

SUPREME COURT OF NIGERIA

4TH JUNE, 1999. SC 200/1994

**CORAM:- M. L. UWAIJS CJN, A. B. WALLI, A. I. IGUH,
A. I. KATSINA-ALU, S. O. UWAIFO, JJSC**

INTERNATIONAL TEXTILE INDUSTRIES APPELLANT
(NIGERIA) LTD

AND

1. DR. ADEMOLA OYEKANMI ADEREMI RESPONDENTS
2. MRS. TEJUMADE DUROSOMO ALAKIJA
3. MR. AYOADE ADELAKUN ADEREMI
4. DR. JOSHU OLARENI OMITOWOJU
5. DANGIL HOLDINGS (NIGERIA) LIMITED

CONTRACTS - *Specific performance - Impossibility of performance of the contract - Is a defence to the claim - Defendant is liable in damages - If impossibility is as a result of his act.*

CONTRACTS - *Specific performance - Where it cannot be ordered - Assessing and awarding due damages - Becomes the best justice that can be done.*

CONTRACTS - *Subject to contract - Use of the phrase - Cannot frustrate a finally concluded contract - And the merit of the phrase - Should always be open to the Court to decide.*

CONTRACTS - *Validity of - Cannot be denied - By parties that were receiving benefits from the contract.*

DAMAGES - *Appeals - Failure of trial court to assess damages claimed - If appellate court finds it impossible from the records - To make any justifiable assessment - The case will be remitted to the trial judge.*

LAND LAW - *Trespass - Better title having been shown by the 5th re-*

spondent - It cannot be regarded as a trespasser - Unto damages being awarded against it.

LAND USE ACT - *Consent of the governor s. 22 - Part performance merely creates a cause for specific performance - S. 22 cannot operate to eliminate the doctrine of part performance.*

LEASES - *Contract for a sublease - Was established against the landlords - Being in breach of the contract - They must bear the consequences.*

LEASES - *Sublessee - Agreement to take a sublease of property - Without securing governor's consent - Declaration that appellant is a sublessee - Should not be made.*

FACTS

The 1st to 4th Respondents are the executors/executrix (hereinafter called the Landlords) of late Oba Adesoji Aderemi, to whom the Lagos State Government leased the property in dispute, plot No. 98 at No. 2 Abudu Smith Street Victoria Island. Sometime in 1986, the appellant indicated its interest in taking a sublease of the property. The Landlords acting through their solicitors made an offer by a letter to the appellant. The sublease was to be for a period of ten years with an option for a further five years. The letter contained other details including the price and was marked "subject to contract". In reaction, the appellant accepted the offer in its own letter with some further requests. The parties exchanged various other correspondences that actually established a contract for the sublease. The landlord's solicitors marked all its letters with one exception "subject to contract". A draft deed of sublease was forwarded by the Appellant to the Landlords for execution to enable it secure the Governor's consent. Landlord's failed to execute the deed, avoided further commitment to the appellant and made an outright sale of the property to the 5th respondent. Appellant had already commenced a redevelopment of the premises.

In its claim before the Lagos High Court, the plaintiff/appellant

sought inter alia, a declaration that it is a sublessee, an order of specific performance, special and general damages against the Landlords, and against the 5th respondent it sought damages for trespass. The 5th respondent filed a counter claim seeking inter alia, a declaration that it is entitled to the statutory right of occupancy as it has obtained the Military Governor's consent. The trial court dismissed the counter claim and granted some of the reliefs claimed by the appellant. On appeal by the respondents, the Court of Appeal set aside the judgment of the trial court. The appellant has now appealed to the Supreme Court raising 4 issues whilst the 5th respondent raised 3 issues which are largely same with that of the appellant.

ISSUES FOR DETERMINATION

"1. Was the Court of Appeal right in reversing the decision of the trial court granting reliefs 2,3 and 4 of the plaintiff/appellant's claim which reversal was predicated on the ground that there was no valid and enforceable agreement between the parties having regard to the fact that:

(a) Governor's consent has not been obtained as required by section 22 of the Land Use Act.

(b) That (sic) the correspondence between the parties were marked 'subject to contract.'

2. Was the Court of Appeal right in holding that the plaintiff's claim for damages is not sustainable since there is no binding agreement between the parties for the reasons stated in issue (1) above?

3. Was the Court of Appeal right for the reasons given in the judgment that the 5th defendant is not a trespasser and therefore could not be made liable to pay damages for such act of trespass?

4. If the judgment of the trial court is restored, should the Supreme Court not order that damages suffered by the plaintiff be assessed as claimed in paragraph 34(5)(A) of the amended statement of claim?"

HELD (Unanimously allowing the appeal in part per lead judgment of UWAIFO JSC)

Subject to contract - Use of the phrase

1. In the present case, although exhibits A-A2, C-C1, D-D1 and E-E5

carry that phrase 'subject to contract', the unseriousness in the use of those words can be seen in exhibit F which finally confirmed the contract and exhibit G which is a receipt for the full 5-year rent. Neither of the two exhibits was marked 'subject to contract'. That would seem to suggest that the landlords, at that stage, no longer intended to insist on whatever the phrase 'subject to contract' was intended by them. But more fundamental in regard to the use of those words in the circumstances of our established conveyancing procedure is the fact that it is clearly unwarranted, as I hope I have earlier demonstrated, to rely on them to frustrate or indeed sabotage by laying ambush with a purely sinister 'subject to contract' cudgel, a contract already fully concluded in all material particulars, the terms and validity of which the court can, or ought readily to, ascertain from documents available. The term 'subject to contract' has no settled effect - or shall I say no magic effect - yet, in my view, in our existing arrangement and procedure for conveyancing. Whenever that phrase is used, it is my opinion that the merit and worth of it should always be open to the court to decide. That is one way of ensuring the integrity of concluded arrangements. (p. 1695 G)

Contracts - Validity of

2. I think it ought to be said with due emphasis that it was not, in any event, open to the landlords to plead on the one hand that there was no valid contract in the circumstances of this case when on the other hand they were receiving benefits from it and committing the appellant to some expenditure arrangement. They had received in advance the full rent for five years. They had put the appellant into possession of the property and had encouraged and permitted it to spend money towards the redevelopment of it. Equity will not permit them to go back on that and get away with what would be regarded as a fraud practised on the appellant. That amounted, at any rate, even if there had been no valid written contract, to an act of part performance. (p. 1696 D)

Land Use Act - Consent of the governor s. 22

3. I may here answer briefly an aspect of the argument of the 5th re-

spondent that it was a breach of s. 22 of the Act for the appellant to have gone into possession to do some reconstruction of the property and that therefore it cannot rely on it to insist on a contract. I think this is a clear misconception. To permit an act of part performance is simply one modality of contract formation. It does not transfer possession under s.22 of the Act in the sense of alienation. It merely creates a cause for the specific performance of the contract. It must not be presumed that s.22 can operate to do away with the doctrine of part performance. It cannot, lest it be used as an instrument of fraud which it certainly is not meant for. (p. 1697 A)

Failure of trial court to assess damages

4. It follows that when an appellate court finds it impossible from the record before it to make any justifiable assessment of damages, I am afraid that the question of the assessment of damages will, painfully, have to be remitted to the trial judge. Professor Kasunmu probably anticipated this in the issue 4 set down on behalf of the appellant for determination. In the present case, the record of appeal compiled by the 5th respondent for the purpose of this appeal does not show enough on the aspect of the evidence led, oral and documentary, in support of the damages claimed. I do not think this is a clear case in which this court can properly embark on assessing the damages claimed. Having regard to what I have earlier indicated about the nature of the evidence on record, I think it will be in the interest of the parties that the learned trial judge be directed to assess the damages. I accordingly order that this case be remitted to the Lagos State High Court for the learned trial judge, Ope-Agbe, J., to assess, by way of a rehearing and as a matter of urgency, the damages arising from the breach of contract in this case and to make the necessary order of compensation in damages. (pp. 1702 F/1707 F)

Leases - Sublessee

5. I have now to indicate why the lower court was right in setting aside the reliefs granted to the appellant by the learned trial judge. Relief A(1) is a declaration that the appellant is a sublessee of the property in ques-

tion This is not correct. It never was a sublessee; it only entered into an agreement to take the sublease of the property. Until that was achieved by getting the governor's consent, no such declaration could be made in its favour. A declaratory relief is merely a confirmation of what is already the state of affairs or what is likely to be, in connection with the subject-matter of the declaration. In other words, a declaration claimed must relate to some legal right or to a legal interest of which the law will take cognizance: see Nixon v Attorney-General (1930) 1 Ch.566 at 574. A plaintiff who seeks a declaratory relief must show that he has an interest or right which forms a foundation for that declaration: see Olawoyin v Attorney-General Northern Nigeria (1961) 2 NSCC 165 at 169. (p. 1703 D)

D Trespass - Better title having been shown

6. The learned trial judge awarded N20,000.00 as general damages against the 5th respondent under relief C(1) and ordered injunction under relief C(2). I think that was an error. The 5th respondent relies on a statutory right of occupancy which prima facie gives it a better title to the land than the appellant as long as that subsists i.e. it has not been set aside. The 5th respondent cannot therefore be regarded a trespasser by the appellant on the well-known principle laid down in Aromire v Awoyemi (1972) 2 S.C.182, Amakor v Obiefuna (1974) 1 All NLR 119 and such like cases that where both parties claim to be in possession, possession will be presumed in favour of the party who can show a better title. It is obvious that the appellant has no title it can rely on. The court below was therefore right in setting aside those orders of the learned trial judge. (p. 1704 A)

Leases - Contract for a sublease

7. But the court below was, with due respect, in error in holding that the appellant did not establish a contract between it and the landlords. It certainly did so upon a proper construction of the entirety of the documents before the court and even upon the equity arising from the part performance which the evidence has shown. The landlords have failed

to perform their part of the contract, that is to say, they were in breach of that contract and must bear the consequences that arise from that breach; or, at any rate, looking at the part performance, equity must hold the landlords liable in regard to the changed position of the appellant to which they induced it: see Trenco (Nigeria) Ltd v African Real Estate & Investment Co. Ltd & Anor (1978) 11 NSCC 220. (p. 1704 D)

Specific performance - Impossibility of performance

8. Impossibility of performance of the contract by a defendant is a defence to a claim for specific performance, even though the contract is unconditional both in terms and in intention: see Ferguson v Wilson (1866) 2 Ch. App.77. One such impossibility is when the property, the subject-matter of the contract, has been sold to a third person: see Denton v Stewart (1786) 1 Cox Eq. Cas.258; or where the necessary consent for concluding the transaction has not been, or is not likely to be, obtained: see Wycombe Rail Co. v Donnington Hospital (1866) 1 L.R. Ch. App. 268. It has been held that impossibility of performance does not cease to be a defence to specific performance simply because the impossibility is due to the defendant's act: see Seawell v Webster (1859) 29 L.J. Ch.71 at p.73 per Kindersley V.C. In such a case, however, impossibility is no excuse for non-performance and the defendant is liable in damages. That is the position equity will take if at law the matter appears closed. (p. 1706 C)

Specific performance - Where it cannot be ordered

9. There is evidence that the 5th respondent has got the consent of the Governor to have a statutory right of occupancy to the property in respect of the residue of the lease. The court cannot compel the Governor to give consent to the appellant to have a statutory right of occupancy to the same property in respect of a sublease. The process by which that course might have been set in motion, even if that relief was available, is absent since the Governor was not made a party to this case. The best justice that can be done in this case therefore is to assess and award damages properly due to the appellant in the circumstances. (p. 1707 A)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. Contracts - Term that has no application is meaningless

There is authority for saying, by way of a very close analogy, that when
B a term is inserted in a contract which has no application, it should be regarded as meaningless and ignored or severed from the contract without impairing the contract itself: see Nicolene Ltd v Simmonds (1953) 1 All ER 822 where Denning LJ said at p.825:

C *"A clause which is meaningless can often be ignored, while still having the contract good, whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms. I take it to be clear law that, if one of the parties to a contract inserts into it an exempting condition in his own*
D *favour which the other side agrees and it afterwards appears that that condition is meaningless or is so ambiguous that no ascertainable meaning can be given to it, that does not render the whole contract a nullity. The only result is that the exempting condition is a nullity and must be*
E *rejected. It would be strange, indeed, if a party could escape every one of his obligations by inserting a meaningless exemption from some of them."* (p.1694 A)

F *2. Subject to contract - When of no effect*

However, circumstances have sometimes made the effect of the words 'subject to contract' not inevitable even where that phrase has acquired a firm customary usage with practical justification. One such circumstance occurred in Michael Richards Properties v St. Saviour's (1975) 3
G All ER 416 where both parties proceeded on the basis that there was a contract. A deposit was made in accordance with the conditions of sale of the property in question. But the letter of acceptance by the plaintiff carried the words 'subject to contract'. As a result of its failure to complete, the plaintiff, relying on those words to assert that there was no contract, brought action to recover the deposit paid. It was held that the letter of acceptance concluded the contract so that the words 'subject of contract' were to be expunged as meaningless. (p. 1695 A)

3. Specific performance - Need to also claim Damages alternatively

A party to a valid contract who does not want it repudiated by the other party will resist any attempt to do so and insist on performance. He has, of course, in that event two alternatives open to him. He knows that if specific performance which is one option fails, then he can sue for damages which is the other. As the order for specific performance is an equitable remedy and therefore discretionary, it will, in my view, be a grave error of pleading to claim for specific performance without at the same time, in the alternative, claiming for damages. As has been said, even after a decree of specific performance has been granted, it can turn out that the defendant cannot give title to the property sold. In that case a plaintiff who failed to claim for damages in the alternative will be in a quagmire. (p. 1705 G)

D

REPRESENTATION

Professor A. B. Kasunmu SAN, with him, Miss O. T. Kasunmu for the appellant.

T. E. Williams Esq for the 1st-4th respondents.

E

B.A. Sodipo Esq for the 5th respondent.

CASES REFERRED TO

Awojugbagbe Light Industries Ltd v Chinukwe (1995) 4 NWLR (pt. 390) 379 F

Nicolene Ltd v Simmonds (1953) 1 All ER 822

Sherbrooke v Dipple (1980) 41 P & CR 173 at 176

Michael Richards Properties v St. Saviour's (1975) 3 All ER 416

Triverton Estates Ltd v Wearwell Ltd (1974) 1 All ER 209 G

United Bank for Africa Ltd v Tajumola & Sons Ltd (1988) 2 NWLR (pt. 79) 662 at 701

Yakassai v Messrs. Incar Motors Ltd (1975) 5 SC 107 at 115-116

Dumbo v Idugboe (1983) 1 SCNLR 29 H

Obot v Central Bank of Nigeria (1993) 8 NWLR (pt.310) 140

Broadline Enterprises Ltd v Monterey Maritime Corp. (1995) 9 NWLR (pt.417) 1

Nixon v Attorney-General (1930) 1 Ch.566 at 574

Amakor v Obiefuna (1974) 1 All NLR 119

Denning v Edwardes (1961) A.C. 245

STATUTE REFERRED TO

B Land use Act 1978 ss. 22, 26

BOOK REFERRED TO

Conveyancing Law and Practice by Barnsley 1973 Edn. p. 4 and pp.
C 109-110

LEAD JUDGMENT BY UWAIFO JSC

The property in dispute in his case is plot No.98 at No.2 Abudu
D Smith Street, Victoria Island, Lagos. It is State land covered by Title
Certificate No.L05166 of 1963 which was leased to late Oba Adesoji
Aderemi by the Governor of Lagos State under a deed of lease dated 4
June, 1963. It was developed by the said lessee and at his death, it
E became vested in the 1st to 4th respondent who are his executors/execu-
trix (hereafter called the landlords).

Sometime in February, 1986, the appellant indicated its interest
in taking a sublease of the said property. The landlords, acting through
F their solicitors, made an offer by letter dated 18 February, 1986 (exhibit
A-A2) to the appellant. The letter contained details which I do not need
to state in full. It is enough to say that the sublease was to be for ten
years with an option for a further five years; the annual rent was to be
N75,000.00 affect from June 1, 1986, the first five years' rent
G N375,000.00 being payable in advance by the sublessee; and the land-
lords were to be responsible for the payment of the ground rent.

The letter stated that the property was offered in the condition in
which it was, a detached two-storey house together with stewards quar-
H ters and garage, but that "you are permitted, at your own expense, to add
to, alter or extend it and in other respects carry out all renovations and
refurbishments you consider necessary to suit your intended use and
taste, subject to you (sic) obtaining necessary planning approval and also

subject to your proposals to us for our clients' prior approval." In addition, there were the following two paragraphs:

"If you are in agreement with the above terms and conditions, we shall be grateful if you would kindly endorse the attached copy of this letter accordingly and return it to us. You have already deposited with us two cheques totalling N297,500.00. In returning to us endorsed copy of this letter, you should please let us have also your cheque for the balance of the rent.

Kindly let us know whether you will directly instruct your own solicitor or we should instruct one on your behalf to prepare a draft sublease in accordance with the above terms and conditions."

This letter was marked 'subject to contract'.

In reaction, the appellant accepted the offer in its letter of 20 February, 1986 (exhibit B-BI) with some requests which included the limit of 10% increase in rent after the first five years, how to determine the rent for the option period, the landlords to bear the cost of erecting a wall fence and that all necessary approvals by the Lagos State Government to be obtained by the landlords. The landlords virtually consented by their letter dated 24 February, 1986 (exhibit C-CI) adding in their last two paragraphs:

"We have tried as much as possible to accede (sic) to your various requests in order to bring this negotiation to completion. We trust that you would now kindly confirm your acceptance of our offer by sending us your cheque for the balance of the rent in the sum of N77,500.00.

You may then wish to pass copies of our two letters to your solicitors to enable them prepare a draft sublease for the approval of the parties."

This latter was also marked 'subject to contract.'

Yet again, the appellant replied by letter dated 28 February, 1986 (exhibit D-DI) requesting a ceiling of 15% increase in rent in respect of the option period and offering to pay N21,250.00 in final settlement of the rent due owing to the uninhabitable condition of the property of which the landlords were said to have agreed to make funds available for renovation, but now the appellant said it was going to spend about N300,000.00

"on improvement which will ultimately revert to the Landlord after the lease period." A cheque for the said N21,250.00 was actually forwarded to the landlords. The Landlords by their letter of 28 February, 1986 (exhibit E-E5) accepted the said cheque for N21,250.00 and the suggested 15% ceiling increase in rent for the option period. The letter ended with the following two paragraphs:

"We expect that you would endeavour to ensure that the refurbishment and improvements you propose would be carried out and completed within the four months of grace so that your sublease would commence on 1st July, 1986.

You should please instruct your solicitors to put in hand the preparation of the draft sublease agreement for approval of the parties and let us have the draft in due course."

Again, this letter was marked 'subject to contract.'

At a stage the appellant proposed erecting a new building of three storeys in place of the existing building but only on a portion of the land in question. This led to a meeting being held by representatives of the parties on 30 October, 1986. Decisions were reached which were recorded (exhibit E-E5) and signed by one of the solicitors for the landlords. Thereafter, a letter dated 14 May, 1987 (exhibit F) was written to appellant's solicitors by the landlords' solicitors, which reads in part:

"We are pleased to confirm on behalf of our clients that your clients, International Textile Industries (Nigeria) Limited, are granted a rent-free period of fifteen months from the date planning permission is granted for the proposed redevelopment of the above premises.

We also pleased to confirm the preparedness of our clients to assist in obtaining the planning approval. We trust that your clients would kindly put in hand forthwith the preparation of the plans so that the plans can be submitted before the end of May, 1987."

This letter was not marked 'subject to contract'.

The plans were later approved by the Lagos State Government. They were released to the appellant on 15 May, 1989. These facts were stated in a letter dated 17 May, 1989 (exhibit H) by the appellant's solicitors to the landlords' solicitors. A draft deed of sublease had earlier been

forwarded to the landlords for execution and return to the appellant in order to seek the Governor's consent. They took no steps to do so but simply avoided further commitment to the appellant. By June, 1989, it had become obvious that the 5th respondent had begun to assert interest in the property in question. The police had even intervened at the instance of one Lt-General T. Danjuma (rtd) who was alleged to be the chairman of the 5th purchase of the property. The police subsequently reached a decision that the matter was a civil one and advised the parties to seek a peaceful resolution of the dispute. What finally emerged was that the landlords had turned their back on the appellant and sold the property to the 5th respondent. B C

Those were the circumstances in which the appellant went to law to seek a number of reliefs. I shall later in this judgment set out the said reliefs and discuss them in relation to this appeal. On 21 December, 1990, at the High Court of Lagos, Ope-Agbe J., granted most of the reliefs claimed but ignored the alternative claim of N3,842,090.70 being special and general damages for breach of contract by the landlords. He dismissed the counterclaim in which the 5th respondent sought two declaratory reliefs, a perpetual injunction and N1,000,000.00 damages for trespass against the appellant. He considered the effect of the phrase 'subject to contract' which appeared on some of the relevant letters from the landlords and held that it did not affect the fact of the existence of a binding contract in the circumstances. As to whether parties could enter into a valid contract for the sale or alienation of land before the Governor's consent was obtained under s.22 of the Land Use Act, 1978, the learned trial judge concluded that they could. D E F

On appeal, the Court of Appeal (Lagos Division) - coram: Sulu-Gambari, Kalgo and Ayoola JJCA - on 13 May, 1993, set aside the judgment of the trial court. It held that there was no contract by virtue of the use of the phrase 'subject to contract'. It seemed also to have held that failure to obtain the prior consent of the Governor was fatal. Said Kalgo JCA: "It is very clear in the circumstances of this appeal that the cardinal issue to the validity of the lease is the consent of the Governor first had and obtained. There is therefore good reason for saying that the issue of G H

consent is a condition precedent in the sub-lease and so there is no binding contract without such consent. There is no consent of the Governor in this case upto the time the parties came to court. This means, in my judgment that there is no binding and enforceable contract of lease between the 1st to the 4th appellants and the respondent despite the presence of the 4 certainties i.e. the parties. The property, the length of term, the rent and the commencement date. This is so, because from all the correspondences (sic) concerned and relevant to the lease, the phrase 'subject to contract' was maintained and therefore applies throughout the negotiations as no where was it expressly or by necessary implication expunged." The appeal against the dismissal of the counterclaim by the 5th respondent was partially allowed by the Court of Appeal.

On appeal against that judgment, the appellant has raised four issues for determination, namely:

"1. Was the Court of Appeal right in reversing the decision of the trial court granting reliefs 2,3 and 4 of the plaintiff/appellant's claim which reversal was predicated on the ground that there was no valid and enforceable agreement between the parties having regard to the fact that:

(a) Governor's consent has not been obtained as required by section 22 of the Land Use Act.

(b) That (sic) the correspondence between the parties were marked 'subject to contract.'

2. Was the Court of Appeal right in holding that the plaintiff's claim for damages is not sustainable since there is no binding agreement between the parties for the reasons stated in issue (1) above?

3. Was the Court of Appeal right for the reasons given in the judgment that the 5th defendant is not a trespasser and therefore could not be made liable to pay damages for such act of trespass?

4. If the judgment of the trial court is restored, should the Supreme Court not order that damages suffered by the plaintiff be assessed as claimed in paragraph 34(5)(A) of the amended statement of claim?"

The landlords filed no brief of argument but the 5th respondent did. At the hearing of this appeal on 8 March, 1999, learned counsel for the landlords proffered oral argument with the leave of court by virtue of

Order 6,r.8(5) of the Supreme Court Rules, 1985. As regards the 5th respondent, it raised three issues for determination as follows:

"(i) Whether the negotiations between the plaintiff/appellant and the 1st to 4th defendants/respondents ever crystallized into a specifically enforceable contract?"

(ii) Whether the alleged demise pleaded by the plaintiff in its statement of claim as the foundation for a declaratory relief sought for in the action was not void having regard to the provisions of sections 22 and 26 of the Land Use Act.

(iii) Whether the plaintiff/appellant is entitled to any of the reliefs claimed on the writ of summons. A corollary to this issue is whether the prayer for specific performance can be properly made by a situation when damages would provide adequate remedy?"

I think the issues raised by the appellant and the 5th respondent, properly understood, are largely the same. I am satisfied that they encompass the general spectrum of the nine grounds of appeal filed. I intend to deal with them together along with the arguments canvassed by the three parties to this appeal in the form of a running commentary before giving specific answers to the issues where necessary.

The appellant's case, as argued, is that (1) there was a binding contract to enter into a sublease at the point at which the parties can be said to have agreed the length of terms, the rent payable and the commencement date notwithstanding the marking of some of the correspondence that passed between the parties 'subject to contract', when clearly that phrase was no more than a mere surplusage; (2) the Land Use Act, 1978 does not prohibit a contract to transfer or alienate land so long as any further step which tends to give effect to such alienation is made with the consent of the Governor by virtue of s.22(1) of the Land Use Act; (3) the fact that an outright sale of the property in question has been made to the 5th respondent will not affect the right to specific performance of the contract between the landlords and the appellant for a sublease since the 5th respondent takes subject to the interest of the appellant; (4) the 5th Respondent having come to the said property upon which the appellant was already in lawful possession, it became a tres-

passer liable to pay damages; and (5) the appellant's claim to damages against the landlords was not considered by the trial court and the lower court did not also deal with it in the appellant's cross-appeal to that court; that being so, the Supreme Court can direct that damages suffered by the
B appellant be assessed.

The landlords submitted through the oral argument of their counsel, Mr. T.E. Williams, that (i) because all the material correspondence were marked 'subject to contract', there was no binding contract made; and (ii) the court will not order specific performance because the sub-
C lease is still subject to the Governor's consent who will not be compelled to give it, more so that he was not made a party to the case. He urged that the appeal be dismissed.

As regards the 5th respondent the contention is that (a) there
D was no binding and enforceable contract but only mere negotiations by correspondence marked 'subject to contract', which phrase must be given its full meaning; (b) the parties were never ad idem as to the cardinal terms of a valid agreement hence 'a deed was never executed or delivered
E '; (c) s.22 of the Land Use Act makes the consent of the Governor to a lease transaction a condition precedent to the validity of the lease, which consent in this case was not obtained; and (d) the court will not order specific performance when it is impossible for the defendant to comply
F with the order and where damages will be sufficient compensation..

It seems to me that the landlords and the 5th respondent have been unable to distinguish between the two stages involved in transactions of the transfer on sale of an estate in land. It is important to bear this phenomenon in mind in order to be able to appreciate the stage at
G which the consent under s.22(1) of the Land Use Act, 1978 (hereinafter called the Act) becomes relevant in a bargain to alienate land. The two stages are well-known in conveyancing procedure. Parties have to agree the terms of sale before the property in question is conveyed. In Con-
H veyancing Law and Practice by Barnsley, 1973 edn. page 4, it is stated:

"A transfer on sale of an estate in land is divisible into two distinct stages: (i) the contract stage, ending with the formation of a binding contract for sale, (ii) the conveyance stage, culminating in the

legal title vesting in the purchaser by means of the appropriate instrument under seal."

It follows that it is only after a binding contract for sale is arrived at that the need to pursue the procedure for acquiring title will arise. That is when the obtainment of the necessary consent to alienate the property becomes an issue in order to make the alienation valid. It is rather surprising that the landlords and 5th respondent did not seem to appreciate this, more especially as they cited copiously from a recent decision of this court in Awojugbagbe Light Industries Ltd v Chinukwe (1995) 4 NWLR (pt. 390) 379. This court in that case approved the Privy Council's approach in Denning v Edwardes (1961) A.C. 245 in similar circumstances where consent was by statute necessary for the valid sale of land. I shall discuss these cases later in this judgment.

In considering the first stage, i.e. the contract stage which ends with the formation of a binding contract for sale, it is pertinent to examine the real relevance, and indeed the effect, of the phrase 'subject to contract' in our own circumstances, a phrase the landlords' solicitors freely and unilaterally marked on some of the relevant letters constituting at least some memorandum of agreement relating to the contract in question. The first point to make (and I consider this quite paramount) is that that phrase may seem to serve well in the established land sale procedure that operates in England where the insistence on a formal contract has acquired a tradition and some meaning.

English land law is noted for its complexities. In sale of land, there have been fashioned out what are known as General Conditions of Sale, Special Conditions, National Conditions and The Law Society's Conditions. I need to quote passages from the Conveyancing Law and Practice (supra) at pp.109-110 in this regard, to explain why formal contract is usually necessary:

"Though in a standard form contract the General Conditions of Sale sometimes appear after the particulars and the Special Conditions, it will be helpful to say something of their basic nature at this stage. It may be asked, why have them? The answer lies in an understanding of English land law, whose complexities are such that in any contract for

the sale of land, it is essential parties are clearly defined. If the parties have not expressly provided for certain important matters, the law will imply terms regulating them. The term 'open contract' has already been mentioned Every open contract is subject to a code of implied obligations, unless specific provision is made to the contrary. These open contract conditions impose onerous terms upon the vendor, and over the years the practice has developed of incorporating within the contract express conditions, designed to facilitate the vendor's task and to cut down the purchaser's rights under an open contract. These conditions have now become fairly stereotyped and sufficiently general in nature to be capable of being incorporated simply by reference to a standard form. Every formal contract is made subject to General Conditions of Sale, though they only apply so far as they are not varied by or inconsistent with the Special Conditions. In reality, General Conditions are incorporated as an insurance measure Notwithstanding their generality, it is still incumbent upon a solicitor to consider whether the peculiar circumstances of his case are adequately covered by the General Conditions; if not he should frame a suitable special condition. In particular the National Conditions and The Law Society's Conditions are planned primarily for the sale of houses with vacant possession; consequently either form may require adaptation on the sale of a building land, or agricultural, industrial or investment property." (Emphasis mine)

At pages 634-643, the National Conditions of Sale (18th edition) are published. They contain 22 conditions. To take just an example, condition 15 is to protect the vendor from any contravention of the Planning Acts when it says in part that "the property is not to the knowledge of the vendor subject to any charge, order, restriction, agreement or other matter arising under the Planning Acts but the property is sold subject to any such charges affecting the interest sold the purchaser shall be deemed to buy with knowledge in all respects of the authorized use of the property for the purposes of the Planning Acts." I do not think we can say we have the equivalent of the National or The Law Society's Conditions et seq which have to be complied with and

therefore should be brought a formal contract stipulations. But this is ensured under English procedure where the intention to have such formal contract is usually expressed and each party is given a counterpart of the contract to be signed.

After the parties have signed their respective parts of the formal contract, the exchange of contracts takes a customary form, usually by post. I need not go into that. I only need to emphasize that it is clear to me that this procedure of formal contract and the recourse to 'subject to contract' do not at the moment, as far as I am aware, fit into our system of land sale particularly as we do not have the equivalent of these General, Special, National and The Law Society's Conditions. 'Subject to contract' in that sense is, in my opinion, no more than an exotic, though convenient, phrase which is employed to meet the various intricate statutory and professional requirements in English conveyancing practice. This is achieved in a common sense approach to meet the intention of the contracting parties by opting to make, as a safety device, whatever agreement is reached in 'land sale subject to contract'. The observation of Lord Greene, M.R., in Spottiswoode, Ballantyne & Co. Ltd v Doreen Appliances Ltd (1942) 2 All ER 56 at p. 66 appears to explain the effect of introducing such expression as "subject to the terms of a formal agreement to be prepared" by the solicitor. He said:

"..... the language used here is equivalent to the more common and more concise phrase 'subject to contract', and, if anything is settled, it is that the phrase is one which makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way." (Emphasis mine)

That seems to make the use of that phrase irrelevant and perhaps meaningless in our own situation here unless it can be shown, in any particular case, that the vendor or purchaser or both had evinced as their intention, a special formal contract to embody terms and conditions which go beyond the mere offer and acceptance implication, to be drawn up and executed. Nothing prevents parties to a contract from deciding to adopt such necessary formalism considered to be in the interest of the bargain. Otherwise, 'in the usual way' as used in Spottiswoode case by Lord

Greene M.R. can have meaning only where there has been an established procedure and form of contract of sale agreement.

There is authority for saying, by way of a very close analogy, that when a term is inserted in a contract which has no application, it should be regarded as meaningless and ignored or severed from the contract without impairing the contract itself: see Nicolene Ltd v Simmonds (1953) 1 All ER 822 where Denning LJ said at p.825:

"A clause which is meaningless can often be ignored, while still having the contract good, whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms. I take it to be clear law that, if one of the parties to a contract inserts into it an exempting condition in his own favour which the other side agrees and it afterwards appears that that condition is meaningless or is so ambiguous that no ascertainable meaning can be given to it, that does not render the whole contract a nullity. The only result is that the exempting condition is a nullity and must be rejected. It would be strange, indeed, if a party could escape every one of his obligations by inserting a meaningless exemption from some of them."

Of course, it must be conceded that when the phrase 'subject to contract' is employed in an appropriate situation, with a clear measure of intention, there can be no valid contract until formal contracts are exchanged. I think that was in essence what Lord Denning M.R. conveyed in Sherbrooke v Dipple (1980) 41 P & CR 173 at 176 when he observed:

"Where parties started their negotiations under the umbrella of the 'subject to contract' formula, or some similar expression of intention, it was really hopeless for one side or the other to say that a contract came into existence because the parties became of one mind notwithstanding that no formal contracts had been exchanged. Where formal contracts were exchanged it was true that parties were inevitably of one mind at the moment before the exchange was made. But they were only of one mind on the footing that all the terms and conditions of the sale and purchase had been settled between them, and even then the original intention still remained intact that there should be no formal contract in existence until

the written contracts had been exchanged." (Emphasis mine)

However, circumstances have sometimes made the effect of the words 'subject to contract' not inevitable even where that phrase has acquired a firm customary usage with practical justification. One such circumstance occurred in Michael Richards Properties v St. Saviour's B (1975) 3 All ER 416 where both parties proceeded on the basis that there was a contract. A deposit was made in accordance with the conditions of sale of the property in question. But the letter of acceptance by the plaintiff carried the words 'subject to contract'. As a result of its failure to complete, the plaintiff, relying on those words to assert that there was C no contract, brought action to recover the deposit paid. It was held that the letter of acceptance concluded the contract so that the words 'subject of contract' were to be expunged as meaningless. In Law v Jones D (1973) 2 All ER 437, it was decided by the Court of Appeal that the unilateral insertion of the words 'subject to contract' into correspondence between the solicitors acting for the parties did not negative the effect of any existing binding agreement, whether oral or written, made between the parties. It is true the correctness of the decision was not accepted E later by the same court in Triverton Estates Ltd v Wearwell Ltd (1974) 1 All ER 209. But the case illustrates that if there is any sense in which those words can be considered not to represent what the parties really intended as a result of what they did or said before or after the insertion F of those words in any of the correspondence between them, then it would be justifiable to regard them as irrelevant. See also United Bank for Africa Ltd v Tajumola & Sons Ltd (1988) 2 NWLR (pt. 79) 662 at 701 per Nnaemeka-Agu JSC obiter.

In the present case, although exhibits A-A2, C-C1, D-D1 G and E-E5 carry that phrase 'subject to contract', the unseriousness in the use of those words can be seen in exhibit F which finally confirmed the contract and exhibit G which is a receipt for the full 5-year rent. Neither of the two exhibits was marked 'subject to H contract'. That would seem to suggest that the landlords, at that stage, no longer intended to insist on whatever the phrase 'subject to contract' was intended by them. But more fundamental in re-

gard to the use of those words in the circumstances of our established conveyancing procedure is the fact that it is clearly unwarranted, as I hope I have earlier demonstrated, to rely on them to frustrate or indeed sabotage by laying ambush with a purely sinister 'subject to contract' cudgel, a contract already fully concluded in all material particulars, the terms and validity of which the court can, or ought readily to, ascertain from documents available. The term 'subject to contract' has no settled effect - or shall I say no magic effect - yet, in my view, in our existing arrangement and procedure for conveyancing. Whenever that phrase is used, it is my opinion that the merit and worth of it should always be open to the court to decide. That is one way of ensuring the integrity of concluded arrangements.

I think it ought to be said with due emphasis that it was not, in any event, open to the landlords to plead on the one hand that there was no valid contract in the circumstances of this case when on the other hand they were receiving benefits from it and committing the appellant to some expenditure arrangement. They had received in advance the full rent for five years. They had put the appellant into possession of the property and had encouraged and permitted it to spend money towards the redevelopment of it. Equity will not permit them to go back on that and get away with what would be regarded as a fraud practised on the appellant. That amounted, at any rate, even if there had been no valid written contract, to an act of part performance. In Caton v Caton (1866) 1 L. R. Ch. App. 137 at 148, Lord Cranworth, L.C., observed:

"The ground on which the court holds that part performance takes a contract out of the Statute of Frauds is, that when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there would be a fraud in the contract on the faith of which he induced, or allowed, the person contracting with him to act and expend his money."

Without a doubt this act of part performance must have a telling effect on

the landlords' reliance on the so-called defence of 'subject to contract' formula.

I may here answer briefly an aspect of the argument of the 5th respondent that it was a breach of s. 22 of the Act for the appellant to have gone into possession to do some reconstruction of the property and that therefore it cannot rely on it to insist on a contract. I think this is a clear misconception. To permit an act of part performance is simply one modality of contract formation. It does not transfer possession under s.22 of the Act in the sense of alienation. It merely creates a cause for the specific performance of the contract. It must not be presumed that s.22 can operate to do away with the doctrine of part performance. It cannot, lest it be used as an instrument of fraud which it certainly is not meant for.

The transaction under the first stage, i.e. the agreement or contract stage does not require the consent of the Governor under s.22 of the Act. This is because when parties enter into a contract for the sale of land, no alienation has taken place as envisaged by the said s.22 which provides:

"22(1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever, without the consent of the Governor first had and obtained.

(2) The Governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under sub-section (1) of this section may be signified by endorsement thereon."

The position of s.22 of the Act is clearly this: A holder of a right of occupancy may enter into an agreement or contract, with a view to alienating his said right of occupancy. To enter into such an agreement or contract, he does not need the consent of the Governor. He merely

operates within the first stage of a 'transfer on sale of an estate in land' which stage ends with the formation of a binding contract for a sale constituting an estate contract at best. But when he comes to embark on the next stage of alienating or transferring his right of occupancy which is done by a conveyance or deed, culminating investing the said right in the 'purchaser', he must obtain the consent of the Governor to make the transaction valid. If he fails to, then the transaction is null and void under s.26 of the Act. In my view, it is necessary to bear these two stages clearly in mind.

I think the distinction between an agreement to alienate land and the instrument by which the alienation takes place was sufficiently drawn by this court in Awojugbagbe Light Industries Ltd v Chinukwe (1995) 4 NWLR (pt. 390) 379 in which the Privy council case of Denning v Edwardes (1961) A.C.245 on a similar point was approved. Directing his mind to the issue, Iguh JSC observed at pages 435-436:

"I think it ought to be stressed that the holder of a statutory right of occupancy is certainly not prohibited by section 22(1) of the Act from entering into some form of negotiations which may end with a written agreement for presentation to the Governor for his necessary consent or approval. This is because the land Use Act does not prohibit a written agreement to transfer or alienate land. So long as such a written agreement is understood and entered into subject to the consent of the Governor, there will be no contravention of section 22(1) of the Land Use Act by the mere fact that such a written agreement is executed before it is forwarded to the Governor for his consent. I agree entirely with Chief Williams, S.A.N. that section 22(1) prohibits transactions or instruments whereby the holder of statutory right of occupancy purports to alienate as a complete action, his right of occupancy by assignment, mortgage, transfer of possession, sublease or otherwise, the absence of the relevant consent of the Governor first and obtained notwithstanding."

(Emphasis mine)

When a statute requires ministerial approval for the sale of property, approval to enter into a contract for the sale of that property is not required but approval to complete the sale must be obtained otherwise

the sale is invalid: see Manchester Diocesan Council for Education v Commercial & General Ind. Ltd Chinukwe (supra) at 426 per Onu JSC. It was therefore a misconception on the part of the 5th respondent when in its brief of argument it submitted.

"..... even if the negotiations between the parties could be said to have resulted in some sort of contract such contract cannot be said to be lawful or valid given the absence of the Governor's consent to the transaction." B

In the same way, the court below, having failed to draw a distinction between the contract stage and the conveyance stage in land transactions, was not able to avoid making the following observation: C

"It is clear in the circumstances of the appeal that the cardinal issue to the validity of the lease is the consent of the Governor first had and obtained. There is therefore good reason for saying that the issue of consent is a condition precedent in the sublease and so there is no binding contract without such consent. There is no consent of the Governor in this case up till the time the parties came to court . This means, in my judgment, that there is no binding and enforceable contract of lease between the 1st to the 4th Appellants and the Respondent despite the presence of the 4 certainties i.e. the parties, the property, the length of term, the rent and the commencement date." D E

In exhibits A-A2, C-C1 and E-E5, the landlord were already anticipating the drawing up of a sublease to be approved by the parties. It is true one was prepared by the appellant's solicitors and sent to the landlords. They failed to execute it and gave no reason for so doing. It turned out that the landlords in the meantime had sold the property to the 5th respondent. It is important to explain that the sublease was not a necessary document for concluding or denoting the contract of sale. It was indeed the document for the conveyance stage, that is, the second stage of the transaction after the first stage, namely, the contract stage, which would have been required to alienate the property after the Governor's consent . The phrase 'subject to contract' is not referable to the said sublease and the sublease that was prepared, did not conclude, and was not what could conclude, the contract: see Lockett v Norman- F G H

Wright (1924) All ER Rep.216 at 219. The real implication of calling for the preparation of a sublease is that an agreement to sell (or the contract of sale) had been concluded. That was the first stage. I wonder if the landlords realize that holding on to 'subject to contract' provision is inconsistent with drawing up a sublease. As I did show earlier in this judgment, the second stage culminates in the right or occupancy (formerly known as the legal title) vesting in the sublessee by a conveyance (or deed) subject to the requirement of s.22 of the Act. I have no hesitation in holding, with utmost respect, that the lower court was in error when it found that there was no binding contract between the landlords and the appellant.

Before reaching a conclusion as to what the ultimate result of this appeal ought to be particularly as regards the appropriate orders to make, it is necessary at this stage to advert to and consider the reliefs in the main claim and counterclaim. I now set out the reliefs claimed by the appellant as follows:

"A. As against the 1st to 4th defendants

(1) *A declaration that the plaintiff is a sub-lessee of the premises known as 2 Abudu Smith Street, Victoria Island, Lagos and registered as Plot L05166 from the 1st to 4th defendants with effect from 1st of July 1986 on the terms and conditions set out in the exchange of letters pleaded in paragraph 8 hereof.*

(2) *An order of specific performance of the agreement between the plaintiff and the 1st to 4th defendants in respect of the sublease of the premises known as 2 Abudu Smith Street, Victoria Island (Plot L05166).*

(3) *An order directing the 1st to 4th defendants to execute a formal lease in favour of the form and manner as set out in the draft lease attached to this statement of claim.*

(4) *An order directing the 1st to 4th defendants to make available to the plaintiff the documents listed in paragraph 25 of the statement of claim and other documents that might be called for to process the application for the consent of the Military Governor now pending as LU/GC/11045.*

(5) *Damages as may be assessed - being the extra cost to the*

plaintiff in redeveloping the demised premises - which damages as at the date of the filing of this action is N2.4 million naira.

B. In the alternative to A above

(1) The plaintiff claims from the 1st to 4th defendants the sum of N3,842,899.70 being special and general damages for breach of contract. B

[Particulars of damages were stated]

(2) Interest on the above sum at the rate of 25% per annum from June 1988 to date of judgment and thereafter at 6% to date of payment thereof. C

C. As against the 5th defendant

(1) N100,000.00 being general damages for trespass.

(2) An injunction restraining the 5th defendant, its agents, servants and privies from trespassing on the plaintiff's property at 2 Abudu Smith Street, Victoria Island, and/or from taking possession by force. D

(3) An inquiry into the damages occasioned by the act of the 5th defendant in stopping the plaintiff's contractor from continuing work on the land in dispute and paying over to the plaintiff of any sum found due." E

The 5th defendant (5th respondent) made a counterclaim as follows:

"Declaration that it is entitled to the statutory right of occupancy (Certificate of Occupancy) to the land in dispute or in the alternative a declaration that it is entitled to be registered as the proprietor of the transfer of the leasehold in Title Certificate No. L05166 having obtained the Military Governor's consent to the said transfer. F

2. N1,000,000.00 (one million naira) as damages for the plaintiff's trespass on the land in dispute. G

3. A declaration that the plaintiff's letter of objection to the Registrar of Title dated 9th January, 1990 based on a purported lease for a period of 10 years in respect of the land in dispute is null and void as the purported lease is without the prior consent of the Military Governor and furthermore the 1st-4th defendants have never executed any deed of lease in favour of the plaintiff and plaintiff's possession of the land in H

dispute is illegal and null and void.

4. *An order of perpetual injunction restraining the plaintiff by itself, its servants or agents or otherwise from encroaching on the said property in dispute."*

B I have already said in this judgment that the learned trial judge dismissed the counterclaim. As regards the main claim, he granted reliefs A(1), (2), (3), (4), as well as (5) in respect of which he awarded N85,509.70. He was completely silent on the damages claimed in the
C alternative relief B; he made no attempt to assess them. This is against what has been established as the usual practice that in order to avoid undue prolongation of litigation and to prevent unnecessary expenses, the trial judge should always, as a matter of duty, assess damages he would have awarded even if his decision was against the party claiming
D damages: see Yakassai v Messrs. Incar Motors Ltd (1975) 5 SC 107 at 115-116. When the trial judge has failed to fulfil this duty, an appellate court, in an appropriate situation, will assume that duty and award damages it considers the claimant is entitled to rather than remit the case for
E the purpose of assessment to the trial judge. There is a long line of decisions on this. The Court of Appeal acts under s.16 of the Court of Appeal Act, 1976 and the Supreme Court under s.22 of the Supreme Court Act, 1960: see Dumbo v Idugboe (1983) 1 SCNLR 29; Obot v Central Bank of Nigeria (1993) 8 NWLR (pt.310) 140; Broadline Enterprises Ltd v Monterey Maritime Corp. (1995) 9 NWLR (pt.417) 1.
F

It follows that when an appellate court finds it impossible from the record before it to make any justifiable assessment of damages, I am afraid that the question of the assessment of dam-
G **ages will, painfully, have to be remitted to the trial judge. Profes-**
sor Kasunmu probably anticipated this in the issue 4 set down on behalf of the appellant for determination. In the present case, the record of appeal compiled by the 5th respondent for the purpose of
H **this appeal does not show enough on the aspect of the evidence led, oral and documentary, in support of the damages claimed. I do not think this is a clear case in which this court can properly embark on assessing the damages claimed.**

The lower court set aside all the reliefs granted to the appellant by the trial judge. For reasons I shall give shortly, there is no doubt it was right in doing so. The lower court further allowed the counterclaim partially by (a) declaring that the 5th respondent was entitled to apply for the statutory right of occupancy in respect of the property in dispute and (b) ordering perpetual injunction against the appellant from remaining on the property. Order (a) above was hardly necessary and was indeed not asked for by the 5th respondent. It pleaded as far back as May, 1990 that it had got the Governor's consent. So there was no purpose served by an order that it is entitled to apply for a statutory right of occupancy. Order (b) was proper in the circumstances since it would be a contradiction of the interest of the 5th respondent to allow the continued presence of the appellant on the property.

I have now to indicate why the lower court was right in setting aside the reliefs granted to the appellant by the learned trial judge. Relief A(1) is a declaration that the appellant is a sublessee of the property in question. This is not correct. It never was a sublessee; it only entered into an agreement to take the sublease of the property. Until that was achieved by getting the governor's consent, no such declaration could be made in its favour. A declaratory relief is merely a confirmation of what is already the state of affairs or what is likely to be, in connection with the subject-matter of the declaration. In other words, a declaration claimed must relate to some legal right or to a legal interest of which the law will take cognizance: see Nixon v Attorney-General (1930) 1 Ch.566 at 574. A plaintiff who seeks a declaratory relief must show that he has an interest or right which forms a foundation for that declaration: see Olawoyin v Attorney-General Northern Nigeria (1961) 2 NSCC 165 at 169. Reliefs (2), (3) and (4) are to the same end, namely, specific performance. I shall treat them together later. Relief A(5) which is about damages representing the alleged cost of redevelopment of the property will better be placed under the alternative B relief regarding general and special damages for breach of contract once it becomes clear that none of the other reliefs under A is available to the

appellant.

The learned trial judge awarded N20,000.00 as general damages against the 5th respondent under relief C(1) and ordered injunction under relief C(2). I think that was an error. The 5th respondent relies on a statutory right of occupancy which prima facie gives it a better title to the land than the appellant as long as that subsists i.e. it has not been set aside. The 5th respondent cannot therefore be regarded a trespasser by the appellant on the well-known principle laid down in Aromire v Awoyemi (1972) 2 S.C.182, Amakor v Obiefuna (1974) 1 All NLR 119 and such like cases that where both parties claim to be in possession, possession will be presumed in favour of the party who can show a better title. It is obvious that the appellant has no title it can rely on. The court below was therefore right in setting aside those orders of the learned trial judge.

But the court below was, with due respect, in error in holding that the appellant did not establish a contract between it and the landlords. It certainly did so upon a proper construction of the entirety of the documents before the court and even upon the equity arising from the part performance which the evidence has shown. The landlords have failed to perform their part of the contract, that is to say, they were in breach of that contract and must bear the consequences that arise from that breach; or, at any rate, looking at the part performance, equity must hold the landlords liable in regard to the changed position of the appellant to which they induced it: see Trenco (Nigeria) Ltd v African Real Estate & Investment Co. Ltd & Anor (1978) 11 NSCC 220. The question (and this is now the only question on this appeal) is whether the appellant may still have an order of specific performance in its favour in the circumstances of this case as claimed by it in relief A(2), (3) and (4) ? It must not be forgotten that the appellant also asked for damages in the alternative.

To sue for specific performance is to assume that a contract is still subsisting and therefore to insist that it should be performed. That

would mean that the plaintiff would not want it repudiated unless for any reason the court was unable to aid him to enforce specific performance of it. He may then fall back on the remedy at common law for damages. The observation of O'Bryan, J., in the Supreme Court of Victoria case of Mckenna v Richey (1950) VLR 360 at 372, which is quite apt in regard B to the present appellant's situation, was cited with approval by Lord Wilberforce in Johnson v Agnew (1979) 1 All ER 883 H.L. at p.893 as follows:

*"The apparent inconsistency of a plaintiff suing for specific per- C
formance and for common law damages in the alternative arises from the
fact that, in order to avoid circuity of action, there is vested in one Court
jurisdiction to grant either form of relief. The plaintiff, in effect, is
saying: 'I don't accept your repudiation of the contract but am willing to
perform my part of the contract and insist on your performing your part- D
but if I cannot successfully insist on your performing your part, I will
accept the repudiation and ask for damages.' Until the defendant's repu-
diation is accepted the contract remains on foot, with all the possible
consequences of that fact. But if, from first to last, the defendant contin- E
ues unwilling to perform her part of the contract, then, if for any reason
the contract cannot be specifically enforced, the plaintiff may, in my
opinion, turn round and say: 'Very well, I cannot have specific perfor-
mance: I will now ask for my alternative remedy of damages at common F
law.' This, in my opinion, is equally applicable both before and after
decree whether the reason for the refusal or the failure of the decree of
specific performance is due to inability of the defendant to give any title
to the property sold, or to the conduct of the plaintiff which makes it G
inequitable for the contract to be specifically enforced."*

There is no doubt in my mind that the above-stated passage correctly represents the law on the matter. A party to a valid contract who does not want it repudiated by the other party will resist any attempt to do so and insist on performance. He has, of course, in that event two H alternatives open to him. He knows that if specific performance which is one option fails, then he can sue for damages which is the other. As the order for specific performance is an equitable remedy and therefore dis-

cretionary, it will, in my view, be a grave error of pleading to claim for specific performance without at the same time, in the alternative, claiming for damages. As has been said, even after a decree of specific performance has been granted, it can turn out that the defendant cannot give title to the property sold. In that case a plaintiff who failed to claim for damages in the alternative will be in a quagmire. The above passage from the judgment of O'Bryan, J., with which I agree, has made it plain why the two reliefs should be pleaded and sought. The appellant in the present case has, in my opinion, diligently so pleaded.

Impossibility of performance of the contract by a defendant is a defence to a claim for specific performance, even though the contract is unconditional both in terms and in intention: see Ferguson v Wilson (1866) 2 Ch. App.77. One such impossibility is when the property, the subject-matter of the contract, has been sold to a third person: see Denton v Stewart (1786) 1 Cox Eq. Cas.258; or where the necessary consent for concluding the transaction has not been, or is not likely to be, obtained: see Wycombe Rail Co. v Donnington Hospital (1866) 1 L.R. Ch. App. 268. It has been held that impossibility of performance does not cease to be a defence to specific performance simply because the impossibility is due to the defendant's act: see Seawell v Webster (1859) 29 L.J. Ch.71 at p.73 per Kindersley V.C. In such a case, however, impossibility is no excuse for non-performance and the defendant is liable in damages. That is the position equity will take if at law the matter appears closed.

It follows that, in equity, the contract must be capable of being specifically performed before an order of specific performance may be made. This is because equity does nothing in vain. As O'Bryan, J., further said in Mckenna v Richey (supra) at p.376, as reported in Johnson v Agnew (supra) at p.893, when the matter goes outside the pale of law: "It is an appropriate case for a Court of Equity to say: 'As a matter of discretion, this contract should not now be enforced specifically, but, in lieu of the decree for specific performance, the court will award the plaintiff such damages as have been suffered by her in consequence of

the defendant's breach. This is the best justice that can be done in this case.' "

There is evidence that the 5th respondent has got the consent of the Governor to have a statutory right of occupancy to the property in respect of the residue of the lease. The court cannot compel the Governor to give consent to the appellant to have a statutory right of occupancy to the same property in respect of a sublease. The process by which that course might have been set in motion, even if that relief was available, is absent since the Governor was not made a party to this case. The best justice that can be done in this case therefore is to assess and award damages properly due to the appellant in the circumstances.

The issues raised by the parties can now be answered in a nutshell. First, the appellant's issues. Issue 1: The court below was right in reversing the trial court's decision which granted reliefs 2,3, and 4 - and indeed relief 1. Issue 2: The court for damages was in error to have held that the plaintiff's claim for damages was not maintainable. Issue 3: The 5th respondent was not a trespasser. Issue 4: This is answered in the affirmative. Now, the 5th respondent's issues. Issue (i): This is answered in the affirmative. Issue (ii): The plaintiff is not entitled to the declaratory relief sought. Issue (iii): The plaintiff is only entitled to damages in the circumstances. I will allow the appeal to the extent of those answers given to the issues raised. **Having regard to what I have earlier indicated about the nature of the evidence on record, I think it will be in the interest of the parties that the learned trial judge be directed to assess the damages. I accordingly order that this case be remitted to the Lagos State High Court for the learned trial judge, Ope-Agbe, J., to assess, by way of a rehearing and as a matter of urgency, the damages arising from the breach of contract in this case and to make the necessary order of compensation in damages.** The appellant is awarded costs of N10,000.00 against the land-lords, i.e. the 1st-4th respondents.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Uwaifo, J.S.C and I entirely agree with the reasoning and conclusion reached therein. I do not wish to add anything more.

Accordingly I too allow the appeal and adopt the consequential order contained in the said judgment.

C

WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Uwaifo, JSC and with which I agree.

For the same reasons ably stated in the lead judgment of my learned brother Uwaifo JSC. I shall also allow the appeal in part and remit the case to the trial court for the learned trial judge to assess the damages arising from the breach of contract by the 1st - 4th Respondents in this case in favour of the appellant.

The appellant is awarded N10, 000.00 costs against the 1st - 4th Respondents.

F

IGUH JSC

I have had the opportunity of reading in draft, the judgment just delivered by my learned brother, Uwaifo, J.S.C. and I agree that this appeal succeeds in part.

The facts that gave rise to this appeal have been set out exhaustively in the leading judgment of my learned brother and I need not repeat them all over again. It suffices to say that the plaintiff, who is the appellant herein, had before the trial court instituted an action against the respondents, as defendants, claiming as follows -

H

"A. 1. A declaration that the Plaintiff is a sublessee of the premises known as 2, Abudu Smith Street, Victoria Island, Lagos and registered as Plot L05166 from the 1st to 4th Defendants with effect from 1st of July, 1986 on the terms and conditions set out paragraph 8 of

Statement of Claim.

2. *An order of specific performance of the agreement between Plaintiff and the 1st to 4th Defendants in respect of the sublease of the premises known as 2 Abudu Smith Street, Victoria Island (Plot L05166).*

3. *An order directing the 1st to 4th Defendants to execute a formal lease in favour of the Plaintiff in the form and manner as set out in the draft lease attached to this Statement of Claim.*

4. *An order directing the 1st to 4th Defendants to make available to the Plaintiff the documents listed in paragraph 25 of the Statement of Claim and other documents that might be called for to process the application for the consent of the Military Governor now pending as LU/GC/11045.*

5. *Damages as may be assessed - being the extra cost to the Plaintiff in redeveloping the demised premises - which damages as at the date of the filing of this action is N2.4 Million Naira."*

In the alternative to A above:

B. 1. *The Plaintiff claims from the 1st to 4th Defendants the sum of N3,842,099.70 being special and general damages for breach of contract particulars of which are set out in the Statement of Claim.*

2. *Interest on the above sum at the rate of 25 per cent per annum from June, 1988 to date of judgment and thereafter at 6 percent to date of payment thereof."*

And as against the 5th Appellant, it claimed:

"C. 1. *N100,000.00 being general damages for trespass.*

2. *An injunction restraining the 5th Defendant, its agents servants and privies from trespassing on the Plaintiff's property at 2 Abudu Smith Street, Victoria Island, and/or from taking possession by force."*

The judgment of the trial court in favour of the plaintiff was on appeal set aside by the Court of Appeal which held that there was no binding and enforceable contract between the plaintiff and the 1st - 4th defendants on the grounds that -

(i) all the various correspondence between the parties were marked "subject to contract" and that until a formal agreement was drawn up and executed by the parties, there could not be a formal contract.

(ii) the consent of the Military Governor of Lagos State which was a condition precedent to the creation of a valid binding sub-lease between the parties was at all material times not in place.

The plaintiff has now appealed to this court against this decision of the B court below.

The two distinct contentions of the defendants in this court and in both courts below are:-

C (1) That since the various correspondence between the parties in respect of the transaction were marked "subject to contract", there could be no binding and enforceable contract until a formal agreement was drawn up and executed by the parties and

D (2) That there could also not be a binding and enforceable sub-lease of the State land in issue unless and until the consent of the Military Governor of Lagos State has been first had and obtained pursuant to section 22 of the Land Use Act.

It is thus clear that the main issue for determination in this appeal is whether or not there is a binding and enforceable contract between the E parties.

The submission of the learned leading counsel for the appellant, Professor A. B. Kasunmu S.A.N. is that four certainties required in a lease agreement of the nature in issue having been identified in the present F case, an enforceable contract between the parties had been concluded. These certainties, he explained, refer to a determination of the parties, the rent payable, the duration of the lease and the actual property which is the subject matter of the lease. He referred to the phrase "subject to contract" which was freely used in all the correspondence between the G parties and contended that this was without any significance or consequence. He contended that this was because all the terms of the sub-lease were clearly known and agreed to by both parties to the contract. On failure to obtain the Military Governor's consent, learned Senior Ad-H H vocate submitted that this was immaterial in so far as the contract concerned is an agreement for a lease which passed no interest in land as against a sub-lease which necessarily passes interest in land, thus requiring the consent of the Military Governor.

Learned counsel for the 1st - 4th defendants T. E. Williams Esq. in his oral submissions contended that despite the existence of the four certainties referred to by Professor Kasunmu, S.A.N., no valid and enforceable contract was reached as all correspondence between the parties in relation to the alleged agreement were marked "subject to contract". B He therefore argued that the parties at all material times were still in the process of negotiation and that until a formal contract was drawn up and executed, no binding and enforceable contract was concluded. On the question of absence of the Military Governor's consent to the contract C which is the subject matter of this action, Mr. T. E. Williams submitted that there could be no valid sub-lease of the property without the Military Governor's consent. He added that the court will never order specific performance of a contract, such as the one under consideration, as the Military Governor, a third party and an entire stranger to the suit cannot D be compelled to give his consent to the transaction in issue.

Learned counsel for the 5th defendant, B. A. Sodipo, Esq. in his own reply argued almost entirely along the same line as Mr. T. E. Williams. On the phrase "subject to contract", he referred to the decisions in E Winn v. Bull (1877) 7 Ch.D. 29 and Caney v Leith (1937) 2 All E.R. 532, and submitted that until both parties agreed on a draft sub-lease, either party could resile from the contract. In particular, learned counsel stressed that the plaintiff was not asserting its right under an agreement for a sub- F lease but under an alleged sub-lease. He therefore submitted that in the absence of the consent of the Military Governor, Lagos State to any such sub-lease, no valid and enforceable agreement would have been reached as between the plaintiff and the 1st - 4th defendants.

Turning now to the phrase "subject to contract", it is not in G dispute that the series of correspondence between the plaintiff, of the one part, and the 1st - 4th defendants, of the other part, were so marked. The real question that arises for consideration is whether the use of that phrase automatically precludes the formation of a binding and enforce- H able contract until a formal agreement is drawn up and signed by the parties.

There can be no doubt that as a general rule, the courts in appro-

appropriate cases construe the words "subject to contract" or such similar incantations so as to postpone the incidence of liability until a formal contract is drawn up and accepted by the parties. It must however be stressed that the court must refuse to postpone such incidence of liability where there exists cogent and compelling evidence of a contrary intention on the part of the parties, the use of the phrase "subject to contract" notwithstanding. It must in each case be a question of construction whether the parties intended to undertake immediate obligations or whether they were suspending all liability until certain events happen. In the first case, the contract is fully binding and enforceable between the parties whereas in the latter, the incidence of liability is postponed until the stipulated event happens, irrespective of whether or not the words "subject to contract" are used. As the learned author of Cheshire and Fifoot's Law of contract, 9th Edition by M.P. Furmston framed the question -

"Have they, in other words, made the operation of their contract conditional upon the execution of a further document, in which case their obligation will be suspended, or have they made an immediate binding agreement, though which is later to be merged into a more formal contract".

In this connection, the point must be stressed that it does not appear to me that the phrase "subject to contract" is a magic wand which when employed at all times and in all circumstances automatically suspends all liability in a contract finally concluded and agreed to by the parties. That cannot, in my view, be the correct proposition of the law. It seems to me that the task of the courts in such cases is to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surround and follow them. If the preparation of a further document is a condition precedent to the creation of a contract, then, of course, the parties, if no such further document has been prepared, would not have reached a consensus ad idem on the various terms of the agreement and no contract in such circumstance would be deemed to have been concluded as at that stage. So, in Winn v. Bull (1877) 7 Ch. D. 29, the defendant by a written agreement agreed

with the plaintiff to take a lease of a house for a certain term and at a certain rent " subject to the preparation and approval of a formal contract". No other contract was ever entered into between the parties. It was held, and rightly in my view, that there was yet no final agreement of which specific performance could be enforced against the defendant. If, however, the preparation of the further document is a mere incident in the performance of an already binding obligation, a contract would exist whether or not the phrase "subject to contract" is used. See VonHatzfeldt - Wildenbury v. Alexander (1912) 1 Ch. 284.

I think it would be right to state that the words "subject to contract" can only be operative in law where they have real and relevant meaning. Where they are meaningless and constitute mere verbiage, not intended to add any thing to an otherwise complete and concluded agreement or if they relate to an inconsequential issue or a matter of relatively minor importance, I am of the firm view that they can and may be ignored. So in Michael Richards Properties Ltd. v. St. Saviour's (1975) 3 All E.R. 416, the words "subject to contract" were added to an unqualified acceptance of an offer. It was held that there was nevertheless a binding contract since the documents set out in full the description of the property and the rest of the other relevant terms of the transaction. In those circumstances, the phrase "subject to contract" was treated as meaningless and was accordingly disregarded.

My above views appear to receive support in the various obiter dicta in the case of Nicolene Limited v Simmonds (1953) 1 Q. B. 543 at 511 - 512 where Denning, L. J. put the matter as follows -

"It would be strange indeed if a party could escape from every one of his obligation's by inserting a meaningless exception from some of them You would find defaulters all scanning their contracts to find some meaningless clause on which to ride free".

Hudson, L.J. in his own contribution in the same case expressed his views at page 553 of the same report as follows -

"I do not accept the proposition that because some meaningless words are used in a letter which contains an unqualified acceptance of an

offer, those meaningless words must, or can, be relied on by the acceptor as enabling him to obtain a judgment in his favour on the basis that there has been no acceptance at all".

I will now briefly examine the finding of both courts below with regard
B to the contract in issue in the matter of whether a binding contract between the plaintiff and the 1st to 4th defendants was concluded.

In this regard, the learned trial Judge found as follows -

*"From the evidence adduced by the plaintiff with particular ref-
C erence to the transaction with the 1st to 4th defendants and the documentary evidence tendered in this case, Ex. "A" to "H" it seems to me that the trappings of a valid lease are present in the transaction.*

*The parties to the transaction, the property, the length of the
D terms including that of the option and the rent of the option and date of commencement are all known and defined
In this case, it appears to me that the minds of the plaintiff and that of the 1st to 4th defendants are ad idem on all matters which are cardinal to every agreement for a lease".*

E A little later in his judgment, he added -

*"I have earlier on held that the facts of this case as between the
plaintiff and the 1st to 4th defendants which are undisputed up to the
stage when Ex. "L" was written i.e. 17/5/89 contain the ingredients of a
F binding agreement for a lease between the parties except for the use of the words "subject to contract."*

*The first issue I have to decide is whether having regard to the facts of
this cases as between the plaintiff and the 1st to 4th defendants, there is
a binding contract between the parties notwithstanding the use of the
G words "subject to contract" which words, as submitted by Learned Counsel for the plaintiff, Prof. Kasunmu, SAN are meaningless in the context of the facts of this case. Are the words "a mere surplusage"?*

He went on -

H *"All the essentials of a Contract for a lease are present in the transaction between the plaintiff and the 1st to 4th defendants
That being the case, I hold that the parties have made a binding agreement and the words "subject to contract" are mere surplusage".*

He then concluded -

Although no formal contract has been exchanged or executed, there is a conclusive agreement which is binding on the parties".

The court below, for its own part, after a careful consideration of the matter observed thus :-

"..... The letting agents for the 1st to the 4th Appellants, appeared to confirm all the terms of the lease. In the last paragraph of Exhibit E-E5, the Respondent was asked to expedite the preparation of the draft lease agreement for approval of the parties.

It would appear on the face of the documents so far exchanged between the letting agents and the Respondent that the four certainties as postulated by Prof. Kasunmu, learned counsel for the Respondent, are present in the final negotiations for the lease. There is no doubt that the parties are known, the property is identified, the rent has been fixed and agreed, and the term or period of the lease has been agreed upon between the negotiating parties. Under normal circumstances, with the offer having been accepted and finally agreed upon, an agreement is reached and a legal contract is formed".

The court then continued :-

"From Exhibits A-A2 and Exhibit C-C1, it would appear that there was some understanding on the parties to the lease, the property involved, the rent payable, the length of the term and the date of commencement. On the authority of Harvey v. Pratt (Supra) and following Michael Richards case (supra) and Nnaemeka Agu's obiter in Tejumola case (supra) it may be right to say that in the instant appeal the exchange of the letters enumerated above constituted an agreement which is valid and binding between the 1st to the 4th Appellants and the Respondent, and that the use of the words "Subject to Contract" in the letters was meaningless and a mere surplusage."

But it added the following rider :-

"This however cannot be correct in this appeal for the following reasons:-

(1) Exhibit A-A2 which was the original offer for the lease made by the letting agents to the Respondent provided in very clear terms in

paragraph 11 that -

"It should be understood that the letting is subject to the usual consent of the Lagos State Military Government."

(2) The penultimate paragraph of Exhibit A-A2 also clearly requested that any draft lease or sublease prepared has to be in accordance with the terms and conditions of the offer including the contents of paragraph 11 thereof.

(3) The property to be sub-leased, No. 2 Abudu Smith Street, Victoria Island is situate in the urban area of Lagos and by virtue of the provisions of Section 22 of the Land Use Act (Cap. 202 of Laws of Nigeria 1990) the sublease can only be lawful if the consent of the Governor has been obtained before hand.

Therefore from (1) above, there is no doubt that the Respondent must have accepted the condition that the letting was subject to the consent of the 'Military' Governor because at that time the Military Governor was in charge of the State as Governor. The respondent must be taken to have accepted this condition with his eyes open and no where in the correspondence exchanged did he challenge this. This means that the letting or the sub-lease cannot be complete and binding between the 1st to the 4th Appellants and the Respondent without compliance with this condition.

The number (2) reason above was to ensure that in the sub-lease which was to be drawn up, the issue of the Governor's consent having been had and obtained must be specified as one of the conditions of the offer.

I now come to reason (3) above. This, in my humble view, is the most important reason in this matter

The Court of Appeal then proceeded to deal with its reason number (3) and concluded thus :-

"From the above, I have no doubt in my mind that the 1st to the 4th Appellants being holders of the statutory right of occupancy in respect of the property in dispute, cannot alienate that right by a sublease without the consent of the Governor first had and obtained. And paragraph 11 of Exhibit A-A2, the offer of the lease, clearly set out this

requirement as a condition in addition to the words on top of the correspondence "Subject to Contract".

In the instant appeal, although a draft sublease was drawn up by Respondent and sent to the letting agents for vetting and approval, nothing actually happened and the lease was not executed by any one. It would appear from the provisions of Section 22(2) of the Land Use Act, that a properly executed assignment, mortgage or sublease is a sine qua non to the application for consent of the Governor under the said Act and the Respondent is fully aware of this".

On the phrase "subject to contract" the Court of Appeal held:-

By the use of the words "Subject to Contract" in their negotiation correspondence with the Respondent in this matter, the 1st to the 4th Appellants were perfectly justified in saying that there was no binding and enforceable contract between them and the Respondent and that whatever they have agreed on was subject to further negotiations until a formal contract was executed It is very clear in the circumstances of this appeal that the cardinal issue to the validity of the lease is the consent to the Governor first had and obtained. There is therefore good reason for saying that the issue of consent is a condition precedent in the sub-lease and so there is no binding contract without such consent. There is no consent of the Governor in this case up till the time the parties came to Court. This means, in my judgment, that there is no binding and enforceable contract of lease between the 1st to the 4th Appellants and the Respondent despite the presence of the 4 certainties i.e. the parties, the property, the length of term, the rent and the commencement date. This is so, because from all the correspondence concerned and relevant to the lease, the phrase "Subject to Contract" was maintained and therefore applies throughout the negotiations as no where was it expressly or by necessary implication expunged".

Now, the law is well settled that in order to establish the existence of a valid agreement for a lease, there must be definite understanding in respect of not only the parties to the lease, the property involved, the rent payable, the length of the term but also the date of its commencement. These comprise of the essentials or the so called certainties

that must be established before a valid agreement for a lease may be said to have been concluded. See Harvey v. Pratt (1965) 2 All E.R.786 at 788, U. B. A. Ltd v. Tejumola and Sons Ltd. (1988) 2 N.W.L.R. (Part 79) 662 etc.

B Both courts below are in agreement that from Exhibits A-A2
together with exhibits C-C1, which constitute the offer in this case, and
Exhibits D-D1, the acceptance, it would appear there was some under-
standing on the parties to the lease, the property involved, the rent pay-
C able, the duration of the lease and the date of its commencement. It is
clear to me that once agreement has been reached by the parties in re-
spect of all these essentials of a valid agreement for a lease, then in the
absence of any inhibiting factor, a contract may be said to have come
into existence between the plaintiff, of the one part, and the 1st - 4th
D defendants, of the other part. The learned trial Judge was of the opinion
that a valid contract for a lease was thus established between the parties.
The Court of Appeal, however, was unable to accept this finding of the
trial court as well founded. In the view of the court below, no binding
E contract was established on the grounds that the transaction was entered
into "subject to contract" and, at all events, that the necessary consent of
the Military Governor of Lagos State pursuant to the mandatory provi-
sions of section 22 of the Land Use Act, Cap. 202, Laws of the Federal
F Republic of Nigeria, 1990 was not obtained before the transaction was
entered into.

Reverting once again to the issue of the term "subject to con-
tract", it is clear to me, as found by the trial court and, rightly affirmed by
the court below, that at the end of negotiations, the parties to the agree-
G ment in issue were completely ad idem in all the essential terms and
details of their contract. These terms expressly included the commence-
ment of all obligations under the contract with effect from the 1st July,
1986, some three years before the breach complained of. There can be
H no doubt that the operation of the contract in issue having taken effect by
the express consent of the parties with effect from the 1st July, 1986, it
is idle to suggest that the term "subject to contract" in the various corre-
spondence that culminated in the formation of the contract postponed

any incidence of liability on the facts of the case. There is, in my view, abundant evidence on record to indicate that the parties intended to undertake immediate obligations under the contract with effect from the said 1st July, 1986, the use of the phrase in issue notwithstanding. I think that the use of the term "subject to contract" in the circumstances of the present case is nothing short of a cosmetic surplusage, a mere verbiage, not intended to add any thing to an otherwise complete agreement in which the terms were clearly known and agreed to by both parties. See Michael Richards Properties Ltd. v. St. Saviours and Nicolene Limited vs Simmonds, (supra).

There is next the second issue which is whether a binding and enforceable contract of a sub-lease was concluded between the parties in view of failure by the defendants to enter into the contract in issue with the consent of the Military Governor of Lagos State first had and obtained. In this regard, section 22(1) of the Land Use Act provides as follows:-

"22(1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever without the consent of the Military Governor first had and obtained".

There is also section 26 of the same Land Use Act which stipulates thus :-

"26. Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void".

It cannot be disputed that section 22(1) of the Land Use Act prohibits the holders of a statutory right of occupancy, such as the defendants in the present case, from purporting to alienate, as a completed action, their right of occupancy whether by assignment, mortgage, transfer of possession, sub-lease or otherwise howsoever without the consent of the Governor first had and obtained. Section 26 of the Act proceeds to render any transaction which purports to vest in any person any interest or right over land other than in accordance with the provisions of the Act

as null and void. See Savannah Bank v. Ajilo (1989) 1 N.W.L.R. (Part 97) 305.

In the present case, it is common ground that the consent of the Governor of Lagos State was not obtained in respect of the lease transaction in issue. This is despite the fact, that apart from the provisions of section 22(1) of the Land Use Act, the parties by the terms of their agreement, made the consent of the Military Governor of Lagos State a condition precedent to the validity of the transaction between them. Indeed by clause 11 of the offer, Exhibits A-A2, it was specifically stated as follows-

"11. It should be understood that the letting is subject to the usual consent of the Lagos State Military Governor."

There is, however, the provision of section 22(2) of the Land Use Act which stipulates thus :-

"The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under sub-section (1) may be signified by endorsement thereon".

A close study of the said section 22(2) of the Land Use Act clearly confirms that it does recognize cases where some form of written agreement executed in evidence of the relevant transaction is submitted to the Governor in order that the necessary consent under section 22(1) of the Act may be signified by endorsement thereon. It therefore seems to me that there cannot be anything unlawful for the holder of a statutory right of occupancy to enter into some form of negotiation which may end up in an agreement for presentation to the Governor for his necessary consent or approval. In my view, the Land Use Act does not prohibit agreements for the sub-lease of land as an act in futuro or purported alienations which the parties do not intend to become immediately effective until the necessary approval of the Governor has been obtained. The legal position which arises in such a situation is that no interest in the land is thus passed under the agreement and, accordingly,

such a contract is not subject to the consent of the Governor pursuant to section 22(1) of the Land Use Act. See Awojugbagbe Light Industries Ltd v. Chinukwe and Another (1995) 4 N.W.L.R. (Part 390) 379. But the Act does prohibit transactions by which the holder of a statutory right of occupancy over a state land granted by the Governor purports to alienate his right of occupancy or any part thereof whether by assignment, mortgage, transfer of possession, lease, sub-lease or otherwise howsoever as a completed transaction without the relevant consent of the Governor first had and obtained.

So in Denning v. Edwardes (1961) A.C. 245 at 253 - 254, Viscount Simonds, interpreting section 88(1) of the Crown Lands Ordinance, the provisions of which are in pari materia with section 22(1) of the Land Use Act explained thus :-

"It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is inescapably necessary before the Governor is approached for his consent otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their Lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequences that ensued were that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective."

I must say that I agree entirely with the above observations of Viscount Simonds and fully endorse the same.

A distinction must therefore be drawn between an agreement for a sub-lease or an agreement to create a sub-lease as an act in futuro which clearly passes no interest in land, as against a sub-lease which, without doubt, confers interest in land. Whereas the former may lawfully be concluded without the consent of the Governor, the latter, where it is concluded without the necessary consent of the Governor, is undoubtedly unlawful and therefore null and void. I therefore entertain no doubt that the contract in issue between the plaintiff and the 1st - 4th

defendants which was expressly made

"Subject to the usual consent of Lagos State Military Governor"

can under no stretch of the imagination be termed a sub-lease. In my judgment, it was never intended to become immediately effective until
B the said consent of the Military Governor was obtained. It was an agreement to create a sub-lease or an agreement for a sub-lease and not a sub-lease and I do not think that it required the consent of the Military Governor of Lagos State to make it a binding and enforceable contract. I am
C also unable to accept the finding of the court below that no valid contract was establish between the plaintiff and the 1st - 4th defendants in this action.

Turning now to the reliefs claimed by the plaintiff, it is apparent that reliefs numbers A1 -A5 pertain to claims under a sub-lease and not in
D respect of an agreement for a sub-lease. Relief A1 relates to a declaration that the plaintiff is a sub-lease of the premises in issue whilst reliefs A2 and A3 are again claims founded under a sub-lease as against an agreement for a sub-lease. Claims A4 and A5 are similarly rooted under a sub-
E lease.

Additionally, it ought to be noted that relief A2, being a claim in specific performance of an alleged sub-lease as against the agreement for a sub-lease may only be granted if a plaintiff shows performance or
F fulfillment of all the conditions precedent to the creation of the relevant sub-lease. It would not matter whether or not such conditions under the sub-lease are to be performed by the plaintiff since, until such performance or fulfillment, the sub-lease would not become absolute and the plaintiff would not be entitled to enforce it. In this regard, it is common
G ground that the alleged sub-lease was strictly subject to the consent of the Military Governor of Lagos State. This vital condition precedent was never fulfilled hence the sub-lease had not become absolute and could not therefore be specifically performed. See Heron Garage Properties
H Ltd. v. Woss (1974) 1 N.W.L.R. 148.

There is finally the accepted evidence by both courts below that the premises in issue was subsequently sold by the 1st - 4th defendants with the written consent of the Military Governor of Lagos State to the

5th defendant. Impossibility of performance by the defendants of the acts sought to be enforced is a definite defence to a claim for specific performance and it would not matter that the contract is unconditional, both in terms and intention, and that the impossibility of performance is due to the defendants' own act. Besides, the court, in the present case, B will be unable to compel the Governor of Lagos State to revoke the written consent it had already given in favour of the 5th defendant in respect of its completed purchase of the premises and to give his consent to the alleged sub-lease as the said Governor was not joined as a party to this C action and no such claims, at all events, were before the court.

The reliefs claimed under items B1, B2 and C1 are, however, all claims in the alternative and sound mainly in damages for breach of contract. I think, the plaintiff is entitled to any damages it may successfully D establish in respect of this breach of contract.

In the final result, this appeal succeeds in part and it is so ordered. The appeal against the judgment and orders of the Court of Appeal in respect of claims A1 - A5 and the alternative claim C2 is hereby dismissed. The appeal against the decision of the court below in respect E of the alternative claims B1, B2 and C1 is hereby allowed and the said three arms of claim are remitted to the Lagos State High Court for the learned trial Judge, Ope-Agbe, J. to rehear and assess the issue of damages arising from the said breach of contract by the 1st - 4th defendants F in this case. I abide by all the consequential orders, inclusive of those as to costs, made in the leading judgment.

KATSINA-ALU JSC

I have had the advantage of reading in advance the judgment of my learned brother Uwaifo JSC in this appeal. I entirely agree with it. There is very little I would seek to add.

The first question, I think, that calls for a resolution is whether H there was a binding contract between the Plaintiff and the 1st to 4th Defendants having regard to the facts and circumstances of this case. The case of the Defendants is firstly, that since the various correspon-

dence between the parties were marked "Subject to Contract" there can be no binding and enforceable contract until a formal agreement has been drawn up and executed by the parties. Secondly, that there could also be no binding and enforceable contract unless and until the consent of the Governor had been obtained. In its judgment, the Court of Appeal at p.280-281 held as follows:

"..... it may be right to say that in the instant appeal the exchange of the letters enumerated above constituted an agreement which is valid and binding between the 1st to the 4th Appellants and the Respondent and that the use of the words 'Subject to Contract' in the letters were meaningless and a mere surplusage. This however cannot be correct in this appeal for the following reasons:-

(1) Exhibit A-A2 which was the original offer for the lease made by the letting agents to the Respondent provided for very clear terms in paragraph 11 that -

'It should be understood that the letting is subject to the usual consent of the Lagos State Military Governor. '

(2) The penultimate paragraph of Exhibit A-A2 also clearly requested that any draft lease or sublease prepared has to be in accordance with the terms and conditions of the offer including the contents of paragraph 11 thereof.

(3) The property to be subleased No. 2 Abudu Smith Street, Victoria Island is situate in the urban area of Lagos and by virtue of the provisions of Section 22 of the Land Use Act (Cap. 202 of Laws of Nigeria 1990) the sublease can only be lawful if the consent of the Governor has been obtained before hand.

Therefore from (1) above, there is not doubt that the Respondent must have accepted the condition that the letting was subject to the consent of the 'Military' Governor because at that time the Military Governor was in charge of the State as Governor. The Respondent must be taken to have accepted this condition with his eyes open and no where in the correspondences (sic) exchanged did he challenge this. This means that the letting or the sub-lease cannot be complete and binding between the 1st to the 4th Appellants and the Respondent without compliance

with this condition."

I must point out that the "usual consent of the Lagos State Military Governor" was part and parcel of the terms and conditions of the agreement. There must be an agreement to create a lease before the Governor can give his consent. Put in another way, there must be in B existence that which the Governor is to give his consent to. This is the contract stage. What this means is that the agreement or contract does not requires the consent of the Governor envisaged under S.22 of the Land Use Act. The agreement is indeed the document, for the second C stage i.e. the conveyance stage which would be required to alienate the property. This, I believe is evident from the provisions of S.22 of the Act which provides as follows:

"22 (1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy D or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise however, without the consent of the Governor first had and obtained.

(2) The Governor when giving his consent to an assignment, E mortgage or sublease may require the holder or a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when as required deliver the said instrument to the Governor in order that the consent given by the F Governor under sub-section (1) of this section may be signified by endorsement thereon. "

Sub-section (2) of Section 22 has put the matter beyond argument. There must be an instrument executed in evidence of the sublease. That G instrument is the deed or instrument between the parties by which the holder of the fight of occupancy intends to alienate his right of occupancy by sublease, assignment etc. It is on the strength of this the Governor may wish to give his consent to the alienation. See Awojugbabe Light Industries Ltd. v. Chinukwe (1995) 4 NWLR (Pt. 390) 379. The H court below was clearly in error when it held as follows:

"It is very clear in the circumstances of this appeal that the cardinal issue to the validity of the lease is the consent of the Governor

first had and obtained. There is therefore good reason for saying that the issue of consent is a condition precedent in the sub-lease and so there is no building contract without such consent. There is no consent of the Governor in this case up till the time the parties came to court. This means, in my judgment that there is no binding and enforcement contract of lease between the 1st to the 4th Appellants and the Respondent despite the presence of the 4 certainties i.e. the parties, the property, the length of terms, the rent and the commencement date."

On the state of the evidence before the trial court I hold that there was a binding contract between the 1st to the 4th defendants and the plaintiff.

It is futile to rely on the clause "subject to contract" since it has not really altered the effect of what was really agreed by the parties. Furthermore, I hold the view that the clause has very little meaning in our circumstance as pointed out in the leading judgment and that a court should be able to decide in any given situation whether there is a binding contract, notwithstanding the reliance on that clause by one of the parties to a bargain.

The 1st to the 4th defendants are in breach of this contract the consequences of which have been ably treated in the leading judgment. As I have already indicated, I entirely agree with the reasoning and conclusion of my learned brother Uwaifo, JSC. I abide by all the orders made including the order as to costs.

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