ltd. was given the opportunity to purchase steel below world market price because we had an order placed prior to the price increase. Our supplier Mital advised that if we paid for the order in full, we would get it at the old price.
> We (*and obviously this must mean BRC Ltd.*) secured and obtained a loan from Pan Caribbean Bank offering Volume 1219 Folio 161 as security, but because of the caveat lodged by Rio Blanco Development Ltd., we were unable to access the loan and the opportunity to purchase the steel. The opportunity lost was US$600,000.00".

My comment above re special damages is relevant and the injunction from Lord Goddard in **Bonham-Carter v Hyde Park Hotel** is instructive. Further, it is difficult to understand why a transaction entered into between an associated company to purchase steel, which transaction was not consummated, can give rise to an opportunity loss by the claimants. There is no evidence that there is any causation between the breach averred and the loss which would not anyway be reasonably foreseeable. The alleged damages in any event are unproven.

119. In paragraph 289 of their submissions, claimants' attorneys-at-law set the real reliefs sought by the claimants as an alternative to those set out in paragraph 268. These are an order for the re-transfer of properties to Rio Blanco Development Ltd.; repayment of the purchase price plus interest at 29% compounded monthly to April 2010; net interest costs of $13,542,926,184.00; refund of alleged operational losses of $32,531,068.00; compensation for lost opportunity on the operational losses in the sum of $1,043,623,555.00; Capital Expenditure on Hotel Property: $24,761,390.00 Interest Costs on Capital Expenditure in the sum of $1,578,857,163.00. An accounting for all profits earned by the first defendant on sums paid by the first claimant in the sum of approximately $22,671,181,565.00 and indemnification for all obligations undertaken while the claimants operated the facilities at Rio Blanco. Given my finding that the Rule in **Bain v Fothergill** applies, these damages are also clearly not permitted.

120. One of the items of claim is for an order that the claimants be indemnified for "all losses suffered as a result of the suit brought by Rio Blanco Development Limited against the 1st and 3rd Defendants; and the caveat lodged against the Certificate of Title comprised in volume 1229 Folio 161 registered in the name of the 3rd Claimant". This claim can be given "short shrift". There is no evidence that the claimants or any of them suffered any "losses" as a result of the suit brought by and against other persons, and to which the claimants were not parties. As far as the caveat is concerned, the evidence which emerged is given by no lesser a witness than Mr. Lake himself. In his first Witness Statement, he said he became aware of the placing of the caveat against the aforesaid title in September 1999. It was admitted that the caveat was not placed by any of the defendants herein, but by principals of the second defendant. In fact, as emerged in the evidence confirmed by Exhibit 21 hereof, the caveat lapsed in 2008. Further, that title was later used by an associate company of the claimants, to raise a mortgage in the same year.

121. Before dealing with the final issue of whether and if so what damages may be payable under the rule in **Bain v Fothergill** I will deal with the issue of the relationship between the Receiver and the first defendant, NCB of which much was made by the claimants. It is not disputed that the Receiver Karl Aird, was an employee of the first defendant. No issue is taken with his appointment and indeed, James J. in the **Rio Blanco Dev. Co. Ltd. v NCB and Others case** found that the bank had acted properly within the terms of clause 13(2) of the debenture which states: "The Bank may at any time after the moneys hereby secured becomes payable by writing under the hands of the manager Asst. Manager.....Attorney-at-Law of the bank appoint any person whether an officer of the bank or not to be the receiver of the property hereby charged.....remove any receiver ....and appoint another in his stead".. There is no doubt that the bank was entitled to appoint Mr. Aird as the Receiver of Rio Blanco Development Co. Ltd. Clause 14 of the debenture also made it clear that a Receiver so appointed would be the "agent of the mortgagor" that is, of Rio Blanco. I do not believe that anything turns on the fact that the Receiver got an indemnity from the bank as this basically protects him from personal liability in circumstances where he is seeking to protect the mortgagee's security. Nor is there any fundamental problem with the attorney at law for the bank being the attorney-at-law for the Receiver. If there is any doubt, it is also clear that section125 of the Registration of Titles Act makes the Receiver the "agent of the mortgagor".

122. There are two (2) other observations which I wish to make here. The claimants' attorneys' submissions say that the "payments were made to the bank". That cannot be correct. The Receiver is under a fiduciary duty to collect in the net assets (or losses) and to account to the mortgagor for them. He is therefore the recipient of the funds though, for convenience, it may be paid into an account with the mortgagee bank in satisfaction of its security interest. Indeed, one of the arguments made by the claimant in the **Rio Blanco v NCB** case which was rejected by James J. was that the Receiver had breached a duty by depositing the funds with the National Commercial Bank. As the defendants' attorneys point out in their submissions: "....a fundamental flaw in the claim for

refund of the purchase price is that it assumes that the purchase price was payable to National Commercial Bank Jamaica Limited. This is wrong"

123. The second observation is that any obligations imposed under the agreements of May 3, 1993 were obligations of "the vendor". The vendor was the 2nd defendant Rio Blanco Development Company Limited. It is logically and legally impossible to assert that by assisting the Receiver in its post completion attempts to secure the relevant duplicate certificates of title, the first defendant retrospectively assumed obligations of the Receiver. The evidence clearly shows that the first defendant has tried to assist in the process of effecting the delivery of the duplicate certificates. That cannot, convert it to becoming a principal in relation to an agreement which had already been completed. Further, the claimants have made no pleading that there is vicarious liability because Mr. Aird is an employee of the bank and the bank and Mr. Aird have a principal/Agent relationship. They do submit, however, the "NCB accepted liability for complying with provisions of the agreement for sale in particular as regards special condition 15". Since NCB was not a party to that agreement, the argument breaks down with the simple question: "What is the consideration given to NCB for accepting such responsibility in relation to a contract to which it was not a party and which had been substantially performed"? I hold that both on the basis of the debenture and section 125 of the Registration, as well as on general principles of contract, that the Receiver is and always was the agent of the second defendant.

124. This leads me to the final consideration. As noted above, special condition 15 provided that the vendor was to make application for the relevant certificates of title immediately after registration of the ownership by the purchaser of the lands in question. Although no time is given, it must be presumed that

a. There was an acceptance of an obligation to provide the duplicate certificates of title at some point in the future; and
b. Duplicate certificates would be provided within a reasonable time.

Twenty (20) years is not a "reasonable period of time" for the provision of such certificates. I would accordingly hold that there has been a breach of an implied term that the purchaser would be provided with duplicate certificates and within a reasonable time. That obligation is clearly the obligation of the vendor, the second defendant through the third defendant who had the responsibility for the affairs of the second defendant. It is not possible to hold that such an obligation could become an obligation of the first defendant *ex post facto,* the execution of the contract *and* post completion of the contract according to its terms. At the same time it is worth noting that as James J. found unequivocally that the (first) claimant is the legal proprietor of an estate in fee simple being bona fide purchaser for value without notice.

125. In the agreement, provision was made for a reduction in the purchase price of the property in case the vendor failed to have the purchaser registered on the original certificates of title. Those provisions ascribed particular values as "market value" of $2,000,000.00; $1,200,000.00; $950,000.00 and $950,000.00 for the respective lots of land. It cannot be argued that any damages payable by virtue of the breach of the implied term to provide the duplicates within a reasonable time is to be compared with the actual market value ascribed those lots in the agreement for sale of land. It is, however, not unreasonable to find that there may have been some inconvenience to the purchaser in not having the duplicates. At the same time, I wonder why the opportunity was not taken to become a party to the proceedings in C.L. R – 021 of 1994. The evidence of Mr. Lake is that the claimants did become aware of that case from as early as 1999. The issue of the respective rights of the parties to the lots in question would have been explored, with all parties including the claimants here, as bona fide purchasers for value, having a right to be heard. **Bain** limits the damages available in cases such as this in the following terms: ".....the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit". Here damages are at large and there is no direct evidence of the expenses

incurred in pursuing this action. Damages are awarded against the second defendant.

126. Although in light of my acceptance of **Bain v Fothergill** the issue of the substantial damages claimed by the claimants does not arise, I am constrained to make the trite observation that: "The general rule of the common law is that where a party sustains *loss by reason of a breach of contract*, he is, so far as money can do it, to be placed in the same position as if the contract had been performed" (Pape J in **Cowan v Stanhill Estates Pty Ltd No 2** [1967] VR 641 at 648; Parke B in **Robinson v Harman** (1848) 1 Exch 850 at 855; 154 ER 363 at 365). "(T)he words *"loss by reason of a breach"* encapsulate the ideas of causation, remoteness and mitigation": **Holmark Construction Company Pty Ltd v Tsoukaris C/A Unrep.** 16.5.88; (1988) NSWConv R 55-397; BC8801975 per Priestley JA.

127. The question as to whether **Bain v Fothergill** should continue to apply was considered in Canada. (See Supreme Court of Canada **A.V.G. Management Science Ltd. v. Barwell Developments Ltd. et al**., [1979] 2 S.C.R. 43). It was held in that case that the rule did not apply so as to limit the damages recoverable as there was neither fraud nor want of good faith. The Court in that case felt that it is enough to oust the limiting rule in **Bain v. Fothergill** if the vendor, having title, has either *voluntarily disabled himself from being able to convey or has risked and lost his ability to do so by what were in effect concurrent dealings with two different purchasers*. (My emphasis)This is not the case in the matter at Bar. According to the summary headnote of the case:

> "The question as to whether the rule in **Bain v. Fothergill** should no longer be followed in common law Canada did not really arise here. However if it had been necessary, in order to decide this case, to come to a conclusion on the matter, the Court was of the opinion that the rule in **Bain v. Fothergill** should no longer be followed in respect of land transactions in those Provinces which have a Torrens system.

While the rule has also been legislated out of existence in some Australian states, there is no basis for doubting its continuing effect in this jurisdiction.

128. For completeness, and for the avoidance of doubt, I set out the following findings of fact and law which have informed my decision:

a. The vendor in this case is the second defendant as represented by the third defendant.

b. The Receiver was not the agent of the first defendant.

c. The claimant is not entitled to specific performance as claimed or at all.

d. No claim in vicarious liability lies as there is no pleading to this effect and clause 13(2) of the debenture clearly allows the first defendant to appoint its employee to be the Receiver. (In that regard I adopt the finding of James J in the **Rio Blanco v NCB** case, at page 9 of his Lordship's judgment).

e. No warranty was given or could have been given by the first defendant as it was not a party to the contracts.

f. Even if the first defendant had undertaken to assist with securing the duplicate certificates of title, this would have arisen after the completion of the contract and there is no consideration for any such promise, if there was such a promise.

g. There is no breach of warranty or breach of contract, save as set out in (h) below, and certainly no breach which is repudiatory.

h. There is breach of an implied term that duplicate certificates of title would be provided and in a reasonable time frame.

i. There has been no repudiation of the contract by the first defendant as the first defendant is not a party thereto.

j. Relief in the form of rescission does not lie at Common Law nor in Equity.

k. Even if it did, *restitutio in integrum* or even practical justice could not have been achieved and the discretion of the court ought not to be exercised to grant it.

l. The liability for the breach at (h) above is the second or third defendant's.

m. On a proper construction of the duties of the Receiver, he receives the purchase price of the mortgaged property and then discharges the liability of the mortgagor by paying the outstanding sums due to the mortgagee.

n. The mere payment of the sums into a bank account at the first defendant's bank is NOT a breach of any duty by the Receiver and does not make the mortgagee the payee (See per James J in **Rio Blanco**)

129. In summary, and in light of the evidence led before me, and the findings of fact and law which are set out above, I hold that the defendants succeed on all aspects of the claim save to the limited extent of a finding that there has been a breach of an implied term in special condition 15 that the duplicate certificate certificates of title would be available in a reasonable time for which **Bain v Fothergill** damages are available.. In the circumstances, although there is no specific evidence to go on, I make an award of damages under the **Bain v Fothergill** rule. In doing so, I recognize the narrow limits of that rule to "damages for costs and expenses of bringing the action for the breach and making provision for its correction". Given the lack of direct evidence, I believe that it is proper, to make a best judgment estimate of the cost and expenses of pursuing the action for breach of an implied term and taking action to remedy it. The period of time from the signing of the contract in May 1993 until the present makes it just to cauterise proceedings in this manner. I accordingly make an award in the sum of five million dollars ($5,000,000.00) which is intended to compensate the claimant for the cost of bringing the action and getting the duplicates by way of seeking a court order, ,if necessary, for the delivery of the duplicates.

130. Given the limited success of the claimants' claim, I award the claimants five per cent (5%) of their costs to be taxed if not agreed and grant certificate for two counsel. In respect of all the other claims and reliefs sought by the claimants, I give judgment for the defendants and award them ninety per cent (95%) of their costs to be taxed if not agreed. I also grant a certificate for two counsel.

Accordingly I make the following Order:

131. Judgment for the defendants on the claim save that the claimants are entitled to damages of five million dollars ($5,000,000.00) with interest at 6% from the date of the service of the claim to the 19th September 2013 and

continuing until payment, against the second defendant solely, for breach of an implied term that the duplicate certificates of title would be available in a reasonable time.

132. Costs of 5% of the claimants' taxed or agreed. Costs to the claimant together with certificate for two counsels.

133. Costs of 95% of the defendants' taxed or agreed costs to the defendants together with certificate for two counsel.

Judgment Delivered This 20th Day of September, 2013.

Anderson J
Puisne Judge