JAMAICA

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 8 OF 1982

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, P.
THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE ROSS, J.A.

BETWEEN SYLVIA ELOISE COE
VERNIE SEMMES COE APPELLANTS

[Administrators Estate Clarice Nina Coe]

AND BERKLEY BUSH RESPONDENT

Ramon Alberga, Q.C., and Paul Dougherty for the Administrators.
N. W. Hill, Q.C., and Phillip Boni for Bush.

30th November; 1st, 2nd December, 1982;
6th June, 1983

CAREY, J.A.:

Grand Cayman, the largest of the Cayman Islands, has become in recent years not only a tax haven but a popular tourist resort. It was not always so. It has also experienced a building boom, which has had a dramatic impact on the value of land. In 1951, the situation was wholly different, and no one who lived in those unlamented times, could possibly have visualized the affluence and wealth of today's Cayman Islands. In that same year, the respondent, Berkley Bush, executed a lease dated 1st June, 1951, between himself and one Captain Arlington Bodden, now deceased. It concerned land known as "George Town Central, Block 14BG Parcel 28." The present value of the land, the subject-matter of the lease, is between $275,000.00 and $235,000.00. By this agreement, the lease was to endure for 30 years and contained the following clause, which in the event, must be regarded as the "fons et origo" of this legal imbroglio between the parties. The clause is in the following form:

"That for and in consideration of the sum of £5 (Five Pounds) "per month paid to the Lessor, by the Lessee, the said Lessor agrees, "and by these presents, has agreed to lease to the said Lessee, for the

"period of Thirty (30) years from this date, with the option of renewal, all "that piece and parcel of land" .... described in the instrument. By a deed of conveyance dated 30th August, 1956, the lessor transferred his interest to his wife, who, by her will, devised this property to Semmes, Barclay, Sylvia, Ivan and Ulric Coe, all relatives of the testator. She died 1st July, 1972, and administration with her will annexed was granted to Sylvia Eloise Coe and Vernie Semmes Coe, the present appellants.

At the trial, there was some controversy as to the date of the expiry of the lease, three dates being suggested, viz., the 31st May; 1st June or 2nd June, 1981. The learned Chief Justice held that the lease expired on 2nd June, 1981, by operation of sec. 49 of the Registered Land Law. Since this finding was challenged on appeal, it will be necessary to return to deal with it. At all events, prior to 2nd June, 1981, the respondent wrote the first appellant a number of letters which I set out hereunder:

"May 1st, 1980

Dear Syl,

As you are aware, the lease for the land on which my theatre is built will expire on the 30th June 1981 (next year) and I would like to meet with all those concerned whenever convenient to arrange a renewal.

I am interested in purchasing the land at a reasonable price but not at the exorbitant price it has been offered.

I shall appreciate your letting me know when you are ready.

Very truly yours,

A.B. Bush"

(Undated)

"Dear Syl,

I would like to meet with you or someone to discuss the renewal of the lease of the land on which my theatre is built, so that we may reach an agreement before the expiry date of June 1st.

Yours truly,

Berkley"

(Undated)

"Dear Syl,

I again write to you about the lease of the land for the theatre and shall appreciate meeting with you not later than during this month to discuss it.

There is no need to put it off until the last moment.

Yours truly

Berkley"

"George Town
May 1st, 1981

Dear Sil,

I must again remind you that the lease of the land on which my theatre is built expires on June 1st. I have written to you several times during the past year requesting a meeting with those of you involved in this land so as to have the lease renewed, but without any results.

I have also spoken to Sims and Barclay who promised to meet with me but never have.

As there is not very much time left, I would therefore appreciate hearing from you not later than 7 days from the date of this and failing this, I will have no alternative but to engage the services of an attorney to petition the Court to exercise my option for the renewal of this lease.

Very truly yours

Berkley"

"June 2nd 1981

"Dear Sil,

I am enclosing the cheque for the rental of land which is the last under the existing lease.

I seen Barclay yesterday and he told me he has nothing to do with the matter, and it is now in Semmes hands. I have not seen or heard from Semmes.

I can not understand, nor do I appreciate the attitude which is being displayed and must again request a meeting with those of you concerned to reach an agreement, and if a meeting does not materialize I will be forced to take the necessary action to exercise my option to renew the lease.

"I hope this will not be necessary as I do not want to disrupt the friendship which has existed between us for many years.

Hoping to hear from you on the matter.

Very truly yours

Berkley"

In addition to the letters which I have set out, there were two telephone calls between the parties. In the first of these, the first appellant explained the reason for delay in arranging a meeting, but gave the respondent to understand that one would take place shortly. On 1st June, the respondent spoke with the first appellant intimating that he would be sending the rent for that month. He was told not to do so and was promised a meeting on that day. No meeting ever took place. This final conversation having taken place, the respondent forwarded his cheque on the next day. At this juncture, the lawyers made their entry. W. S. Walker & Co. acting on behalf of the appellants wrote the respondent on 11th June, 1981. They acknowledged receipt of a cheque for C$10.00 with its covering letter of June 2, 1981. That letter, it was said, was received on 3rd June. They returned the cheque on the footing that the respondent had not exercised his option before the expiry date of the lease, noting that "the relationship of landlord and tenant no longer exists." They accordingly demanded that the respondent deliver up possession of the premises. S. Gill & Co. acting for the respondent, replied, requesting the appellants to "reconsider granting (the respondent) a new lease under the option." Thereafter the appellants filed a writ against the respondent claiming (inter alia) an order for immediate possession of the premises. The respondent filed a defence and counter-claim praying (inter alia) for a declaration that he had validly exercised the option. In a full and careful judgment, the learned Chief Justice declared that the respondent had validly exercised his option to renew the lease and dismissed the appellants' claim for possession.

The sharp question which starkly arises on this appeal is whether in the circumstances of this case, the respondent has exercised his option under the lease. In Wm Cory & Son Ltd. v. I.R.C. [1964] 3 All E.R. 66 at p. 75, Lord Diplock defined an "option to buy property" as a

unilateral or if contract, to which the grantee "is only a protatic party. "The grantor by his agreement to the option assumes a conditional "obligation which he promises to perform, to transfer to the grantee the "property the subject matter of the option, the conditions to which his "obligation is subject being (i) the grantee's demand for its performance "and (ii) payment by the grantee of the agreed price. The grantee by his "agreement to the option acquires the right to demand performance of his "obligation by the grantor, but he does not thereby assume any obligation "to the grantor which he promises to perform." This proposition applies mutatis mutandis, to an option to renew a lease. The lessor by his agreement to the option assumes a conditional obligation which he promises to perform, to renew the lease in favour of the lessee. The lessee by his agreement to the option acquires the right to demand performance of his obligation by the lessor. Since the option to renew is part of the larger lease agreement, its effect is to create an irrevocable offer and a power of acceptance on the part of the lessee. The respondent, on the exercise of the option, would be entitled to have this lease renewed for a further period of 30 years i.e. to the year 2011 A.D. at a monthly rental of ≠5 [C$10.00]. This was a state of affairs which the appellants would not devoutly wish for. One may entertain the greatest sympathy for them, but plainly that cannot be the basis for a judgment in their favour. This Court is concerned with the question of law, which I have already identified.

In the Court below, the Chief Justice held that the respondent did exercise his option by his conduct on the footing that there was a holding over by the respondent when the lease expired by efluxion of time, further, the letters to the appellants which demonstrated his clear intention to exercise the option, the verbal approaches of the appellants, the telephone conversation of 1st June, advising that the June rent would be sent and the posting of that rent on 2nd June.

The mode of the exercise of the option in this lease is critical to arriving at a solution of the problem in this appeal. The clause was silent as to the mode of its exercise. The lessee, the present respondent, was entitled to exercise the option either expressly or by conduct as the learned Chief Justice pointed out - "In order to exercise "such an option the tenant need only indicate to the landlord his intent

"to renew it, either by words or conduct, where there is no time or "manner of exercise provided for in the lease." It is plain he did not expressly exercise the option. Certainly, in none of the letters which have already been set out is this demonstrated, although no one doubted that he wished to exercise it. His clear intention to do so is however manifest in all of them. The learned Chief Justice so found and no challenge was mounted in regard to that finding. There is authority for the proposition that an option to renew may be exercised by conduct. I thus begin with Gardner v. Blaxill [1960] 1 Q.B. 457, where it was held that an option could be exercised by conduct. There, landlords granted a tenant a lease of a shop and premises for seven years from June 24, 1947. The lease contained, inter alia, a clause which reads as follows: "... provided that the "tenant has reasonably fulfilled the covenants hereinbefore mentioned he has "the option of continuing for an extension of seven or fourteen years ..." When the seven years granted by the lessor expired on June 24, 1954, the tenant remained in the premises and paid rent for the following quarter which was accepted by the landlords. Thereafter the tenant remained in the premises and paid rent from quarter to quarter. There was no express provision in the lease that the tenant had to give notice to the landlords if he desired to exercise the option. By a notice dated December 21, 1957, the landlords served a notice to quit expiring on June 24, 1958. The tenant sued for a declaration that he had validly exercised the option by his conduct in remaining in the premises and paying rent therefor. Paul, J., in giving judgment said this at page 461:

"The next question is when precisely is the option exercised. "Is it exercised if the tenant stays on for a day over the seven years or "is it exercised only when the tenant pays to the landlords, the rent due "in respect of the quarter following the seven years and the landlords "accept that rent? In my judgment, it is the latter. It does not follow "that, if a tenant stays on for a day over his period, he has any intention "other than a final clearing up before he actually leaves. It is true that "the phrase 'tenant on sufferance' is used in such circumstances, but I "do not think that his action is sufficient to show an intention of "exercising a choice or option. So soon, however, as he sends the rent for "the following quarter, whether it be in advance or in arrear, he is

"definitely indicating to the landlords that he desires to remain a tenant "after the seven years are over."

It must be pointed out that since the tenant had held over upon the expiry of the lease, the conduct which was held to amount to the exercise of the option was the payment of rent and the landlord's acceptance of the rent. Where the lease has expired, I do not think there is any question, but that the tenant could no longer exercise his option. The clause no longer has any life after the term of the lease has expired. This case is not, of course, on all fours with the instant case, but it is valuable for dicta which indicate that the payment of rent is a clear indication on the part of the tenant that he has exercised his option. Thus Paul, J., at p. 461 stated -

"So soon, however, as he sends the rent for the following quarter, "whether it be in advance or in arrear, he is definitely indicating to the "landlords that he desires to remain a tenant after the seven years are over ".... I think he definitely indicates that he is exercising his option unless "he expressly avers to the contrary." This case is also helpful in showing that the fact of mere holding over, is equivocal and cannot therefore be a basis for holding that a tenant has exercised an option to renew.

The weight of authority appears to me to show that after a lease containing an option not limited in time to renew, has expired, the option may only be exercised if the relationship of landlord and tenant continues. In Rider v. Ford [1923] 1 Ch. 541, Russell, J., at p. 545 is noted as saying: "Thus is Moss v. Barton L.R. 1 Eq. 474 where the contract was to grant a lease "on request, and no time was fixed within which the request was to be made, "and in Buckland v. Papillon L.R. 1 Eq. 477, where the contract was to grant "a lease whenever called upon, it was held that the right to exercise the "option continued as long as the relationship of tenant and landlord continued "between the person claiming to exercise the option and the person against "whom it was claimed to be exercisable." He expressly stated at p. 546 - "In such a case the true view is, as appears from the authorities to which I "have referred, that an option unlimited in time exists so long as the "relationship of landlord and tenant continues." For the relationship of landlord and tenant to continue, there must, in my opinion, be some bilateral

conduct from which its continuance can be inferred, for example, evidence that on the part of the tenant he has paid rent, and that on the part of the landlord, he has accepted it. With respect to a tenant who holds over, there is plainly no agreement; the tenant has merely remained in possession without obtaining the consent of the landlord.

It is necessary therefore to ascertain whether Moss v. Barton (supra) and Buckland v. Papillon (supra) are authorities for the proposition that the right to exercise the option continues between the person claiming to exercise the option and the person against whom it was claimed to be exercisable, only in circumstances where the relationship of landlord and tenant continues. It was strongly pressed by Mr. Alberga, Q.C., for the appellants, that these cases represent the law of England and so, of Grand Cayman. Mr. Hill, Q.C., called attention to some Canadian cases in which it was held that mere holding over of a tenant was sufficient evidence of the exercise of an option unlimited as to the time of exercise thereof. I propose to consider these North American cases especially as the suggested basis for this formulation is the two U.K. cases to which I have already adverted, viz., Moss v. Barton (supra) and Buckland v. Papillon (supra).

First, Moss v. Barton - That case concerned an agreement made on 30th November, 1857, to let a house for three years at a yearly rent. By a term in the agreement, the landlord agreed at the request of the tenant to grant him a lease for seven, fourteen or twenty-one years from the expiration of the three years occupancy, at the same rent, the tenant undertaking to keep the house in repair. Seven years later, in 1864, the plaintiff claimed to be entitled to exercise his option for a lease under the said agreement. The action was instituted for specific performance of that agreement. The defendants (so far as is material to the point of this appeal) by their answer stated that in 1862, the plaintiff applied for a lease of seven, fourteen or twenty-one years at a reduced rent to which proposal they did not accede, and the plaintiff then continued to occupy the house as tenant from year to year. It was submitted that the plaintiff was not entitled to claim a lease. Lord Romilly, M.R., at p. 476 said this:
"Why did they not, at the end of 1862 call on the Plaintiff to exercise "his option? They allowed him to continue in occupation though they knew

"that the option continued until the agreement was carried into effect "or waived." The learned Master of the Rolls entertained not the least doubt that if a landlord allows the tenant to remain in possession after the expiry of the lease, then the tenant is at liberty to exercise his option to renew the lease.

Buckland v. Papillon Law Report I Eq. 477, need not be discussed at length because the question there was whether an option to take a lease is comprised under the words "personal estate, and effects, present and future," in sec. 141 of the U. K. Bankruptcy Law Consolidation Act. But a primary question was whether in fact an option to renew had been exercised or not. Lord Romilly, in the course of his judgment at page 480 said this - "I had recently to consider a similar point in Moss v. Barton 20 Beav. 442 "where I held that the fact of the lessee holding on with the consent of the "lessor did not destroy the original agreement or enable the lessor "successfully to contend that it had been waived." On appeal, the order of the Master of the Rolls was affirmed, and the following quote reinforces the point- Lord Chelmsford at page 70 of the [1866] L.R. 2 Ch. 67 expressed the view that "....I think that continuing in possession, with the sanction "of the landlord, he was entitled to exercise his option. He had done "nothing whatever to preclude him from demanding that lease at any time: and "if the landlord wished to know upon what terms the tenant held, he might "have called upon him to say whether he meant to have a lease or not. As "the landlord did not choose to do so, it appears to me that the time was "unlimited in which the tenant could demand a lease. As long as he continued "as tenant with the sanction of the landlord, so long he retained his option."

In my judgment, there can be little doubt that the law in Cayman is that an option unlimited as to time for its exercise, must, if it is to be regarded as validly exercised, be exercised prior to the expiry of the lease of which it forms part or so long as the relationship of landlord and tenant continues.

The contention of Mr. Hill, Q.C., for the respondent, is that there is a duty on the part of the landlord to ask whether the tenant wishes to renew. The tenant is then under an obligation to make an election whether he will exercise his option or not. The tenant thus has a negative rather than a positive obligation. The basis for this proposition, it was

suggested, is to be found in certain Canadian cases. The first case to which I would call attention is Guardian Realty Co. v. John Stark & Co. 70 D.L.R. 333. The formulation for which Mr. Hill contends appears in the judgment of Duff, J., in the Supreme Court of Canada, where he said at p. 343:

"I do not so interpret the decisions in question (in a reference "to Moss v. Barton and Buckland v. Papillon). The principle as appears "sufficiently, I think, from the reasoning of Lord Chelmsford as well as that "of Sir John Romilly, which, as I have intimated already, accords with "the view that in other connections has been taken of the effect of such "a covenant, is that the lessee's option remains open and exercisable until "he has done something which concludes it. It is quite true that in both "these cases the lessee who had remained for some years after the expiry "of the lease had been in possession with the active assent of the lessor "who had accepted rent and given the lessee thereby the status of tenant "from year to year. But there must have been a period in both cases in which "the lessee was in occupation without the assent of the lessor. There is "nothing, I think, in the language of the judgments to indicate that during "this period the right of the lessee to renew was supposed to be in "suspense. On the contrary, both the Lord Chancellor and the Master of the "Rolls pointedly emphasize the power of the lessor over the situation by "reason of the circumstance that he is entitled at any time to call upon the "lessee to elect whether he will take a lease or not."

Earlier in his judgment, the learned judge had stressed his correlation of obligation and duty. At page 342, he delivered himself in this way:

"Both (in a reference to Moss v. Barton and Buckland v. Papillon) "treat the covenant to renew as vesting a right in the lessee which the "lessee may exercise so long as he has not lost his right by electing not to "exercise it. By going out of possession at the end of the term he would "obviously exercise his option against renewal. If he continues in possession, "the lessor is in a position to call upon him at any time to say whether he will "remain or take a lease; that the lessor is entitled to do, and the "correlative obligation would rest upon the lessee to exercise his right by "taking a lease or to lose it." Duff, J., it might be noted, was the only judge who stated definitively that the decisions in England support the view

he put forward. In the Court below, viz., the Appellate Division of the Ontario Supreme Court, Meredith, C.J., was certainly not of that view, having reviewed a number of English authorities, viz., Nicholson v. Smith (1882) 22 Ch. D. 640; Lewis v. Stephenson (1898) 67 L.J. (Q.B.) 296; Moss v. Barton (1866) 35 Beav. 197; Buckland v. Papillon (1866) 35 Beav. 281. As I have considered two of these decisions as well as Gardner v. Blaxill [1960] 1 W.L.R. 752, I do not propose to make any further observations as to the principle which may be properly extracted therefrom. Duff, J., came to his view on the following passage in the judgment of Romilly, M.R., in Moss v. Barton at p. 476: "Why did they not at the end of 1862, call on the Plaintiff to exercise "his option?" With respect, the significance of the remainder of the passage appears to have been ignored. The Master of the Rolls had gone on to observe: "The case of Hersey v. Giblett 18 Beav. 174 shews that a person entering into "an agreement of that description (emphasis supplied) may execute it any "time, if no time is stipulated for within which it is to be exercised, unless "the landlord calls upon him to do so and he makes default in which case the "landlord may determine the tenancy."

The cases of Moss v. Barton and Hersey v. Giblett related to agreements similar in nature. In the former, the lessor agreed at the request of the lessee to grant him a lease of the premises for five, seven, fourteen or twenty-one years from the expiration of the current lease. While in the latter, the option was stated in the following form - "... and should "(the lessee) wish for a lease of the said premises (the lessor) will grant "the same for seven, fourteen or twenty-one years at the same rent." Sir John Romilly, M.R., in construing that clause in the latter case said this - "I concur in thinking that it is sufficiently clear what was intended "between the parties, which was a tenancy from year to year, with an option "given to the lessee to ask for a lease from the beginning, for twenty-one "years, determinable at his option, at seven or fourteen years."

The duty to enquire whether the lessee will exercise his option and which prompted the enquiry on the part of the learned Master of the Rolls arose, with respect, from the peculiar nature of the option. The lessee was, on the interpretation given by the Court, entitled at his option to become a lessee for 21 years but determinable at the end of seven, fourteen or twenty-one years. It was therefore not the holding over at the expiry of the term,

which created this duty to enquire on the part of the lessor. In Moss v. Barton, Lord Romilly stated as respects the lessee at p. 470: "They allowed him to "continue in occupation ...." and in Hersey v. Giblett at p. 70: "... it is "quite clear, however, that the acceptance of rent after that time would cure any such defect." Thus the point to be emphasized is that the relationship of landlord and tenant continued so as to allow a valid exercise of the option. Nothing stated in these decisions inclines me to the view that after the expiry of the lease which gives life to the option, it is nonetheless exercisable on the footing that some reasonable time is allowed for its exercise in the absence of a prescribed time limit. The lessee either remains in possession with the consent of the lessor or he remains in possession without his consent. There is no period when the option goes into a sort of hibernation. If he remains in possession consensually after the expiry of the lease, the option is exercisable and if he remains after the expiry, without permission, he remains at sufferance. In the latter case, the option dies with the lease upon its expiry. It was suggested by Duff, J., that in Fry on Specific Performance (6th Edition) at p. 516, para. 1105, the learned editor in discussing laches as a defence to an action for specific performance, expressed the view that where no time has been originally limited within which a tenant's option to have a lease must be exercised, and the landlord has never called upon the tenant to declare his option, mere lapse of time will not preclude the tenant or his assignor or legal personal representative from exercising it. The authorities for this proposition are stated to be Moss v. Barton, L.R. 1 Eq. 474; Buckland v. Papillon, L.R. 2 Ch. 67 and Re Adams and Kensington Vestry 24 Ch. D. 199 .... 27 Ch. D. 394. Lapse of time in the context of those cases, it is clear, did not mean that the lessee was entitled to exercise the option after the lease had expired. In effect, because the lease was construed as one for 21 years determinable at the option of the lessee at seven or fourteen years, no question of holding over arose nor could delay in declaring his option affect its exercise. The lessee could remain for 21 years. The exercise of the option allowed the leasee to determine the lease at any of those periods. Nothing in the view expressed in that work provides any warrant for saying that the duty to enquire applies generally to options of whatsoever kind. As I have previously indicated, the relationship of landlord and tenant existed when the option was exercised.

I cannot, with respect, agree with the opinion of Duff, J., that the decisions in England do not establish the rule "that at the expiry of "the term the right to exercise the option is gone if the lessee had not "already exercised it unless he continue in possession with the consent of "the landlord - consent meaning in this connection something more than a "consent inferred for mere passivity." In my view, it is plain that the Canadian authorities have taken a path altogether different from that in England. Meredith, C.J., in Guardian Realty Co. v. Stark & Co. pages 338 - 339 - "If unfettered by authority, my view of the result of the English "cases would be that it is essential to exercise of the option to renew "after the expiration of the original term, that the retention of "possession by the tenant must have been with the assent of the landlord. "However, in Brewer v. Conger [1900] 27 A.R. (Ont.) 10 the rule is broadly "stated without that qualification and we are bound to follow that case"...

In Gasner v. Bellak Bros. Ltd. [1945] 3 D.L.R. 365 the headnote so far as is material reads:

"Where a lease for a time certain contains an option for renewal "by the tenant for a further period without specifying the time or manner "of the tenant giving notice of his election to exercise the option, mere "retaining in possession after his term has expired is sufficient and binds "both the tenant and the landlord for the additional term." The Ontario Court of Appeal considered among other cases Guardian Realty Co. v. Stark & Co. (Supra) and Brewer v. Conger (supra). In the most recent Canadian cases cited to us, Blomidon Mercury Sales Ltd. v. John Piercey's Auto Body Shop Ltd. 129 D.L.R. (3d) 630 that principle was maintained in the Newfoundland Supreme Court Trial Division before Hickman, C.J., T.D. I have not therefore found the Canadian cases helpful in elucidating the problems raised in the appeal for reasons which I have already indicated.

In the circumstances, the law as I have suggested it is, must be applied to the facts in this case. But, before that takes place, one point must be disposed of, viz., on what date, did the lease expired? The learned Chief Justice concluded that the date was 2nd June, 1981. Mr. Alberga did submit, albeit with less than his accustomed forcefulness, that the Chief Justice was wrong in holding that 2nd June was the expiry date. The Chief Justice who had based his conclusion on the operation of the

Registered Land Law Sec. 49, pointed to the pleadings on this issue and noted the happy coincidence in respect of the date between the parties. For my part, I accept this finding especially as it was the basis on which the case was fought below. Moreover, I am not persuaded that there is reason to impugn it, despite Mr. Alberga's endeavours to change it to one of two dates - 31st May or 1st June, 1981.

The next question is, was the option exercised? Apart from the Canadian cases, e.g., Brewer v. Conger (1900) 27 O.A.R. 10 at p. 13, where McLennan, J.A. , is recorded as saying: "Upon such a covenant as that, I "think all that is essential is the existende of the desire. No doubt the "lessor has a right to know within a reasonable time, whether there was a "desire or not. That could be ascertained by enquiry if it was thought to "be uncertain or it might be plainly indicated by conduct and circumstances", I do not think any case has gone as far as laying down that the existence of the desire to renew, in other words, the mere intention to renew is sufficient to demonstrate the exercise of an option to renew. In my opinion, this does not represent the law in these Islands. As at presently advised, it appears to me that the Canadian Courts are bound by Brewer v. Conger [1900] 27 A.R. (Ont.) which purports to rely on Moss v. Barton and Buckland v. Papillon. Neither of those cases, with all respect to the learned and distinguished judges in the Canadian Courts, in my judgment, support the view that holding over or the existence of a desire to renew, is sufficient evidence of the exercise of an option to renew.

The law of the Cayman Islands, as I conceive it, in respect of options unlimited as to exercise in point of time or mode of exercise, is by positive action, e.g., writing a letter stating baldly that the option is being exercised or by other conduct from which the inference could fairly be drawn that he had exercised the option - Gardner v. Blaxill (supra).

Although the learned Chief Justice did not accept the law to be as stated in the Canadian cases, he appeared to be attracted to their approach. Howsoever, that may be, he did use the holding over by the present respondend as a factor in determining exercise vel non. But it was a holding over in the light of the conduct of the appellants in leading the respondent to believe that they were willing to meet with him for the

purpose of discussing the terms..

In my view, since the exercise of an option requires nothing to be done on the part of the lessor, his conduct is wholly irrelevant in this regard. The lessee is the "protatic party". It is he who must demand performance: it is he who must "accept" the offer. It is trite law that the person accepting an offer should notify his acceptance to the person making the offer. I am therefore quite unable to regard the verbal approaches or the letters indicating, as the Chief Justice correctly found, a clear intention to renew as acts constituting a valid exercise of the option. They are not conclusive acts, the positive action I earlier suggested, from which the inference can fairly be drawn that there has been an exercise of the option. In my opinion, the telephone conversation of 1st June, advising that rent in respect of June 1981, would be sent and the forwarding of a letter with that rent on the following day, constituted the valid exorcise of the option. The intimation that the rent would be sent differs from the earlier verbal approaches and letters as indicating a definite decision that he will remain as tenant upon the same terms as before. The exercise took place on or before the expiry of the lease on 2nd June. I would agree with the learned Chief Justice in the conclusion at which he arrived that the respondent did exercise his option by his conduct and accordingly he has been in lawful possession of the land ever since. In the event, the respondent is entitled to possession of this property until 2nd June 2011 A.D. at a monthly rental of CI$10.00.

I would, in the final result, dismiss the appeal with costs.

ROSS, J.A.:

I concur.

ZACCA, P.

I have had an opportunity of reading the judgment of Carey, J.A., I entirely agree with his conclusion and I too would dismiss the appeal with costs to the respondent