IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C-062 of 1987

BETWEEN	CHERKISS ENTERPRISES LIMITED	PLAINTIFF
A N D	ROY DePASS (Executor of the Estate of Reginald Cecil DePass Deceased)	DEFENDANT

Michael Hylton instructed by Myers, Fletcher and Gordon, Manton and Hart for the Plaintiff.

Clinton Davis for the Defendant.

Hearing on June 1st and 2nd, 1989

Note of Judgment

On June 1st and 2nd, 1989, I heard evidence from the Plaintiff's side and most of the time spent in this hearing was taken up with legal submissions from Counsel for the parties. At the end of the hearing I made an order that the "Option Contract" contained in Clause 4 (e) of the Lease Agreement to purchase the property known as Columbus Inn, and entered into between the Plaintiff Company (Cherkiss Enterprises Limited) and the late Reginald Cecil DePass, for which the defendant Roy DePass as Executor of the deceased estate is the personal representative, be specifically performed. I also awarded costs to the Plaintiff on the Claim.

I gave Judgment for the defendant on the Counter-Claim for the sum due as interest on the sum claimed for rental. This amount being calculable on $33,333,32¢, that principal sum according to the evidence having been paid to the defendant's Attorney on 9th April, 1987.

At the end of the hearing, I gave an oral judgment of my reasons for coming to my decision. I have since then from notes made of this judgment shortly there after now sought to formulate these reasons into this note of the judgment.

The Claim for Specific Performance turned on a construction of certain clauses in the Lease Agreement executed on 28th November, 1983 and more particular Clauses 2, 4 (d) 4(e) and 4(f) of that document.

The issues which it is common ground arose from the pleadings were:-

1. In so far as Clause 4(e) falls to be construed, do the words "first option" in the context in which those words are used give

to the lessee (plaintiff) a right to purchase the fee simple estate in the demised premises or if not what is the nature of the grant if, any, which may be ascribed to those words?

2. Assuming that a binding option to purchase the demised premises was granted to the lessee, was that option properly exercised?

3. Having regard to the provisions in the lease at Clause 5 (b) (3) directing that "any dispute arising out of the provisions herein be referred to Arbitration" was the matter justiviable before the Court?

In so far as the last issue relating to arbitration is concerned this matter was not seriously argued before me as it was conceded by both sides on an observation by the Court that the matter having reached to a trial stage such a reference no longer falls to be considered being waived by the conduct of the Defence having regard to the various steps taken in the action following the entry of an appearance from as far back as 9th March, 1987. In this regard Section 5 of the Arbitration Act provides in part that:-

> "Section 5 If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed or to be referred any party to such legal proceedings may at anytime after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings" and the Court or Judge thereof if satisfied .....
> .....
> may make an order staying the proceedings." (Emphasis supplied)

Of the two remaining issues both were fully argued although most of the time spent was focussed upon that in effect was the primary issue, this having to do with the construction of Clause 4 (e) of the Lease Agreement. For the defendants part both remaining issue provided his Counsel with a distinct advantage as in order to succeed in obtaining the relief sought, the plaintiff had to succeed on both these issues. The defendant to win the day, had only to succeed in relation to the first issue. To fail he had to loose on both and in this regard, therefore, the secondary issue provided him with "a second string to his bow."

The relevant clauses read as follows:-

> "2. Upon execution of this Lease, the lessee shall pay to the Lessor a sum of ($84,000) Eighty Four Thousand Dollars hereinafter called "the advance"). The advance shall be applied as a portion of the rental for the leased premises for the fifth year or in reduction of the purchase price of the leased premises in the event that the lessee exercises

> the option to purchase the leased premises hereafter contained. And the lessee hereby agrees that the lessor shall be entitled to use the said Advance for his own purposes and any reference to a refund or repayment herein contained shall be for the lessors own personal resources since no sum is hereby retained in escrow under the terms of this lease."

This clause is followed at Clause 3 which contains the Lessees covenants and is followed at Clause 4 by the Lessor's covenants in which at Clause 4 (d) he covenants as follows:-

> "4(d) Not to sell the leased premises before the expiration of the first three years of the term herein contained and any sale of the said premises during the said term shall only be with the written consent of the Lessee provided always that the Lessor shall give six months notice to the Lessee during the period of December to June so that the said property shall be vacated during the low period of the tourist season."

Then follows the very important option clause at 4 (e) which sought to grant the option referred to at Clause 2 and sets out the formula or manner in which it falls to be brought into being. Clause 4 (e) states:-

> "The Lessor hereby gives to the Lessee a first option to purchase the leased premises in any event, during the period up to the fourth year of the term herein contained at a purchase price of ($900,000) Nine Hundred Thousand Dollars to be paid in the following manner:-
>
> (i) A deposit of ($450,000) Four Hundred and Fifty Thousand Dollars to be paid on exercise of the option.
>
> (ii) The advance paid by the Lessee pursuant to Clause 2 hereof shall be a deductable sum from the deposit.
>
> (iii) The balance of the purchase price shall be lent by the Lessor to the Lessee on the security of a first Legal Mortgage over the leased premises, such mortgage to be for a period of three years bearing interest at 15% fifteen per cent per annum and payable by equal monthly instalments.
>
> (iv) On the fulfilment of sub-clauses (i) (ii) (iii) above, then the Lessors covenants under Clauses 4(a), (c), (d) aforesaid shall determine and Clause 5 (b) (i) and (ii) and 5(b) (2) post shall apply and the Lessee covenants under Clause 3(a) and (b) shall cease." (Emphasis supplied).

In so far as Clause 4 (e) iv relates to the prompt payment of rental by the Lessee, and thereafter to the risk passing to the Lessee in event of the option being exercised there is no inconsistency in the manner in which subclause (iv) is drafted.

Clause 4 (F) then deals with the manner in which the option is to be exercised. It states:-

> "(4) "The option to purchase shall be in writing delivered to the Lessee or his agent duly appointed or to the person for the

> time being entitled to the reversion. And if the Lessee fails to exercise the option, then the Lessor shall be at liberty to sell, giving the Lessee six months notice between the periods of December to June as stated in paragraph 4 (d) above." (underlines supplied)

The Law as it relates to the construction of documents which would naturally include this lease is that the intention of the parties is to be gathered from the words used in the instrument and extrinsic evidence cannot be resorted to in order to alter, vary or explain the meaning of such words provided these words are clear and unambiguous. Where an ambiguity appears on the face of the document then it is duty of the Court to seek from an examination of the words used in the instrument in order to discover the true intention of the parties. On a reading of Clause 4 (F) in my opinion it is abundantly clear that the word "Lessee" appearing in the first line of the instrument was inserted in error and ought properly to read "Lessor". This must be so, as in interpreting the clause in order so as not to lead to any absurdity or inconsistency and in so far as the clause seeks to deal with the grant of an option the person upon whom this right or entitlement was conferred, the grantee (lessee) would be required in exercising this right to do so in writing delivered to the grantor (Lessor) or his agent duly appointed or the person entitled to the reversion - all of whom by definition were one and the same as the grantee (Lessee) could not properly exercise the option by making delivery to himself. It will be necessary to return to this clause when the secondary issue as to the exercise of the option falls to be considered. For the moment, however, I will now return to the primary issue.

Learned Counsel for the Plaintiff has submitted that a construction of the lease agreement, on the face of it, the intention of the parties was to create a binding option to purchase the demised premises. He relied on this statement for three reasons:-

1. The Clause 4 (e) sets out the terms such as to sale, such as price, deposit and the terms of the option and there was in addition a stated period.
2. Having granted what on the face of it seemed to be a right to purchase, Clause 4(e) uses the words "in any event" clearly stating that the lessor wanted to sell the demised premises in any event.
3. The fact that there is also the grant of an option this carried

with it also a right of first refusal.

In support of his contention he cited:-

Du Santoy vs. Symes [1967] 1 AER 25 from the headnote of the judgment and at page 33 (D). He further contends that where there are separate rights given they are not inconsistent as a right of pre-emption is equally consistent with a right of first refusal.

Counsel takes issue with the argument being advanced by the other side that the words "first option" alters or changes the meaning of the relevant clause from creating an option to it being something else.

He refers to McKay vs. Wilson [1947] S.R. 315. This report was not available but is referred to in Voumards Sale of Land 3rd Edition at page 5.

In so far as the question as to whether if there was an option, as to the manner of its exercise it was submitted by Counsel that although it was not properly communicated to the defendant, Mrs. E.H. Williams was the agent of the personal representative of the Estate by implication and alternatively was an agent of necessity.

As to the question of implied agency he referred to Bowstead on Agency page 22, Article 9 under the subhead, "Implied Agency". In this regard he contended that Mrs. Williams had been the agent of the deceased. She prepared the lease. The plaintiff had not seen a will and there was no Probate despite searches at the Supreme Court Registry. He had received no notice that Mrs. Williams was replaced by anyone. He had made enquiries about the whereabouts of the defendant without success. A reasonable man would be entitled to infer that the only person he could deal with was the Attorney. The matter can be taken further as over a period of two months from November to December 1986 four letters were written to Mrs. Williams on the basis that she represented the Estate. One of these letters sought to exercise the option. This letter of 3rd November, 1986 in which the plaintiff sought to exercise the option was later copied to the defendant. When Mr. Williams eventually replied she did not deny having any authority to act on behalf of the Estate. She stated that the defendant was in Miami and introduces a 'red herring' as to the possibility of the deceased lessor's will having revoked the option. The defendant did not seek to revoke her ostensible authority to act in that capacity.

The cheque contained in the option letter is returned three months later. The defendant has elected not to give any evidence.

On the basis of all this he contended that the option was duly exercised and the plaintiff is entitled to the Order for Specific Performance.

Learned Counsel for the defendant when his turn came to respond sought to deal firstly with the secondary issue. In this regard he submitted that if the plaintiff had a good option it was not exercised properly or at all.

He relied upon a statement of the principle which applies as to the condition precedent to the exercise of options - that they must be exercised strictly and in the manner as laid down by the grantor. In this regard Volume 23 of 3rd Edition Halsburys Law of England under the Heading "landlord and Tenant" at page 471 at paragraph 1091 fully supports this contention.

Counsel also referred in support to Hankey vs. Clavory [1947] 2 AER 311. He further argued that there was good reason for this rule in so far as the proper exercise of an option would seek to deprive the lessor of the rental for the remainder of the term of the lease.

Beades vs. Free 1829 B & C Reports 167 was cited as authority for the proposition that an agency is terminated by the death of the principal and this is so even if the agent has a honest belief that the principal was still alive.

He further argued that although there was no doubt that Mrs. Williams was the agent of the deceased, once he died she ceased to be his agent. The deceased having died the question to be determined was did the defendant as Executor of the Estate engage the services of Mrs. Williams as Attorney to the Executor? In this regard the onus of establishing the existence of the relationship of principal and agent between the defendant and this Attorney was on the plaintiff and that burden has not been discharged.

In dealing with the principal issue most of the arguments presented by Counsel for the defendant was directed at the meaning to be ascribed to the words, "first option." These words he sought to equate to the words, "first refusal" and a "right of pre-emption" and the Court was treated to a lengthy dissertation on the effect of these words when contained in a document. To further reinforce his arguments, Learned Counsel for the defendant prepared a summary of his submissions for the cCourt's consideration. When the evidence is examined along Counsel's submissions two main questions arise for determination:-

1. In construing the lease agreement and in particular Clause (2), 4(d) and 4 (e) when read together was the effect of this to create a first option in the lessee (donee) during the period of four years stated is Clause 4 (e) of the lease.

In this regard the authorities when examined make it abundantly clear that the contention of the Learned Counsel for the plaintiff is correct. There is further support for his argument in Voumard on Sale of Land 3rd Edition at pages 5 - 7 and the cases cited at the footnotes on page 5. At page 5 the Learned editor states:

> "There is a distinction between an option to purchase and what is generally referred to as a right of pre-emption. Once an option is granted the initiative of determining whether the relationship of vendor and purchaser between the parties is to eventuate rests entirely with the donne of the option. The position is otherwise in the case of a mere pre-emptive right, the person to whom the right is given having in general no more than a privilege to purchase the land in priority to any other person if the owner decides to sell, and it is often a difficult question of construction to determine whether the words used constitute the grant of a true option or a mere pre-emptive right."

With regard to the first situation the case of McKay vs. Wilson [1947] S.R. (N.S.W.) 315 per Street J. is cited as being an authority supporting the granting of an option where by the words used in the instrument a tenant was given "the first option for purchasing the property at the price of #1350." It was held that, "subject to certain qualifications stated in the judgment the tenant had an absolute, immediate and continuing option which he was entitled to exercise at any time during the currency of the lease." When this case is examined against the background of the facts in the instant case, it is my opinion that this present case is on even stronger ground for holding that the words used in Clause 4 (e) created a binding option in favour of the lessee.

The manner of the exercise of the option has to be one for the donee of the right to perform within the period set out in the lease. This is in effect what distinguishes an option where the only act required to bring the contract for sale into effect is the unqualified acceptance of the offer by the donee by performing such acts required to complete the transaction from that of a pre-emptive right.

This is what also distinguishes the instant case in which there was not merely the grant of a right to the plaintiff but Clause 4(e) was explicit as to all the essentials required, once offer was accepted, going towards effecting a valid and binding contract for the sale of the property.

All the cases cited by Counsel for the defendant and in particular Manchester Ship Canal Company vs. Manchester Race Course Co; Murray vs. Two Stokes Ltd and Brown vs. Gould are all cases which were decided on totally different facts. The critical factors missing in all these cases were that:

1. There was no immediate grant of a right and even if so, such a right stood to be postponed for a limited period (see for example Carter vs. Hyde [1923] 33 CLR 115 but only a mere hope that on the happening of some future event then the right would come into being. (Manchester Ship Canal vs. Manchester Race Course [1901] 2 CH 37.
2. There was no set formula as to how the conditions of the contract were to govern and when the right became exercisable. Upon the exercise of the right in the instant case all the terms required to create a valid and binding agreement for the sale of the property were clearly identifiable.

Clause 4 (e) when read can only mean that the exercise of the option had to be "in writing delivered to the lessor or his agent duly appointed or the person for the time being entitled to the reversion." All the persons named in the document being concerned with the present ownership of the demised premises. Once this is established then there was an irrevocable right created in favour of the lessee (donee) during the period stated in Clause 4 (e) to exercise the option in the terms as set out in the said Clause.

The remaining question, which is of no less importance is, was the option properly exercise?

The following conditions had to be strictly complied with:-

1. It had to be in writing. This creates no difficulty.
2. It had to be delivered to the lessor, his agent or the person entitled to the reversion.

In this regard, the lessor being dead, delivery had to be effected to his personal representative.

The evidence in this case, which is entirely from the plaintiff's side and from the Bundle of Documents forming part of the Record is that there was doubt as to who was the personal representative of the lessor certainly up to January 1987 (See enclosure 23-letter dated 18th March 1987 addressed to the defendant from the Attorneys for the plaintiff).

Although Mrs. Williams, an Attorney-at-Law had in the past acted for the lessor, her authority to act for the defendant ceased with the death of the lessor and/irrespective of the fact that her conduct subsequent to his death was of such a nature as to suggest that she also represented the defendant this by itself would not make her his agent. Her conduct, however, in the manner in which she acted following the lessor's death/see correspondence passing from Plaintiff's Attorney's to her in agreed Buhdle of Documents/ would have been sufficient to cause any reasonable person to assume that she was the attorney acting for the deceased estate. This, however, would not go as far as to fix the defendant with notice of the exercise of the option letter which was sent to her.

In my view, however, this would not be fatal to the question as to whether the option was properly exercised in the light of the fact that the lease at Clause 4 (F) was silent to the mode of delivery in which event although delivery to the person of the defendant would have been desirable it was not essential given the facts of this case. The post, therefore, in the absence of a contrary intention in the document was a proper means of communication. The effect of this was that the letter of 15th December, 1986 from the plaintiff's Attorney to the defendant forwarding a copy of the notice of an intention by the plaintiff to exercise the option was in my opinion proper and sufficient means of communication. There is further no evidence that this letter was returned unclaimed and being sent to the defendant at his post office box it is reasonable to infer that delivery was effected to him.

I would therefore answer the issues raised in relation to (1) and (2) above in the affirmative with the result that the Plaintiff succeeds on the Claim.

As by the option clause, the Lessor has already laid down a formula within which the option falls to be exercised, it is clear that the usual conditions

for sale will be those which ought to govern the Contract for the sale of the property.

In so far as the Counter Claim was concerned, this posed no difficulty. Granted that the sum claim for rental had been paid the only question which falls for determination was whether the claim for interest ought to succeed. In my view it ought to for the simple reason that had the defendant accepted the fact that the lease created a binding option which was exercisable by the Plaintiff (lessee) within the option period of four years and which was in fact properly exercised certainly not later than December 1986 when the latter from the Plaintiff's Attorney came into his hands, although this would have altered the nature of the relationship between the parties from that of lessor and lessee to vendor and purchaser, there would still be monthly mortgage payments due instead of rental and these payments would have been attracting an interest rate of 15% per annum., which when apportioned is the precise rate of interest that was awarded on the sum claimed as being the arrears of rental.