IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

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| GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff vs. ERMA THOMAS, Defendant | CIVIL NO. 1084/1981 |
| HERBERT FORBES AND RUTH FORBES, Plaintiffs vs. GOVERNMENT OF THE VIRGIN ISLANDS, DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL, Defendant | CIVIL NO. 758/1982 |
| MARIA JOSEPH AND COURTNEY JOSEPH, Plaintiffs vs. GOVERNMENT OF THE VIRGIN ISLANDS, DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL, Defendant | CIVIL NO. 318/1983 |
| ALPHONSE HARLEY AND VIOLA HARLEY, Plaintiffs vs. GOVERNMENT OF THE VIRGIN ISLANDS, DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL, Defendant | CIVIL NO. 319/1983 |

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CHRISTIAN, ALPHONSO A., Senior Sitting Judge

## MEMORANDUM OPINION AND ORDER

### I - INTRODUCTION

This matter is before the Court on Government of the Virgin Islands, Department of Housing and Community Renewal's (hereafter Seller) motion to dismiss the complaints in Civil No. 758/1982, Civil No. 318, 1983, Civil No. 319/1983, and the Counterclaim in Civil No. 1084/1981, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, Failure to state a claim upon which relief can be granted; pursuant to Rule 12(c), Federal Rules of Civil Procedure, For Judgment on the pleadings;[1] and because the claims of "Buyers", three plaintiffs and counter-claimant in these actions consolidated for final disposition, are time-barred pursuant to 5 V.I.C., Section 31(3)(A). For the reasons stated below, the motion will be denied in part, and granted in part.

II - THE FACTS

A - AS TO THE CASES INDIVIDUALLY

1. - GOVERNMENT vs. ERMA THOMAS

On December 2, 1981, Seller filed a complaint dated November 10, 1981, against Erma Thomas (hereafter Thomas) in Case No. 1084/1981, for debt and foreclosure, alleging that Thomas was in default of her purchase-mortgage secured debt as of October 31, 1981, for eight months in the amount of $654.48. In Thomas' Answer dated and filed December 30, 1981, she prayed for dismissal of the Seller's complaint and counterclaimed for an un-

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[1] Rule 12(c) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56". All parties were given reasonable time, from August 2, 1984, when Government filed its Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, to present all material made pertinent to such a motion by Rule 56, Federal Rules of Civil Procedure.

specified amount of damages on the grounds that Seller had committed a breach of "its expressed or implied warranty of merchantability, and/or fitness for a particular purpose, to wit, as a dwelling place for human beings, and that such breach continues" in that at the time of the conveyance of title to the realty in question, Plot No. 32A Lindberg Bay, St. Thomas, V.I., with the improvements thereon, there existed several serious latent defects which caused loss and damage to Thomas from the beginning of her occupancy of the property. On November 10, 1982, by leave of Court, Thomas filed an Amended Answer and Counterclaim, dated November 9, 1982, in which she amended the ad damnum clause of her counterclaim by specifying the amount of damages she was claiming, in the amount of $100,000.00.[2]

2. HERBERT FORBES & RUTH FORBES (hereafter FORBES) vs. GOVERNMENT OF THE V.I., DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL (hereafter SELLER)

On September 17, 1982, Forbes filed a Complaint, dated September 13, 1982, against Seller, praying for damages in the amount of $100,000.00 and costs, on the grounds that (a) Seller deeded to them real property No. 32B Estate Lindberg Bay, No. 4A Southside Quarter, St. Thomas, V.I., on September 12, 1969; (b)

[2]Thomas is represented by the same law firm which represents all the three other parties listed as plaintiffs herein. All of said three other parties are suing as plaintiffs, as distinguished from counterclaimant, for the identical amount of damages, $100,000.00 each. For this reason, the Court will treat all three claims of plaintiffs and the counterclaim of defendant Thomas, in the same manner, they all having the same attorney, claim against the same party, Seller, in the identical amount, and for identical reasons.

that the deed contained an express or implied warranty of habitability [of the improvements built on the land] or fitness for use as a dwelling place for human beings in general, and plaintiffs in particular; (c) that Seller breached this covenant or warranty because from the beginning of occupancy of the property by plaintiffs they discovered that the property contained substantial latent defects which seriously impaired its habitability; and that in spite of the aforesaid express or implied covenant in the deed, the requirement of 3 V.I.C., Section 301 imposing a statutory obligation on Seller to correct the defects,[3] and several efforts of Seller to ameliorate the untenable situation in which this plaintiff found itself as purchaser and occupant of the property, the defective conditions continue almost completely uncorrected.

Seller filed a pretrial 12(b)(6) Federal Rules of Civil Procedure motion, dated October 13, 1982, on October 14, 1982, for dismissal for failure to state a claim upon which relief can be granted; or, in the alternative, for a more definite statement as to certain allegations in this plaintiff's case,

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[3] We fail to see how Section 301 of Title 3, which clearly establishes a general policy of Government in creating the Department of Housing and Community Renewal, creates any contractual obligation of Seller in any particular transaction which can be used as grounds for legal action as Forbes contends.

or to have them stricken pursuant to Rules 12(e) and (f) of the Federal Rules of Civil Procedure.[4] This motion was denied on December 8, 1982. Whereupon, Seller filed its Answer on January 25, 1983, praying for dismissal of the action on the grounds that the complaint fails to state a claim upon which relief can be granted for the reasons that the claim is time-barred on the very face of the complaint and Answers to Interrogatories propounded after the filing of the complaint, which show that the cause of action ripened from the year 1969, and suit was not begun until 1982, thirteen years later, when the applicable statute of limitation, which is six years,[5] this being a breach of contract action as alleged, had fully run its course; and that plaintiffs are further barred from recovery based on the doctrines of equitable estoppel and waiver, which are applicable to the case. In-

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[4]Rule 12(e) FRCP reads: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the Court is not obeyed within 10 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just".

Rule 12(f) FRCP reads: "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the Court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter".

[5]See 5 V.I.C., Section 31(3)(A).

terrogatories pursuant to Rule 33, Federal Rules of Civil Procedure, and Demand for Production on July 20, 1983, pursuant to Rule 34 Federal Rules of Civil Procedure, were served by Seller on these plaintiffs and all other Buyers on July 20, 1983. These were answered and produced on June 26, 1984.

3. ALPHONSE HARLEY & VIOLA HARLEY (hereafter HARLEYS) vs. GOVERNMENT OF THE V.I., DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL (hereafter SELLER)

On April 22, 1983, Harleys filed a Complaint, dated April 22, 1983, against the Seller, praying for damages in the amount of $100,000.00 on the same grounds as alleged in the Forbes action. Thereafter the pleadings and succeeding steps are substantially the same as in the Forbes case set forth in Facts "2" above.

4. MARIA JOSEPH & COURTNEY JOSEPH (hereafter JOSEPHS) vs. GOVERNMENT OF THE V.I., DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL (hereafter SELLER)

The factual part of this case track completely and identically that stated in the Forbes case in Facts "2" hereinabove.

III. FACTS AS TO THE FOUR CASES COLLECTIVELY

In all four cases, the parties agree on the following facts in varying parts of the proceedings, from the filing of the complaints to the time they ceased the discovery process:

1. That the controversy began with the purchase of a parcel of real estate by the individual private citizen from the Seller, to wit, Parcels Nos. 32A, 32B, 32C, and 32D Estate Lindberg Bay, No. 4A Southside Quarter, St. Thomas, V.I.;

2. That said purchase was made by a quitclaim deed.[6]

3. That the purchase was effected by a partial payment and a note and purchase money mortgage to secure the payment of the unpaid portion of the purchase price.[7]

4. That the Buyers received notice of substantial defects in the premises from October 9th or 10th, 1969, about eight days after the closing of the transaction, but commenced suit for relief only in 1982, thirteen years after, while the statute of limitations in this contract transaction, according to 5 V.I.C., Section 31(3)(A) is six years.[8]

5. That Buyers in all four cases, learning and having clear and painful notice of substantial defects in the improvements on the property purchased from the beginning, did complain to various officials of Government, including Housing Commissioners and Senators, both before and after the running of the statute of limitations, and did receive many expressions of sympathy and even some, albeit inconsequential, physical assistance.

6. That the Legislature in 1980 did appropriate $95,000.00 to remedy the defects; and by Bill No. 14-0463, (Act No. 4494),

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[6]See Response dated May 24, 1984, to Demand for Production, dated July 20, 1983, to which is attached copy of deed in question.

[7]See Responses to Seller's Interrogatories Nos. 14, 15, & 16 dated June 26, 1984.

[8]See Interrogatory No. 2 and answer thereto in Case No. 318/1982, which applies to all four cases. Also Answer to Interrogatory No. 4 in Civil No. 758/1982, the Forbes case.

on September 9, 1981, appropriated $94,000.00, apparently an amended sum, for the benefit of these four particular homeowners, but for lack of funds these monies were never allocated by the Budget Director.[9]

7. That the sale of the properties by Seller to Buyers in all four cases did not involve any antecedent contract to build or any building by the Seller of the structures erected on the premises in whole or in part, or to improve, repair, or renovate the same. Asked upon what legal theory they base their contention that Seller has a duty to cure the alleged defects, and on which legal theory they intend to rely to prove the amount of damages they are entitled to be granted by the Court, Buyers objected, refused to answer, pleading attorney-client privilege and attorney's work product privilege.[10] But Buyers in the Facts portion of their Brief in Opposition to Seller's Motion to Dismiss give their answer as to the theory on which they base their

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[9] Even then Senator Belardo labeled it special legislation and a hand out in the following language, "Thank you, Madam President. I am not clear on this. He said which were sold by the Government, with damages needed to be repaired, which gives me an idea that these people bought the houses knowing that those damages were there. Now, I want to know if there was a contract before that to state--which stated that the damages were going to be repaired by the government, if not, I cannot see how Senator Dennis a couple of hours ago objected to $5,000.00 for mechanics who depend on their tools for their livelihood. Here he appropriates $94,000.00 for four private homes. I don't understand those reasoning".

[10] See Seller's Interrogatories Nos. 8 & 9, and Buyer's Answers thereto.

claim, as follows: "These actions arise out of the purchase by four families and sale of homes by the Government possessing latent defects on September 12, 1969. Plaintiffs primarily base their cause of action upon the breach of implied warranty of habitability, a doctrine recognized in the Virgin Islands as arising out of the contract of sale of new homes", and they rely on Allaire v. United States Trust Company, October 24, 1979, a D.C.V.I. St. Croix case. Seller did not deny this crucial fact--that it sold to Buyers new homes.

8. That the houses continue in need of repairs.

IV. THE ISSUES AS TO THE CASES COLLECTIVELY

The Court has already denied a 12(b)(6) motion and a 12(e) and (f) motion on the grounds that on the face of the complaint, without more, a claim was stated on which relief could be granted; that the complaints were sufficiently definite and certain to apprize defendant of the nature and scope of plaintiffs' complaints; and that the complaints did not contain redundant, immaterial, impertinent or scandalous matter making an order to strike appropriate. Now, at this much later stage in the proceeding, where it has progressed to the point where there has been a completion of the discovery process, the submission of briefs in depth on both sides, and a trial in two of the cases, Thomas and Joseph, Nos. 1084/1981 and 318/1983, was begun on June 4, 1984, and continued to June 12, 1984, the Court is called upon by Seller to decide a Motion to Dismiss (a) On the grounds that complaints and counterclaim fail to state a case on which relief can be granted, Federal Rules of Civil Procedure 12(b)(6);

(b) For Judgment on the pleadings, Federal Rules of Civil Procedure 12(c); and (c) the claims are all time-barred.

## V. DISCUSSION ON ALL FOUR CASES

### A. RULE 12(b)(6) MOTION

For dismissal of a complaint to be proper in response to attack by a 12(b)(6) Federal Rules of Civil Procedure motion, it must appear clearly and without doubt that the complaint shows that the pleader cannot recover under any state of facts that may be developed by the evidence. It is not enough that the complaint fails to demonstrate that the pleader is entitled to recover.[11] We hold that in all four cases the complaints and counterclaim of Buyers meet the above test of sufficiency.

### B. RULE 12(c) MOTION

Rule 12(c) Federal Rules of Civil Procedure provides: "If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for Summary Judgment and disposed of as provided in 56 Federal Rules of Civil Procedure,and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56". There has been full discovery in these cases to the point where trial on two of them was begun in June as hereinabove noted. The last filing in these cases, a Reply Brief by Seller, was on August 3, 1984. So the parties have been given ample opportunity to make such presentations and filings as the Rule contemplates.

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[11] See, e.g., 2A J. Moore & J. Lucas, Moore's Federal Practice Paragraph 12.08 (2d ed. 1984).

Besides all the pertinent facts to the case as enumerated in one through eight above are undisputed by both sides, the Seller and all four Buyers. No genuine issue as to any material fact appears of record from the pleadings, depositions, answers to interrogatories, admissions on file, affidavits or other items on the record. The only issues before the Court are issues of law, not of fact. The cases are therefore ripe for disposition by Summary Judgment and the Court will act accordingly.

C. STATUTE OF LIMITATIONS

Both parties agree that the six-year statute of limitations, 5 V.I.C., Section 31(3)(A), is applicable to the case. They also agree that the case was not started until many years after the statute had run its course. But the Buyers contend that Seller is estopped or has waived its right to plead the statute because of many reasons. First, they argue Seller is equitably (not legally) estopped, that is, subject to estoppel in pais, by conduct short of a formal legal act such as a law properly and formally adopted. They cite as their authority for this proposition Horwitz v. Government of the Virgin Islands, 17 V.I. at 469, which enunciates the position that to successfully assert equitable estoppel against the Government, six conditions must be met:

1) There must be a waiver of sovereign immunity to suit;

2) The agent whose conduct is relied upon to work an estoppel must have acted within the scope of his authority lawfully conferred;

3) The party to be estopped must know the facts;

4) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

5) The latter must be ignorant of the facts; and

6) The party seeking estoppel must rely on the former's conduct to his injury.

In their brief opposing Seller's motion to dismiss, Buyers dwell on only parts one and two above. We agree that part one applies to the facts of this case, i.e., that the Seller in these cases was in fact acting in its proprietary rather than in its sovereign capacity, and therefore there is a waiver of its sovereign immunity. However, we are surprised that Buyers have joined Seller in relying on the Horwitz case as the facts here are clearly not to the effect, and we find that they do not show, that the second requirement prescribed by the Horwitz Court has been met--that the agents whose conduct is relied on here to work an estoppel in pais acted within the scope of their authority. The only authority who has power to waive the application of the statute of limitations so as to fiscally bind the Government, no matter the amount involved, or the cost to the public fisc, is the very authority who created the statute of limitations in the first place, the lawmaking authority, the Legislature, in the same clear, direct and express manner and terms in which they enacted the limitation. Negotiations and discussions between the parties as to repairs that were needed were unauthorized and therefore cannot bind the Seller. Mentis v. U.S. Postal Service (WDNY, 1982, 547 F Supp. 164. This is true even if a person has relied innocently to their detriment on misinformation or promises received from a Government agency or Government officials. Id at 166.

Seller contends that such legislation must identify the recipient or beneficiary thereof and must unequivocally provide a right to sue. We agree. U.S. v. Cumming 130 U.S. 452, 95 Ct. 383 32L Ed. 1029; Scull v. U.S. 98 U.S. 410, 25L Ed. 164. Were the law otherwise the Government, and particularly those in charge of raising and disbursing revenues would be thrust into a hopelessly chaotic and unsolvable situation. Things are bad enough as they are with the present restraints; without them we would find ourselves in a fiscal abyss, a veritable minefield. No more would only the duly elected representatives of the people hold the purse strings, but any lesser, unauthorized Government functionary could bind the Government by his conduct. This is exactly what the principles enumerated in Horwitz and Mentis supra are designed to prevent. Horwitz makes it clear that any attempts by unauthorized persons to bind the Government, fiscally or otherwise, but especially fiscally, are ineffectual and void. No such clear authority has been presented to us in these cases, and we know of none. We hold that statute of limitations cannot be lengthened or waived, by equitable, as distinguished from legal, estoppel by the acts of Government agents unless they are clearly authorized to perform the acts or engage in the conduct upon which reliance is based to claim such estoppel. "Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees. Failure to comply with the applicable statute and regulations precludes recovery against the Government no matter with what good reason the claimants believed they had come within the requirements. Estoppel will not lie regardless of the financial hardship resulting from innocent ignorance". Mentis, supra, at 166.

D. BASIS OF SELLER'S LIABILITY CLAIMED BY BUYERS

While Buyers declined to answer Seller's Interrogatory No. 8: Upon what theory they base their contention that Seller has a duty to cure the alleged defects in the buildings purchased and Seller's Interrogatory No. 9: Upon what legal basis they intend to prove the measure of damages the Court should award them, pleading attorney-client and attorney work product privileges, they did answer these questions in paragraph one of their Brief in Opposition to Seller's Motion to Dismiss: "Plaintiffs primarily base their cause of action upon breach of implied warranty of habitability, a doctrine recognized in the Virgin Islands as arising out of the contract of sale of new homes". And they base this contention on the case of Allaire v. United States Trust Company, Slip Opinion entered October 24, 1979 (D.C.V.I. 1979, St. Croix Division). In Allaire the District Court did hold that there exists an implied warranty of habitability as "meaning there are no latent defects in the facilities vital to the use of the premises for residential purposes, and that these essential facilities will remain during the entire term in a condition which makes the property livable", citing Kline v. Burns, 276 A.2d 248, 252 (N.H. 1971); Marini v. Ireland, 265 A.2d 526, 534 (N.J. 1970); and Kamarath v. Bennett, 568 S.W.2d

658, 551 (Tex. 1978). Although he stated the above principle of law, Judge Young declined to apply it to the case before him on the ground that the latent defect complained of, if that it was, existed on the porch of the house, and this was not a "facility vital to the use of the premises". But for that factor, it appears that the principle would have been applied although the Court there, unlike here, was not dealing with the "builder or other vendor of a new house" but with the rental of quarters, which were not new, and which were not being sold but only rented for residential purposes.

Our research into this question of precisely what a buyer of a new home from a builder especially, but even from any other vendor, has a right to expect in return for his investment, to conform to contemporary concepts of fairness in the market of selling and buying homes which are increasingly being applied by the courts of this country, has revealed the following legal positions:

1. Generally "[W]hile most courts still adhere to the proposition that in the usual, normal sale of lands and old buildings the ancient doctrine of caveat emptor applies, the decided trend of modern decisions is to make a distinction with respect to a vendor who is also the builder of a new structure, and that where the vendor is also the builder, he is today, by the weight of modern authority, held liable for damages and injuries occurring after the surrender of title and possession, on one or more of three theories: (1) implied warranty; (2) an imminently dangerous condition caused by negligence in construction; and (3)

concealing or failing to disclose to his vendee any condition which involves unreasonable risk to persons on the land if the vendee does not know or have reason to know the condition of the risk involved and the vendor knows or has reason to know of the condition, realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk. Restatement, Torts 2d 353". 25 ALR 3rd 383, citing Rogers v. Scyphers (1968, S.C.) 161 SE 2d 81.[12]

2. In a number of cases the view is taken that implied warranties arise from the sale of a new building. This is in relaxation, if not in abandonment, of the doctrine of caveat emptor, the courts taking the view that a builder-vendor, or other vendor, of a new building may be held liable for loss, injury, or damage occasioned by a defective condition of the dwelling, on the theory of breach of an implied warranty of habitability or quality. See 25 ALR 3d 383 at 413. See also Waggoner v. Midwestern Development, Inc. (1967, S.D.) 154 NW 2Q 803. While in Waggoner the Court held that the builder (or other vendor) of a new building is not required to construct a perfect house, it held that the correct test to apply in determining whether a house is defective is reasonableness. Here, from the beginning Purchasers experienced serious problems with the buildings

[12] The Rules of the Common Law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States shall be the rules of decision in the Courts of the Virgin Islands in cases to which they apply in the absence of local laws to the contrary. 1 V.I.C., Section 4.

bought from the Seller. This position is distinguished from that taken in Restatements, Torts, Section 352, which deals only generally with the vendor of land "with appurtenances", but does not address the specific question sub judice, where the vendor is also the "seller" or "builder and seller" of a new building.

3. Liability of the builder or other vendor of a new building may also be predicated on the theory of negligence, that the builder or other vendor of a new building is liable for defective construction thereof, where the defects were latent and not discoverable by the vendee by a reasonable inspection. See Murphy v. Sheftel (1932) 121 Cal. App. 533, 9 P2d 568. In the cases before the Court, we find that the defects complained of were latent, and thus not discoverable before the delivery and acceptance of the deed transferring title, by a reasonable inspection of the Buyers.

4. Liability in the cases before the Court has also been based on the rule of strict liability, the Courts holding the builder or other vendor of a new dwelling liable for defective construction causing injury or loss to the vendee or other persons: (a) where the builder or other vendor was in the business of selling new buildings; (b) where, as here, the new building was expected to and did reach the vendee or other user of the dwelling without substantial change in the condition in which it was sold; and (c) without regard to whether or not the builder or other vendor had exercised due care or whether or not the injured person was in a contractual relationship with such builder

or other seller. The builder-vendor "or other seller of a new building" was held liable under the theory of strict liability in tort as well as under a negligence theory. See Restatement of Torts Section 402A. Also State Stove Mfg. Co. v. Hodge (1966), Miss.) 189 So 2d 113, cert. den. 386 U.S. 912, 17L Ed. 2d 784, 87 S Ct. 860.

Based on these theories, we hold that the Seller having sold new buildings to Buyers to be used as their residences would be liable for the injuries or damages sustained by them, but for the bar of the statute of limitations.

The Buyers also contend that the Seller is barred from pleading the statute of limitations for the reason that there exists a legal estoppel in that the Government in 1980 and in 1981 passed an appropriation of $94,000.00 or $95,000.00 to be paid to them as compensation for these defects. They base their contention on the case of Corklings v. State, 2 NE 454 (N.Y. 1885). But in Corklings, unlike here, the Government received the funds claimed by the plaintiff from the plaintiff as a performance bond deposit, and lost it. The Government then made a bona fide appropriation, one in which the funds to discharge it were identified and available to pay the claim. Surely, no charge of special legislation could be legitimately claimed here as the Government was only doing what was its bounden duty, undertaking to make good the funds of the claimant which the Government had negligently lost. In Corklings, also, the claim was a liquidated one, in that unlike the cases here, the amount to which claimant was entitled was definite and certain. Here the amount due each claimant is still unliquidated, undetermined by either a competent appraisal or a judicial determination. Finally, as the Corkling Court noted, the claimant there "duly presented his claim within the meaning of the constitutional provision referred to, <u>and his claim was prosecuted with due diligence</u>". [underscoring ours].

Moreover, even if a perfectly proper and sufficient appropriation had been made by the legislature to pay these particular four claimants these damages, as Seller contended, this legislation would be void as special legislation in view of the provisions of 48 U.S.C. Section 1471, which was in force and effect in 1980 and 1981 when this so-called appropriation was passed. We say "so-called appropriation", because the sum due each claimant was still unliquidated, undetermined, up in the air. Nor was there any money identified and available to fund the appropriation. At best,this was a vacuous gesture of the legislature for good political reasons about two or three months before the general election of 1980. This may be deft political action, but legally it leaves much to pass the test that an appropriation was in fact made. At best it was an authorization to spend funds if and when such funds, a tidy sum here under the circumstances, became available. To close the book on this sham, the so-called appropriation was later voided by at least abandonment by the Government. We say this because in the four to five years that transpired since the act was passed nothing of any substantive, respectable, nature has been done by the legislature to make good on its generous gesture.

Finally, now that Section 1471 Title 48 U.S. Code has been repealed,[13] presumably clearing the way for the passage of legal special legislation, if indeed the legislature is sincere about wanting to help these people, and redeem its uncertain past in this respect, and finds the funds to do it, all it has to do is to pass an act based on adequate research and preparation that can withstand legal attack. Thus, it may still not be too late for these claimants, our holding that the claims are barred by the applicable statute of limitations notwithstanding.

Let Judgment enter accordingly.

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[13] P.L. 98-312, Section 16 (w), Dec. 8, 1983, 97 Stat. 1463

Dated: February 28, 1985

Alphonso A. Christian

ALPHONSO A. CHRISTIAN,
JUDGE.

ATTEST:

VIOLA E. SMITH
ADMINISTRATOR/CLERK OF THE COURT

Gloria E. Thompson

By: Gloria E. Thompson
Chief Deputy Clerk