JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 133/05

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN: **BEVAD LIMITED** **APPELLANT**

AND **OMAN LIMITED** **RESPONDENT**

Miss Hilary Phillips, Q.C. and Mr. Patrick Bailey, instructed by Patrick Bailey and Co. for the Appellant.

Dr. Lloyd Barnett and Mr. Keith Bishop, instructed by Bishop and Fullerton for the Respondent.

June 25, 26, 27, 2007 and July 18, 2008

HARRISON, P.

I have read in draft the judgment of Harris, J.A. I agree with her reasoning and conclusion. There is nothing further I wish to add.

HARRISON, J.A.

I also agree with the judgment of Harris, J.A. and I have nothing further to add.

HARRIS, J.A.:

This is an appeal from a decision of Jones, J. on November 15, 2005 which was made in favour of the respondent.

The facts giving birth to this appeal are founded upon two contracts for sale between the appellant and respondent. Sometime in 1996, Mr. Winston Crichton, a real estate agent, acting on behalf of the appellant approached the respondent, through its principal director Mr. Paul Harris, offering for sale, a package consisting of a lot of land on Hopedale Avenue in the parish of Saint Andrew owned by the appellant, and approved building plans for ten 2 bedroom, two 1 bedroom and two studio apartments.

Following this offer, Mr. Crichton took Mr. Harris to Hopedale Avenue. There he pointed out to him a lot on which Mr. Harris said a partially completed building was sited. Both Mr. Crichton and Mr. Harris asserted that the lot was situated to the right of an apartment building on 9 Hopedale Avenue.

Mr. Harris expressed an interest in the property for the construction of a residential apartment complex. He declared, however, that he voiced some concerns about the presence of the incomplete building on the property, as also, the inadequacy of parking spaces on the lot. In an effort to address these concerns, Mr. Crichton took him to the office of Mr. Dixie Adams, the principal director of the appellant. Mr. Harris stated that Mr. Adams showed him a set of drawings there. With these drawings, Mr. Harris declared, he expressed some dissatisfaction. In an effort to assuage his anxiety, Mr. Adams, he said, offered to take him to the property.

He went on to assert that approximately one week later, Mr. Crichton, Mr. Adams and himself visited the property. Mr. Adams pointed out a lot, approximately half an acre in dimension and after giving him an explanation as to the design and proposed location of the building, he indicated to him that the incomplete building thereon was not included in the plans. Mr. Adams, he said, outlined the boundaries and frontage of the land. He further related that Mr. Adams informed him that the appellant had obtained permission from the relevant authorities to utilize a part of the roadway for parking purposes.

Subsequent to these events, Mr. Harris instructed his attorneys-at-law to proceed with the purchase of the property. On April 11, 1996 the parties entered into an agreement for sale of lot 2 on the plan of 36 Beverley Drive, in the parish of Saint Andrew, (11 Hopedale Avenue) registered at volume 1082 and folio 341, for the sum of Four Million Dollars ($4,000,000.00) as well as an agreement for approved building plans for the construction of apartments on the property, for the sum of Three Million Three Hundred and Fifty Thousand Dollars ($3,350,000.00). Before the sale was completed, the respondent obtained a surveyor's identification report in respect of the land. This report, however, was never tendered in evidence. Following the receipt of the report, Mr. Harris issued instructions to his attorneys-at-law to proceed with the transaction. The sale was completed and the land was transferred to the respondent on July 12, 1996. There is evidence from Mrs. Jennifer Messado, the attorney-at-law who

then acted for the appellant that approved building plans were delivered to the respondent's attorney-at-law.

Mr. Harris stated that, in 2002, due to a downturn in the real estate market, he decided to carry out development of the land with a view to constructing studio apartments only. As a consequence, he retained the service of an architect to re-design the plans. He declared that he then sought to locate the original approved plans, but this proved futile. This he stated, prompted him into embarking on a further visit to the property with a surveyor to carry out an engineering survey. The surveyor informed him that checks made by him revealed that the boundaries on earth did not conform with those on the plan annexed to the Certificate of Title.

Mr. Adams died in November, 1998.

On October 18, 2002 the respondent commenced action against the appellant, seeking to rescind the contracts of sale and for damages for loss of opportunity to carry out the proposed development and make a profit from the venture.

Judgment was entered for the respondent as follows:

> "(a) First, the judgment will be to set aside the sale of the land comprised in Certificate of Title registered at Volume 1082 Folio 341 together with the sale of the building plans to the Oman Limited by Bevad Limited and declare that the Agreement for Sale of Land and the Agreement

for Sale of Plans both dated April 11, 1996, between Oman Limited and Bevad Limited are null and void and of no legal effect.

(b) Second, a note of this judgment must be indorsed by the Registrar of Titles on the Certificate of Title registered at Volume 1082 Folio 341, and all documents of title for the said lot of land together with the building plans in the possession of Oman Limited possession must be given to the defendant, Bevad Limited.

(c) Third, Bevad Limited must repay the purchase-money, of $4,000,000.00 for the lot and $3,350,000.00 for the plans together with the proved expenses incurred by Oman Limited in consequence of the purchase of the land which amounts to $140,000.00.

(d) Fourth, General Damages assessed to Oman Limited for prospective loss of profit in the amount $20,689,585.00

(e) Bevad Limited to pay the cost of this action in accordance with the CPR 2002 and any other cost associated with the endorsement of the Certificate of Title; such cost to be agreed or taxed."

Leave was sought and obtained by the appellant to amend the grounds of appeal. Consideration will first be given to grounds (a), (b), (c) and (d):

"(a) The Learned Judge erred and misdirected himself as to the purport and effect of a Surveyor's Identification Report obtained by, or, on behalf of the Purchaser/Respondent prior to completion of the pending sale transaction, the subject of this appeal.

(b) The Learned Judge erred in failing to find that any representation allegedly made by Dixie Adams as to the location of the subject lot, was not relied on by the Purchaser/Respondent prior to completion but was superceded by the contents of the Surveyor's Identification Report obtained by or on behalf of the Purchaser/Respondent as the Purchaser/ Respondent had a duty to satisfy itself as to the location of the land being purchased.

(c) That the Learned Judge erred and misdirected himself when he concluded that as a matter of law Dixie Adams in pointing wrong lot, [sic] which is not admitted, constituted fraudulent misrepresentation.

(d) The Learned Judge erred and misdirected himself as to the weight to be given to the representations attributed to Dixie Adams by the Respondent's agent Mr. Paul Harris in that:—

(i) These "representations" were first made known after the death of Dixie Adams.

(ii) Further these "representations" were made known in excess of six (6) years after the subject sale transactions were completed i.e. the title was transferred to the Respondent, the Plans in the possession of the Appellant were delivered to the Respondent's Attorney (and agent) and the agreed Purchase Price paid by the Respondent in full.

(iii) Mr. Dixie Adams, being dead was not in a position to give evidence in contradiction of the evidence of Mr. Paul Harris, the Respondent's agent.

(iv) That there was no documentary or other evidence whatsoever that the Purchaser/Respondent raised concerns

> or dissatisfaction about the location of the subject lot or the details of the plan during the lifetime of Mr. Dixie Adams."

The thrust of the appellant's submissions was that the learned trial judge failed to give any or adequate consideration to the evidence before him, thus rendering his findings and conclusions unreasonable. It was first contended that no representations were made by Mr. Adams and even if representations as alleged were made by him, there was no proof of fraud or recklessness on the part of Mr. Adams and further Mr. Harris, being an experienced purchaser of lands did not place reliance on Mr. Adams' representations, but relied on his own acumen.

The challenge to the learned trial judge's decision essentially brings into focus the question as to whether the judge's findings of fact can be assailed. An appellate court will not lightly depart from the decision of a trial judge which is grounded on facts found unless such findings are plainly wrong. The assessment of a witness' credibility resides within the province of a trial judge. An appellate court, therefore, will only disturb his findings of fact if it is satisfied that he had obviously erred on the facts as found. See **Watt v. Thomas** [1947] A.C. 484; 1947 1 All ER 582; **Eldemire v. Eldemire** [1990] 27 J.L.R. 316; **Industrial Chemical Co. (Jamaica) Ltd. v. Ellis** 35 W.I.R. 303.

The critical issue arising is whether Mr. Adams had pointed out the wrong lot for sale and in so doing intended to defraud the respondent causing him loss

and damage. Did he induce the respondent into entering into the contracts by making false representations without belief in the truth, or was he reckless in not caring whether they were true or false? Is there evidence on which liability could be ascribed to the appellant by virtue of the tort of deceit?

In **Derry v. Peek** [1886 – 90] All E.R. 1 the *locus classicus* on the tort of deceit, Lord Herschell, speaking over a hundred years ago, stated that for an action to lie in the tort it must be shown that the statement was not only false but was "made knowingly, or without belief in its truth, or recklessly, careless, whether it be true or false". In that case it was held *inter alia*, that a false statement made carelessly, without reasonable belief in its truth did not amount to fraud but may furnish evidence of it.

Four principal elements of the tort must be established:

(i) There must be a false representation of fact. This may be by word or conduct.

(ii) The representation must be made with the knowledge that it is false, that is, it must be willfully false or made in the absence of belief in its truth. **Derry v. Peek** (supra); **Nocton v. Lord Ashborne** [1914 - 1915] All E.R. 45.

(iii) The false statement must be made with the intention that the claimant should act upon it causing him damage.

(iv) However, it must be shown that the claimant acted upon the false statement and sustained damage in so doing. **Derry v. Peek** (supra); **Clarke v. Dickson** [1859] 6 C.B.N.S. 453; 35 Digest 18,100.

If fraud is proved, there is no necessity to establish that there was no intention on the part of the defendant to injure or defraud the claimant. The true test is whether the claimant was induced by the false statement to act as he did.

The issue as to whether a representation is fraudulent is one of fact. When therefore is a statement willfully false within the context of the principles laid down in **Derry v. Peek**? The answer lies in the intention of a defendant as to whether he had a genuine belief in the truth of his statement. Liability may be imposed on a defendant if it can be shown that he did not honestly believe the truth of the statement. If a man makes a statement, intending it to be acted upon by others, knowing it to be untrue, or has reasonable grounds to believe it to be untrue, he commits a fraud. To establish liability, it is not necessary to show that he should have known the statement was false. Once it is made and it is shown that he has no belief in it, this is affirmation which renders him liable. In **Smith v. Chadwick** [1884] 9 App. Cas. 187, Lord Bramwell at page 203 said:

> "An untrue statement as to the truth or falsity of which the man who makes it, has no belief is fraudulent; for, in making it, he affirms, he believes it, which is false."

In the absence of fraud, it is sometimes sufficient to assign liability to a defendant by showing that he acted recklessly in making the representation. Reckless means lack of sincerity in the belief of the truth of the statement made.

It must be shown that there was a conscious indifference on the part of a defendant as to whether the statement was true or false. In **Armstrong and Another v. Strain** [1951] 1 T.L.R. 856 at 871 Delvin, J., as he then was, in construing recklessness, said:

> "A man may be said to know a fact when once he has been told it and pigeon-holed it somewhere in his brain where it is more or less accessible in case of need. In another sense of the word a man knows a fact only when he is fully conscious of it. For an action of deceit there must be knowledge in the narrower sense; and conscious knowledge of falsity must always amount to wickedness and dishonesty."

In **Angus v. Clifford** [1891] 2 Ch. 449 at 471 Bowen, L.J. described recklessness in the following terms:

> "It seems to me that a second cause from which a fallacious view arises is from the use of the word "reckless." Now, what is the old common law direction to juries? And it is not because I think that common law is better than equity that I go back to it — but it is because an action for deceit is a common law action — the old direction, time out of mind, was this, did he know that the statement was false, was he conscious when he made it that it was false, or if not, did he make it without knowing whether it was false, and without caring? Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn — evidence which consists in a great many cases of gross want of caution — with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence."

Generally, a person is bound by his statement and he is ordinarily taken to have a belief in its truth. If, however, it is shown that he was conscious that the statement would be understood in a manner other than that which he honestly, though, mistakenly thought was correct, he cannot be said to be fraudulent. An honest mistake does not rank as dishonesty. See **Derry v. Peek** (supra), **Smith v. Chadwick** (supra). Recklessness amounting to gross negligence will not attract liability. The statement must be shown to have produced a misunderstanding in the claimant's mind which would have induced him to have entered into the contract and he thereby sustained injury.

The first issue identified by the learned trial judge related to the pointing out of the lot. In dealing with this issue, at paragraph 10 of his judgment, he said:

> "The evidence of both Winston Crichton and Paul Harris was that Dixie Adams pointed out the lot to the right of the apartment complex which was not the lot referred to in the agreement for sale and certificate of title owned by Bevad Limited. This lot contained an incomplete building and from the court's visit to the locus is distinct in appearance and position from the other lot contained in the agreement. No evidence has been led to contradict this and the court accepts the evidence of Paul Harris and Winston Crichton and concludes that the wrong lot was in fact pointed out by Dixie Adams, the agent of Bevad Limited."

Miss Phillips submitted that Mr. Harris gave evidence of the presence of an incomplete building on the lot which he said was shown to him, however, Mr.

Crichton made no mention of this building. Mr. Harris or Mr. Crichton could have been mistaken, she argued. This important aspect of the evidence, she argued, had not been adequately addressed by the learned trial judge.

Mr. Adams was the appellant's Managing Director. No. 11 Hopedale Avenue is owned by the appellant. It is sited in a small subdivision. There is no dispute that Mr. Crichton was the appellant's agent when he pointed out the lot to Mr. Harris. Messrs Crichton and Harris visited the lot on two occasions, once by themselves and later accompanied by Mr. Adams. The lot pointed out by Mr. Crichton was the same lot about which Mr. Adams held discussions with Mr. Harris when they all visited the location. It could not be said that Mr. Crichton was mistaken when he had first shown the lot to Mr. Harris. If he had erred in so doing, obviously, this would have been corrected by Mr. Adams when all three attended at the site.

Further, the lot which was pointed out was described by the witnesses as being sited to the left of an apartment building on No. 9 Hopedale Avenue. The lot owned by the appellant is to the right of the apartment building. The learned trial Judge visited the *locus*, and had the benefit of inspecting the area. He saw the witnesses. He had the opportunity of observing their demeanour and assessing their credibility. He obviously found them credible.

The learned trial judge found that Mr. Crichton corroborated Mr. Harris. Mr. Crichton, the appellant's agent, pointed out the wrong lot. Mr. Adams' subsequent visit thereto with the witnesses was confirmation of this. The learned trial judge concluded that the wrong lot had been pointed out. I see absolutely no reason why this court should depart from the learned judge's conclusion.

The next question to be answered is whether Mr. Adams had falsely represented to Mr. Harris that the appellant owned the lot which was pointed out and whether he had relied on the representation to the detriment of the respondent. In dealing with this issue, the learned trial judge at paragraph 14 of his judgment said:

> "In general, an action to rescind a contract for misrepresentation would fail if the purchasers did not rely on the vendor's statements but tested their accuracy by independent investigations and declared themselves satisfied with the result. However, a claimant will not be left without relief for fraudulent misrepresentation except on clear proof that he had actual and complete knowledge of the true facts. The onus would be on the defendant to prove that the claimant has explicit knowledge of the truth. In this case, Bevad Limited has not discharged this burden as there is no evidence that Paul Harris or Oman Limited had actual and complete knowledge of the true facts of what he purchased."

He continued at paragraph 16 by saying:

> "In this case, there cannot be any doubt that the representations made by Dixie Adams were false. He was the principal officer of Bevad Limited and had actual or ostensible authority to conduct business on its behalf. He must have or ought to have known that the lot that the company was selling was not the

> one that he showed to Paul Harris. In addition to the lot, Dixie Adams also agreed to sell approved building plans for that lot. I find to a high degree of probability that his action in pointing out the wrong lot — if it was not intentional — was at least reckless or indifferent to the truth. While the Surveyor's Identification Report ordered by Reginald Fraser Jr. on behalf of Oman Limited would have afforded them an opportunity to examine and corroborate the representation made by Dixie Adams, this cannot by itself, deprive Oman Limited of its claim for fraudulent misrepresentation. Accordingly, the court concludes as a matter of law that the statements of Dixie Adams in pointing out the wrong lot constituted fraudulent misrepresentation."

Miss Phillips argued that Mr. Adams is dead and the court should treat with jealously his unavailability to have given evidence. She submitted that the appellant pleaded that Mr. Adams did not point out the lot. It was her further submission that if he had made a representation, it could have been done by reason or a mistake or carelessness but there is nothing to establish dishonesty or deceit on his part.

Dr. Barnett submitted that Adams' absence from the trial would not have precluded the learned trial judge from concluding that the representation was made. He further submitted that Mr. Adams was the Chief Executive Officer of the appellant, and the lot for sale was the only one owned by the appellant on the road in the area. It was also his submission that plans were prepared for the lot and an application was made for modification of a covenant on it and that Mr. Adams executed the agreements for the sale of the lot and the plans. There

could be no reasonable basis for Mr. Adams' belief that the lot pointed out was owned by the appellant, he argued.

Mr. Adams offered for sale land which was not owned by the appellant. This was clearly a misrepresentation of the land which was being sold. Does this point to the want of honest belief on the part of Mr. Adams in the identification of the subject matter for sale? Mr. Adams was the appellant's agent. The appellant became the registered proprietor of the lot on March 23, 1987. The sale to the respondent was conducted in 1996 some nine years after the appellant assumed ownership. Mr. Adams must have known or ought to have known that the lot, for which the parties contracted, was Lot 2 on the plan of 36 Beverley Hills (11 Hopedale Avenue) as contained in Certificate of Title registered at volume 1082 folio 341.

To say that Mr. Adams was mistaken would be inaccurate. As the Managing Director of the appellant he would have known or ought to have been aware which lot had been put on the market for sale. On his visit to the property with Messrs Crichton and Harris he addressed certain concerns raised by Mr. Harris relating to the very lot which Mr. Crichton had previously pointed out to Mr. Harris. It is of manifest significance that Mr. Adams did not only offer the property for sale but also plans for the development of the land and had taken those plans to the site with him. He also informed Mr. Harris that approval had been granted for parking on the roadway which was untrue.

Mr. Byron Constantine, an expert witness testified that his inspection of 11 Hopedale Avenue, showed that the topography would not permit the proposed development unless major restructuring of the land was carried out. The lot was a little less that half an acre. He opined that the general rocky foundation of the land would result in the incurring of great expense in the restructuring of the land. It was also his opinion that 15 habitable rooms were the maximum units permissible on the land.

Mr. Crichton said that the lot shown to him by Mr. Adams was undulating in topography and a half an acre in size. It cannot be denied that the irregular terrain of 11 Hopedale Avenue would render it unattractive. It could be that the topography of the land pointed out would have been more appealing to Mr. Harris than that owned by the appellant. The lot pointed out was a little larger than the appellant's. Significantly, Mr. Harris said he would not have purchased 11 Hopedale Avenue. In all the circumstances, it could be inferred that Mr. Adams knew that the lot pointed out would have been more readily acceptable to Mr. Harris for the purpose of accommodating the proposed development than 11 Hopedale Avenue. Mr. Adams knew or ought to have known the true of identity of the lot for sale. It could be said that the learned trial judge was correct to find that he was either fraudulent or reckless and indifferent to the truth as to the lot which was being sold, as the learned trial judge found.

It is perfectly true, as Miss Phillips argued that the court should guard with jealousy the fact that Mr. Adams could not have testified. However, if the witnesses before the court are found to be credible, their evidence can be accepted notwithstanding the death of someone who would have been a vital witness.

In **Re: Garnett Gandy v. Macaulay** (1885) 31 Ch. D. 1, cited by Dr. Barnett, the law was authoritatively expressed by Brett, M. R. at page 9 when he said:

> "The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or in Equity."

In the case under consideration, on the evidence presented by the respondent, the learned trial judge cannot be faulted to have found the witnesses credible as he did. Neither the fact that the claim as to misrepresentation had been made subsequent to Mr. Adam's death nor Mr. Adam's unavailability to have given evidence would have operated in such a way so as to have precluded the learned judge from making a finding that Mr. Adams

pointed out the wrong lot and by so doing, had tricked the respondent into purchasing the appellant's lot.

It was Miss Phillip's further submission that the respondent had secured legal representation during the transaction and before the sale was completed. She argued that a surveyor's identification report had been obtained by virtue of which the respondent had carried out independent investigations. By these acts, she contended, Mr. Harris, an experienced purchaser of lands, relied on his own acumen and expressed satisfaction as to the location and dimensions of the lot for sale.

A claimant may act to his detriment if he relies on the words of a defendant in circumstances where he fails to avail himself of information open to him and thereby suffers loss. In support of this proposition, the Earl of Devon, in **Attwood v. Small & Others** [1835 – 1842] All E.R., 258 at page 261 said:

> "... if a party engaged in negotiating for a purchase of property, having employed competent agents to inspect that property, either did not call for or obtain any report from those agents, or, having got such a report, did not act upon it, he could not afterwards turn round and say that he had been deceived by placing reliance upon the statements of the vendor instead of availing himself of the means of information which were open to him."

He continued by saying:

> "It is not inconsistent with my view of this case to suppose that Mr. Attwood may have been very anxious that the worst side of the picture should not

> be turned to the intended purchasers; that he was willing to divert their attention from the proper objects of inquiry; and that he even represented generally his property to be more valuable than it really was. Such cases are of daily occurrence in which the doctrine of "Caveat emptor" is to apply, and parties are left to take the consequences of their own want of caution or prudence. A court of equity will only interfere with this doctrine of common law in those cases in which it is proved that one party has made a representation of a material circumstance which it he knows to be false and the falsehood is one of which the other party has no means of knowing, and in which it can be further shown that the contract which it is sought to set aside was founded upon this misrepresentation so made and in reliance on the facts so misrepresented."

At page 262 he said:

> "The question is not as to waiver or acquiescence in fraud, but whether the purchasers have used that ordinary degree of vigilance and circumspection in order to protect themselves which the law has a right to expect from those who apply for its aid. The whole course of the proceeding from its commencement to its close tends to show that the purchasers did not rely upon any statements made to them, but resolved to examine and judge for themselves."

The question arising is whether Mr. Harris had applied the ordinary degree of diligence in protecting the respondent by reason of the securing of the surveyor's identification report and by the retention of legal representation. Can it be said that Mr. Harris had not relied upon representations made by Mr. Adams but on his own acumen and on inquiries of his own?

Where a claimant enters into a contract having been influenced so to do by false representations of a defendant, it is not sufficient to say that if the claimant had exercised due diligence he would have discovered that the representation made by the defendant was not true. In **Aaron's Reefs Limited v Twiss** (1896) A. C. 273 at 279, Lord Halsbury L. C. had this to say:

> "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself to them.' I take it to be a settled doctrine of equity, not only as regards specific performance, but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations".

The surveyor's identification report would have had no impact on this case for two reasons. First, the service of a surveyor was secured by the respondent's attorneys-at law for the purpose of identifying the boundaries of the property which was being sold after the execution of the agreement for sale. The report having been secured subsequent to the parties' entry into the agreement, it cannot be said that the report was a factor influencing the respondent's entry into contractual relationship with the appellant.

Secondly, there is no evidence that Mr. Harris had pointed out the lot to the surveyor at the time he carried out the identification of the boundaries. In fact, he did not recall requesting the identification report. The inference is that the report had been commissioned by the respondent's attorneys-at law. It

follows that the attorneys–at-law would have given the surveyor either the lot number or its civic address in order for him to proceed with the assignment. Consequently, the dimensions and location of the lot as found by him would not only, doubtlessly, be in conformity with those recited in the agreement but also with those as appearing on the plan annexed to the relevant Certificate of Title, and would therefore not be in accordance with the lot pointed out.

The surveyor's identification report would in no way have caused the respondent or its attorneys-at- law to have embarked on any further enquiry as to the true identification of the land which was being sold. It is clear that the report would have identified the property which the respondent agreed to buy. It entered into a contract for the purchase of Lot 2 on the plan of Beverley Hills, 11 Hopedale Avenue and that was what it would have expected to receive.

I cannot accept, as contended for by the appellant, that the fact that the respondent's attorneys-at-law sought to verify the lot which was being purchased, it can be said that it was the correct lot for which the respondent contracted. The entire course of dealings between the parties clearly demonstrates that the respondent relied on the false statements made by Mr. Adams. His pointing out of the lot and the information given by him to Mr. Harris would have produced some misunderstanding on Mr. Harris' part and would have induced the respondent into entering into the contract to purchase the land to its detriment.

It was further contended by the appellant that six years had elapsed since the conclusion of the contracts before the respondent sought to register its complaint and that it would be barred from any relief by the effluxion of time.

Here the appellant seeks to rely on the equitable defence of laches. To found a defence in laches, it must be specifically pleaded. **Sutcliffe v. Jones** 40 L.T.R. 875. This was not done. The defence having not been pleaded, the appellant cannot be aided by it.

Ground (g):

> "The Learned Judge erred and made a finding contrary to the evidence in holding that Dixie Adams participated in selling an ***unapproved*** plan." [Emphasis original]

The subject matter of the subsidiary agreement between the parties are plans for the construction of 10 two bedroom, 2 one bedroom, and two studio apartments. The agreement provides for the purchase of Building Plans approved by the Kingston and Saint Andrew Corporation and the Town Planning Department. The learned trial judge found that the plans were never approved.

The plans were not tendered in evidence. Mr. Harris stated that they were given to him by his attorneys-at-law. He said, "Person or persons to whom I entrusted them lost them." Mrs. Jennifer Messado, the appellant's attorney-at-law, at the time of the transaction, testified that approved Building Plans were submitted to the respondent's attorneys-at- law. This was confirmed by a letter

of July 4, 1996 from Jennifer Messado and Co. to the respondent's attorneys-at-law receipt of which was acknowledged by them. Mr. Crichton spoke of a signed plan, indicating the approval by the Kingston & Saint Andrew Corporation, with reference to the proposed development of 11 Hopedale Avenue, authorizing the construction of twenty six habitable rooms. This plan would be in conformity with the units as prescribed by the agreement.

The development as proposed demands two processes, planning as well as building approval by the relevant authorities. A planning approval precedes a building approval. Planning permission is required by virtue of the Town and Country Planning Act and in accordance with regulations prescribed by the Town and Country Planning (Kingston) Development Order 1966. Planning approval is required where a subdivision exists. Such approval would, among other things, include the size and form of the lots or the units in the development. Building permission is required in accordance with the Kingston and Saint Andrew Building Act. Building permission regulates and controls, *inter alia*, matters such as the size of the building and the purpose for its proposed use.

There was evidence from Mr. Leonard Francis, Manager of the Planning and Development Department at the National Planning and Environment Agency revealing that approval had been granted on June 9, 1992 for the construction of eight studios and three one bedroom apartments on 11 Hopedale Avenue. He did not state to whom the approval was granted.

Evidence was also adduced from Mr. Errol Bennett, an administrator in the Town Clerk's Department of the Kingston and Saint Andrew Corporation showing that on June 23, 1992 approval was granted by the Kingston and Saint Andrew Corporation to Bryad Engineering for the construction of units as described by Mr. Francis. Although Mr. Francis did not specify to whom the approval was granted, it could be that it was with reference to the same units for which approval was granted to Bryad. Mr. Bennett stated that an application was made for the approval of twenty six habitable rooms but approval was given for only eleven habitable rooms.

He further disclosed that an approval for twenty six habitable rooms would be in contravention of the relevant regulations, as, the regulations only permit thirty habitable rooms per acre. This requirement had been in operation since the 1980s. 11 Hopedale Avenue comprises approximately half an acre. The property was purchased in 1987 by the appellant. It follows that it would have been subject to all regulatory requirements imposed by the relevant authorities.

The appellant obtained an order of the Supreme Court modifying a restrictive covenant on the title which authorized the subdivision of the land, subject to the approval of the relevant authorities. This order was endorsed on the appellant's title on July 22, 1993. The erection of apartments brings a development within the parameter of a subdivision. There is no evidence that subdivision / planning approval had ever been granted to the appellant by either

the Kingston and Saint Andrew Corporation or the Town Planning Department at the time of the sale of the Building Plans.

Neither Mr. Bennett nor Mr. Francis was able to state whether approval had been granted to the appellant with respect to the Building Plans sold to the respondent. Mr. Crichton made reference to a stamped plan and referred to the sale of an approved Building Plans. The respondent's attorneys-at-law received approved Building Plans from Mrs. Messado. The balance purchase price was paid and the property was transferred to the respondent.

It is without doubt that the balance purchase price would not have been paid unless the respondent's attorneys-at-law had been satisfied that the plans for the sale were approved for those units as stated in the contract. I would differ from the learned trial judge to say that it is reasonable to infer that approved Building Plans were sold. The plans would, however, have contravened the Town and Country Planning (Kingston) Development Order 1966. Such plans, as contracted for, would have breached the permissible density of the lot owned by the appellant. This Mr. Adams had known or ought to have known.

He was fully aware that planning /subdivision approval would be required as a result of the modification of the restrictive covenant. This was not secured, yet he permitted the appellant to enter into the contract with the respondent without disclosing to him that no planning approval had been obtained. In so doing, he was either fraudulent or reckless.

Ground (e):

> "The Learned Judge erred and misdirected himself as to the effect of condition (g) of the terms and conditions of the Agreement for Sale of Plans ..."

It was also contended by the appellant that Mr. Harris read, understood and executed the agreement for sale of the plans in the presence of his attorneys-at-law and is bound by clause (g) thereof. Clause (g) of the agreement reads:

> "The Purchaser is deemed to have examined the said Plans prior to the sale and no warranty, condition, description or representation on the part of the Vendor is given or implied nor is any warranty, condition, description or representation is [sic] to be taken to have been given or implied from anything said or written and any statutory or other warranty of condition or of description expressed or implied as to the Plans, the subject of this Sale is hereby expressly excluded. The Purchaser must take them of its own judgment as the result of its examination and no description expressed or implied given by the Vendor shall constitute a sale by description"

In addressing the question of the exemption clause in the contract, the learned trial judge at paragraph 19 quoted Lord Ashburton in **Pearson & Sons Ltd. v Dublin Corp.** [1907] AC 351 at 360:

> "I cannot think that in face of the evidence in the case this clause could be regarded as establishing a defence. Such a clause might in some cases be part of a fraud and might advance and disguise a fraud, and I cannot think that on the facts and circumstances of this case it can have such a wide and perilous application as was contended for. Such a clause may be appropriate and fairly apply to

> errors, inaccuracies and mistakes, but not to cases like the present"

At paragraph 20 he said:

> "On this basis I reject the argument that the no warranty clause in the Agreement for sale of the Plans can exclude Bevad Limited from liability for the sale of "Approved plans" not in accordance with what was agreed both orally and in writing"

Generally, where a contact has been reduced to writing and has been executed by the parties, they are bound by its terms and conditions. In certain contracts a grantor may seek to absolve himself from liability by introducing terms and conditions limiting himself from any tortious action. Over the years, the courts have frowned on exemption clauses and so far as permissible by the rules of construction of contracts, interpret exclusion clauses within a narrow context. Usually, the question for the court, in construing the contract as a whole, is whether the limiting or excluding term or condition can be construed as an integral part of the contract or is of any effect.

A party who is guilty of a fundamental breach which goes to the root of a contract may not pray in aid an exemption clause in the contract. See **Karsales (Harrow) Ltd. v. Wallis** [1956] 1 WLR 936. In that case, at page 943 Parker L. J. said:

> "... in my judgment, however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term".

Clause (g) must be construed by taking into account all the circumstances surrounding the contract and the purpose which the condition was intended to serve at the time the parties entered into the contract. At the time of the contract, the appellant sold the land for the purpose of its development by the respondent. It would have been contemplated that the appellant was selling land which could easily accommodate units as provided for in the plans. It would also have been expected that any plans sold would be in compliance with the relevant regulations. It would have been a requirement that a subdivision plan be obtained. None was in existence. This fact was not disclosed to the respondent. In these circumstances clause (g) should be construed to mean that in contracting, the intention was for the respondent to be sold Building Plans which would not have been in breach of any regulations and also that all regulatory requirements had been satisfied .

A party seeking to rely on an exemption clause may be denied the right so to do if he is found to be in fraudulent breach of a contract. In the instant case, the appellant has been found to have made fraudulent representations knowing fully well that 11 Hopedale Avenue was not suitable for the construction of 23 habitable rooms. The approved building plans were defective. No planning approval was in existence. This was not disclosed to the respondent. Mr. Harris was misled into believing approval for parking was granted. This clearly taints the entire contract. This being so, it would be barred from relying on the warranty clause.

Ground (f):

> "The learned Judge erred, having regard to the evidence on behalf of the Respondent that the plan could not be located, in ordering that the said Plan be delivered to the Appellant and erred in ordering the Appellant to repay $3,350,000.00 for the said plan in circumstances where they cannot be produced." [Emphasis original]

Miss Phillips argued that rescission was not a proper remedy so far as the plans are concerned. She submitted that the plans cannot be located and it would therefore be impossible for *restitutio integrum* to be applied as the appellant could not be placed in the same position in which it would have been before the contract.

The learned trial judge declared the contracts null and void. He indicated that the respondent was entitled to the rescission of the contracts as claimed by them. He ordered the return of all documents of title as well as the building plans to the appellant. The question arising is whether, in the circumstances of this case, he was correct in ordering the return of the plans.

It is well settled that where a party is induced to enter into a contract as a result of fraudulent representations the contract is susceptible to rescission. However, rescission will not operate as a relief unless the parties to the contract are in a position to make *restitutio integrum*. If the remedy is to be invoked, the situation must be such as to be able to place the parties in their original

positions. In **Newbigging v. Adams and Others** [1886 – 1890] All E.R. Rep. 975 at page 984 describing the remedy, Bowen L.J. said:-

> "... it seems to me that complete rescission would not be effected unless the misrepresenting party, besides handing back the benefits which he had himself received, re-assumed the burden which under the contract the injured person had taken upon himself. I am speaking entirely for myself, but I should not like to lay down the proposition that a person is to be restored to the position which he held before the misrepresentation was made, or to lay down the proposition that the person injured must be indemnified against loss which arises out of the contract, unless you place upon the words "out of the contract" the limited and special meaning which I have endeavoured to shadow forth."

It is clear that the plans were in the custody of Mr. Harris, he having admitted receiving them. He failed to produce them at trial for the reason that they could not be located. It is therefore impossible to have them returned to the appellant. The order by the learned trial judge for their restitution is clearly nugatory. This being so, the respondent would have to absorb the cost of the plans. The appellant would therefore be under no obligation to refund the sum paid by the respondent for the plans.

Grounds (h) and (i):

> "(h) The Learned Judge erred and misdirected himself as to the assessment of general damages and used an incorrect formula for calculating "prospective loss of profit" and gave consideration to irrelevant and inapplicable factors in awarding the sum of $20,689,585.00 as general damages.

(i) The Learned Judge erred and misdirected himself in awarding damages on the basis of loss due to fraudulent misrepresentation."

In its amended statement of claim, the respondent claimed special damages of $7,490.000.00 made up as follows:

Purchase of land	$4,000.000.00
Purchase of approved plan	$3,500.000.00
Agreement of Sale	$ 7500.00
Transfer costs	$ 130,000.00
Miscellaneous costs	$ 2,500.00

General damages of $20,000,000.00 for the loss of opportunity for the construction and sale of apartments with interest thereon at commercial rate were also sought.

I will first deal with the claim for special damages. The learned trial judge ordered the refund of the purchase money for the lot as well as the purchase money for the plans and for such other expenses as incurred and proved by the respondent.

The sum claimed for the purchase of the approved plans ought not to be refunded to the respondent. There is, however, no dispute that the sum of $4,000,000.00 had been paid for the purchase of the land. This sum ought to be

repaid to the respondent and the lot be transferred to the appellant. Other items such as the costs of transfer from the appellant to the respondent, agreement for sale and miscellaneous costs which have been claimed as part of the special damages have not been proved. No evidence was placed before the court below to substantiate these sums claimed. These are special damages and must be specifically proved. See **Bonham-Carter v. Hyde Park Hotel, Limited** (1948) 64 T.L.R. 177 and **Murphy v Mills** (1976) 14 J.L.R 119. The costs of the agreement of sale, transfer and miscellaneous costs ought to have been proved at the trial. This was not done. The respondent is therefore barred from recovering these sums.

I now turn to the award of general damages. Generally, where a claimant has been induced to purchase property by reason of fraudulent representation, he may recoup his loss by recovering not only the price paid and the actual value of the property at the time of sale but also any consequential loss he may have sustained, provided such loss is not too remote. See **Clarke and Others v Urquhart** [1930] A.C. 28.

Lord Denning, in **Doyle v. Olby (Ironmongers) Ltd. and Others** [1969] 2 Q.B. 158, speaking to the question of damages in an action for deceit, at page 167, said:

> "The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his

> detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement"

In the instant case, the appellant had fraudulently induced the respondent into purchasing land which he would not otherwise have bought. The lot was not one which the respondent would have found suitable for such development as proposed by Mr. Adams if Mr. Harris had been informed of the true facts. If Mr. Harris had known that 11 Hopedale Avenue was the land which was being sold, it is unlikely that it would have been purchased by the respondent.

The learned trial judge awarded the sum of $20,689,585.00 for the respondent's loss of profits. In assessing the damages he applied a wrong formula. At paragraph 27 of his judgment he said:

> "Oman Limited has asked for general damages for deceit. They have claimed a lost opportunity to construct, sell and profit from the proposed apartments. In general, a claimant may recover damages for loss of prospective profits if the loss is the natural and direct result of his acting on the fraudulent misrepresentation."

He continued at paragraph 29 by stating:

> "In this case, the main thrust of the claim under this head was through the evidence of Rohan Thompson who provided the court with a schedule of the

> accumulated interest that would accrue to Oman Limited over the period had the money paid been left in the account at the bank. The schedule showed that for the period March 1996 to May 2004 the amount of $7,500,000.00, which Oman Limited withdrew from its account, if invested at National Commercial Bank, St. Jago Plaza in Spanish Town, St. Catherine, would provide a capital gain of $17,090,489.50 after taxes are deducted. That figure when updated to October 2005 using 12.65 percent (the bank's rate) and making deductions for income taxes (25%) amounts to $20,689.585.08."

The learned trial judge's use of the evidentiary material provided by Rohan Thompson as the foundation for calculating the measure of damages for loss of opportunity loss of profits was incorrect. The case under review is a commercial case. The material provided by Mr. Thompson would only be relevant with reference to the rate of interest which the sums expended by the respondent in respect of the purchase would have attracted. These sums would be treated as an indebtedness by the appellant to the respondent.

In dealing with the award of interest in commercial cases, Forbes J. in **Tate and Lyle Food and Distribution Ltd. v. London Greater Council & Anor.,** [1981] 3 All E.R. 716 at 722 he said:

> "I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a

> very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money."

See also **British Caribbean Insurance Ltd. v. Perrier** SCCA 114/94, in which this court also dealt with and applied the foregoing principle.

A court, in dealing with the measure of damages in an action for deceit should assess the damages by treating the matter as one for a jury assessment. It has to be considered in the round. See **Doyle v. Olby Ltd. (Ironmongers) Ltd. & Others (supra); East & Anor. v. Maurer & Anor.** [1991] 1 W.L.R. 461. The measure of damages for deceit being at large, such damages can be estimated. As the matter is one for a jury, a broad approach ought to be used. It follows therefore, that, in the case under review, damages would be at large.

Mr. Harris said in cross examination that in 1999 he took a decision to get new plans and commence construction. However, it was not until 2002 that he took steps towards the proposed venture when he sought to obtain an engineering survey of the land. No reason had been advanced by him for the respondent's failure to have taken steps to start his project within reasonable time after the contracts were concluded. It is a settled principle of law that a claimant must take reasonable steps to mitigate his loss. This principle was eminently expressed by Vicount Haldene, LC, in the leading case of **British Westinghouse Electric and Manufacturing Co, Ltd. v. Underground Electric Railways Co. of London, Ltd**. [1912] A.C. 673 at 689, when he said:

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by the second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps"

The respondent had a duty to mitigate its loss. It permitted six years to elapse before deciding to proceed with the development, albeit on a reduced scale. The period of delay in commencing the project or making an attempt so to do is excessive. It is my view that in the circumstances, it would be unreasonable for the respondent to be fully compensated for the loss of the opportunity to construct the units and realize a profit. In the statement of claim the estimated profit from the construction and sale of the units is stated to be $20,000,000.00. An award in the sum of $10,000,000.00, in my opinion, would be adequate compensation for the respondent's loss, discounted by 25%, or the tax on companies, to arrive at a net sum of $7,500,000.00.

I would dismiss the appeal on liability. The contracts of sale in respect of 11 Hopedale Avenue, Saint Andrew and of the Building Plans are set aside. I would, however, allow the appeal as to damages. Damages are awarded as follows:

Special damages:

Refund of the purchase price
of the lot with interest thereon at the rate of
12.5% per annum from July 4, 1996 $4,000,000.00

General damages

Loss of profits $7,500,000.00

The respondent should transfer 11 Hopedale Avenue to the appellant and the appellant should bear all costs relating to the transfer.

Costs of the appeal to the respondent to be agreed or taxed.

HARRISON, P.

ORDER:

1. Liability

Appeal dismissed. Order of the court below affirmed, in that the contracts of sale of 11 Hopedale Avenue, St. Andrew, and of the Building Plans are set aside.

2. Damages

Appeal allowed. Damages reduced and awarded as follows:

Special damages:

Refund of the purchase price
of the lot with interest thereon at the rate of
12.5% per annum from July 4, 1996 $4,000,000.00

General damages

Loss of profits $7,500,000.00

3. The respondent is hereby ordered to transfer 11 Hopedale Avenue, St. Andrew to the appellant, with the latter bearing all costs relating to the transfer.

4. Costs of the appeal to the respondent to be agreed or taxed.