IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E106/1983

BETWEEN	MICHAEL EVANS	PLAINTIFF
A N D	ROBERT YOUNG	DEFENDANT

Mr. D. Scharschmidt, Q.C. instructed by
Miss Sonia Jones for Plaintiff

Dr. L. Barnett, Q.C. and Mr. Patrick Foster
instructed by Messrs. Clinton Hart & Co.
for Defendant

Heard: 8th, 9th July, 1996

MARSH, J. (Ag.)

The plaintiff's claim is for:-

(1) A declaration that the defendant is bound by his agreement dated 30th September, 1980, to sell premises known as "Fairview" Aguilar Road, Stony Hill in the parish of Saint Andrew for the sum of Seventy-Five Thousand dollars ($75,000.00);

(2) Specific performance of the said agreement;

(3) Damages for breach of contract in lieu of or in addition to Specific Performance;

(4) Further or other relief;

And the plaintiff claims costs.

The defendant counter claims as follows:-

(a) Possession of the said premises;

(b) All necessary and consequential accounts directions and enquiries;

(c) Payments of such sums as may be due to the defendant on the taking of such accounts;

(d) Further or other relief;

(e) Costs.

PLAINTIFF'S CASE

Plaintiff's evidence is that by agreement dated September 30, 1980, he became lessee of the premises "Fairview",Aguilar Road, Stony Hill, Saint Andrew. Lessor was the defendant. This agreement was tendered in evidence as Exhibit 1. Clause 4 (ii) of this agreement contained an "option to purchase" and is worded thus, "the lessee shall have option to purchase the leased premises at any time during the continuance of the lease at the market value to be decided by an independent valuator at the time of this exercise of such option. By a letter dated 6th July, 1981, written to defendant on plaintiff's behalf by Miss Sonia Jones, Attorney-at-law, formal notice was given to defendant that the plaintiff intended to exercise the option contained in Clause (4) (ii) of the said agreement. This letter is tendered and admitted as Exhibit 2. By letter, dated 6th July, 1981, tendered and admitted in evidence as Exhibit 3, plaintiff indicated to defendant that he formally "exercise that option and/or formally give notice of the exercise of that option" making particular reference to Clause 4 (ii) of the said Agreement. He also formally offered to pay the sum of Seventy Five Thousand Dollars ($75,000.00) for the property, "being the market value, assessed by Messrs. Allison, Pitter & Co., who are independent valuators."

A copy of a Valuation Report and a contract for sale were sent to the defendant. These were tendered in evidence as Exhibits 2(a) and 2(b) respectfully.

Owen Pitter, the "Pitter" in the firm Messrs. Allison, Pitter and Co., and John Dolphy, Estate Appraiser also gave evidence for the plaintiff. Owen Pitter testified as to his experience in land valuation and identified the Valuation Report as being the work of one Irvin M, Jackson, formerly of Messrs. Allison, Pitter and Co., but who had since migrated to and now lived in Miami Florida. He agreed that the amount of Seventy Five Thousand dollars could have been the market value of "Fairview", on 23rd

April, 1981. He however admitted that he had not, himself inspected the premises during the relevant period and that for him to express a personal opinion re valuation it would have been necessary for him to have examined the building.

John Dolphy said that he had visited "Fairview" for the first time in 1982, to assess the market value of the property. He again visited in 1992, to determine the value of the property in 1981. He concluded, that in 1981, the said premises would be valued at Eighty Thousand dollars ($80,000.00). His valuation of premises made in 1993 was no different from that made in 1982. He was a trainee when he made his visit to the premises in 1982. Defendant gave no evidence and called no witnesses.

SUBMISSIONS:

Defendant's case, Mr. Scharschmidt submitted, was clearly this, that no option was created by the agreement. Defendant had not stated that if there was an option that this option was not validly exercised. Defendant had stated that the option was unenforceable as it never set out material terms. However, there is evidence in the lease which identifies the property, parties and the means of arriving at the price. He relied on dicta of Harman L.J. in **Talbot v. Talbot** (1967) 2 A.E.R. 920

> "If an agreement be made to sell at a fair valuation, the Court will execute it although the value is not fixed".

The means of ascertaining the price was adequately stated, that the market value was to be decided by an independent valuator. Valuation of Allison, Pitter and Co., was an independent valuation. Independence did not depend upon who paid the valuator. It depended upon the likelihood or otherwise of the opinion of valuator being influenced by party involved in the transaction. 'Independent' means, as stated in **Potato Marketing Board v. Merrick** (1958) 2 A.E.R. 538 "bringing independent mind to the problem". Consequently, Allison, Pitter and Co., can be termed 'independent'. Plaintiff has therefore clearly established that option was properly exercised and the market value arrived at.

Dr. Barnett, responding to submissions made by Mr. Scharschmidt, countered that there was no valid option in this particular case - one had to construe the particular document. Clause 4(ii) of the lease contains the terms relied upon and it has 2 elements of utmost importance, namely:

(a) market value - plaintiff has given powerful evidence as to fact that "market value" although legal concept, its ascertainment is a difficulty.

(b) Resolution of this question, whether it be done by independent valuator, at the time of the exercise of option, not subsequently or before.
In trying to establish a machinery, the parties failed to express a clear formula for its resolution.

The meaning in this case of the word "independent" is different from that in Potato Marketing Board v. Merrick (supra). Further, it was plaintiff in his Statement of Claim who relied upon the existence of an option and its valid exercise. Nowhere however, in the Statement of Claim is there an allegation that the decision was made by an independent valuator. Plaintiff is consequently placed in an impossible position.

The only reasonable understandingof what the parties contemplated would be someone appointed by both parties and not someone appointed by one party.

Owen Pitter, not having done the valuation himself, plaintiff has failed to prove that the market value has been determined by person who plaintiff presented as an independent valuator. He had not inspected premises for valuation and conceded that a critical factor on the assessment of market value, is the use of comparables and that he did not know what comparables and

variables were used; the subjective element is of importance in assessing variables and arriving at price and consequently these result in variations.

The Valuation Report - 'Instructions as to valuation' - is basis/for negotiating mortgage finance. It is for plaintiff to prove that a valuation for negotiating a mortgage is the same as a valuation for market value. John Dolphy, giving evidence for the plaintiff stated that he has seen appraisals vary by as much as 20%. Consequently, there was no evidence that there was a proper exercise of the option.

Plaintiff is contending that Clause 4(ii) of the lease establishes a valid option - an option for him to purchase the fee simple estate in "Fairview", Aguilar Road, Stony Hill, in the parish of Saint Andrew -

(a) at anytime during the continuance of the lease;

(b) at the "market value"

(c) to be decided by an independent valuator;

(d) at the time of the exercise of such option.

Further that by letter dated 6th July, 1981, notice of intention to exercise this option was communicated to defendant. The valuation of the said property was done by an "independent valuator" Messrs. Allison, Pitter and Co., Chartered Valuators, that having at all material times been ready and willing to pay the sum of $75,000.00, the assessed market value of the aforesaid property, the plaintiff is entitled to succeed as per the amended Statement of claim.

On the other hand, the defendant is contending that Clause 4 (ii) of the lease agreement did not contain a valid or enforceable option to purchase "Fairview", that alleged option was void for uncertainty because it did not contain a necessary material term of a valid option to purchase land and/or the arrangement for

securing consensus between plaintiff and defendant or the machinery to carry the alleged purchase into effect. He therefore denies being in breach of contract and consequently is entitled to refuse to complete the 'sale'.

In Hillas & Co. v. Arcos Ltd. (1932) 2 A.E.R. at p. 499, Lord Tomlin opined:

> "The problem of a Court of Construction must always be so to balance matters, so that, without violation of essential principle, the dealings of men may as far as possible be treated as effective and that the law may not incur the reproach of being the destroyer of bargains".

What was the effect of the agreement in Clause 4(ii) of the lease? Was this an agreement to agree as an essential term of the agreement was missing?

In Sudbrook Trading Estate Ltd. v. Eggerton et al (1981) 3 A.E.R. 105, at p. 115, Templeton, L.J. stated:

> "All three of these principles stem from one central proposition, that where the agreement on the face of it, is incomplete, until something else has been done, whether by further agreement between the parties or by the decision of an arbitrator or valuer, the Court is powerless, because there is no complete agreement to enforce".

In the instant case, was there an agreement between the plaintiff and defendant as to the price at which the said premises "Fairview" would be sold at the exercise of the option? Land at the time of exercise of the option was to be purchased at the "market value" to be decided by an "independent valuator". There seemed to have been no machinery as to who should be or how the "independent valuator" was to have been appointed.

There was no consensus as to how the "independent valuator" should be selected. The valuator selected, Messrs. Allison, Pitter and Co., was selected by one party, the plaintiff, unilaterally.

According to the Report and Valuation (Exhibit 2a), plaintiff sought an "appraisal to assess the current market value of the freehold interest in the premises as a basis for negotiating mortgage finance".

Valuation inspection was completed on April 19, 1981. Formal notice of plaintiff's intention to exercise the option to purchase the property as per Clause 4(ii) of the lease agreement was communicated to defendant by letter dated 6th July, 1981. This was nearly three months after the inspection of valuation of the premises had taken place. This was an "independent valuation", plaintiff strongly argued. "Independent" here, meant, as in **Potato Marketing Board v. Merricks** (1958) 2 A.E.R. 538, the headnotes at page 539

> ..."bringing an independent mind to the proceedings and not in the sense of being unfair".

This does not seem to be the meaning of "independent" contemplated by the parties to the agreement (Exhibit 1), certainly not that one party, without imput from or consensus of the other party, arranges/and appoints the valuator.

Even if it could be accepted that there was an independent valuation at "market value", the market value was assessed some months before the date of the exercise of the option. There was no agreed machinery to ascertain the selection of the independent valuator - the price at which the land would be sold remained an essential term of the contract. There was an agreement to agree the precise machinery to be used to select independent valuator.

I therefore find that Clause 4(ii) does not contain a validly exercisable option and defendant was entitled to refuse to complete the sale of the said premises "Fairview". Agular Road, Stony Hill in the parish of Saint Andrew.

Judgment for the defendant is therefore entered as hereunder:-

(a) Plaintiff is to quit and deliver up possession of the said premises on or before June 30 1997

(b) That the Registrar makes all directions and enquiries and take all consequential accounts;

(c) Payment be made to defendant of all such sum or sums due to the defendant on the taking of such accounts;

(d) Costs to the defendant to be agreed or taxed if not agreed.

(e) Six weeks stay of execution granted.