IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 123 of 1971

ROWE J.

BETWEEN	COLONY THEATRE CO. LTD.	PLAINTIFF
A N D	BASIL KEITH FRANKSON	DEFENDANT

Mr. Scholefield of Lake, Nunes, Scholefield & Co. and Dr. Barnett for Plaintiff.

Mr. Emile George, Q.C. and Mr. Derrick Jones of Myers, Fletcher & Gordon for Defendant.

27/2/76

J U D G M E N T

On the 28th day of January 1928 John Frankson and Hilda his wife became the registered proprietors as joint tenants of premises then known as Marie Ville on Retirement Road and which later became No. 4 Retirement Road. Hilda has been described as the dominant of the two partners and this probably accounts for the transfer No. 28684 registered on 7/11/32. That was a transfer,

"From John Frankson and Hilda Bertha Frankson of all their estate in the land comprised in this Certificate to the said John Frankson and Hilda Bertha Frankson for their joint lives with power to the said Hilda Bertha Frankson to transfer, sell, mortgage, charge, or dispose of the land by any deed or Instrument or Last Will and Testament as if she were the sole proprietor in fee simple and in default of the said Hilda Bertha Frankson exercising any of the said powers to the said Hilda Bertha Frankson and John Frankson for their joint lives and to the survivors of them for his or her life with remainder to Thelma Nivens Frankson, Lauriston Nivens Frankson children of the said John Frankson and the said Hilda Bertha Frankson as tenants in common."

By lease dated the 29th day of January 1955 John and Hilda Frankson leased to Dudley Guillermo McMillan a portion of No. 4 Retirement Road at a rental of £144.0.0 per annum for 25 years from the 1st April 1955 payable by monthly payments in advance of £12.0.0 per month as from the 1st April, 1955.

Although Mr. McMillan had taken a lease of only a portion of No. 4 Retirement Road, he was given an option in clause 2 of the lease to purchase the entire premises at the end of the term for £4,000.0.0. The lessors could

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require him to exercise the option at any time during the term of years on giving 60 days notice.

Clause 7 provided inter alia,

> "that if the rent hereby reserved or any part thereof shall be in arrears for the space of sixty days next after any day or days whereon the same ought to have been paid whether the same shall or shall not be legally demanded ..... it shall be lawful for the lessors in the name of the whole to re-enter upon and retake possession of the leased land and hereditaments and the same to have again and enjoy as of their former estate etc."

Under Clause 9 the terms, "Lessors" and "Lessee" were defined to include the heirs, executors, administrators and transferees of each set of parties to the lease. Acting under this clause McMillan transferred the option to purchase and the lease to Colony Theatre Co. Ltd., the present Plaintiff. McMillan is the Managing Director of the plaintiff company.

Hilda Bertha Frankson died on the 28th July, 1963 and by paragraph 5 of her Will provided as follows:

> "Pursuant to the powers reserved to me in Certificate of Title registered at Volume 204 Folio 18 I hereby dispose of the land comprised in that Certificate of Title and now known as Number 4 Retirement Road, Saint Andrew as follows, That is to say I GIVE DEVISE AND BEQUEATH the said lands to my son BASIL KEITH FRANKSON for the term of his natural life with remainder to his daughter Penelope Jane Frankson and thereby disposes of all the limitations contained in the said Certificate of Title which were to take effect in default of other disposal of the said land by me."

John Frankson died on 30/6/67.

The demised premises were used by the Plaintiff as a car park. On the 13/1/66 the defendant roped off the premises and put up No. Parking signs, thereby purporting to forfeit the lease for non-payment of rent for a period in excess of 60 days and to re-enter and retake possession of the demised land. The instant proceedings arise out of this purported forfeiture of the lease.

By his pleadings the Plaintiff avers that the rents reserved by the lease were duly and regularly paid by the Plaintiff and his predecessor in title until some time in January 1966 when John Frankson refused to accept the said rent which was properly tendered to him under the lease. After John Frankson's death the defendant as tenant for life of the demised premises has also refused to accept the reserved rent.

At the commencement of the trial on the application of the defendant the defence was extensively amended and in consequence there were amendments to the Reply and Counter Claim. On the amended pleadings the Plaintiff claimed

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a declaration that the lease was still subsisting and alternatively relief from the forfeiture if it was found that the defendant was entitled to terminate the lease for non-payment of the rent. The Plaintiff alleged that there was an understanding reached between the Plaintiff and John Frankson acting also on behalf of Hilda Frankson that John Frankson would attend on Plaintiff for rent and that John Frankson would accept payment of the same by cheque, and that this agreement was repeatedly acted upon. On the 31st January 1966 John Frankson in pursuance of this agreement or understanding attended upon the plaintiff and collected a cheque for £72 in satisfaction of the rent due. By this acceptance of rent John Frankson expressly or implidely waived any breach of the terms of the lease for payment of rent.

Alternatively the Plaintiff claimed that the defendant was estopped from denying that he acted at all material times as agent for John Frankson the surviving lessor.

Alternatively that the defendant represented that John Frankson was entitled to act as lessor or held out the said John Frankson to be lessor and as a result of the defendant's said representation the plaintiff continued at all material times to act in accordance with the arrangement that had been agreed with John Frankson.

The main thrust of the amended defence was to state that the defendant acted in his capacity as tenant for life, as opposed to that of an agent, when in 1966, the rent reserved by the lease being in arrear for a period in excess of 60 days, he re-entered and re-took possession of the leased premises and roped off those premises.

He averred that Dudley G. McMillan unlawfully entered upon the premises after the re-possession and then unlawfully took possession thereof. The defendant further averred that the plaintiff and Dudley McMillan knew that the defendant became tenant for life of the leased premises on the death of his mother Hilda Bertha Frankson on 29/7/63 and as such was entitled to possession of the said premises. The defendant's contention was that the plaintiff remained on the demised premises as a trespasser and he put in a Counter-Claim for possession and for mesne profits.

THE EVIDENCE

Dudley McMillan, the Managing Director of the Plaintiff Company was the sole witness for the Plaintiff and the defendant gave evidence on his own behalf.

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McMillan said that the first rent under the lease was paid for 3 months in advance and threafter for periods of 2 or 3 or 1, month in advance. Originally he would post cheque to the home of the lessors, then at the request of John Frankson he desisted and would pay directly to John Frankson who would call personally at the plaintiff's office for the cheque. Hilda Frankson wished to have the rent sent to her and wrote to plaintiff to this effect but plaintiff kept his promise to John Frankson.

About 1960 there grew up the practice to pay the rent every 3 months in advance. This was done to facilitate John Frankson who said he was getting old and did not find it convenient to attend at the plaintiff's downtown office every month.

McMillan said that John Frankson came to his office on 6/8/63 and informed him that his wife had died the previous month. At McMillan's request John Frankson signed a note in the following terms.

"August 6, 1963

> My wife Hilda died on July 28, 1963 as the survivor of the joint ownership of premises No. 4 Retirement Road I am now entitled to receive the rent etc. and to make any future arrangements."

This note was signed by John Frankson and witnessed by Calvin Bowen. McMillan said this was his first notification of the death of Hilda Frankson. He streneously denied that the defendant had visited him at the State Theatre in the first few days of August 1963 and had a conversation with him there, in which McMillan was told of the death of Hilda Frankson, apprised of the fact that the demised land was devised to defendant for life by Hilda Frankson and that McMillan then offered defendant £5,000 for the demised premises.

It was McMillan's testimony that after August 1963 John Frankson continued to come to him for the rent as it fell due. It was not John Frankson's practice to come on the due date but at that time the practice was to pay the rent for 3 months in advance. In November 1965 the rent fell due. John Frankson did not call for it. This did not startle McMillan. However on 13/1/66 McMillan observed that the leased land was roped off and no parking signs erected. He said he did not know who had done this although he had a suspicion that it was done by defendant. McMillan removed the ropes and the signs and went to seek legal advice.

On the 13/1/66 McMillan wrote on behalf of the Plaintiff to John Frankson alleging that John Frankson had illegally roped off the entrance

of the leased land and enclosed in that letter cheque for £72.0.0 being six months rent to the 30/4/66. That letter and cheque were eventually returned unclaimed.

Sometime before 31/1/66 McMillan received a letter from Dunn Cox & Orrett dated 19/1/66 addressed to "D.G. McMillan, Esq." That letter purported to have been written on the instructions of the "estate Mildred B. Frankson" and stated inter alia:-

"We have been instructed to say that our client having entered into possession and terminated the Lease is not prepared to retract from that position."

McMillan said he did not then know on whose behalf Dunn Cox & Orrett had written.

Then on the 31/1/66 John Frankson together with his eldest son came to the office of McMillan. McMillan said this visit was not at his request. At that meeting McMillan asked John Frankson why he had roped off the premises and put signs there. John Frankson said he had not done either of those things and that he was not attempting to forfeit the lease. John Frankson said he had not received McMillan's cheque of the 13/1/66 whereupon McMillan gave him another cheque for a similar sum in lieu thereof. At the request of McMillan John Frankson signed a certificate which was witnessed by Ruby Hoo. This Certificate reads:

" January 31, 1966

Dear Mr. McMillan,

This is to certify that whenever I have come to you for the rent in the past 11 years I have always got it. I have been coming for the rent from the lease started, and received it every three months in advance.
I have not endorsed the cheque sent to me on January 13, 1966 and have not authorised anyone to do so. I accept this cheque No. AE 038402 for £72.0.0 in lieu of the cheque dated January 31, 1966, and confirm that this will take care of the rent up to the end of April 1966."

The Cheque which McMillan gave to John Frankson on 31/1/66 was never cashed.

BASIL KEITH FRANKSON the defendant gave evidence that he is a Real Estate Agent and an Autioneer. He lived for some years in Canada but returned to Jamaica to attend the funeral of his mother Hilda Bertha Frankson. He had conversations with his father John Frankson, his brother Laurie Frankson who

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has since died, and his sister Mrs. Harris. From his sister he learned that his mother had devised premises 4 Retirement Road to him by her Will. He read the Will, and after the funeral, he went to see McMillan at State Theatre. At that point of time the defendant knew that part of No. 4 Retirement Road had been leased to McMillan but he did not know the details concerning the lease. The purpose of defendant's visit to McMillan was to advise McMillan that he was now the owner of No. 4 Retirement Road and to enquire if McMillan would pay to him a year's rent in advance as at that time he was short of money. The defendant told McMillan of his mother's death, of the purpose of his visit and McMillan offered him £5,000 for the property. The defendant refused this offer and McMillan said he could purchase the property for £4,000.0.0 according to the terms of the lease. No agreement was reached and defendant went to the Titles Office to determine the nature of the terms of the lease. Very soon after this incident the defendant returned to Canada. Before doing so he empowered John Frankson, his father, to continue to collect the rent. After a few months the defendant returned to Jamaica to live permanently. He did not disturb the arrangement he had made with his father concerning the collection of the rent as it was the defendant's desire that John Frankson should use the rent towards his own maintenance.

It was agreed on all sides that John Frankson was an old man. At the time of his death in 1967 he was 92 years of age, so that at the beginning of 1966 he was well over 90 years old. John Frankson could not get about without being accompanied and in a letter from Dunn, Cox & Orrett to McMillan on 14/2/1966 the Solicitors said that John Frankson "was very aged and no longer able to attend to business matters."

It was the defendant's evidence that John Frankson complained constantly that he was not receiving the rent from the Plaintiff. The defendant challenged the Plaintiff to show by receipts that Plaintiff had been paying the rent in advance for three month periods. The Plaintiff produced two receipts to show that rent was paid on 7/2/64 for 3 months in advance to 30/4/64 and again on 6/5/64 for 3 months in advance.

From August 1963 onwards the defendant was very dis-satisfied with the amount of rent that the Plaintiff was paying for the leased premises. The defendant had very serious reservations as to the manner in which the agreement for the lease had been concluded and when an opportunity

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presented itself for action to be taken he promptly took it. It was on the 13th January, 1966 that he, having discovered that rent was in arrears for about 90 days, decided to forfeit the lease, re-enter and re-take possession of the leased premises. Within days of this action, agents of the Plaintiff visited the home of John Frankson on several occasions endeavouring to have him accept the overdue rent. John Frankson did not oblige. The defendant said that he went to the office of McMillan sometime before the end of January 1966 and asked McMillan to cease bothering his father who was then too old to deal with business matters.

FINDING OF FACTS

I find as a fact that the defendant went to see McMillan on a day very early in August, 1963, told McMillan of his mother's death, and that the defendant had inherited the leased land through his mother's Will. I find as a fact that there was the conversation about the £5,000.0.0 on that occasion.

It follows that I reject McMillan's evidence that on 6/8/63 he learnt of death of Hilda Frankson for first time and that intimation was from John Frankson.

I incline to the view canvassed by Counsel for the defendant that the letter of 6/8/63 signed by John Frankson was prepared by McMillan after McMillan had had legal advice and after McMillan had known that the defendant was claiming to be the owner of the leased land. It is admitted by the defendant that he roped off the leased land on 13/1/66 and I find that McMillan had reasonable cause to suspect that this roping off had been by defendant.

I find that John Frankson during the lifetime of his wife was anxious to get into his own hands the monthly rental reserved for the leased land and that he did make the arrangement with Plaintiff that Plaintiff should hold the rent until he called to collect it.

I find as a fact that the defendant continued after the death of Hilda Frankson, to call upon the Plaintiff for the rent. I find as a fact that the Plaintiff did pay rent in advance on some occasions. It appears to me that the Plaintiff kept records in respect to the leased land and was able to produce several documents considered favourable to the Plaintiff's case. The Plaintiff only produced two receipts dated in 1964 corroborating his evidence that from 1960 onwards the practice was to pay the rent for 3 months in advance. The Plaintiff agrees that rent was due and owing for more than 60

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days on the 13/1/66.

I find as a fact that John Frankson attended the office of McMillan on 31/1/66 and there signed the exhibited letter of even date and took from Plaintiff a cheque for £72.0.0 referred to in that letter.

INTERPRETATION OF TRANSFER

No. 28684 dated 5th and registered 7th November 1932

In the original pleadings John Frankson and Hilda Frankson were stated to be registered owners as joint tenants of No. 4 Retirement Road. It was a late perusal of the Transfer referred to above that induced the defendant to amend his pleadings and the plaintiff followed suit.

A special feature of the Transfer which I was told was not common form in transfers between husband and wife, was that Hilda Frankson was given a very wide power to dispose of the property both during her life-time and by Will whereas no similar power was reserved to John. In default of the exercise of the power given to Hilda provision was made for the property to be held by John and Hilda during their joint lives and then to the survivor of them and finally to named remaindermen.

Mr. George for the defendant contended that two possible interpretations could be put upon this Transfer. Firstly that it created a simple joint tenancy with power to appoint and on failure to exercise the power, the joint tenancy would continue with survivorship. Alternatively that the Transfer created a settlement in which the husband and wife became tenants for life under the Settled Land Act. He submitted that by virtue of Sections 8-10 of the Settled Land Act a tenant for life's power to lease the settled land was limited to 21 years. As John and Hilda Frankson purported to grant a lease for 25 years that would be an illegal contract as being in excess of the powers conferred by the Settled Land Act upon tenants for life. He argued further that whatever be the true interpretation of the Transfer No. 28684 it could not be gainsaid that Hilda exercised the power granted to her by Will and under her Will which became effective on 28/7/63 the defendant became the tenant for life taking subject to the lease, if it was lawful, but also taking the privilege and rights of the Lessor which included a right to forfeit for non-payment of rent. For the Plaintiff Dr. Barnett argued that if the true interpretation of the Transfer is that it created a Settlement, then the settlors gave an express and unlimited power to the wife to lease the settled land and this, would be valid by reason

of section 62 and 63 of Settled Land Act. The Settled Land Act was not intended to place a fetter on Settlors, but its purpose was to facilitate the creation of settlements and to lay down common rules which could be incorporated into every settlement under the Act.

Section 63 of the Settled Land Act states:

"63(1) Nothing in this Act shall precluded a settler from conferring on the tenant for life, or the trustee of the settlement, any powers additional to or larger than those conferred by this Act.

(2) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in their like manner, and with all the like incidents, effects and consequence, as if they were conferred by this Act unless a contrary intention is expressed in the settlement."

Another of Dr. Barnett's contentions was that the power given to the wife should be read in such a way that if possible, it be consistent with the limitation which begins by giving the life interest to both husband and wife. He argued that the powers reserved to the wife were not intended to be used to defeat the interest of the husband. If the wife had sold the property in the life time of the husband the proceeds of sale would be held in trust for both husband and wife. If she leased the property without the husband's consent equally she could not keep the rents for herself to the exclusion of her husband. However she disposed of the property in the exercise of the power conferred, this disposition was subject to the husband's life interest.

In my opinion No. 4 Retirement Road became settled land under the provisions of the Settled Land Act. Under the sttlement contained in Transfer 28684 the wife was given larger powers than those enumerated in the Settled Land Act. It was in my view the clear intention of the settlors that the power of appointment therein given to the wife should be of the widest nature without any restrictions whatsoever. There was no intention in the settlors that the husband's life interest should be indefeasible by any of the Wife's actions in exercise of the power of appointment. In default of appointment the right of survivorship was given to either party. This would indicate that the basic intention of the parties was that the husband and wife should enjoy the estate while both of them were alive or until the wife exercised the power.

The husband's life interest could not survive the death of his wife if she made an appointment. Of course it was open to the wife to create a fresh life interest for the husband in her Will with remainder over to her son but in the instant case she did not do so. The defendant became the tenant for life upon the death of Hilda Bertha Frankson and at that same moment John Frankson ceased to have any beneficial interest in the property the subject of the settlement.

The defendant after asserting his claim to McMillan returned to Canada leaving his father to collect and keep the rents, to give receipts and to make arrangements. In so doing defendant held out John Frankson to the Plaintiff as his agent. The defendant had a faint recollection of having given to John Frankson a power of attorney prepared by a lawyer to enable John Frankson to act in relation to the leased premises.

I find that the defendant, represented to the plaintiff that John Frankson had authority to collect and keep the rent, to give receipts and to make arrangements for the payment of rent. There was never a time during the currency of the lease prior to 13th January, 1966 that the defendant interposed his power to demand the rent from the plaintiff to the exclusion of John Frankson and so put the plaintiff on notice that John Frankson did not have a free hand any longer to make arrangements touching the method of payment of the rent.

However, I find that after the 13/1/66 and before 31/1/66 the defendant did go to the office of McMillan and acquaint him of the fact that John Frankson, an old man unfit to make business decisions, should not be contacted again and no attempts should be made to pay rental to him. This was the clearest indication to the plaintiff that John Frankson was no longer the agent for the defendant to collect rent due in respect of the leased premises. When on the 31.1.66 the plaintiff prepared a letter for John Frankson to sign and had John Frankson give a receipt for six months rent, that was a useless ploy. Nothing that John Frankson did then could affect the rights of the tenant-for-life for whom he was not, to the knowledge of the plaintiff, acting.

Whereas an acceptance of rent due after the act of forfeiture of of after knowledge of the breach which could lead to forfeiture is a waiver of the specific breach, in this case there can be no waiver as the defendant did not by himself or his agent accept any rent from the plaintiff due after

the 13/1/66.

There is no dispute that on 13/1/66 rent was due for more than 60 days and I find that on that date the defendant could forfeit the lease and re-enter for breach of the covenant to pay rent. The plaintiff put forward the argument that the defendant was estopped from relying upon his strict legal rights under the lease.

For the principle of equitable estoppel to arise the plaintiff must show that John Frankson the pre-decessor in title and later agent of the defendant, by his conduct, induced the plaintiff to believe that neither John Frankson nor the defendant would insist upon his legal right to require payment of rent in advance so long as the plaintiff paid rent for 3 months in advance whenever rent fell due and John Frankson called for it.

Notwithstanding the letter of 31/1/66 signed by John Frankson, the inability of plaintiff to produce more than 2 receipts showing that rent was paid for 3 months in advance, leads me to believe that there was no general understanding or agreement between plaintiff and John Frankson by which to accommodate John Frankson the plaintiff paid rent 3 months in advance, something he was not required to do by the lease and in return there was the understanding or agreement that the plaintiff did not have to pay on the date but could delay payment until John Frankson called.

It is worthy to recall that in his latter years John Frankson could not get about on his own and had to be constantly accompanied. I do not accept that John Frankson could, at that advanced age, be willing to remain at home complaining of not receiving rent when all he had to do was say to McMillan, "I can't get down to your office very easily these days, please put the cheque in the post." The probabilities are that the plaintiff, after the death of Hilda Bertha Frankson, only paid when John Frankson called and then for such sum as would content John Frankson.

I do not think that there is any factual basis on which the equitable principle enunciated in Hughes v. Metropolition Railway Co. (1877) 2 A.E.R. 439 and Tool Metal Co. v. Tungsten Electric Co. (1955) 2 AER 657 can be based.

Dr. Barnett submitted that even if the Court should hold that the forfeiture and re-entry were properly made and that there was neither waiver nor room for the application of the principle of equitable estoppel, the

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plaintiff would still be entitled to ask the Court to grant relief from the forfeiture.

The principle upon which the Court relies in considering applications for relief from forfeiture for non-payment of rent is that if the landlord can be completely compensated in money then the tenant is entitled to be relieved.

In Hill v. Barclay 18 VERSEY JNR'S REPORTS 1845, LORD ELLON L.C. said

> "The Court has very long held, in a great variety of classes of cases, that in the instance of a covenant to pay a sum of money, the amount of damage, arising fron non-payment at the time stipilated, that it takes upon itself to act as if it was certain that in giving the money five years afterwards with interest, it gives a complete compensation."

To the same effect is the decision of Sterling J in Howard v. Fanshawe (1895) 2 C.L. 581 when after referring inter alia to Hill v. Barclay, he said.

> "These authorities appear to me to establish that the ground on which Courts of equity formerly gave relief was that the proviso for re-entry was in the eye of the Court simply a security for the rent, and on principle I cannot see that it makes any difference whether the Lessor avails himself of such security with or without the assistance of a Court of Law."

In the instant case the plaintiff has been willing and able to pay the rents reserved by the lease and has been paying the rent into Court since the filing of the action. The first departure from paying on the due date by post came at the request of one of the original Lessors. An underlying factor in this case is that the plaintiff has an extremely valuable option to purchase which would be lost if he could not secure relief from the forfeiture. The defendant's attitude throughout has been that his birthright has been sold for a mess of pottage.

This lease ran from 1955 to 1966 a period of 11 years, before any action was taken to forfeit. However ridiculous the consideration for the option to purchase may appear twenty years after the date of the lease, that could not by itself be a ground for refusing relief from the forfeiture. I do not admire the strategy used by plaintiff to obtain the signature to the letter of 31/1/66 but that again is an insufficient basis for refusing to grant relief. McMillan knew that the defendant had an interest in the land from August 1963 but at that time the plaintiff had the lease safely tucked away. Notwithstanding my findings that the defendant spoke truthfully about the matters within his own knowledge, in my opinion he can be adequately

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and completely compensated by acceptance of the rent and I accordingly grant relief from the forfeiture.

Judgment for Plaintiff on the claim Counter Claim.

Declaration granted as prayed.

Costs to the Plaintiff to be agreed or taxed.

Ordered that Rent paid into Court be paid to Plaintiff's Attorney-at-Law.

I.D. ROWE
27/2/76

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