154

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 143/1991

BETWEEN	ELIZABETH BOELAERT ROACHE	1ST PLAINTIFF
A N D	LLOYD ROACHE	2ND PLAINTIFF
A N D	CIBONEY HOLDINGS LIMITED	DEFENDANT

Donald Scharschmidt Q.C., and David Batts
instructed by Livingston, Alexander & Levy
for the Plaintiffs

Michael Hylton, Peter Goldson and Debbie
Fraser instructed by Myers, Fletcher &
Gordon for the Defendant.

Heard: December 7 - 10, 1992; February 8, 9, 10, 11, 12 1993; December 13 and 14, 1993; February 1 - 3, 10, 11, 14, 15, 17, 18, 1994; March 3, 1994; April 18, 20, 21 1994 and December 7, 1994

CLARK, J.

This is an action for re-transfer of land and/or for damages for breach of two contracts in writing dated 11th March, 1988: one an agreement for sale of land and the other, an agreement entitled, "Heads of Agreement", providing inter alia for the development of the said land (known as Cassa Nina) and the transfer to the plaintiffs (the Roaches) of two "townhouses" upon completion of the development.

The sale of land agreeemnt provides as follows:

> "THIS AGREEMENT is made ... BETWEEN LLOYD and ELIZABETH BOELAERT ROACHE ...(hereinafter called "the Vendor") of the ONE PART AND CIBONEY HOLDINGS LIMITED ... or its nominee hereinafter called "the Purchaser)" of the OTHER PART WHEREBY the Vendor agrees to sell and the Purchaser to purchase ALL THAT parcel of land more fully described in the Schedule hereto upon the terms set out therein.

THE SCHEDULE

DESCRIPTION OF LAND:	ALL THOSE parcels of land part of Hoghole in the Parish of Saint Ann and being the land comprised in Certificate of Title registered at Volume 835 Folio 5 of the Register Book of Titles.
ENCUMBRANCES:	None
PURCHASE PRICE:	ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00).
HOW PAYABLE:	A deposit of $7000,000.00 on the signing hereof which the Vendor may use at her sole discretion. A further payment of $200,000.00 on or before the expiration of one hundred and eighty (180) days from the date hereof. The balance of $600,000.00 on or before the expiration of eighteen (18) months from the date hereof and shall be secured by the 2nd mortgage hereinafter referred to. Interest will be payable by the Purchaser to the Vendor on any instalment or purchase money not paid within thirty (30) days of the expiration of the agreed periods set out in (ii) and (iii) of this Clause, and at the rate charged by the Purchaser's Bank for loans made to it for development of the Property sold.
COMPLETION:	On payment of the aggregate of $900,000.00 in exchange for registrable Transfer to the Purchaser and the duplicate Certificate of Title for the Property.
POSSESSION:	The Vendor will give vacant possession of the premises hereby sold on or before the 31st March 1988.
CARRIAGE OF SALE:	LIVINGSTON ALEXANDER & LEVY, 72 Harbour Street, Kingston for the Vendor. MYERS, FLETCHER & GORDON MANTON & HART for the Purchaser.

COST OF TITLE

On the signing of this Agreement, the Purchaser will pay to the Vendor's Attorneys-at-law one half Stamp Duty and Registration Fee of the Transfer and the Attorneys' costs of this Agreement fixed at $500.00. The Vendor and Purchaser will bear their own Attorneys' costs of the Transfer.

TRANSFER TAX:

Transfer Tax to be borne by the Vendor.

TAXES AND WATER RATES:

To be adjusted to date of possession.

INSURANCE PREMIUM:

To be adjusted to date of possession.

SPECIAL CONDITIONS:

1. It is a condition precedent to the coming into effect of this Agreement for Sale that same shall first be signed by the Vendor and the Purchaser.

2. The Vendor authorises the Purchaser to make all payments due to him under this Agreement to his Attorneys-at-law.

3. It is understood and agreed that the Vendor's Attorneys-at-law shall be entitled to pay Stamp Duty and Transfer Tax on this Agreement for Sale from the deposit and that if for any reason whatsoever the deposit has to be returned to the Purchaser, the purchaser shall to the extent of such duty and/or tax so impressed, be deemed to have been refunded same by delivery to him of the original Transfer Tax receipt and stamped Agreement duly noted by the Vendor as cancelled.

4. The Vendor and the Purchaser agree to be bound by and to carry out the terms and conditions of the Heads of Agreement of even date herewith made between them.

5. The Purchaser shall execute and the Vendor shall be entitled to register a mortgage or charge against the said land to secure the sums due to her by virtue of these presents and the due performance hereof by the Purchaser to the intent that such mortgage or charge shall rank subsequent to a mortgage or charge to such reputable financial insitution as shall be financing the development of the property hereby sold; and such mortgage shall permit the release of lands therefrom to purchasers of apartments or townhouses on completion of the development to be undertaken by the Purchaser's nominee, on payment of the balance of the purchase price therefor.

6. The Vendor hereby warrants that the area of land now remaining in the Certificate of title herein referred to is at least 1 Acre and 1 Rood."

The terms and conditions of the Heads of Agreement by which the parties agreed to be bound and to carry out are set forth in paragraphs numbered 1 to 8 in that document thus:

"HEADS OF AGREEMENT made .....

BETWEEN ELIZABETH BOELAERT ROACHE ... (hereinafter called "E.B.R.") and CIBONEY HOLDINGS LIMITED ... or its nominee (hereinafter called "CIBONEY").

1. E.B.R. will ensure that the interests of herself and LLOYD ROACHE in land part of Hoghole in the parish of Saint Ann registered Volume 835 Folio 5 of the Register Book of Titles will be transferred to CIBONEY and or its nominees as it shall deem free of all encumbrances.

2. CIBONEY will cause the said land to be developed by the erection thereon of townhouses in accordance with architectural drawings prepared for Ciboney for adjoining lands to the east with such adjustments to the site plan as CIBONEY may decide so that same shall form an integral part of the Ciboney property.

3. CIBONEY will pay all costs of developing the site, constructing the townhouses, putting in water and sewage mains and other infrastructure so that the development shall be completed in eighteen (18) months from the date hereof.

4. E.B.R. will provide CIBONEY with the approvals of the Local Planning Authority and all plans, drawings and other information or documents which are available to her.

5. Upon completion of the development CIBONEY shall cause two (2) two-bedroom units to be conveyed to E.B.R. or her nominee E.B.R. shall have the option of choosing one of the units out of the total to be built and the other unit shall be chosen jointly by Ciboney and E.B.R.

6. In consideration of the above transfer and other matters referred to in these heads of agreement, CIBONEY will pay a sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00) to E.B.R. to be paid in the following manner:-

   (i) On the signing hereof and on the signing of a formal sale agreement for the said land the sum of SEVEN HUNDRED THOUSAND DOLLARS ($700,000.00) which E.B.R. may use at her sole discretion;

   (ii) On or before the expiration of 150 days from the date hereof a further sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00);

   (iii) On or before the expiration of 18 months from the date hereof a further sum of SIX HUNDRED THOUSAND DOLLARS ($600,000.00).

7. CIBONEY SHALL EXECUTE and E.B.R. shall be entitled to register a mortgage or charge against the said land to secure the sums due to her by virtue of these presents and the due performance hereof by CIBONEY to the intent that such mortgage or charge shall rank subsequent to a mortgage or charge to such reputable financial insitutitoin as shall be financing the construction of the development of the property hereby sold.

8. A formal sale agreement for the said land shall be executed by the parties hereto contemporaneously with this agreement."

Breach Alleged By the Plaintiff

The Roaches aver that in breach of the contracts the defendant (Ciboney) has failed to construct the two townhouses or to take any steps to develop Cassa Nina within 18 months of the date of the Heads of Agreement or within a reasonable time thereafter. The Roaches further assert that damages from the breach are continuing because up to now the townhouses have not been transferred to them, as indeed, they have not been built.

On any reading of the two contracts the question of Ciboney's obligation to construct the townhouses and to take steps to develop Cassa Nina arises, and only arises, under the Heads of Agreement. No term of the sale of land agreement obliges Ciboney to construct and deliver townhouses to the Roaches. So, if Ciboney is in breach of an obligation to construct and deliver the two townhouses as contemplated by the Heads of Agreement, such a breach would be a breach of the Agreement and not of the sale of land agreement.

As Mr. Goldson pointed out, the terms employed by the parties in the sale of land agreement by which they recognise the existence of the Heads of Agreement are not effectual to incorporate by reference the terms of the Heads of Agreement into the sale of land agreement. Special Condition 4 of the latter agreement provides that "The Vendor and the Purchaser agree to be bound by and to carry out the terms and conditions of the Heads of the Heads of Agreement of even date herewith made between them."

So stated the parties have merely affirmed their obligations under the Heads of Agreement. They have stopped well short of stating that the terms of the Heads of Agreement are incorporated into the sale of land agreement and that breach of the terms of the Heads of Agreement constitutes a breach of the sale of land agreement entitling the innocent party to terminate the sale of land agreement. Indeed, nothing in the language of Special Condition 4 suggests that the completion of the sale of land agreement cannot take place unless or until the parties have performed their obligations under the Heads of Agreement which alone speaks of the construction and transfer of the townhouses.

Denying that it is in breach of its obligations under the contracts Ciboney pleads that it is in an implied term of the Heads of Agreement that the construction

of the townhouses is subject to its obtaining subdivision aproval from the Town and Country Planning Authority and building approval from the St. Ann Parish Council. Such approvals, it further pleads, have not yet been obtained.

Question of the implied term

The Roaches say that even if the term pleaded by Ciboney should be implied (which they do not admit) Ciboney would be in breach of that very term. Ciboney, they say, either made no application for the approvals within what they assert is the 18 month period contemplated by the Heads of Agreement for the completion of the contract, or failed to do so within a reasonable time.

Now, in looking at this question of implication in the contract of the term pleaded by Ciboney counsel on both sides, in an effort to support their rival contentions, appeal to aspects of the Heads of Agreement's factual background or context. Mr. Scharschmidt points out what is common ground, that before that contract was entered into the Roaches obtained outline approval for Cassa Nina. And he reminds the court that the Roaches have complied with paragraph numbered 4 of the Heads of Agreement which stipulates that the Roaches "will provide Ciboney with the approvals of the Local Planning Authority and all plans, drawings and other information or documents which are available" to them. Yet, observe that when the Heads of Agreement was entered into the self same outline planning approval that the Roaches provided Ciboney with stood as the only approval for townhouses from a goverment authority in respect of Cassa Nina. It was, at any rate, the only approval available to the Roaches and they furnished it only a few days after contract.

The development of Cassa Nina called for, among other things, the construction of townhouses in terms of the Heads of Agreement and in particular paragraph numbered 2 thereof. At the time that agreement was entered into Ciboney owned abutting lands known as Honeycomb lands. Those, too, were also earmarked for building development, a fact I find Mrs. Roache well knew. She admitted in evidence that when the Agreement was enterd into Ciboney did not, as far as she knew, have architectural drawings for the Honeycomb lands. And I accept Peter Rousseau's evidence that at that time it was an outline planning approval that was in place for those lands.

So, furnished with only outline approvals for Cassa Nina and Honeycomb, Ciboney would have been unable in planning law to build the townhouses referred to in paragraph 2 of the Agreement unless it were to obtain subdivision and building approvals in connection with which developed plans would have had to be submitted to the relevant government authorities. As Mr. Hylton points out, Mrs. Roache in her evidence confirmed that she was experienced in the area of building development, that she had been through the process of securing approvals for building development and, most importantly, she knew that subdivision and building approvals were necessary. I also agree that in stating Mrs. Roache's obligation to provide Ciboney with "the approvals of the Local Planning Authority and all plans, drawings and other information or documents ... available to her", the Heads of Agreement clearly demonstrates the importance with which the parties themselves veiwed the obtaining of the requisite planning approvals before any development on Cassa Nina could commence.

I must therefore adopt the approach of the common law as exemplified by the following dictum of Scrutton L.J. in one case:

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would both have replied: 'Of course so and so will happen, we did not trouble to say that; it is too clear'." -

see **Reigate v. Union Manfucturing Co. (Ramsbottom) [1918 K.B. 592 at 605**

And in another case Lord Pearson said essentially the same thing:

> "An unexpressed term can be implied if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the Court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which although tacit, formed part of the contract which the parties made for themselves". see

Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board [1973] 2 All. E.R. 260 at 268.

Bearing all that in mind I hold that the implied term as pleaded by Ciboney so went without saying by the parties that it is obviously to be implied from the express terms of the Heads of Agreement. Therefore, Ciboney's obligation

to convey the two townhouses to Mrs. Roache was conditional on Ciboney obtaining subdivision approval from the Town and Country Planning Authority and building approval from the St. Ann Parish Council.

CONDITIONAL CONTRACT

That is, as a matter of law, the extent to which the contract was conditional, for there is no question of the contract not having come into existence. That is the essential difference between the instant case and a line of cases relied on by Mr. Scharschmidt where the very existence of the ocntract in each of these cases was conditional.

In **Aberfoyle Plantations Ltd. v. Cheng [1959] 3 All E.R.** the contract for sale provided that the vendor would sell and the purchaser buy certain lands conditional upon the vendor obtaining the renewal of several leases on part of the property. In **Re Longlands Farm, Alford v. Superior Developments Ltd. [1968] 3 All E.R. 552** the contract expressly provided that "[s]such purchase to be subject to my company obtaining planning permission to its entire satisfaction for the development of this land and the question of title being to our approval" **(emphasis supplied).** In **Pillersdorf v. Denny (1973) 26 W.I.R. 33** the sale agreement was conditioned on the purchaser obtaining permission from the Town and Country Planning Officer for the development of the land for residential purposes and the purchaser was to submit an application for that purpose. In the event of permission being refused the vendor was to refund to the purchaser the deposit without interest and the agreement was to be at an end and of no force and effect.

Those cases show that until the particular condition was fulfilled there was no contract of sale to be completed. In other words the very existence of the mutual obligations was dependent on the performance of the stipulated condition.

Turning to the Heads of Agreement in the instant case, there is nothing to suggest that failure to obtain the requisite planning approvals would render the contract nugatory. As Mr. Goldson submitted, the effect of the condition is simply that until the approvals were obtained, Mrs. Roache had no legal basis to demand that the townhouses be built and handed over to her. The vital obligation under the Agreement, viz, to transfer the land, was not subject to the condition of planning approval being first obtained. So, some contractual obligation existed from the formation of the Agreement. Again, I agree that if Mrs. Roache had, for example, sold the land to a third party after signing the Agreement,

Ciboney would have been able to sue for breach of contract regardless of the non-fulfillment of the conditions of obtaining approvals.

On the other hand Ciboney's performance of its obligations under the Heads of agreement was conditional on its obtaining planning approval to construct the type of units contemplated by the terms of the Heads of Agreement.

Meaning of townhouses under the Heads of Agreement

If, as the Roaches contend, Ciboney was obliged under the Heads of Agreement to erect townhouses consistent with architect Carl Chen's description of them as residential units that are vertically (as opposed to horizontally) stratified with their own foundations and roofs (a description which I hold constitutes the ordinary meaning of the word) then the implied terms imposing the condition of planning aprovals would not avail Ciboney. The reason would simply be that since the Agreement was entered into some six years ago, no application has been made for approval to build townhouses fitting Carl Chen's description. Ciboney would have done nothing in respect of the implied term and would clearly be in breach.

It would be otherwise if -

(a) the word "townhouses" as used in the Heads of Agreement means as Ciboney contends "hotel rooms so configured as to give the appearance of townhouses",

(b) Ciboney has made reasonable efforts to obtain the approvals to build the units so defined and

(c) the approvals have been thereby obtained and Ciboney thereupon has proceeded to build in accordance with the approvals.

Now, hotel rooms so configured as to give the appearance of townhouses are not townhouses, as Peter Rousseau himself conceded in evidence. So, it is important to determine whether the parties used the word "townhouses" in the Agreement otherwise than in its ordinary meaning, that is to say, whether its meaning was qualified by the language employed by the parties in the Agreement made by them and; if so, what was the meaning.

Clause 2 of the Heads of agreement provides:

> "Ciboney will cause the said land to be developed by the erection thereon of townhouses in accordance with architectural drawings prepared for Ciboney for adjoining lands to the east with such adjustments to the site plan as Ciboney may decide so that same shall form an integral part of the Ciboney project".

The word "townhouses" must obviously be construed in the light of the words which follow it. I shall accordingly consider those words or phrases, always bearing in mind that the Agreement must be examined in the matrix of facts in which it is set and not interpreted purely on internal linguistic considerations: see **Prenn v. Simmonds [1971] 3 All. E.R. 237, at 239 and 240,** per Lord Willberforce. The phrases for consideration are:

(a) architectural drawings prepared for Ciboney;

(b) adjoining lands to the east;

(c) site plan;

(d) integral part of the Ciboney project.

The townhouses were to be erected in accordance or in conformity with architectural drawings prepared for Ciboney for lands to the east of Cassa Nina. The evidence leaves me in no doubt that at the time the Heads of Agreement was entered into Mrs. Roache well knew that the Ciboney project would include three phases, viz Phase 1, Ciboney on the sea subsequently called Sandals Ocho Rios; Phase 2, called Ciboney on the Hill and Phase 3 lying north of Phase 2. She knew that the third Phase would comprise Cassa Nina and the Honeycomb lands situate immediately beside it. She also knew that the lands for Phase 1 were immediately to the east of the said lands that were to comprise Phase 3.

Mr. Scharschmidt submitted that there is nothing in the Heads of Agreement creating any ambiguity as to the meaning of the word, "adjoining", and accordingly he urged that the word must be given its primary or literal meaning of "conteminous" or "joined to" Cassa Nina. Once that is done, the lands "adjoining" to the east of Cassa Nina must, he further submitted, be the Honeycomb lands and not the lands further east on which the Sandals Hotel is built.

However, two other phrases in clause 2 point the way, as Mr. Hylton contended, to the true interpretation of the words "adjoining lands to the east." First, the

clause describes the architectural drawings as "prepared for Ciboney". This latter phrase does not, be it noted, say "to be prepared" or "which shall be prepared". The unchallenged evidence is that as of the date of the Agreement the only relevant drawings which had been prepared for Ciboney were those of the Sandals Hotel. No plans had been prepared for Ciboney for either Cassa Nina or Honeycomb. Second, the clause goes on to say "with such adjustments to the site plan ... so that same shall form an integral part of the Ciboney project". I agree with Mr. Hylton that the key word there is "site". And I also agree that there may be numerous plans prepared in respect of a building such as floor plan, structural plan, roof plan and so on. However, the site plan simply shows where the buildings and other facilities are located on the site.

Now, the Agreement clearly envisages that the site plan is the only plan that needs to be changed. The floor plan etc. from the Sandals plans could be transposed to Phase 3 and be similar to the rest of the Ciboney project. The site plan would, however, have to be changed for the simple reason that the site is different. Mr. Scharschmidt sibmitted that the phrase "architectural drawings prepared for Ciboney for adjoining lands to the east" must be a reference to architectural drawings prepared for Honeycomb. If that is correct then one would have to change more than the site plan to make the roof etc. compatible with the rest of the Ciboney project. What one would need to change in these circumstances would be the plans that deal with the roof, door, finishings and similar items. It is significant that the parties identified the one plan, namely the site plan, as the only plan that could be adjusted. The parties were therefore clearly signifying that the site plan was a plan for a site other than Honeycomb or Cassa Nina because the "architectural drawings prepared for Ciboney for adjoining lands to the east" had, in the context of the evidence, nothing to do with either Cassa Nina or Honeycomb. Those drawings concerned Sandals situate immediately to the east of Cassa Nina and Honeycomb. Save for the site plan for Sandals the other plans for Sandals needed no adjustment to erect the townhouses in accordance with the aforesaid architectural drawings as identified by the language of Clause 2.

Test further the conclusion that the said architectural drawings concerned Sandals. Observe that the evidence shows that as far back as 1985 the Honeycomb lands were in fact known as the Honeycomb lands. If the parties were using the

phrase "adjoining lands to the east" to refer to the Honeycomb lands they could easily have used the designation, Honeycomb lands (which Ciboney had acquired from Leroy Lamie in 1987) and avoided using the quoted phrase. When the Agreement was entered into in March 1988 the Sandals Hotel had not yet been built. The parties could not therefore have identified it in the Agreement with the certainty with which they could have identified Honeycomb or Cassa Nina.

The context and the surrounding circumstances therefore plainly show that the parties did not use the word, "adjoining", in its primary and exact sense but in a loose sense as meaning "near" or "neighbouring".

Accordingly, I construe "adjoining lands to the east" as meaning the lands on which Sandals Ocho Rios was subsequently built. So the townhouses that Mrs. Roache and Ciboney agreed that Ciboney would build were in accord with the architectural drawings prepared for Ciboney for the lands subsequently known as the Sandals lands.

And Ciboney had the right to adjust the site plan and to ensure that the development "form an integral part of the Ciboney project". I construe this final phrase as meaning both (1) that the units for erection would be architecturally compatible with Phase 1, that is Sandals, and with Phase 2, that is, Ciboney on the Hill, and (2) that the units would be owned and operated in the same way as the units in Phase 1 and Phase 2.

Along with the parties and their attorneys I have had the benefit of viewing Phases 1 and 2 and the as yet incomplete Phase 3 of the Ciboney project. The units standing at Sandals (which comprises Phase 1) are clearly hotel rooms configured in such a way as to resemble the townhouses described by the architect Carl Chen. The Sandals units do not have separate foundations and roofs and are not vertically but horizontally stratified. They are, nevertheless, built in accordance with the architectural drawings prepared for Ciboney for Sandals. So the townhouses agreed to be built to accord with the self same drawings (save for adjustments to the site plan as Ciboney might decide) were not in my judgment, townhouses in the ordinary sense of the word but were hotel rooms so configured as to give the appearance of townhouses.

The matter of the subdivision and building approvals

Has Ciboney taken reasonable steps to secure the approvals and, if so, have they been obtained? If the answers are in the affirmative has Ciboney

proceeded to build in accordance with the approved plans? Those are the next questions that arise.

Now, prior to the Heads of Agreement Mrs. Roache had had plans prepared and had obtained outline approval for the development of Cassa Nina. Having already found that on a true interpretation of Clause 2 of the Heads of Agreement Ciboney was to build the townhouses in accordance with the Sandals plans, I readily accept Peter Rousseau's evidence that Ciboney did not agree to build in accordance with Mrs. Roache's plan or Lamie's plans for Honeycomb because as Rousseau explained they were architecturally incompatible with Phases 1 and 2 and did not fit into the context of development for the three phases of the Ciboney project. However, he made the valid point that earlier outline approvals ought to expedite the planning process because densities and other conditions would have been previously established by the planning authority.

I also accept Rousseau's evidence that as soon as the Heads of Agreement was signed in March 1988 he at once started to prepare plans for Cassa Nina (and Honeycomb) form submission for outline approval. Ciboney submitted the application on September 6, 1988 and two days later submitted the preliminary plans. I further find that the approval process was adversely affected by the disruptive hurricane of 12th September 1988 and by the non-functioning of the planning authority for some 6 to 9 months following the change of government after the general election of Feburary 1989. I also find that despite those set backs Ciboney pursued the task of trying to get the requisite approvals.

On 8th March 1990 even though it had not yet obtained outline approval Ciboney submitted final detailed plans (designated in the evidence as the B Plans) to the St. Ann Parish Council for building approval. Later that month Ciboney appealed to the Minister of Development, Planning and Production because the Town Planning Authority had not yet granted subdivision approval.

In May 1990 Peter Rousseau said he attended a meeting of the Town Planning Authority but that no decision was conveyed to him then. By March 1991 the plans, that is to say, the B Plans, were approved. Up to then I find that Ciboney had taken reasonable steps to secure the approvals. Yet Ciboney could no longer build in accordance with the B Plans becuase as Rousseau said Ciboney in compliance with the subsequent set of plans, called the C Plans, had already developed on the site

the existing building and built thereon a swimming pool etc., a fact confirmed by the Phase 3 photograph dated 31st January, 1991.

I understood Rousseau as saying that he submitted new plans that is, the C Plans after he said he was told by the Planning Authority several months after the May 1990 meeting that the B Plans were lost. If that was what the Planning Authority was saying one would have expected it to have put that in writing and given Ciboney an opportunity to submit duplicate or copy plans. Alternatively, if Rousseau was in fact told that the B Plans were lost one would equally have expected Ciboney to urge that a search for the plans be launched or that it would at once furnish copy B Plans.

Ciboney's inability to build in accordance with the approved plans (the B Plans) was of its own doing. In my opinion Ciboney should have ensured that it was in a position to build in accordance with the approved plans so soon as it got them back in March 1991. It failed to do so. Instead it submitted new plans (the C Plans), the approval of which it still awaits. It would be plainly unreasonable to expect the Roaches to await the approval of the C Plans. Had Ciboney put itself in a position to begin construction of the units on receipt of the approved plans in March 1991, as it ought to have done, construction of the units would on Rousseau's own estimate have been completed in 12 months, that is by March 1992. And so I hold that the two two-bedroom units , that is to say the two two-bedroom townhouses within the meaning of Clause 2 of the Heads of Agreement should have been transferred to Mrs. Roache by March 1992.

Ciboney has failed to erect and transfer the units to the Roaches. It must therefore pay to them such sum as represents the value of the two units.

The plaintiffs' claim for relief

As already demonstrated the Roaches' claim to the re-transfer to them of Cassa Nina must fail.

By their amended statement of claim they also claim for breach of contract damages in the form of:

(a)	market value of two townhouses at the date of the unit and increasing in value	US$580,000.00
(b)	rentals lost over the period September 1989 to December 1993	407,464.00
		US $987,464.00

And they assert that the Jamaican dollar equivalent of US$987,464.00 at J$33.00 to US$1.00 is J$32,586,312.00. Then too, the plaintiffs claim interest as follows:

(i) Interest at 7% for 5 years on the sum of US$27,030.00

(ii) Interest at 7% for 3 years on the sum of US$57,832.00

(iii) Interest at 7% for 1 year on the sum of US$57,100.00.

They aver that the said sums on which interest is claimed are the sums lost in respect of rental of one townhouse in the period September 1989 to December 1993.

They further claim "interest on the above sums and on additional special damages incurred between the date of the statement of claim and judgment at 25% per annum pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act or as the Court deems just".

Now, even if the aprovals had been obtained and the townhouses built within 18 months of the date of the Heads of Agreement, the Roaches' entitlement, if any, to rental or interest could not start until, say August 1991. This is so because I find that the operation of the units comprised in the overall Ciboney project was not reasonably expected to generate profit in the first two years of operation by reason of marketing factors peculiar to the hotel industry. And I further find that losses were suffered in respect of Phase 1 and Phase 2 over this period.

In any event the Roaches cannot be entitled to both rental and interest because, as Mr. Hylton submitted, they could not have been kept out of both the townhouses and the money value of the townhouses. Otherwise they would recover twice over for the same loss. And note that what the Roaches are claiming is not townhouses but a sum of money representing their value. So, it is interest, and only interest, that would be awardable on the value of the units.

Their value falls to be assessed in the light of the evidence of the real estate appraiser John Dolphie. On October 25, 1992 he inspected Cassa Nina and calculated that the sale value of two two-bedroom townhouses of 1,700 square feet at such a location, were they then built there, would be between US$290,000.00 and US$300,000.00. Although the Heads of Agreement makes no mention of the size of the units I accept Mrs. Roache's evidence that Rousseau indicated that Ciboney would erect bedroom units of 1,700 square feet.

Dolphie calculated the value of such writs by comparing actual sale prices of similar units in similar locations.

On making his valuation Dolphie seemed to have taken into account the benefit that units erected on Cassa Nina would have, namely, that of sharing facilities of the Ciboney project. At the same time he appeared to have ignored the fact that the owners' use of the units would be restricted. Even so, I bear in mind that the valuation was not challenged in cross-examination and that, as Dolphie said, apartments generally fetch a slightly higher price per square foot than the conventional townhouses described by Carl Chen. So, I accept the sale value of the units to be US$290,000.00 each as at the date of valuation namely, October 25, 1992.

Question of interest

The statement of claim claims interest at the rate of 25% per annum. The Roaches adduced evidence as to Jamaican dollar interest rates and as to United States dollar interest rates.

As the Roaches are claiming the value of the units in United States currency, namely, the sum of US$580,000.00 they cannot properly claim interest on that sum at the Jamaican dollar rate of interest. Therefore, given the way the claim is framed and the fact that the units were valued in United States currency I agree with Mr. Hylton that the evidence as to Jamaican dollar rates is irrelevant. It is the United States dollar rate that is applicable and I find on the evidence that 7% per annum is the appropriate rate.

Ciboney breached the Heads of Agreement by unjustifiably working on Cassa Nina to such an extent that by the time the B Plans were approved in or about March 1991 it could no longer build the type of units contemplated by the Heads of Agreement. Were it able to start then, it would have been able to erect and transfer the two units to Mrs. Roache or her nominee by March 1992. The units Mrs. Roache should have got would have both been worth on the open market US$580,000.00 as at October 25, 1992. Accordingly, I hold that interest at 7% per annum is payable on that sum from October 25, 1992 to today, the 7th December, 1994. The interest payable is therefore US$85,984.00. So, the total sum due in United States currency adds up to US$665,984.00.

As a general rule damages for tort or breach of contract are assessed as at the date of breach. However, in the instant case the two two-bedroom units that were to be built as part of the Ciboney project (a tourism project) were understandably valued in United States currency. And a claim for their market value has been made in that currency as well. Further, I express in that currency judgment for their value plus interest. The Roaches have up to now been kept out of the money value of the units epxressed in United States currency. So, in the circumstances of this case I hold that the conversion into Jamaican dollars of the sum of US$665,983.00 at the prevailing rate of exchange of J$33.00 to US$1.00 would compensate the Roaches for the damage or loss suffered through the breach, as if the Heads of Agreement had been performed.

There will therefore be judgment for the Roaches in the sum of US$665,984.00 converted to J$21,977,439.00.

True, I have disallowed their claim for re-transfer to them of Cassa Nina and have disallowed their claim for special damages for lost rentals. I cannot, however, agree that so much of the substratum of their case has been swept away that they should not be regarded as successful parties. Ciboney was in breach of the Heads of Agreement at the date of the issue of the writ on May 1, 1991. The Roaches have succeeded in their significant claim for the market value of the two two-bedroom units. And I find that there is nothing in their conduct in relation to the litigation that ought to deprive them of their costs as successful parties.

Ciboney must therefore pay the Roaches' costs which are to be taxed if not agreed.