

734

RECORDED & INDEXED

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 195 of 1981

BETWEEN	JANET ROBERTSON	PLAINTIFF
AND	SURBITON PROPERTY DEVELOPMENTS LTD.	DEFENDANTS

Mr. Norman E. Wright for plaintiff.

Mr. R. N. A. Henriques, Q.C., instructed by Livingston, Alexander and Levy for defendants.

January 25, 1982; May 10, 1982;
May 19, 1982.

Patterson J.:

A lease agreement, expressed to be under the Registration of Titles Act, was made on the 12th March, 1979, between R. Louis McGann, the duly appointed Agent/Receiver and Manager under mortgage No. 273412 of Surbiton Property Developments Limited, the mortgagor of the premises subject to the lease, of the one part and Janet Robertson of the other part. The lease agreement related to Town House numbered 11 of the Surbiton Square Town Houses situated at No. 5 Surbiton Road in Saint Andrew. The agreed term was for two years commencing on the 1st day of April, 1979. The lease contained the usual covenants. Under the provisions of clause 4(vi) of the said agreement, the plaintiff was given a first option to purchase the lessor's interest, couched in the following form:

" (vi) The Lessee shall have the first option to purchase the Lessor's interest in fee simple in the leased premises and shall not less than six (6) months before the expiration of the term hereby granted give to the Lessor six (6) months notice in writing of such desire then the Lessor covenants that he will upon the expiration of such notice and upon payment of the sum of \$49,000 representing the purchase price and costs of and incidental to the transfer of these premises to the purchaser herein and being subject to the terms and conditions set out in the purchase agreement dated 12th day of March 1979 and attached hereto and marked with the Letter "B" for identification

200

" together with all arrears of rent up to the expiration of the notice, transfer the leased premises to the Lessee in fee simple. Further it is hereby agreed that of the total amount rental paid by the tenant during the term hereby created seventy-five (75) per centum thereof shall accrue to the Lessee's credit as the deposit payable on account of the agreed purchase price herein."

The plaintiff, by a letter dated the 14th day of November, 1980, gave notice to the defendants of her desire to exercise the option to purchase the leased premises "at the end of the lease agreement."

The plaintiff in an action commenced by way of an **Originating Summons** claimed to be entitled to have transferred to her all the estate and interest in the property, 11 Surbiton Close, and to that end, sought the determination of the following questions:

- " 1. That this Honourable Court Determine whether JANET ROBERTSON by letter dated 14th November, 1980 validly exercised her option contained in Lease Agreement dated 12th March, 1979;
2. That This Honourable Court Determines and makes a Declaration that the said JANET ROBERTSON is entitled to have the said premises transferred to her upon payment of the sum of FORTY-NINE THOUSAND DOLLARS (\$49,000.00) and the necessary legal costs of and incidental to the transfer of the said premises by the Defendant Surbiton Property Developments Limited and accordingly grants an order for specific performance of the sale agreement herein; and
3. That this Honourable Court makes a Declaration that the Plaintiff is entitled to be credited with 75 percent of the sums paid in respect of rental for the said premises in keeping with item (vi) on page 3 of the said Lease Agreement;"

The plaintiff's affidavit in support of the **Originating Summons**, in so far as it is material to this action, reads as follows:

- " 2. That under Lease and Sale Agreements, both of which are dated the 12th day of March, 1979, I entered into possession of premises situate at No. 11 Surbiton Close, Kingston 10 in the parish of Saint Andrew on the 1st day of May, 1979 for a period of two years and I annex herewith photo-copies of the said Lease and Sale Agreements marked Exhibit JR. 1 and 2.
- 281

3.

" 3. That under the said Lease Agreement the term of the Lease should have commenced on the 1st day of April, 1979 but at the request of the then Receiver/Manager of the Defendant Company I did not commence occupation until the 1st day of May, 1979.

4. That under item (vi) on page 3 of the said Lease Agreement I was granted a first option to purchase the said premises at No. 11 Surbiton Close, Kingston 10 and was required to give six (6) months notice in writing of my desire to exercise the said option.

5. That in accordance with the said item (vi) on page 3 of the said Lease Agreement, by letter dated the 14th day of November, 1980, I exercised the said option and I annex hereto marked Exhibit JR 3, photocopy of the said letter.

6. That notwithstanding my exercise of the said option the Receiver/Manager of the Defendant Company has refused, failed and/or omitted to take any steps to transfer the said premises to me.

7. Further, that under the said item (vi) on page 3 of the said Lease Agreement I am entitled, on the exercise of my option, to be credited with seventy-five per cent (75%) of the rental paid during my two years of occupation under the said Lease Agreement.

8. That I ask this Honourable Court to Declare that my option has been properly exercised and remains valid, that I am entitled to have the premises transferred to me for the sum of FORTY-NINE THOUSAND DOLLARS (\$49,000.00) and further that I am entitled to be credited with the seventy-five per cent (75%) of the rental in accordance with item (vi) on page 3 of the said Lease Agreement."

The defendants filed an affidavit in reply, but abandoned the use of it on the plaintiff's objection that it was served out of time.

The plaintiff also sought to rely on a further affidavit sworn 9th March, 1982 and filed subsequent to the commencement of arguments by Mr. Wright but I held that it was too late to admit such further evidence.

The main thrust of Mr. Wright's arguments was that the option to purchase was validly exercised on the date of the notice i.e. on 14th November, 1980. He agreed that the option to purchase the freehold reversion was an independent contract, a collateral agreement to the lease. He said that in relation to contracts generally, time is not of the essence unless made so by the nature of the subject matter, the conduct of the parties or by notice

4.

making time of the essence. In the instant case, there was nothing in the nature of the property or the conduct of the parties to support any suggestion or inference that the parties intended time to be of the essence. On the contrary, the conduct of the parties supported a finding that time was never regarded to be of any importance. In support of this argument, he pointed out that clause 1 of the lease fixed the term to begin on the 1st April, 1979 and in disregard of this, the defendants requested the plaintiff to commence the term one month later. Again, the sale agreement dated 12th March, 1979, fixed completion date as "on or before two months of the date hereof", although the parties knew that was not possible. Lastly, the plaintiff exercised the option and the defendants did nothing relative thereto, neither in terms of the sale agreement as regards the deposit nor by requesting the plaintiff to pay the balance of the purchase money, nor by refuting the validity of the exercise of the option. These considerations, he argued, as well as the "general tenor of the relationship" between the parties, were such as to rebut any suggestion that time was of the essence of the option agreement. Alternatively, the defendant has waived by conduct any possible requirement as to time. That being the case, he submitted that notwithstanding that the notice to the defendant was dated 14th November, 1980, it was a valid exercise of the option to purchase the reversion.

Additionally, he argued that the Memorandum of Agreement for Sale, which was duly executed by the parties simultaneously with the lease agreement on the 12th March, 1979, should be regarded as a valid agreement which can be read independently of the option clause and on which the Court would be entitled to decree specific performance.

Mr. Wright referred to a number of cases but in my view, although they may be supportive of his arguments, they did not really assist me in determining the real issue in this action.

Mr. Henriques relied on the plaintiff's originating summons and affidavit in support and contended that the plaintiff was seeking

to determine whether or not the option was validly exercised and that the other reliefs sought were ancillary. All the rights of the plaintiff depended on the valid exercise of the option to purchase the reversion.

He argued that the lease agreement would be irrelevant if the sale agreement was read to be independent of it. Under the provisions of clause 4(vi) of the lease, the valid exercise of the option is a condition precedent to the operation of the sale agreement. The sale agreement is an integral part of the option and is only enforceable if the option is validly exercised by six months' notice and then on the expiration of that notice, upon the payment of the purchase price of \$49,000.00 by the plaintiff to the defendants. Six months' notice was necessary for the valid exercise of the option. On the plaintiff's admission, the notice of intention to exercise the option was 14 days' late; the option had lapsed and the plaintiff therefore lost the right to any benefit under it. In fact, she was six weeks late and not 14 days, as the lease was expressed to commence on the 1st April, 1979 and the fact that she entered on the 1st May, 1979, was not relevant to the date of the lease. He cited, in support, the case of Allan Estates Limited v. W. G. Stores Limited [1981] 3 All E.R. 481.

He argued that it is a well established principle that the agreed terms of an option must be strictly construed and complied with, and in support he referred to the case of West County Cleaners (Falmouth) Ltd. v. Soly [1966] 1 W.L.R. 1485.

He contended that the defendants had not waived the right to treat the purported exercise of the option as invalid, since it had done nothing to give that impression.

I am much indebted to counsel for their refreshing arguments in this case. In my view, the crucial question to be decided is whether or not the plaintiff's notice to the defendants, given on the 14th day of November, 1980, was a valid exercise of her option to purchase the reversion. It is admitted that such notice was given

at least 14 days late.

I must now look to see what the terms of the option are, and what is the proper construction to be put on those terms.

Clause 4(vi) of the lease agreement, in creating the option, limited the time for service of the notice of a desire to exercise the option to "not less than six (6) months before the expiration of the term hereby granted." The term granted in the lease was for "two years commencing from the first day of April 1979," although the plaintiff's evidence is that, by oral agreement, the commencement date was altered to the 1st May, 1979. It follows that the term granted expired on either the 31st March, 1981 or the 30th April, 1981, but it is not necessary to decide which, as in any event, the notice of intention to exercise the option was served less than six (6) months before the expiration of the term granted and therefore late.

At common law, stipulations as to time in a contract were, as a general rule, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent. Equity, on the other hand, regarded stipulations as to time, in the absence of express or implied evidence to the contrary, not to be of the essence of the contract, save in mercantile contracts. The doctrine of Equity that time is not of the essence, is especially true in the case of contracts for the sale of land but it is not one of universal application. It is well settled that "an option for the renewal of a lease or for the purchase or re-purchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse." (See Halsbury's Laws of England Vol. 8, 3rd edition, 165) There is no difference as regards stipulations for time between the rule of the common law and the rule of equity. Where time is limited the option must be exercised within the time in which it is expressed to be given, both at law and in equity. Where six months' notice in writing was necessary, a shorter notice was held to be

insufficient (Riddel v. Durnford [1893] W.N. 30.)

But a landlord may by conduct waive any delay in the exercise of the option. In Pegg v. Wisden (1852) 16 Beav. 239, it was decided that a letter sent by the landlord to the tenant after the time for the exercise of the option had elapsed, requesting him to complete, amounted to a waiver. The landlord had taken some positive steps which showed an intention to waive the breach. In West County Cleaners (Falmouth) Ltd. v. Soly (supra) it was held that where a landlord was aware of a breach of a covenant to repair and raised no objection, it was no more than mere silence and could not amount to waiver of the tenants' breaches of contract.

In the instant case, it is admitted that the plaintiff's notice of her intention to exercise the option was served out of time. I hold that in those circumstances the option has not been validly exercised and that it lapsed.

I am of the view that the defendants' silence after the notice was served out of time cannot amount to a waiver of its right to treat the option as having lapsed.

I further hold that the sale agreement cannot be considered in isolation; it is inextricably bound to the valid exercise of the option. It is subject to the valid exercise of the option and all amounts payable in consequence thereof will stand or fall with it.

It only remains for me to declare that for the reasons stated, the answers to the questions are:

1. The plaintiff, Janet Robertson, by letter dated 14th November, 1980, did not validly exercise her option contained in the lease agreement dated 12th March, 1979;
2. As a consequence, the plaintiff, Janet Robertson, is not entitled to have the premises No. 11 Surbiton Close transferred to her by the defendants; and
3. The plaintiff is not entitled to be credited with any amount paid in respect of rental for the said premises.

In as much as I have decided against the plaintiff, the defendants are entitled to the costs of this action.