[2015] JMSC Civ. 262

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2011HCV03619

BETWEEN	SNIVELY JUNIOR BARRETT	CLAIMANT
AND	HERON DALE	1ST DEFENDANT
AND	CHARLES GIBBS (Both Executors in the Estate of Peter Lawrence)	2ND DEFENDANT
AND	PEARNEL CHARLES JNR.	3RD DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2012 HCV01006

BETWEEN	PEARNEL CHARLES JNR.	1ST CLAIMANT
AND	PATRECE CHARLES-FREEMAN	2ND CLAIMANT
AND	SNIVELY JUNIOR BARRETT	DEFENDANT

Mr. Debayo Adedipe instructed by Brown, Godfrey and Morgan for the claimant/defendant

Mr. Keith Brooks for the first defendant

Ms. Tamiko Smith instructed by Frater, Ennis and Gordon for the third defendant/first claimant and second claimant

HEARD: 2nd and 3rd June 2015, 24th July 2015 and 16th July 2015

Landlord and Tenant - Option to purchase at fixed price –Term expires and lessee holds over as statutory tenant – Option not exercised during term-Transfer of property to beneficiaries - Whether option exercisable by Statutory Tenant.

CORAM: Dunbar Green J.

BACKGROUND

1. These are two consolidated actions. The lead action arises from a lease with a provision for an option to purchase. The second action is for recovery of possession and mesne profit.

THE LEAD ACTION

2. By a lease dated 27th March 2001, Peter Lawrence, deceased, entered into an agreement with the claimant to lease a dwelling house on lands at Lot 10, Knapdale, Saint Ann, for a fixed term of one (1) year.

3. The lease contains the following a provision: that *"The Landlord agrees to sell the rented premises to the Tenant for FOUR MILLION SIX HUNDRED THOUSAND DOLLARS ($4,600,000.00) as soon as the registered Certificate of Title for the individual lot is available and the Landlord shall give a written notice to exercise their (sic) option to enter into an agreement to purchase within FORTY-FIVE days."*

4. Peter Lawrence died 25th July 2001. Eight months after his death, the lease expired. Although the lease made provision for its renewal, the option was not exercised. The claimant remained in possession as a statutory tenant under the **Rent Restriction Act**.

5. Probate of Mr. Lawrence's Will was granted to the first and second defendants in 2003. On 3rd December 2008 the property was transferred to

Pearnel Charles Jnr. and Patrice Charles-Freeman, the beneficiaries and first and second claimants in the second action.

6. On 31st May 2011, by Claim Form, the claimant instituted these proceedings for a declaration that the agreement of 27th March 2001 was a binding contract which created an equitable interest in the land, and that the devise to the third defendant lapsed, adeemed or failed altogether entitling the legatees only to the purchase price agreed by the claimant and the deceased. He also sought an order for the re-transfer of the land to the first and second defendants, specific performance of the agreement and damages.

THE SECOND ACTION

7. By Fixed Date Claim Form filed 17th February 2012, the claimants commenced proceedings to recover possession of the property and mesne profit of fifty thousand dollars ($50,000) per month from 1st October 2009 and continuing.

Witness Statements

8. The Witness Statements of Snively Barrett, Heron Dale, Pearnel Charles Jr. and Patrice Charles-Freeman, with amplification, were ordered to stand as their evidence in chief. The parties were also cross-examined.

Facts not in Dispute

9. At the time of the Grant of Probate in 2003, the lease had expired a year prior, in March 2002.

10. No written Notice to exercise the option had been given up to service of the Claim Form in 2011, at which point the term granted by the lease had already expired.

11. The claimant held over paying rent of $15,000 monthly, as a statutory tenant.

12. Claims were brought in the Resident Magistrate's Court for rent for the years 2005 to 2009 and there had also been a claim for recovery of possession which was adjourned without a date. The claimant made payments in relation to those claims.

13. Title for the property became available in 2008 and in the said year the property was transferred to the claimants in the second action.

14. The premises are controlled premises for purposes of the **Rent Restriction Act**.

Agreed Documents

15. By consent, the following documents were admitted into evidence as Exhibits 1-14:

i. Tenancy Agreement dated August 1999;

ii. Memorandum of Agreement made on 27th March 2001;

iii. Grant of Probate P. N0. 101 of 2003 filed 7th March 2003;

iv. Last Will and Testament of Peter Leonard Lawrence dated 26th May 1999;

v. Notice to Quit issued to Snively Junior Barrett on behalf of Patrice Freeman dated 4th September 2009;

vi. Plaints for recovery of rent and Plaint for recovery of possession, filed in the St. Ann Resident Magistrate's Court;

vii. Copy Certificate of Title Volume 1427 Folio 327;

viii. Copy Certificate of Title Volume 941 Folio 407;

ix. Letter dated 29th January 2003 from Heron Dale;

x. Letter dated 26th July 2007 addressed to Snively Barrett from Heron Dale;

xi. Undated letter to Resident Magistrate's Court signed by Snively Barrett;

xii. Four receipts issued in February, 2008 by Pearnel P. Charles to Snively Junior Barrett, for rent:

a. Receipt dated 3rd February 2008;

b. Receipt dated 7th February 2008;

c. Receipt dated 10th February 2008; and

d. Receipt dated 14th February 2008;

xiii. Certificate of Title in the name of Gladstone Harris for Lot 10 Knapdale, St. Ann; and

xiv. Letter to Wentworth Charles dated 14th September 2009.

Issues to be determined

16. The following issues arise: (1) whether the option to purchase was exercisable after the lease expired; (2) whether the claimant in the lead action is entitled to specific performance of the agreement; (3) whether the claimants in the second action have satisfied the statutory requirements for an order for recovery of possession; and (4) whether the claimants in the second action are entitled to mesne profit and if so at what rate.

17. There are other issues pertaining to whether the first and second defendants had been aware of the option at the time they became executors and their conduct in that regard; and the terms and conditions under which the claimant remained in possession of the property following the expiration of the lease. I will deal with those matters in the course of answering the more germane legal question of whether the benefit of the option to purchase continued to exist after the expiration of the lease.

Option to Purchase

18. The claimant submits that there is authority for the principle that an option to purchase is only exercisable during the term of the lease and that a tenant who is holding over is not usually entitled to exercise the option because it is a separate undertaking from the lease (***Sherwood*** *v* ***Tucker*** [1924] 2 Ch 440 at 444-445).

19. The claimant argues, however, that on a proper construction of the terms of the option, it was intended to be exercisable whenever the claimant received notice that a title was available, after which the claimant would have forty-five days to exercise the option. It is contended that this was the mechanism for exercise of the option. It is argued further that the deceased's successors in title were obligated to give notice of the availability of the title to the claimant, as a condition precedent.

20. Authority to support these arguments is said to be found in the following passage from the judgment of Graham-Perkins J.A. in ***Caribbean Asbestos*** *v* ***Lopez*** 12 JLR 1512:

An option when granted for value confers a right or privilege in the optionee to call for the sale to him of the land in accordance with conditions specified for the exercise of the option and the lessor undertakes that he will not within the time, if any, specified in the option clause, which is indeed a separate contract, deal with the land in any way inconsistent with the right of the optionee to purchase the land together with a binding agreement not to revoke the offer during the time, if any, specified in the option. If the option is accepted within the time specified a contract of sale is made...If the les

sor in breach of his agreement purports to revoke his offer his revocation is ineffectual to prevent the formation of a contract by the acceptance of the offer within the specified time...Where the option contract is one which would

be specifically enforceable in equity a court of equity attaches to it the consequence that it creates an equitable interest in the property...But this equitable interest is not that which results in favour of a purchaser under an agreement of sale and purchase of the property. By the grant of an option no land is sold to the optionee...If the optionee does not exercise the option by the time limited for its exercise the equitable interest in the land arising from the grant of the option comes to an end. (p. 516 b-e).

21. In response, the first defendant relies on **Halbury's Laws of England** (4th ed) vol 27(1) at para 110, where the learned authors state:

A lease may confer upon a tenant an option to purchase the landlord's interest in the demised premises...Such an option is collateral to, independent of, and not incident to, the relation of landlord and tenant. It is not, therefore, one of the terms which will be incorporated in the terms of a yearly tenancy created by the tenant holding over after the expiration of the original lease.

Halsbury's refers *to* ***Re: Leeds & Batley Breweries & Bradbury's Lease, Bradbury v Grimble*** **[1920] 2** Ch. 548; [1920] ALL ER 270; and ***Sherwood*** *v* ***Tucker*** [1924] 2 Ch. 440; [1924] ALL ER 354.

22. The first defendant also relies on the Canadian case of ***Rafael*** *v* ***Crystal*** [1966] 2 O.R. 733 in which the court held:

...The general rule was that where the tenant overheld, an option to purchase would, in the absence of special agreement, expire if not exercised prior to the end of the tenancy proper, because ordinarily it was not an incident of the relation of landlord and tenant.

23. These authorities share in common that the period within which the option was to be exercised had been an express provision of the agreement. In ***Re: Leeds*** an option to purchase, at a fixed price, was exercisable "at any time

six calendar months before the determination of [the] lease." The lease was extended for an additional twelve months after which the lessee became a tenant from year to year. It was held that the tenant could not rely on the option as it was a provision which was outside the relation of landlord and tenant and therefore not a term of the original tenancy.

24. In ***Sherwood***, it was an express provision that the option be exercised within the term of the three year lease. The term was extended by indorsements but the Court found, on construction of those documents, that it was not intended to extend "...all [the] provisions, collateral or otherwise, and [that] the option was therefore not extended".

25. In ***Rafael***, a 28 month lease was converted to a monthly tenancy "subject in other respects to the terms of this lease." The original lease had a provision for an option to purchase but it specifically stated that the option had to be exercised "during the term of the within lease". The Court interpreted the words "during the term of the within lease" to mean that the option had to be exercised during the fixed term of 28 months.

26. In the instant case, the option became exercisable on an action which was not time-bound. It was dependent on the lessor obtaining a registered title and notifying the lessee that he had done so. In my opinion, this formulation makes no material difference to the question of whether on the expiration of the lease, the option survives. The dictum of Peterson J. in ***Re: Leeds*** is instructive:

It is one thing for a landlord to give an option of purchase at a fixed price within a limited time like seven or eight years, but it is a very different thing to suppose that a landlord could have intended to have conferred upon a tenant a right to purchase at the original sum...although the right may not be exercised for fifteen or twenty years. The real question is what are the terms of the tenancy under the lease which are applicable to a tenancy from year to

year, or, in other words, what are the terms regulating the relations between the landlord as landlord and the tenant as tenant which are to be treated as incorporated in the tenancy from year to year? In my opinion an option to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy. It is a provision which is outside of the terms which regulate the relations between the landlord and the tenant as tenant. (pp. 551-552)

27. An option to purchase cannot be exercised after a lease has expired because the substratum of the option no longer exists. The words "until title is obtained" by themselves cannot take the option outside the terms of the lease.

28. It must be the intention of the parties that an option is to continue after the expiration date of a lease, whether expressly or by implication. This was the case in ***Giles v Hughes*** [1960] EGD 187 where a separate deed, which was executed subsequent to the lease, granted an option to purchase the freehold. It was found that on a proper construction, the supplemental deed applied to the parties in their personal capacities, distinct from their relationship of landlord and tenant. Accordingly, the option to purchase was enforceable under the supplemental deed, despite the lessee holding over after the original lease had expired, and without acting on a provision in the supplemental deed relating to the grant of a further lease for 21 years.

29. In the absence of a specific agreement to that effect, the option cannot survive the lease. This is the import of the authorities referenced.

30. The words "as soon as the registered Certificate of Title for the individual lot is available" do not differ materially from "at any time" which was the operative term in ***Longmuir v Kew*** [1960] 3 All ER 26. In that case, the landlord let the premises for a term of five years with an option to purchase at a specified price "at any time." When the term of the lease expired, a statutory tenancy was created under which the tenant remained in possession for a further

fifteen (15) years, at which time he sought to exercise the option. The Court found that on a true construction of the agreement, the words "at any time" meant "... at any time during the currency of the tenancy created by the agreement..." The purported exercise of the option was, therefore, invalid because it was done after the expiration of the original term of five years.

31. Although ***Longmuir*** is authority for the proposition that an option to purchase dies with the term, Cross J. acknowledged that the question was "...by no means an easy one, and certainly not made easier by the authorities." (p. 30). The case of ***Rider v Ford*** ([1923] All ER Rep 562 is one of those authorities and it was distinguished in ***Longmuir.***

32. Cross J. considered a submission that he should follow the dictum of Russel J. in ***Rider*** and find that that there was no distinction between an option for renewal of lease and an option to purchase or that there was a basis on which one or the other should be confined to the term of the lease.

33. His Lordship placed weight on the fact that in the cases which were relied on in ***Rider,*** the landlord could have turned out the tenant at the end of the lease. His Lordship found that the situation was different when the landlord is bound by statute to keep him on. (p. 30).

34. But his Lordship stated that, on a whole, the question was one of construction of the particular document. In construing the agreement in ***Longmuir*** Cross J. applied a dose of common sense. He observed:

It was prima facie most unlikely, especially in these days of Rent Acts, that a landlord would agree in advance to a tenant having the right to purchase the reversion, at a price named in the agreement, throughout the quite uncertain period during which the tenant may continue to be his tenant by holding over." (ibid).

35. Of course, a landlord who believes that prices could fall might very well be motivated to hedge his bets on an option which locks in a sale price for the future. But his intention would have had to be expressed by agreement.

36. Counsel for the claimant has asked me to consider the circumstances of the relationship between the parties, to include a prior lease agreement of 1999 and verbal expressions. These, in the main, would have had to do with repairs to the premises on the expectation to purchase. The prior lease agreement of 1999 did not include any option to purchase and I have found no circumstance which would have established an agreement that the option to purchase should survive the term of the lease agreement of March 2001.

37. There was evidence from the claimant that he had informed the first defendant about the option, albeit after the lease had expired. This was denied by the first defendant. However, even had the first defendant been aware of the option prior to the expiration of the lease, the claimant would not have been in a position to exercise the option until the title was ready.

38. The first defendant could not be taken to have intended that the option be renewed under the statutory tenancy since, on the authority of ***Re Leeds,*** the option to purchase is not one of the terms of the tenancy and section 28 of the **Rent Restriction Act** preserves only terms and conditions of the tenancy which are consistent with the provisions of the Act. Section 28 provides, *inter-alia*:

A tenant who, under the provisions of this Act, retains possession of any premises, shall, so long as he retains possession, observe and be entitled whether as against the landlord or otherwise, to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the original contract of tenancy...

39. Although the claimant is entitled to continue to enjoy rights which were under the expired lease, those rights do not include the option as it was not a term of the tenancy agreement, but separate.

40. There is a further ground on which to examine the issue. This is, that an option to purchase which is not time-bound, offends the rule against perpetuities. In ***Rafael,*** Gale C.J. approved the following statement by the learned authors of ***Morris & Leach, Rule Against Perpetuities***, 2nd ed., p.222:

> *(c) If an option to purchase the reversion is contained in a lease for less than twenty-one years, and after the expiration of the term the tenant remains in possession as a tenant from year to year or as a statutory tenant, it is usually held as a matter of construction that the option is exercisable only during the fixed term and cannot be exercised after that term has expired. Otherwise, it could be argued that every option to purchase the reversion is too remote, no matter how short the lease." (para 22)*

41. As was observed in ***Rider*** no time limit was expressed for exercise of the option to purchase. Russel J. found that so long as a relationship of landlord and tenant existed, the option continued to exist, which meant that it would pass beyond the expiration of the lease and continue during a period of statutory tenancy.

42. However, Russel J. said that an option to purchase, which was not time-bound, was invalid for reason that it would offend the rule against perpetuities. His Lordship made a distinction between an option to purchase and one to renew a lease, the latter found to be unaffected by the rule against perpetuities (p.565).

43. The claimant also relies on S.130 (1) of the **Registration of Titles Act** for the proposition that the executors had been registered on transmission, subject to the claimant's equity under the option to purchase. The section provides:

Upon such entry being made the person so entitled by the transmission shall become the transferee of such land, lease, ,mortgage or charge, and be deemed to be the proprietor thereof, and shall hold the same for the purpose for which it may be applicable by law and subject to any qualification under which the previous proprietor held the same, but for the purpose of any dealings therewith under the provisions of this act he shall be deemed to be the absolute proprietor thereof.

44. The claimant cites the opinion of the Privy Council in ***Gardener v Lewis*** [1998] UKPC 26, paras 7-9. Their lordship said, inter-alia:

...But it is clear that these provisions relate solely to the legal title to land. Although the owner of the fee simple in equity is authorized to apply for first registration of the land, apart from that all trust interests, whilst continuing to exist, are kept off the register; see section 60. (para 8).

The land certificate is conclusive as to the legal interests in the land, But that does not mean that the personal claims (e.g. for breach of contract to sell or to enforce trusts affecting the registered land against the trustee) cannot be enforced against the registered proprietor. In Frazer v Walker...Lord Wilberforce said:"...their Lordships have accepted the general principle that registration under the Land Transfer Act 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under section 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a Plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognized..."

In their Lordships' view these principles are equally applicable to the Torrens system of title applicable in Jamaica. (para 9).

45. The claimant argues, on the strength of these authorities, that the beneficiaries' title is subject to the claimant's equitable interest.

46. However, I do not see how these authorities can be of assistance to the claimant in answering the central question with which this case is concerned, that is, whether an option to purchase dies with the term. They state clearly the legal position if a registered owner takes a title which is subject to equities. It is my finding, on the construction of the lease agreement, that the option did not survive the expiration of the lease. So, at the time the land was registered on transmission to the first defendant there was no equitable interest in favour of the claimant.

47. I find that the facts of the instant case are similar to those in ***Longmuir*** and the dictum of Cross J. clearly applicable. I hold that the claimant is not entitled to specific performance of the option to purchase because that option expired with the lease. Alternatively, applying the dictum of Russel J. in ***Rider***, the option to purchase was invalidated by the rule against perpetuities.

48. For these reasons the order for the declaration sought is refused.

The Devise to the Third Defendant (lead action) and the 2nd Claimant (second action)

49. In the event I am wrong in finding that the claimant cannot exercise the option to purchase, I go on to consider the issue of whether the devise to the third defendant lapsed, adeemed or failed altogether, entitling the legatees only to the purchase price agreed on between the claimant and the lessor, and whether the land should be re-transferred to the first and second defendants.

50. In summary, counsel for the claimant makes five points. He contends that the option created an equitable interest, which is binding on the executors as personal representatives of the deceased original landlord. The second contention is that the transfer of title by the executors, without serving notice on the claimant that title had been obtained, was a breach of the option provision. Thirdly, the beneficiaries were volunteers, having provided no consideration. Fourthly, the transmission to the first defendant was subject to the claimant's equity. The fifth point is that the first defendant could have only transferred to the beneficiaries, subject to the equities.

51. Counsel relies on the opinion of the Privy Council in ***Gardner v Lewis*** [1998] UKPC 26 paras 7-9:

> *7. From these provisions it is clear that as to the legal estate the Certificate of Registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The appellants' legal title can only be challenged on the grounds of fraud or prior registered title or, in certain circumstances, on the grounds that land has been included in the title because of a "wrong description of parcels or boundaries": section 70.*
>
> *8. But it is clear that these provisions relate solely to the legal title to the land. Although the owner of the fee simple in equity is authorised to apply for first registration of the land, apart from that all trust interests, whilst continuing to exist, are kept off the register: see section 60. The land certificate is conclusive as to the legal interests in the land. But that does not mean that the personal claims (e.g. for breach of contract to sell or to enforce trusts affecting the registered land against the trustee) cannot be enforced against the registered proprietor. In Frazer v. Walker [1967] A.C. 569 at page 585 Lord Wilberforce said:-*

"... their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia: see, for example, Boyd v. Mayor, Etc., of Wellington [1924] N.Z.L.R. 1174, 1223 and Tataurangi Tairuakena v. Mua Carr [1927] N.Z.L.R. 688, 702."

9. In their Lordships' view those principles are equally applicable to the Torrens system of land title applicable in Jamaica.

Section 70 of the **Registration of Titles Act** provides:

Nothwithstanding the existence in any other person or any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate if title, but absolutely free from all other incumbrances whatsoever, except the estate of interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from our through

such a purchaser: Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent there of, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon of affecting such land, and to any unpaid rates and assessment, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.

52. The principle of indefeasibility of title, as encapsulated in section 70 of the **Registration of Titles Act**, was also considered by the Privy Council *in* ***Creque v Penn*** **(2007) 70 WIR 150,** an appeal from the British Virgin Islands, involving section 106 of the *Land Registration Act,* which is similar to section 70. Lord Walker of Gestingthorpe, delivering the advice of the Board, approved of Lord Wilberforce's explanation in ***Frazer v Walker***(at pp 584 and 585) that under the Torrrens system " ...indefeasibility of title does not exclude the possibility of a right of action for a personal remedy between the original parties to a transaction" and that "...the continued existence of rights of action of a personal nature, as between the original parties to a land transaction, is not inconsistent with the Land Registration Act.."

53. The claimant, in the instant case, is pursuing a personal remedy against the executors of his original landlord, who by virtue of their status, stand in place of the deceased. The question is whether he can do so by defeating the third defendant's title.

54. The Jamaican Court of Appeal has provided clear authority on the matter. In ***Whylie v West*** [2012] JMCA App. 41 the claimants were lessees with an

option to purchase. On the same day the landlord died, they lodged a caveat against the property to protect their equitable interest and subsequently sought to exercise the option but were rebuffed by the executrix of the estate. Subsequently, a registered title was issued to the respondents by way of a devise contained in a will. The claimants sought orders, inter-alia, for the Registrar to act under section 153 of the Act by recalling the certificate of title.

55. At paragraph 17 of the judgment, Morrison JA said:

There can be no question...that the judge was correct in saying, based on this section, that "[t]he Act holds sacrosanct the endorsement on a registered title except fraud is found" (para. [40], under the rubric 'Indefeasibility of Title'). Several authorities of long standing support this view (see for example, Fraser v Walker [1967] 1 AC 569) and, indeed...Any appearance of circularity in the conclusion that, despite the registration of the transfer in the respondents' favour having been effected without the caveat having been effectively warned, as the judge found, the fact of registration nevertheless rendered their title indefeasible, is in my view completely dispelled by a consideration of the judgment of the Privy Council in Half Moon Bay Ltd v Crown Eagle Hotels Ltd (Jamaica) [2002] UKPC 24 (a case referred to by Phillips JA in delivering the leading judgment in Hylton v Pinnock).

56. Morrison JA then summarized the facts of ***Half Moon Bay Ltd*** and referred to paragraph 30 of the judgment where Lord Millett said:

Be that as it may, the entry of a caveat merely operates to prevent the registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat. It does not of itself subject the title of the transferee to the interest or incumbrance which the caveat serves to protect. If, notwithstanding the failure to obtain the consent of the caveator or the withdrawal of the caveat, and in breach of section 142, the Registrar mistakenly registers a transfer without making the appropriate entry or notification of the caveator's interest on the Register Book, then subject to the

Registrar's powers under Section 15(b) [the power to correct errors in the Register Book] the transferee takes free from that interest." (ibid)

57. It followed, Morrison JA said, at paragraph 19, *"that the registration of the transfer of the property in favour of the respondents [was]...beyond reach by way of challenge, in the absence of proof of fraud."*(ibid)

58. Morrison JA referred to ***Timoll-Uylett v Timoll*** (1980) 17 JLR 257, ***Willocks v Wilson*** (1993) 30 JLR 297 and ***Smith v Steer*** (SCCA No 91/2008, delivered 8 May 2009, as authorities for the proposition that fraud in this context meant *"...the sense of dishonesty of some sort, and not in the sense of equitable or constructive fraud...general, sweeping allegations of fraud will not suffice..."* (ibid).

59. In the instant case, although the claimant states in his Witness Statement that he had "lodged a caveat to protect my interest", there was no evidence of any registration of a caveat, nor was it established that the executor was aware of the option to purchase. There can be no attribution of knowledge simply because, as alleged, the first defendant's deceased agent had been aware of the provision and might have represented to the claimant that arrangements were being made to sell the demised premises to him. (See Claimant's Witness Statement).

60. Even if, as the claimant appears to have assumed, reasonably I might add, that as an Attorney-at-Law, the first defendant should have or expected to have familiarized himself with the circumstances under which the claimant had been in possession of the land, it would be a leap to conclude that the first defendant had conspired to do something by deceit or dishonesty to transfer title to the third defendant. Such a conclusion, adopting Morrison JA's words, would be a sweeping, general allegation of fraud which could not possibly suffice to displace the registered title. (para 21).

61. I also agree with counsel for the first defendant that in the circumstances of this case, where the devise was made before the option was given, the gift would have been adeemed only if the option had been exercised when it was open to the claimant to do so. This accords with the doctrine of redemption by conversion, whereby a devise fails, for example, if the property was the subject matter of an option to purchase, which had been exercised. (See, **Halsbury's Laws of England** Vol. 103 (2010), para 157 referencing ***Re Carrington***[1932] 1 Ch 1 , ***Re Calow, Calow v Calow***[1928] Ch 710; ***Re Sweeting, Sweeting v Sweeting*** [1988] 1 All ER 1016; and **Tolley's Administration of Estates** Part E 4.4). This is because the property would no longer form part of the testator's estate at the date of death. (See **Halsbury's Laws of England,** ibid.).

62. I also agree, had that been the case, the devisees would have been entitled to nothing pursuant to the devise. Rather, the proceeds of sale, being personalty, would devolve to the person who is entitled to the personal estate of the testator, or on intestacy (**Lawes** v **Bennett** (1878) 1 Cox Eq. Cas. 167.

63. Having considered the circumstances of this case and the foregoing authorities, I find no basis for the Court to order a re-transfer of the property to the first defendant or specific performance in relation to the option.

THE SECOND ACTION

Application for Recovery Possession

64. Under section 25 (1) of the **Rent Restriction Act**, there can be no recovery of possession of controlled premises unless the landlord satisfies the relevant restrictions that apply to recovery of possession of controlled premises. This was affirmed by the Privy Council in ***Crampad International Marketing Company Limited and Clover Brown v Val Benjamin Thomas*** (1989) 26 JLR 16.

65. The relevant provisions of S.25 (1) are:

(e) the premises being a dwelling-house or a public or commercial I building, are reasonably required by the landlord for –

(i) occupation as a residence for himself or for some person wholly dependent upon him or for any person bona fide residing or to reside with him, or for some person in his whole-time employment...

(h) the premises, being a dwelling-house or a public or commercial building, are required for the purposes of being repaired, improved, or rebuilt...

And unless in addition, in any such case as aforesaid, the court asked to make the order or give the judgment considers it reasonable to make such order or give such judgment:

Provided that an order or judgment shall not be made or given on any ground specified in paragraph (e), (f) or (h) unless the court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it; and such circumstances are hereby declared to include –

(i) when the application is on a ground specified in paragraph (e) or (f), the question of
whether other accommodation is available for the landlord or the tenant;

(ii) when the application is on a ground specified in paragraph (h), the question of whether other accommodation is available for the tenant.

66. In ***Muriel Reid and Eustace Chisolm*** *v* ***Denise Johnson et al*** SCCA No 135 of 2007, Morrison JA said, at para. 25:

In addition to ***establishing by evidence*** *one of the statutory reasons, the claimant for recovery of controlled premises must satisfy the court that it is*

reasonable to make an order for recovery of possession and that, "having regard to all the circumstances of the case, less hardship would be caused by granting the order or the judgment than by refusing to grant it"... (My emphasis).

67. I understand Morrison JA to mean that evidence must be led to establish the statutory reason for recovery and the Court must also be satisfied about the reasonableness of making the order.

68. In ***Betty Café Ltd v Phillips Furnishing Stores Ltd*** [1958] 1 All ER 607, 623 Lord Denning said:

> *Provided, however, that the notice is a good and honest notice when it is given, then it is clear, to my mind, that the ground stated therein must be established to exist at the time of the hearing. Suppose a landlord had been willing, on the giving of the notice, to provide alternative accommodation, but he was not willing at the time of the hearing; or suppose he had the intention, at the giving of the notice, to reconstruct the premises, but had changed his mind by the time of the hearing. He clearly could not resist a new lease. To succeed, he must satisfy the trial judge that, at the time when the court comes to make its order, he is then willing to provide alternative accommodation, or then intends to reconstruct, or as the case may be...In short, it comes to this: the landlord must honestly and truthfully state his ground in his notice, and he must establish it as existing at the time of the hearing.*

69. The landlord must therefore prove that she had definite intention to act, consistent with the statutory reasons for requiring possession as stated in the notice to recover possession.

70. At the trial, the second claimant said she wished to take possession for her own use. That general statement was not evidence that she had been ready,

able or intended to effect repairs to the premises or to occupy it as a residence. In any event, the Court has a duty not to grant the order if it has not been satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order than by refusing to grant it. The circumstances include the question of whether other accommodation is available for the second claimant. No evidence was offered on those matters. For these reasons the second claimant has not satisfied the evidential requirements for a grant of recovery of possession.

Mesne Profit

71. The claimants, in the second action, allege that the defendant breached the conditions under which he was in possession of the premises by failing to pay rent.

72. The defendant is in lawful possession as a statutory tenant until such time as the claimants obtain an order of possession from the Court. That being the case, I find that he may be liable for non-payment of rent but not for mesne profits, which are in the nature of damages for trespass to land (See ***Stirling v Leadenhall Residential 2 Ltd*** [2001] 3 All ER 645)

73. I will now turn to whether there should be an order for rent.

74. I have considered that sometime prior to February 2008 a judgment for rent had been obtained against the claimant. It is also not in dispute that in February 2008 the defendant had made payments to the first claimant amounting to $210,000.00. The defendant's evidence is that this was the sum which the first claimant had indicated as owing.

75. Neither of the claimants was able to state definitively the sum which was allegedly owed for rent. The second claimant's knowledge was generally that payments had been made and that the rent was $15,000 per month. The defendant testified to have paid in excess of $2,430,000 since being in

possession, but he provided no supporting evidence of this and in cross-examination admitted to having been in breach of the tenancy agreement. However, he denied that he was still in arrears.

76. It is a well-known principle of law that he who avers must prove. The claimants failed to prove that the defendant owes rent. In the circumstances, there will be no order for arrears of rent.

77. Accordingly, I need not make any finding about whether the defendant had carried out repairs as distinct from alterations and whether any amount he claims in that regard, would affect the payment of rent.

78. For these reasons, I dismiss the lead and second actions. Costs in the first action to the defendants to be taxed if not agreed. Costs in the second action to the defendant to be taxed if not agreed.