JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 16 OF 1997

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**FRANKLYN GRIER**	**DEFENDANT/ APPELLANT**
A N D	**TAVARES ELLIS BANCROFT**	**PLAINTIFF/ RESPONDENT**

Lord Anthony Gifford, Q.C. and Miss Carol Davis, instructed by Davis, Bennett and Beecher-Bravo, for the defendant/appellant

Dennis Morrison, Q.C., and Miss Paula Blake, instructed by Dunn, Cox, Orrett & Ashenheim for the plaintiff/respondent

March 6, 7, 9, 2000 and April 6, 2001

BINGHAM, J.A.:

In this matter the defendant/appellant (hereinafter referred to as the appellant) sought to challenge a judgment of Panton, J. (as he then was) delivered on December 20, 1996. Following a hearing lasting some eight days, the learned judge reserved his decision. In a written judgment delivered on December 20 he found in favour of the plaintiff and entered judgment against the appellant. He also as a consequence granted the

declarations sought at paragraphs 13(a) and (d) of the Statement of Claim. He further found that the counterclaim brought by the appellant was totally devoid of merit and dismissed it.

The appellant sought to challenge the said judgment on the following grounds, viz.:

> "**(1)** That the learned trial judge erred in law and in fact in awarding judgment to the Plaintiff.
>
> **(2)** That the Learned Trial Judge erred in fact and in law in declaring that the purported Instrument of Transfer dated the 17th day of December 1979 and the subsequent registration thereof was procured by fraud and are null, void and of no effect whatever.
>
> **(3)** That the learned Trial Judge erred in fact and in law in ordering that the Defendants account to the Plaintiff."

As originally framed, the Writ and the Statement of Claim had been brought against two defendants, the second defendant being the Attorney-at-law who acted for the plaintiff in respect of the transaction out of which the action arose. This defendant filed a defence to the claim. Before the trial, however, his health deteriorated and he died before the hearing took place. His widow, as the personal representative, was substituted as a defendant to represent his estate in the matter. At the outset of the hearing and before any evidence was taken by the learned judge, the claim against the estate of the second defendant was withdrawn with an order for costs against the plaintiff/respondent.

As the claim related to the transfer of a dwelling house which was registered under the Registration of Titles Act and levelled very serious

allegations of fraud and conspiracy against both defendants, with the subsequent withdrawal of the claim against the second defendant's estate, it is of crucial importance as to how the respondent now sought to maintain the action against the appellant.

The Evidence

The appellant and the respondent were good friends. The respondent had lived in England for several years and on his return to Jamaica he acquired property in the Forest Hills area of St. Andrew which included a dwelling house and a large plot of land surrounding it. This land he later subdivided into lots. The appellant purchased one of the lots on which he built a dwelling house where he resided. The appellant was in the business of constructing houses.

In 1972 the respondent engaged the appellant to construct a dwelling house for him on another lot in the sub-division. The respondent, with the assistance of the appellant, obtained a mortgage from Victoria Mutual Building Society in order to finance the cost of construction. There was, however, an over-run on the cost of construction which necessitated the respondent having to acquire a second mortgage from Workers Trust and Merchant Bank. This also resulted in an outstanding debt of $5,771 being created in favour of the appellant in relation to work done by him at the dwelling house and advances made on behalf of the respondent in respect of the mortgage with Victoria Mutual Building Society.

The need to construct this dwelling house at 11 Belvedere Drive in 1977, had resulted from the medical expenses which the respondent had

been faced with due to his wife's condition. This also caused the mortgages he had with Victoria Mutual Building Society and Workers Savings and Loan Bank to be in arrears.

In August 1977 the respondent left Jamaica for England. It is not certain from the evidence whether or not his wife accompanied him or she had left before. What was clear was that the wife, who was English, had gone to England to live out the remainder of her days and that the respondent also went to be with her. Before his departure, the respondent was in a state of financial embarrassment. He turned to his close friend, the appellant, for assistance in his hour of need. He wished the appellant to purchase his residence but the appellant was not in a position to do so at the time. There was little if any construction taking place in the building industry in Jamaica. The real estate market was also in a depressed state economically. It could be best described as the ideal buyers' market for those having the necessary capital to exploit the situation.

The parties came to an agreement. The appellant was to take a lease of the respondent's dwelling house for a fixed term with an option to purchase the freehold during the period of the lease. The lease also contained what was described by the second named defendant, an Attorney-at-law who was responsible for drafting it, apart from the usual terms and conditions found to be embodied in such documents, as very unusual conditions. It required the appellant, apart from paying the mortgage instalments of $300.00 per month due on the demised premises from the rental of $500.00 per month to pay an initial premium to the respondent of

Ten Thousand Dollars ($10,000) Jamaican. The appellant was also required to pay all outstanding rates and taxes due on the property as well as all arrears of payment due on the mortgage debt as well as telephone charges. All such payments made including rental of the premises in the event of the appellant exercising the option were to abate in relation to the consideration price of Fifty-five Thousand Dollars ($55,000).

The respondent, in leaving Jamaica for England, left no forwarding address where he could be contacted. An undated transfer document was prepared by the second defendant which was executed as in the case of the lease document in the presence of the second named defendant. Despite this, the respondent was later to allege at paragraph 6 to 10 of the Statement of Claim that he merely signed two blank sheets of paper at the request of the second defendant which were to be filled in by him later on.

The Statement of Claim, while alleging that the respondent signed what was blank documents headed "Lease Agreement" and "Transfer of Property", the respondent then sought to found his claim alleging fraud on the part of the first and second defendant in which it was particularised that they did the following:

> "**(i)** Acquiescing in engrossing or causing to be engrossed an Instrument of Transfer over the signature of the plaintiff while well knowing that that was contrary to the plaintiff's express instructions.
>
> **(ii)** Presenting or causing to be presented for registration a fraudulent document.
>
> **(iii)** Procuring discharges of mortgages without the plaintiff's knowledge or consent.

(iv) Conspiring to deprive the plaintiff of his interest in the said land."

This aspect of the respondent's claim was traversed by the defendants in the following manner:

The First Defendant's Defence and Counterclaim

"**12.** The First Defendant denies paragraph 12 of the Statement of Claim and the Particulars contained therein. The First Defendant says that the transfer was effected pursuant to the agreement between the parties whereby the Plaintiff agreed to sell the said land to the First Defendant and in furtherance of this agreement the Instrument of Transfer duly executed by the Plaintiff and the First Defendant."

In his defence, the second named defendant at paragraphs 4 to 10 stated that:

"**4.** In relation to paragraphs 6 and 7, the Second Defendant denies that the Plaintiff signed a blank sheet of paper in his presence and will say that following further discussions between the First Defendant and the Plaintiff they visited the offices of the Second Defendant together in August 1977 and they signed an undated Instrument of Transfer at which time the First Defendant made a payment of TEN THOUSAND DOLLARS ($10,000.00) to the Plaintiff.

5. As regards to the other allegations in paragraph 7, no admission is made.

6. Paragraph 8 of the Statement of Claim is admitted.

7. No admission is made as to paragraph 9 of the Statement of Claim.

8. Paragraph 10 of the Statement of Claim is denied and the 2nd Defendant will say that the Plaintiff did agree to transfer the said property to the 1st Defendant in consideration of payments made by the 1st Defendant to the Plaintiff and to

> the Victoria Mutual Building Society and Workers Savings and Loan Bank on behalf of the Plaintiff.
>
> **9.** In relation to paragraph 11, the First Defendant will say that all moneys paid by him in relation to the Lease Agreement and Instrument of Transfer were paid either directly to the Plaintiff or the Victoria Mutual Building Society and Workers Savings and Loan Bank as previously agreed between himself and the Plaintiff.
>
> **10.** The Second Defendant denies paragraph 12 of the Statement of Claim and maintains that at no time did he stamp, file or deliver any documents at the Office of Titles. He never collected any funds for the purpose.
>
> **11.** Paragraph 13 of the Statement of Claim is denied."

At this stage two important considerations come to mind viz:

Firstly, in his written judgment, while referring to the option clause in the lease as to its terms (paragraph 6), the learned trial judge also made no mention of the important proviso contained therein. Paragraph 6 reads as follows:

> "**6.** If the Tenant shall desire to purchase the reversion in fee simple in the premises hereby demised and shall not less than three months' before the expiration of any year of the term hereby granted give to the Landlord notice in writing of such desire then the Landlord hereby covenants that he will upon the expiration of such notice and upon payment of the sum of $55,000.00 together with all arrears of rent up to the expiration of the notice and interest on the said sum of $55,000.00 at the rate of $12.00 per cent per annum from the expiration of the notice until actual payment thereof assure the demised premises to the Tenant in fee simple for all the estate and interest of the Landlord therein or until the said sum of $55,000.00 together with interest as aforesaid and the said arrears of rent shall have actually been paid this lease shall continue in full

> force and the Tenant shall not be released from any of his obligations hereunder.
>
> "PROVIDED that on completion of the purchase in exercise of the said option, the Landlord shall take into account the premium of $10,000.00 paid by the Tenant and all payments under the said mortgage paid by the tenant and treat and apply the same as a part-payment towards the said purchase price of $55,000.00 and the said purchase price shall abate accordingly." [Emphasis supplied]

Secondly, the lease mentioned the mortgage with Victoria Mutual Building Society, but there were in fact two mortgages on the said property, the second being with Workers Savings and Loan Bank. This clause in the lease to have its true meaning and effect would have to be construed literally and to include not the word "mortgage" but "mortgages", the latter being that which the parties must have intended. The endorsements on the duplicate Certificate of Title exhibited at pages 158 to 159 of the Record of Appeal confirms this.

While the lease called for a payment of $10,000 as a premium upon execution, the respondent said that he received only $2,000. The appellant on the other hand said that he paid to the respondent the full amount of $10,000. This was supported by the evidence contained in the deposition of the second defendant who deponed that the respondent had told him of receiving that sum of money from the appellant. This raised an important issue of fact for determination by the learned judge. Regrettably, there was no such finding made by him in relation to this matter. With the withdrawal of the claim against the second defendant, however, the weight of evidence

is decidedly in favour of the appellant's account being the one to be accepted as true.

As previously mentioned, the claim against the second named defendant was not proceeded with at the trial. Following the filing of the defence of the second defendant and before the trial date, the second defendant became seriously ill, was confined to bed and not expected to live. While on his deathbed, his knowledge of the events and circumstances relating to the matter was recounted in a deposition from the defendant through a court order made by a judge of the Supreme Court and taken by the Registrar of that court. At this hearing both counsel who appeared at the trial and were present, took an active part in the proceedings.

The Statement of Claim had sought to allege fraudulent conduct on the part of both defendants in respect of the transfer of the plaintiff's property to the first defendant. It had sought to allege at paragraphs 6, 7 and 10 of the claim that the respondent had signed blank documents relative to the Lease and the Instrument of Transfer. With the withdrawal of the claim against the second defendant, the very foundation of this claim was now open to question as to its validity, as, on the taking of the deposition of the second defendant he denied that the respondent had signed any blank documents in his presence or at his request.

Given the particulars of fraud, as set out in paragraph 12 of the Statement of Claim, with the subsequent withdrawal of the claim against the second named defendant, the crucial issues which the court below was left to determine given the pleadings and the evidence adduced were:

1. Was there proof of fraudulent conduct on the part of the first defendant?

2. Was the option exercised?

3 On the evidence, has the appellant in effecting the transfer of the property properly accounted for the agreed consideration price to be paid for the said property?

The Submissions

Ground 1

Learned Queen's Counsel, Lord Gifford in advancing his submissions on this ground of complaint adverted to the fact that from as early as 1981, the appellant was seeking to redeem the Mortgage from Victoria Mutual Building Society. T he tenor of the Society's letter to the appellant dated April 28, 1980, supports this. It reads:

"April 28, 1980.

Mr. F. C. Grier
17 Belvedere Road,
P.O. Box 99,
MEADOWBRIDGE P.O.

Dear Sir/Madam,

Subject: Account No.92-576-75

We have received your letter dated March 10, 1980, giving notice of three clear calendar months, under the provisions of Rule 95 (2) to redeem the Mortgage on the above property.

The expiry date of this notice is June 30, 1980, on which date the notice is automatically cancelled if payment is not received. We remind you that monthly payments should be kept up-to-date, and approximately three weeks before the expiry date please request a Statement of Account. On

payment of all repayment subscriptions, we will instruct our Attorneys-at-Law to discharge the Mortgage.

Yours faithfully,

Sgd:
For: F. W. HARRISON
MORTGAGE OPERATIONS MANAGER."

This was followed in 1981 by a letter written on behalf of the appellant by Workers Savings and Loan Bank and addressed to Victoria Mutual Building Society. This letter dated July 8, 1981, reads as follows:

"July 8, 1981.

Victoria Mutual Building Society,
73-75 Half Way Tree Road
Kingston 10

Dear Sirs,

Re: Mortgage Account No 92-576-75
Lot 5, Circle Valley, Forest Hills
St. Andrew
Tavares E. Bancroft to Franklin Grier

Our bank will shortly be settling mortgage in respect of the above premises.

Kindly advise us of the balance outstanding at a specific payout date on our undertaking to send you our cheque in exchange for the relevant Certificate of Title in the name of Franklin Grier.

Yours faithfully,

Sgd:
Merlene Graham (Mrs)
Branch Manager
c.c. Mr Michael Vaccianna."

It was in 1982, however, that active steps started to be taken to redeem the mortgages and to exercise the option agreement to transfer the

property to the appellant. The protracted manner in which the matter proceeded was due in no small measure to the conduct of the respondent who in departing these shores in 1977 left no forwarding address where he could be contacted nor did he during the ten years of his absence attempt to get in touch with anyone. Added to this he had left several outstanding debts which had to be satisfied.

In handing over the Transfer document to the appellant to enable the transfer of the property to be effected, the second defendant in his capacity as the Attorney-at-Law for the respondent wrote to Victoria Mutual Building Society. In the letter dated September 21, 1982, Mr Monteith in words which clearly showed that in forwarding the document he was himself acting in the capacity as the respondent's agent, expressed himself in the following manner:

> "21st September 1982
>
> Messrs The Victoria Mutual Building Society,
> 6 Duke Street
> P.O. Box 90
> Kingston.
>
> Attention: Mr Anderson
>
> Dear Sirs,
>
> Re: Transfer – Tavares E Bancroft to
> Franklyn Grier – part of Lot 5 Forest Hills
> St. Andrew
>
> Mr Franklyn Grier now of 17 Belvedere Road, Meadow Bridge P.O., P.O. Box 99, Kingston 10, has consulted me and informed me that you desire the production of the original Instrument of Transfer relating to the above, to enable certain transactions to go through.

2. I had taken the precaution of preparing a Transfer and obtained thereto the signatures of Mr Tavares Ellis Bancroft as Vendor, and Mr Franklyn Grier as Purchaser and which signatures made in my presence were witnessed by me. My file indicates that I did so on or about the 4th August, 1977.

3. By letter dated the 29th March 1979, I informed you that I returned under cover of my letter dated the 14th September 1978, the duplicate Certificate of Title registered at Volume 697 Folio 64 to Messrs Judah Denoes Lake Nunes Scholefield & Co. which letter was for the attention of Mr S. C. Lee.

4. At the time of the execution of the above Transfer and at other times, the Vendor Mr Bancroft informed me that he was returning to England, I fruitlessly inquired his likely place of abode and postal address in that country, but he was unable or unwilling to supply the same. Since his return to England I have not heard from him.

5. I accordingly enclose the above Transfer and at the further request of Mr Grier, set out below the following fees to be paid:

Stamp Duty	$1457.82	
Registration Fees.....	$ 55.00	
My Transfer Tax.....	$2550.00	
Attorney's Costs	$1070.00	$5132.82

6. I will be obliged if you will secure my attorney's fees and let me have your cheque for the same in due course. The transfer is sent to you on this condition. Mr Grier has been provided with a copy of this letter.

Yours faithfully

Sgd: B. K. Monteith

c.c. Mr Franklyn Grier."

Learned counsel submitted that given the contents of the letters and the manner in which they were written there was no basis for the learned judge's findings that the appellant in activating the Transfer document did so in a manner which was calculated to deceive and that he was guilty of fraudulent conduct in registering the transfer of the property.

Given the open manner in which the appellant had set about this task I find that there is much merit in this submission.

In my opinion, the learned trial judge in his judgment correctly found on the weight of evidence that:

> "Having considered the evidence of the witnesses given at the trial, and the evidence of the second defendant given on his deathbed, I am satisfied that the relationship between the plaintiff and the first defendant so far as this property is concerned is embodied in the document headed 'Instrument of Lease under the Registration of Titles Act'. I find that this document was executed by the parties prior to the plaintiff's departure to England. I find also that the plaintiff did execute and leave with the second defendant the document headed Transfer of Land. This latter document was undated and was intended for use later if the occasion arose."

On an examination of the above findings, he accepted that there was a clear and express intention on the part of the respondent to transfer the said property to the appellant for a purchase price of $55,000. In going on, therefore, to then find that there was no agreement for sale, as contended for by the first defendant, the learned trial judge, with the utmost respect erred.

Here was a situation of a plaintiff who was financially embarrassed, his mortgage payments in arrears and in urgent need of capital to be able to

travel to England with his wife who was seriously ill. He turned to his friend who undertook to lease his property with an option to purchase it if he was put in funds to do so. In the interim, a substantial down-payment of $10,000 was advanced to the respondent to finance his trip to England. He was also indebted to the appellant at that time in the sum of over $5,000. There was further an arrears of mortgage payments of over $1000 due on the property from Victoria Mutual Building Society. Added to this was the mortgage debt of over $28,200 due to Victoria Mutual Building Society and of $7,000 due on a second mortgage to the Workers Savings and Loan Bank. There was, further, payments to be made to the utility companies, to clear arrears due for water rates, telephone bills; as well as arrears due for property taxes. When all added together, the total sum was close to, if not in excess of, the agreed consideration price for the property. It would be idle for one to contend otherwise in the existing circumstances, where a party who satisfied his end of the bargain by meeting all these obligations due under the lease agreement in a situation where all such payments made thereunder were to be treated as going in abatement of the purchase price, and in which there was a transfer document duly executed evidencing an intention that the appellant was to have the benefit of the property being transferred to him. It is, therefore, unreasonable to say the least, for the learned judge in the face of such evidence to conclude that, not only was there no intention on the part of the respondent to transfer his property to anyone, moreso to the appellant, but to go on to find the appellant guilty of fraudulent conduct in activating the transfer of the property to himself. The

learned trial judge seems to have rested the finding of fraud on the activation of the transfer document. As to his finding concerning how the document came to be dated, I see no material significance in this aspect of the case. It would have to be dated for the transfer to be effected.

This brings me to the next question, therefore, as to whether the option was exercised. The evidence tends to suggest that it was. Although Workers Bank had been making enquiries on behalf of the appellant from as early as 1981, about discharging the mortgage with Victoria Mutual Building Society, the Statement of Claims given the particulars of fraud alleged in the activation of the transfer document by the insertion of the date would not be a material basis for consideration. On the question of fraud as pleaded such findings by the learned judge, therefore, would be impermissible being contrary to the respondent's case as pleaded.

It was in May 1982, that the appellant attended on the second defendant who, was the attorney-at-law acting for the respondent. In the particular situation in which neither the appellant nor the second defendant knew of the respondent's whereabouts, such notice to the second defendant, acting in the capacity as the respondent's agent of the intended exercise of the option, could be imputed to him.

Irrespective of what may have transpired on the appellant's visit to the second defendant, it was following the handing over of the Instrument of Transfer to the appellant that both mortgages were discharged, as well as payment made of the usual costs attendant on a transfer of property. Such

acts were all incidental in the process of a transfer of property falling under the Registration of Titles Act.

Prior to his departure to England, the respondent was not in a position to meet the mortgage instalments due on the property. Without the timely intervention and assistance of the appellant the property stood to go the route of foreclosure. It is common ground and not in dispute that the real estate market was in a depressed state. The appellant acted by coming to the aid of his "friend," and to be found guilty of fraudulent conduct, as stated in the judgment of the learned judge, was in my opinion, given the pleadings, and an absence of any credible evidence emanating from the respondent in support of what was alleged therein, most inequitable.

Notwithstanding this, however, at the trial of the action in which the respondent in a surprising change of position now sought to admit placing his signature on a lease document which was fully completed, as well as a transfer document, fully engrossed except for the date being inserted, the learned trial judge found in part that:

> " ... there was no agreement for sale, as advanced by the first defendant. Rather, the agreement that existed was a lease agreement which contained an option to purchase. The first defendant who was constantly in consultation with various attorneys-at-law could not have failed to understand that it was a lease and not an agreement for sale.
>
> The first defendant did not faithfully comply with the various terms of the lease. He was often delinquent in the payment of the monthly mortgage amounts to the mortgagee. This caused the mortgagee to be constantly threatening a sale by public auction.

The first defendant did not comply with paragraph 6 of the lease agreement. He claims that he gave written notice to the second defendant. I reject that. It is not without some significance that the first defendant has been unable to produce a copy of that notice. He cannot produce a copy as there was no original. It does not exist. It is also not without some significance that the first defendant who was always in consultation with an attorney-at-law found it convenient to avoid the use of the services of an attorney-at-law to do this most important task. After all, the first defendant would have known that the exercise of the option would have had very important consequences, legal and otherwise, for him and the property.

I find that the plaintiff was not in contact with anyone in relation to the land. He communicated no desire to sell to anyone – not to the first defendant, not to the second defendant. He clearly did not wish to sell. This conduct on the part of the plaintiff cannot be regarded as a waiver. An owner of land who does not wish to sell is not required in the circumstances that obtained in this case to do anything.

The activation of the blank transfer form was done by the first defendant in circumstances where he clearly knew he had no authority or basis so to do. The activation of this transfer form was unauthorized, and calculated to deceive. The second defendant's letter to VMBS makes it clear that he had not heard from the plaintiff. It is also clear that the first defendant had not heard from the plaintiff.

So far as the insertion of the date on the transfer form is concerned, I find that that was done as a result of either the first defendant's conduct or instructions. Workers Bank in its letter dated September 15, 1987, is saying that the transfer was not registered by them or anyone acting on their behalf. So, there is this very strange situation: the first defendant goes to the second defendant and secures possession of the transfer which he takes to VMBS; the latter does nothing with the transfer but points a finger at Workers Bank; the mortgage held by VMBS is paid up by

> Workers Bank; the transfer is registered, and the first defendant's name ends up on the title; all three parties (VMBS, Workers and the first defendant) claim innocence so far as the activities at the Titles Office are concerned. However, the first defendant claims the benefit from all of this. He has asserted that he has a lawful title.
>
> All the circumstances, in my judgment, point unequivocally to the first defendant being involved in fraudulent activity in relation to the registration of the transfer. There is no allegation of a mistake having been made. If there has been no error, then clearly that which has been done was done deliberately." (Emphasis supplied)

In finding that:

> **1.** There was no agreement on the part of the respondent to sell the property to the appellant, and
>
> **2.** That the appellant was guilty of fraudulent conduct in activating the transfer document,

the learned judge fell into error.

It is to the option clause that one has to look to discover the true intention of the parties. The payment of the premium of $10,000 acceded to by the appellant, a claim supported not only in the defence of the second defendant, but also in the evidence deponed to by him; the several payments made by the appellant with the sole purpose of meeting obligations normally failing to be exercised by the respondent, as owner of property; supports a finding of the existence of an agreement for sale of the property to the appellant. Whatever the issue that may have been raised as to the respondent's intention in this regard, would have been resolved by the option clause in the lease document.

The respondent's conduct in failing to provide the appellant, and more importantly his attorney-at-law, over the ten years of his absence from Jamaica with any information as to his whereabouts, would have frustrated any attempt by the appellant to exercise the option in the manner provided for in the option clause in the lease. It was this stance by the respondent that led the second defendant to prepare the transfer document for execution by the parties prior to the respondent's departure for England. As the second defendant indicated, this document, in the absence of the respondent returning to Jamaica or being heard from, being a registrable document could be utilised in carrying into effect what he saw as being the stated intention of the parties.

The handing over by the second defendant to the appellant of the Transfer form in 1982 can be seen in no other way than as providing him with the means of exercising the option by transferring the property. It is significant that in handing over the Transfer form to the appellant for delivery to Victoria Mutual Building Society, he was aware of the purpose for which the document was being requested by the appellant. The letter forwarding the Instrument of Transfer requested the Building Society to protect his interest in relation to his fees which the respondent had not paid prior to his departure to England. Given the respondent's long period of silence, the handing over by the second defendant of the Transfer in his capacity as the respondent's agent can be considered as reasonable conduct on his part given the circumstances of the case.

Conclusion

The respondent in the particulars of fraud set out in the Statement of Claim sought to allege fraudulent conduct on the part of the two defendants named in the suit of which the appellant was one. The rules governing such allegations required the particulars of the fraud to be specifically alleged and to be strictly proven. The standard of proof required was, also, that of beyond a reasonable doubt. It was on the basis of these allegations outlined upon which the respondent relied in seeking to have the transfer of the property in dispute rendered a nullity, and, the property re-transferred to him.

As the evidence clearly showed, the respondent, contrary to his pleadings, signed no blank sheets of paper with the instructions to be filled in afterwards as the Statement of Claim sought to allege. There were two mortgages, to Victoria Mutual Building Society and Workers Savings and Loan Bank, and not one, as the respondent also stated. As to the various advances made on the respondent's behalf by the appellant and the other payments made by him, all in all a substantial benefit to the respondent in respect of which he contributed nothing, the only comment that the respondent was able to proffer was that he had no money so he expected the appellant as his friend to come to his assistance.

The learned trial judge, in assessing the demeanour of the respondent, sought to account for the material conflicts in his testimony attributing this to his state of mind immediately prior to his departure from these shores. What ought to have been the proper approach given the state of the pleadings,

was whether on the evidence adduced the particulars relied on did establish fraud on the standard of proof required. Had he done so, he would have been led to the irresistible conclusion that on the crucial issue of fraud it had not been proven.

The particulars of fraud in the Statement of Claim sought to allege fraudulent conduct on the part of one or both respondents in engrossing two blank sheets of paper headed "Transfer of land under the Registration of Titles Act" and "Lease Agreement". When the respondent failed to adduce credible evidence, supporting, or in proof of such particulars of the alleged fraud that ought to have put an end to the claim in fraud. The learned judge sought to use the insertion of the date in the transfer document as a basis for a finding of fraud on the part of the appellant. Such a conclusion was clearly an impermissible finding, being contrary to the cardinal principles relating to pleadings where fraud is alleged. It bears repeating that fraud, where alleged, must be specifically pleaded in relation to the particulars relied on and strictly proven. The respondent having failed below to prove what was alleged, the claim in fraud accordingly must fail.

The claim in fraud once disposed of, the finding below that the transfer effected under the Registration of Titles Act was, therefore ineffectual the order that the property be re-transferred to the respondent must be set aside.In this regard, proof of actual fraud on the part of the appellant would be the legitimate basis for the learned judge's finding that the transfer was "null and void and of no effect." In this regard, section 161 of the Registration of Titles Act is instructive. It reads as follows:

> "**161.** No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say—
>
> ...
>
> **(d)** the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud."

The burden of proof in establishing fraudulent conduct is no different whether the cause or matter is one of civil or criminal proceedings. It calls for conduct of a dishonest nature on the part of the defendant and the standard of proof is that required in a criminal case, viz., proof beyond a reasonable doubt.

Several cases were cited in argument by counsel for both parties. These cases all have one consistent principle running throughout which established that where fraud is alleged the proof required to establish same must be one of actual, and, not constructive fraud.

The decision of the Board of the Privy Council in ***Assets Co. v Mere Roche*** [1905] A.C. 176 at page 210 is instructive in offering guidance as to the tests laid down where fraud is alleged in a matter such as that before this Court. Lord Lindley stated the law in the following terms:

> " ... by fraud in those Acts is meant actual fraud i.e. dishonesty of some sort, not what is called constructive or equitable fraud as unfortunate expression and one very apt to mislead but often used for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears

> to their Lordships that the fraud which must be proved in order to invalidate the title of the registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries from fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulent or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can properly be acted upon." (Emphasis supplied)

This statement has been followed and applied by this Court in ***Timolll Mylett v Timoll*** SCCA 28/76 (unreported) delivered 5th December, 1980, per dictum of Kerr JA and ***Alele v Honiball and Brown*** SCCA 111/89 (unreported) delivered 14th March 1991.

On the evidence, in this case, in my opinion there was nothing approaching fraud of any degree. Indeed, it was the respondent's long period of absence in circumstances in which he failed to communicate with his attorney-at-law and the appellant as to his whereabouts, while leaving with the said attorney-at-law an undated transfer document if just such a situation came about, and if, the appellant as the purchaser named in the document, wished to take up the offer to purchase the property. The attorney-at-law regarded the Transfer as a registrable document capable of effecting the transfer of the property to the defendant.

The Reliefs Granted at Paragraphs 13(c) and (d) of the Claim

The appellant was the lessee of the said property from August 1977 up to February 2, 1984, when he became the registered fee simple owner of the property. During that period, the lease called for certain obligations to be discharged by him in respect of the payment of the mortgage, rates and taxes, as well as maintaining the demised premises in a good state of repair. There is no evidence that he has sought to furnish the respondent with an account of such sums, if any, which may now be due to the respondent. Had there been such moneys due, the lease called for these sums to be held in escrow for the benefit of the respondent. As there is nothing to indicate whether this course has been followed, it appears to me only just and equitable that the appellant, as ordered by the learned judge below, ought to account to the respondent in respect of the period now under review and that any balance when arrived at be paid over to the respondent. To that extent, I would uphold the decision of the learned trial judge. I would, however, on the substantive issue of fraud, allow the appeal and set aside the judgment entered by Panton, J. (as he then was). I would enter judgment for the appellant.

LANGRIN, J.A:

This is an appeal by the defendant from a judgment given at the trial of an action in which the plaintiff sought a declaration that the purported Instrument of Transfer dated the 17th day of December, 1979 and the subsequent registration thereof were procured by fraud and are null, void and of no effect whatever and also an award of damages.

When the matter came before the judge he found that fraud was proved and granted a declaration that the purported Instrument of Transfer dated the 17th day of December, 1979 and the subsequent registration thereof were procured by fraud and are null, void and of no effect whatever.

The plaintiff was the registered proprietor of an estate in fee simple, in all that parcel of land part of Forest Hills in the parish of Saint Andrew registered at Volume 1155 Folio 537 of the Register Book of Titles.

In the year 1977, the plaintiff decided to emigrate to England and to lease the said premises to the defendant for a period of ten years at a rental of $500 per month. The lease was to commence on August 1, 1978 and terminate on July 31, 1988. About the first week of August, 1977 the plaintiff and defendant attended the offices of Mr. B.K. Monteith, Attorney-at-law to whom the plaintiff gave instructions to prepare a lease agreement

which also conferred on the defendant an option to purchase. The option stated thus:

> "If the Tenant shall desire to purchase the reversion in fee simple in the premises hereby demised and shall not less than three months before the expiration of any year of the term hereby granted give to the Landlord notice in writing of such desire then the landlord hereby covenants that he will upon the expiration of such notice and upon payment of the sum of $55,000.00 together with all arrears of rent up to the expiration of the notice and interest or the said sum of $55,000.00 at the rate of $12.00 per cent per annum from the expiration of the notice until actual payment thereof assure the demised premises to the Tenant in fee simple for all the estate and interest of the Landlord therein or until the said sum of $55,000.00 together with interest as aforesaid and the said arrears of rent shall have actually been paid this lease shall continue in full force and the Tenant shall not be released from any of his obligations hereunder.
>
> **PROVIDED** that on completion of the purchase in exercise of the said option, the Landlord shall take into account the premium of $10,000.00 paid by the Tenant and all payments under the said mortgage made by the tenant and treat and apply the same as a part- payment towards the said purchase price of $55,000.00 and the said purchase price shall abate accordingly".

There is also an unusual clause in the agreement which needs to be stated. It is a follows:

> "In consideration of the Tenant having entered into this Agreement, the Tenant will at his sole cost and expense execute or cause to be executed such works and things as are necessary(the consent of the Mortgagee being first had and obtained) to render and make the main building on the said demised premises into two-bedroom self-contained flats (not

> exceeding four such self-contained flats) in accordance in all respects with and subject to the drawings and specifications of works to be annexed hereto and in accordance with the requirements of the relevant local authorities, the said works and things shall be completed on or before the exercise of the date of the option to purchase hereinafter contained and completion of any purchase under the said option shall be taken as an unconditional expression of satisfaction with the acceptance of all the said works and things."

The plaintiff also gave Mr. B.K. Monteith instructions to prepare a Transfer of the plaintiff's interest in the land, pursuant to the agreement between the parties. Both parties signed the lease agreement with option to purchase as well as an undated Instrument of Transfer in the presence of the Attorney-at-Law, Mr. B. K. Monteith.

In the Statement of Claim the plaintiff alleged that the Transfer and the subsequent registration thereof in favour of the defendant were effected by the fraudulent conduct of either the first or the second defendant or both of them acting together. The particulars of fraud were stated as follows:

> "(i) Acquiescing in engrossing or causing to be engrossed an Instrument of Transfer over the signature of the plaintiff while well knowing that that was contrary to the plaintiff's express instructions.
>
> (ii) Presenting or causing to be presented for registration a fraudulent document.
>
> (iii) Procuring discharges of mortgages without the plaintiff's knowledge or consent.
>
> (iv) Conspiring to deprive the plaintiff of his interest in the said land."

On the basis of these assertions, the plaintiff by his pleadings in the original form claimed:

> "(a) A declaration that the purported Instrument of Transfer dated the 17th day of December, 1979 and the subsequent registration thereof were procured by fraud and are null, void and of no effect whatever;
>
> (b) An Order directing the Registrar of Titles to cancel the entry in the Register Book dated the 2nd day of February 1988 transferring the premises registered at Volume 1155 Folio 537 to the first named Defendant;
>
> (c) An Order that the defendants account to the plaintiff;
>
> (d) An Order for the payment of all moneys of the plaintiff found to be due to him from the defendants on the taking of such accounts;
>
> (e) Damages against both defendants."

The plaintiff issued proceedings against Mr. Monteith for fraud but these proceedings were withdrawn at the commencement of the trial.

The judge rejected the evidence of the plaintiff who denied signing the transfer and also denied signing the lease in blank. He found that the document headed **"Instrument of Lease under the Registration of Titles Act"** was executed by the parties prior to the plaintiff's departure to England. He also found that the plaintiff did execute and leave with Mr. Monteith the document headed **"Transfer of Land."** The document was undated and was intended for use later if the need arose. However, the

judge found that "the activation of the blank transfer form was done by the defendant in circumstances where he clearly knew he had no authority or basis so to do. The activation of this transfer form was unauthorised and calculated to deceive..."

The defendant now appeals from this judgment and relies broadly on the following grounds of appeal:

> "(1) The learned judge having found as a fact that the Respondent executed the Instrument of Transfer, had rejected the basis on which fraud had been alleged in the Statement of Claim and it was not open to him to find or infer fraud on the part of the appellant on any other bases.
>
> (2) There was no evidential basis on which the learned judge could properly hold that the appellant had been involved in fraudulent activity whether as pleaded or at all".

What has emerged from the evidence is that in July 1981 Workers Bank gave notice to Victoria Mutual Building Society that they would be discharging the mortgage on the property and asked for particulars of the balance outstanding.

On 21st September, 1982 Mr. Monteith wrote to Victoria Mutual Building Society enclosing the original Instrument of Transfer. It is necessary to state the contents of this letter:

> "Dear Sirs,
>
> Re: Transfer –Tavares E. Bancroft to Franklyn Grier-
> part of Lot 5 Forest Hills, St. Andrew

Mr. Franklyn Grier now of 17 Belvedere Road, Meadow Bridge P.O., P.O. Box 99, Kingston 10 has consulted me and informed me that you desire the production of the original Instrument of Transfer relating to the above to enable transactions to go through.

I had taken the precaution of preparing a Transfer and obtained thereto the signatures of Mr. Tavares Ellis Bancroft as Vendor, and Mr. Franklyn Grier as Purchaser and which signatures made in my presence were witnessed by me. My file indicates that I did so on or about the 4th August, 1977.

By letter dated 29th March, 1979 I informed you that I returned under cover of letter dated the 14th September, 1978 the duplicate Certificate of Title registered at Volume 697 Folio 64 to Messrs Judah Desnoes Lake Nunes Scholefield & Co. which letter was for the attention of Mr. S. C. Lee.

At the time of the execution of the above Transfer and at other times, the Vendor Mr. Bancroft informed me that he was returning to England. I fruitlessly inquired his likely place of abode and postal address in that country, but he was unable or unwilling to supply the same. Since his return to England I have not heard from him.

I accordingly enclose the above Transfer and at the further request of Mr. Grier, set out below the following fees to be paid:-

Stamp Duty.....	$1457.82
Registration Fee.....	$ 55.00
My Transfer Tax.....	$2550.00
Attorney's Costs	$1,070.00
	$5,132.82
	======

I will be obliged if you will secure my attorney's fees and let me have your cheques for the

same in due course. The Transfer is sent to you on this condition..."

Yours faithfully

B. K. Monteith
c.c. Mr. Franklyn Grier."

It was common ground at the trial that the plaintiff went to England leaving no address with his attorney or the defendant. He stayed away for ten (10) years and made no communication or enquiry about the property.

In June, 1983 the indebtedness to Victoria Mutual Building Society from the plaintiff was discharged by Workers Bank on behalf of the defendant. The Instrument of Transfer with discharge of mortgage was sent by Victoria Mutual Building Society to Workers Bank. From the document lodged with the Registrar of Titles on 12th January, 1984, it would appear that Workers Bank lodged the Instrument of Transfer for registration. On 2nd February, 1984 the Transfer was registered in the Register Book of Titles.

In the pleadings the plaintiff in his claim sets out specific allegations of fraud by the defendant and Mr. Monteith, who was sued as the second defendant. The essence of the allegations was, that, the plaintiff had signed a blank sheet of paper, believing it to be for the purpose of engrossing thereon the terms of a lease agreement, and the defendant and Mr. Monteith had engrossed thereon an Instrument of Transfer and had then used the transfer to deprive the plaintiff of his land. The defendant denied fraud and

said that the plaintiff had signed an undated Instrument of Transfer. Mr. Monteith likewise denied fraud and said that the plaintiff had signed an undated Instrument of Transfer. At the trial the plaintiff said he no longer alleged fraud against Mr. Monteith (who was then deceased). Judgment was entered for Mr. Monteith against the plaintiff with costs.

The judge himself summarized the plaintiff's submission on the law and his conclusions based on that submission in the following passages of his judgment:

> "The activation of the blank transfer form was done by the first defendant in circumstances where he clearly knew he had no authority or basis so to do. The activation of this transfer form was unauthorized, and calculated to deceive. The second defendant's letter to VMBS makes it clear that he had not heard from the plaintiff. It is also clear that the first defendant had not heard from the plaintiff. So far as the insertion of the date on the transfer form is concerned, I find that that was done as a result of either the first defendant's conduct or instructions. Workers Bank in its letter dated September 15, 1987, is saying that the transfer was not registered by them or anyone acting on their behalf. So, there is this very strange situation: the first defendant goes to the second defendant and secures possession of the transfer which he takes to VMBS; the latter does nothing with the transfer but points a finger at Workers Bank; the mortgage held by VMBS is paid up by Workers Bank; the transfer is registered, and the first defendant's name ends up on the title; all three parties (VMBS, Workers and the first defendant) claim innocence so far as the activities at the Titles Office are concerned. However, the first defendant claims the benefit from all of this. He has asserted that he has a lawful title".

And again he said:

> "The first defendant did not comply with paragraph 6 of the lease agreement. He claims that he gave written notice to the second defendant. I reject that. It is not without some significance that the first defendant has been unable to produce a copy of that notice. He cannot produce a copy as there was no original. It does not exist. It is also not without some significance that the first defendant who was always in consultation with an attorney-at-law found it convenient to avoid the use of the services of an attorney-at-law to do this most important task. After all, the first defendant would have known that the exercise of the option would have had very important consequences, legal and otherwise, for him and the property".

The essential issue in the appeal is whether the defendant was guilty of fraudulent conduct in so activating the transfer knowing that the option had not been exercised.

Counsel for the defendant in the course of his helpful arguments on appeal submitted that there was no evidential basis for the judge's finding that all the circumstances point unequivocally to the defendant being involved in fraudulent activity in relation to the registration of the Transfer. The judge did not specify what the fraudulent activity was and clearly it was not any of the activities pleaded by the plaintiff in his particulars of fraud. He further submitted that once those particulars, especially the use of a blank document and conspiracy failed, as they did, the only finding which the judge could properly make was that the claim failed.

The registration of the Transfer in the name of the defendant can only be invalidated on proof of fraud. Section 161 of the Registration of Titles Act states that:

> "**161.** No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the persons registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say—
>
> (a) – (c)...
>
> (d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."

The burden which is a high one, lies on him who alleges fraud. It requires proof of actual dishonesty on the part of the defendant. Constructive fraud is not enough. A failure to comply with a contractual requirement does not amount to fraud.

It is common ground that we should apply the general principles summed up by Carey JA in ***Christian Oritsetimeyin Alele and Robert D. Honiball and George A. Brown*** SCCA 111/89 (unreported). For the case on appeal see ***Honiball*** and ***Brown v A.lele*** (1993) 30 JLR 373 (Privy Council). The legal position under the Torrens System in Australia relating to fraud was summarized as follows:

> "(1) No definition is given, either by statute or by judicial decision of what constitutes fraud, nor, it seems, is any such definition possible.

(2) Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.

(3) Fraud must involve an element of dishonesty or moral turpitude.

(4) Notice of the existence of any trust, or unregistered instrument, does not of itself constitute fraud, but may be an element in the establishment of the existence of fraud.

(5) Abstaining from inquiry, when suspicions have been aroused, may constitute fraud.

(6) The presentation for registration of a forged or fraudulently obtained instrument does not constitute fraud if the person presenting it honestly believes it to be a genuine document.

(7) The fraud to which the sections refer is that of the registered proprietor or his agent".

In ***Assets Co. v Mere Roihi*** (1905) A.C. 176 at p. 210 Lord Lindley had this to say:

> "...A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

The submissions of counsel for the plaintiff had a somewhat legal attraction which the judge found acceptable notwithstanding the judge's rejection of the plaintiff's evidence relating to the central issues of fraud. In my judgment however, the argument is unsound. The defendant had recourse to an attorney representing the plaintiff who clearly knew what was going to happen. Mr. Monteith assisted in the process of the exercise of the

option and in the circumstances before us it cannot be said that Mr. Monteith in sending the Transfer to Victoria Mutual Building Society had not done so in order to facilitate the transfer to the defendant when the defendant was able to discharge the mortgages. In any event a breach of the option clause without being specifically pleaded cannot form the basis of fraud against the plaintiff. Further the particulars of fraud were not supported by evidence. The learned judge was wrong in holding that the insertion of the date on the transfer form was done as a result of the defendant's conduct or instruction. There was no credible evidence as to the insertion of the date. However, the insertion of a date on a transfer form which the plaintiff had signed and intended to be acted on in a certain eventuality would not amount to fraudulent conduct without more on the part of one who had fulfilled that eventuality.

Against the background of the lease agreement including the option to purchase coupled with the lack of communication by the plaintiff as well as his protracted absence abroad, the defendant was entitled to assume that the attorney acting as the agent of the plaintiff was assisting in the implementation of the intention of the parties. It must be taken that the defendant honestly believed that the Transfer was a genuine document intended to be acted upon.

For the reasons stated, I respectfully disagree with the judge's conclusion that fraud has been proven against the defendant. I would set

aside his order in part and order that judgment be entered for the defendant. I would be prepared to make an order for payment of all monies to the plaintiff found to be due to him from the defendant on the taking of such accounts.

HARRISON, J.A. (DISSENTING)

This is an appeal from the judgment of Panton, J., (as he then was) on 20th December, 1996, granting a declaration on the plaintiff's claim that the Instrument of Transfer dated 17th December, 1979,and the registration thereof were procured by fraud and consequently null and void.

The facts are that in 1977, the respondent decided to return to England due to the ill-health of his wife. He was the registered owner and resided at premises at Forest Hills in the parish of Saint Andrew registered at Volume 1155 Folio 537 of the Register Book of Titles. The respondent had discussions with the appellant, his friend, and as a result they attended the office of Mr B. K. Monteith, an attorney-at-law, originally the second defendant in the suit. Mr Monteith, on the agreement of the parties drafted a lease agreement between the respondent and the appellant, with an option to purchase the said premises and a Transfer, which latter document was undated. The parties signed both documents in May, 1977. The respondent left for England in August, 1977.

The lease document at page 147 of the record, was for a period of five years commencing on 2nd May 1977, with an obligation the appellant, in clause 1(a):

> **"(a)** ...paying therefore during the term hereby granted the yearly rent of $5,400.00 clear of all deductions to be paid by equal monthly instalments in advance on the 1st day of each and every month in each and every year the first of such payments to be made on the 2nd day of May 1977."

The said lease required the appellant in clause 1(b):

> **"(b)** On the day of the execution hereof by the parties hereto, to pay to the landlord or his agent or Attorney-at-Law the premium of $10,000.00

> (hereinbefore mentioned) to be applied in the discharge of the arrears of the said mortgage and telephone charges as hereinbefore recited."

There then followed in the said lease document, the usual covenants by the landlord (respondent) and the tenant (appellant), and in clause 5, the following provision:

> "**(5)** In consideration of the Tenant having entered into this Agreement, the Tenant will at his sole cost and expense execute or cause to be executed such works and things as are necessary (the consent of the mortgagee being first had and obtained) to render and make the main building on the said demised premises into two-bedroom self-contained flats (not exceeding for such self-contained flats) in accordance in all respects with and subject to the drawing and specifications of works to be annexed hereto and in accordance with the requirements of the relevant local authorities."

The lease document then contained the all-important option clause which reads:

> "**(6)** If the Tenant shall desire to purchase the reversion in fee simple in the premises hereby deemed and shall not less than three months' before the expiration of any year of the term hereby granted give to the Landlord notice in writing of such desire then the Landlord hereby covenants that he will upon the expiration of such notice and upon payment of the sum of $55,000.00 together with all arrears of rent up to the expiration of the notice and interests of the said sum of $55,000.00 at the rate of $12.00 per cent per annum from the expiration of the notice until actual payment thereof assure the demised premises to the Tenant in fee simple for all the estate and interest of the Landlord therein or until the said sum of $55,000.00 together with interest as aforesaid and the said arrears of rent shall have actually been paid this lease shall continue in full force and the Tenant shall not be released from any of his obligations hereunder.

> PROVIDED that on completion of the purchase in exercise of the said option, the Landlord shall take into account the premium of $10,000.00 as paid by the Tenant and all payments under the said mortgage by the Tennant and treat and apply the same as a part-payment towards the said purchase price of $55,000.00 and the said purchase price shall abate accordingly."

The appellant entered into possession of the said premises as the tenant under the said lease.

Furthermore, the said lease recognized the existence of a mortgage to Victoria Mutual Building Society on the said premises, at page 146,

> " ... MORTGAGE No. 239269 to The Victoria Mutual Building Society as Mortgagors dated the 10th day of April 1972 and registered at the Office of Titles on the 11th day of April 1972 to secure the sum of $28,200.00 with interest thereon."

making provision for the lessee/tenant to deal with it, in the landlord's absence. The lease further reads, at page 146:

> "AND WHEREAS on the 1st day of May 1977 there remained unpaid in respect of the principal moneys and interest secured by the said mortgage the sum of $ and the sum of $1,122.00 for arrears of mortgage instalments.
>
> +
>
> AND WHEREAS the Landlord and the Tenant have mutually agreed that as from the 2nd day of May 1977:
>
> **(a)** The tenant will discharge and pay out of the premium of $10,000.00 (hereinafter mentioned) all arrears due and owing by the Landlord for Principal and interest and other moneys under the said mortgage up to the 30th day of April 1977 and the arrears then due for telephone charges; and
>
> **(b)** all and every the monthly mortgage instalments of $374.00 out of the moneys payable for rent hereunder as provided in

> the said mortgage and for the due and punctual performance and observance of all the covenants obligations and stipulations on the part of the Landlord contained in the said mortgage to the extent and in so for as the provisions of these presents shall thereto extend."

Mr Monteith was in possession of the said Transfer. The respondent went to England leaving no forwarding address, nor any address where he could have been contacted. He returned to Jamaica in 1987 after an absence of ten years. He went to the said premises and spoke to the appellant. The respondent discovered that the registered title was no longer in his name, but in the name of the appellant.

In the respondent's absence, the appellant requested that Mr Monteith send the abovementioned Transfer in respect of the said premises to Victoria Mutual Building Society. Mr Monteith did so by letter dated 21st September, 1982, which reads at page 118:

> "Messrs The Victoria Mutual Building Society,
> 6 Duke Street
> P.O. Box 90
> Kingston.
>
> Attention: Mr Anderson
>
> Dear Sirs,
>
> Re: Transfer- Tavares E. Bancroft to Franklyn Grier - part of Lot 5 Forest Hills, St Andrew
>
> Mr Franklyn Grier now of 17 Belvedere Road, Meadow Bridge, P.O. Box 99, Kingston 10, has consulted me and informed me that you desire the production of the original Instrument of Transfer relating to the above to enable certain transactions to go through.

2. I had taken the precaution of preparing a Transfer and obtained thereto the signature of Mr Tavares Ellis Bancroft as Vendor, and Mr Franklyn Grier as Purchaser and which signatures made in my presence were witnessed by me. My file indicates that I did so on or about the 4th August 1977.

3. By letter dated the 29th March 1979 I informed you that I returned under cover of my letter dated the 14th September 1978 the duplicate Certificate of Title registered at Volume 697 Folio 64 to Messrs Judah Desnoes Lake Nunes Scholefield & Co. which letter was for the attention of Mr S.C. Lee.

4. At the time of the execution of the above Transfer and at other times, the Vendor Mr Bancroft informed me that he was returning to England. I fruitlessly inquired his likely place of abode and postal address in that country, but he was unable or unwilling to supply the same. Since his return to England I have not heard from him.

5. I accordingly enclose the above Transfer and at the further request of Mr Grier, set out below the following fees to be paid:

Stamp Duty $1457.82
Registration Fees .....$ 55.00
My Transfer Tax $2550.00

Attorney's Costs $1070.00 $5132.82

6. I will be obliged if you will secure my attorney's fees and let me have your cheque for the same in due course. The Transfer is sent to you on this condition. Mr Grier has been provided with a copy of this letter."

By letter dated 1st November 1982, the acting mortgage manager of Victoria Mutual Building Society wrote to Mr Monteith, acknowledging receipt of the said Transfer, stating that:

> "... the Society is now in a position to accept the wishes of Mr Bancroft ..." (Emphasis added)

The said letter continued, at page 110 of the record:

> "Please note however, that we will only release the relevant duplicate Certificate of Title after the amount owing by Mr Bancroft has been settled, or upon receipt of an undertaking from the Workers Savings and Loan Bank that the balance will be paid by them. (The bank has already indicated their willingness to do so).
>
> It is therefore suggested that you discuss the matter further with Mr Grier and inform us which of the above-mentioned methods will be used to give effect to the desired Transfer.
>
> We enclose a statement of Mr Bancroft, account, showing the balance owing at November 30, 1982.
>
> Yours faithfully,
>
> RAYMOND ANDERSON
> ACTING MORTGAGE MANAGER
>
> c.c. Mr Grier
>
> Mr Grier:
>
> Kindly discuss with the Workers Savings and Loan Bank."

Workers Savings and Loan Bank held a mortgage on the said property of the since, presumably, 1973. A letter dated 26th November, 1973, was written by Workers Savings and Loan Bank and Victoria Mutual Building Society, in that respect. It reads at page 91:

> "Tavares E. Bancroft
>
> Mr Bancroft has approached us for credit facilities and has offered as collateral his property which is part of Circle Valley, Forest Hills, St Andrew.
>
> However, your Company is currently holding a first mortgage on the said property and accordingly, we

> are hereby requesting the loan of the relative Certificate of Title in order that we may record our second mortgage to the extent of $7,000.
>
> If our request meets with your approval, please be good enough to forward this document to us at 9C Constant Spring Road, Kingston 10, at your earliest convenience."

By letter dated 7th June, 1974, Workers Savings and Loan Bank, returned the said title registered at Volume 697 Folio 64 to Victoria Mutual Building Society stating,

> " ... we thank you for having afforded us the use of same to record our Second Mortgage."

The said lease agreement dated 2nd May 1977, did not however, refer to the mortgage held on the said premises by Workers Savings and Loan Bank.

The respondent said at page 75:

> "The Workers Bank arrangement was not mentioned in Lease but it was mentioned to Mr Monteith."

In the years 1974 and 1975, letters of notice of default and threats to sell the said property by public auction in the exercise of its power of sale were sent out to the respondent by Victoria Mutual Building Society, the latter of which letters dated 7th February 1975, was copied both to Workers Savings and Loan Bank and curiously, to the appellant.

By letter dated 12th March 1975, Workers Savings and Loan Bank advised Victoria Mutual Building Society that the respondent's indebtedness to the former by way of mortgage on the said property was $8,557.00.

Thereafter, the respondent continued to experience difficulties in paying off the arrears of his mortgage. Consequently, and in addition to his wife's ill

health, the said lease agreement of 2nd May 1977, was entered into. By letter dated 28th April 1980, from Victoria Mutual Building Society to the appellant, the former acknowledged receipt of the appellant's letter to Victoria Mutual Building Society dated 10th March 1980, giving notice to redeem the mortgage on the said property.

Workers Savings and Loan Bank, by letter dated 8th July 1981, signed by Mrs Merlene Graham, Branch Manager, wrote to Victoria Mutual Building Society, expressing their intention to settle the mortgage held by Victoria Mutual Building Society on the said property and continued as at page 108 of the record:

> "Kindly advise us of the balance outstanding at a specific payout date on our undertaking to send you our cheque in exchange for the relevant Certificate of Title in the name of Franklyn Grier."

The mortgage held by Workers Savings and Loan Bank on the said property had been paid off on 26th January 1978. By letter dated 1st February 1982, signed by the said Merlene Graham of Workers Savings and Loan Bank to Messrs Kelly, Vaccianna & Whittingham, attorneys-at-law, the latter was informed:

> "Dear Sirs,
>
> Re: Lot 5 Circle Valley, Forest Hills
> Tavares Bancroft to Franklyn Grier
>
> With reference to your letter dated 28th January, 1982 with regards to captioned matter, we hereby confirm that our records indicate that outstanding debt of over $10,000 owed to us by Mr. Tavares Bancroft was settled by Mr. Franklyn Crier on the 26th January, 1978.
>
> Yours faithfully,
>
> Merlene Graham (Mrs.)

Branch Manager."

There then followed, a series of letters signed by the said Mrs Merlene Graham from Workers Savings and Loan Bank to Victoria Mutual Building Society, in respect of the discharge of the said mortgage account No. 92-576-75 held by Victoria Mutual Building Society on the said premises of the respondent:

(1) Letter dated 4th May 1983, which reads, inter alia,

> "Reference is made to your letter to us dated 21/7/83, at which time we requested you to send us the duplicate Certificate of Title along with the relative discharge of mortgage for captioned premises in exchange for our cheque for $7,328.72 in full settlement."

(2) Letter dated 3rd June 1983, which reads inter alia,

> "Further to our letter dated 4/5/83, we enclose herewith our cheque numbered 8445 for $8,240.80 as full and final settlement of mortgage outstanding.
>
> In exchange, kindly send us immediately the relevant Certificate of Title along with the Discharge of Mortgage
>
> Yours faithfully,
>
> Merlene Graham (Mrs.)
> Branch Manager
>
> P.S. Kindly note that we already hold a second mortgage on this property." (Emphasis added)

(3) Letter dated 13th June 1983, which reads,

> "With reference to telephone conversation of even date (Anderson/Graham), enclosed herewith is our cheque numbered 8471 for $388.25 to cover short payment of the above mortgage.
>
> We now look forward to receiving the Certificate of Title and your executed Discharge of Mortgage."

(4) Letter dated 8th July 1983, which reads,

> "The above account was settled by us on 9th June 1983, and to date, we have not received the relevant Certificate of Title along with your executed Discharge of Mortgage and original Transfer.
>
> We would appreciate your immediate attention to this matter as it has been long outstanding."

(5) Letter dated 4th August 1983, which reads,

> "This is our second request for you to send us the Certificate of Title along with the original Transfer in respect to the abovementioned.
>
> We had already settled with account on the 9th June, 1983, and we hold a second mortgage on the said premises."

The mortgage loan held by Victoria Mutual Building Society was eventually repaid on 16th June 1983.

By letter dated 31st August 1983, from Victoria Mutual Building Society to Messrs Myers, Fletcher and Gordon, attorneys-at-law, and copied to Workers Savings and Loan Bank, and to Tavares Bancroft, Lot 5 Circle Valley, the duplicate Certificate of Title and executed discharge of mortgage in respect of the said premises were dispatched. It reads at page 111:

> "Dear Sirs
>
> Subject: Mortgage No. 92-576-75
> Premises: Lot 5, part of Forest Hills, St. Andrew
> Mortgagor/s: TAVARES BANCROFT
>
> The amount due to the Society to settle the above mentioned mortgage was repaid by Workers Savings and Loan and we have been instructed by the Mortgagor/s to send the Duplicate Certificate of Title and

executed Discharge of Mortgage to Workers Savings and Loan Bank.

We enclose herewith the Duplicate Certificate of Title registered at Volume 1155 Folio 587 together with the Discharge of Mortgage and ask that you act for the Society and forward same to

As an indication that you, have received the within mentioned documents, please sign and return the copy of this letter which is also enclosed.

Yours faithfully,
THE VICTORIA MUTUAL BUILDING SOCIETY

For: R. ANDERSON (MR)
ACTING MORTGAGE MANAGER

ENCLS.

c.c. Workers Savings and Loan Bank
161-163 East Street
KINGSTON
c.c. Tavares Bancroft
Lot 5, Circle Valley."

The transfer document in respect of the said premises, signed by the appellant and the respondent in May 1977, was registered by Workers Savings and Loan Bank, on 2nd February 1984, transferring the said premises from the respondent to the appellant, "Consideration money Fifty-Five Thousand Dollars".

The said transfer was dated 17th December 1979.

The Statement of Claim reads, inter alia, in paragraph 12 on page 6 of the record:

> " ... the transfer and the subsequent registration thereof in favour of the first named defendant were effected by the fraudulent conduct of either the first or the second defendant or both of them acting together.

PARTICULARS OF FRAUD

(1) Acquiescing in engrossing or causing to be engrossed an Instrument of Transfer over the signature of the plaintiff while well knowing that that was contrary to the plaintiff's express instructions.

(ii) Presenting or causing to be presented for registration a fraudulent document.

(iii) Procuring discharges of mortgages without the plaintiff's knowledge or consent.

(iv) Conspiring to deprive the plaintiff of his interest in the said land."

Lord Gifford counsel for the appellant argued that there was no basis on which the learned trial judge should have found that the appellant was involved in any fraudulent activity and having found that the respondent executed the said Instrument of Transfer, thereby rejected the basis on which the respondent complained of fraud. The appellant acted honestly. He settled the Workers Savings Loan Bank mortgage debt, "procured the settlement of the whole of the debt to Victoria Mutual Building Society" and acquired the said premises in keeping with the intention of the respondent to sell to the appellant when the latter paid off the said mortgages. There was no evidential basis to find that the appellant committed fraud or from which fraud could be inferred.

Mr Morrison argued that the terms of the lease included an option to purchase which had not been exercised by the appellant and therefore (having knowledge of this) the appellant was guilty of fraudulent conduct when he activated the transfer of the said premises, knowing that the relevant conditions of the lease in relation to the said option had not been fulfilled. He concluded that the appellant was guilty of actual fraud.

The registration of a Transfer under the provisions of the Registration of Titles Act effectively transfers the legal estate on the premises to the transferee. It is conclusive evidence that the latter is entitled to the legal estate therein, and such Title cannot be vitiated except by fraud (Section 68 to 71 of the said Act.) Section 70 reads:

> **"70.** Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described as identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

However, a person who claims to have been deprived of such premises may bring an action to recover the said premises. Section 161 reads:

> **"161.** No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say,
>
> ...
>
> **(c)** the case of a person deprived of any land by fraud as against the person registered as proprietor of such land

> through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.

The nature of the fraud that would suffice to defeat such a registered Title is actual fraud.

In the case of **Assets Co. Ltd. v Mere Roihi** [1905] A.C. 176, the Judicial Committee of the Privy Council referred to the nature of fraud, in construing sections of the Land Transfer Act (1870) (New Zealand), as it affected the registration of titles under the said Act.

Lord Lindley said, at page 210:

> " ... by fraud in these Acts is meant actual fraud i.e. dishonesty of some sort ... A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

The necessity to point to dishonesty in the conduct The necessity to point to dishonesty in the conduct of a person against whom dishonesty is alleged, was reinforced by the Judicial Committee of the Privy Council in ***Waimiha Sawmilling Company Limited* v *Waione Timber Company Limited*** [1923] NZLR 1137 (C.A.); [1926] A.C. 101 upholding the decision of the majority discuss that there was no moral fraud in a defendant who took a transfer of land, after a caveat by a plaintiff had been removed and before an appeal against the order had been heard. The opinion of the Board (per Lord Buckmaster) was:

> "If the designed object of a transfer be to cheat a man of a known existing right, that

> is fraudulent, and so also fraud may be established by a deliberate and dishonest risk causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."

The case therefore, reveals that fraud is incapable of any general definition and each case must be considered on its peculiar set of circumstances. In ***Merrie v McKay*** (1897) 16 NZLR 124, Prendegast, CJ in defining fraud as it applied under the Torrens system said:

> "If the defendant acquired the title intending to carry out the agreement with the plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavouring to make use of the position he has to deprive the plaintiff of his rights, under the agreement. <u>If the defendant acquired his registered title with a view to depriving the plaintiff of those rights, then the fraud was in acquiring the registered title.</u>" (Emphasis added)

In respect of an option to purchase, the law requires that it must be strictly exercised and within the stipulated time otherwise it will lapse. In Halsbury's Laws of England, (4th Edition) Volume 27 (1) in respect of the exercise of an option it was said, at paragraph 115:

> "A tenant who wishes to exercise an option to renew must conform with the conditions in the lease as to its exercise, and those conditions will be strictly construed. In general the option must be exercised by a notice given at or before the stated time before the termination of the lease."

In ***Hare v Nicoll*** [1966] 1 All E.R. 285, the plaintiff had an option to purchase shares held in trust by the defendant to be exercised if he gave notice in writing of his intention to purchase the shares, "before May 1, 1963" and "on payment of the price before June 1, 1963." The plaintiff gave written notice which was accepted as given before May 1, 1963, but failed to pay the price by June 1, 1963. The defendant gave the plaintiff notice that the option was terminated and thereafter disposed of her interest in the shares. On June 7, 1963, the plaintiff tendered a banker's draft as payment of the price of the shares. The plaintiff as a consequence claimed damages for breach of the option agreement. The trial judge found in favour of the defendant. On appeal, dismissing the appeal, it was held that the defendant was not in breach of the option agreement and the plaintiff was not entitled to damages. Willmer, LJ at page 289 said:

> "It is well established that an option for the purchase or re-purchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option. In the present case, cl. 2 of the agreement prescribes two specific dates: (i) a date before which the plaintiff must give notice of his desire to re-purchase the shares, and (ii) another date before which he must make his payment of the purchase price. I entertain no doubt that the two conditions as to date would have to be strictly complied with if he desired to avail himself of the privilege conferred."

Explaining the nature of the option, Winn, L.J. at page 294 said:

> "The whole provision represented a restraint or clog on the defendant's freedom to dispose for her

> own advantage of property sold to her in the initial stage of the transaction up to the end of April, 1963, capable of being extended throughout May, 1963, by a duly given notice. It was of manifestly essential importance to her that she should know precisely the duration of that restraint, and should be free from it unless the condition on which it was accepted by her were strictly complied with." (Emphasis added)

In the instant case, the said lease agreement specifically provided for the payment of the arrears of mortgage by the appellant and for "all and every the monthly installments of $374.00 out of the monies payable for rent." Under the lease the "yearly rent of $5,400.00 clear of all deductions to be paid by equal monthly installments ..." meant that the appellant held the sum of $450.00 rent each month from which he was obliged to pay on behalf of the respondent, the sum of $374.00 monthly to Victoria Mutual Building Society as mortgage payment. This would leave with him a balance of $176.00 each month as from the month of May 1977, which monies belonged to the respondent Bancroft. The appellant admitted in cross-examination at page 75:

> "I was to pay the monthly payments directly to Victoria Mutual Building Society.
>
> I have never rendered an account to Mr Bancroft for rents collected from that property."

The fact that the mortgage payment to Victoria Mutual Building Society fell into arrears after May 1977, was the fault of the appellant who was obliged to pay the rent under the lease agreement. He agreed in cross-examination;

> "I agree that my obligation to pay the rent under the lease agreement was not tied to the presence of tenants."

It is therefore obvious that the respondent and the appellant agreed by the terms of the said lease that the monthly mortgage payment to Victoria Mutual Building Society would have been completely satisfied from the monthly rent payable by the appellant.

The appellant further said in cross-examination at page 69:

> "From 1977 I continued the monthly payments on the V.M.B.S. mortgage".

and on being shown a statement, said also at page 69:

> "I see balance of $32,322.93. Between 31st December and time mortgage paid off entirely, I made the payments for all period".

These payments would have been from the monthly rent due from him under the lease, and payable to the respondent. It is therefore less than ingenious and contrary to any term of the lease contract when the appellant, without specific reference to the monthly rental payments said, at page 69:

> "My understanding was that from the Agreement I should pay up mortgage and debts set this off against the purchase price and apply for option."

All the mortgage payments were from rent monies, the property of the respondent.

The mortgage held by Workers Bank amounting to $8,557.10 on 12th March, 1975, was paid off by the appellant on 26th January, 1978, out of the then $10,000.00, thereby discharging that said mortgage.

When therefore by letter dated 3rd June 1983, from Workers Bank to Victoria Mutual Building Society enclosing "cheque numbered 8445 for $8,240.00 as full and final settlement of mortgage outstanding," the question arises, on what basis did the said letter further state?-

> "P.S. Kindly note that we already hold a second mortgage on this property."

The Workers Bank mortgage known to the respondent was discharged on 26th January, 1978.

By letters dated 8th July 1983, and 4th August 1983, from Workers Bank to Victoria Mutual Building Society, requesting the Certificate of Title and executed discharge of mortgage, Workers Bank requested "the original transfer" in respect of the said premises.

Even as "mortgagee" the Workers Bank was not entitled to the said original transfer. A mortgage has its statutory power of sale.

When by letter dated 21st September 1982, Mr Monteith sent the said Transfer to Victoria Mutual Building Society stating that:

> "Mr Franklyn Grier now of 17 Belvedere Road, Meadow Bridge P.O. Box 99, Kingston 10, has consulted me and informed me that you desire the production of the original Instrument of Transfer relating to the above to enable certain transactions to go through." (Emphasis added)

it was an unwarranted request by the appellant. He was not entitled to the said Transfer in September of 1982. He had not exercised the option. The appellant himself said in cross-examination:

> "I went to see Mr Anderson at Victoria Mutual Building Society in 1982 ... I discussed the transfer of the property. ... He instructed me to go to Mr Monteith to get the transfer ... I said that Victoria Mutual Building Society sent me to get transfer to carry out option of sale 'It was my option of sale'. The option was' not enforced yet ... They sent me to get transfer in order to effect my option to purchase." (Emphasis added).

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Raymond Anderson of Victoria Mutual Building Society said in examination in chief at page 56:

> "Mr Grier came to see me and informed me that Workers Bank which held a second mortgage on the security was prepared to pay off the indebtedness. He also informed me that Mr Bancroft had executed a Transfer for the property to be transferred to him. Mr Grier and this would be part of the Workers Bank arrangement to pay off the debt.
>
> Workers Bank actually wrote to that effect and Mr Grier informed us that he had a signed Transfer from Mr Bancroft. The two go hand in hand. Workers Bank would pay off and transfer would then take effect.
>
> Yes, something did happen as a result. I got a letter from an Attorney, Mr Monteith to which an executed transfer was attached."

When therefore in September 1982, the appellant went to Mr Monteith requesting that the Transfer be sent to Victoria Mutual Building Society, he the appellant, well knew that he had not yet exercised the option, and therefore knew that the Transfer should not lawfully have been removed from the custody of Mr Monteith.

The said option was offered to the appellant in the lease on 2nd May 1977, and was exercisable within a period of five years and in writing.

The said option therefore lapsed in 1982, that is on the 5th May 1982, not having been exercised previously. It could not thereafter be exercised.

Mr Monteith in cross-examination said at page 180:

> "The reason I say I took the precaution of preparing at the same time an instrument of transfer was that the Plaintiff was going abroad, wasn't sure of his address – even if he had died abroad that transfer would have been registrable. The other conditions – 1st of these would be if the option to purchase had

> been received. The lease gave an option by notice given within 3 months before the expiration of any year. To my knowledge - I am not aware of the Plaintiff receiving from the 1st Defendant the consideration of $55,000.00."

and at page 189:

> "Not so Workers Bank wrote me a letter on behalf of Mr Grier exercising the option to purchase sometime in 1982. I don't remember."

By granting the option in May 1977, the respondent had effectively imposed "a restraint or clog on (his) freedom to dispose" of his property, and,

> "It was of manifestly essential importance to (him) that (he) should know precisely the duration of that restraint, and should be free from it unless the conditions on which it was accepted by her were strictly complied with." (***Hare v Nicoll***, supra)

The respondent had, by the terms of the lease in May 1977, contracted with the appellant that he the respondent would not be able to dispose of his own property for a period of five years, during which period the appellant would pay rent to cover the mortgage payments, and have the right to purchase the said premises, if he so chose, by indicating in writing, that he desired to do so, and by payment of the purchase price of $55,000.00. At the expiration of the said period of five years, ending in May 1982, the premises of the respondent was, in law, free of the said restraint. The benefit to the appellant would have lapsed, as long as the option to purchase had not previously been exercised.

The conduct of the appellant after May 1982, cannot in law be referrable to any valid attempt to exercise the option to purchase, which option did not any longer exist.

I agree with Panton, J., (as he then was), when he said at page 28:

> "I find that the plaintiff was not in contact with anyone in relation to the land. He communicated no desire to sell to anyone not to the first defendant, not to the second defendant. He clearly did not wish to sell. This conduct on the part of the plaintiff cannot be regarded as a waiver. An owner of land who does not wish to sell is not required in the circumstances that obtained in this case to do anything,"

and

> "The first defendant did not comply with paragraph 6 of the lease agreement. He claims that he gave written notice to the second defendant. I reject that. It is not without some significance that the first defendant has been unable to produce a copy of that notice. He cannot produce a copy as there was no original. It does not exist."

The appellant said in evidence that "... sometime in 1981, Mrs Graham at Workers Bank wrote a letter on my behalf " in respect of the exercise of the option. This bit of evidence is inadmissible purporting to be oral evidence of the contents of a document, without any prior evidence to explain the absence of the document itself. He made no attempt to have the original located and produced. No such document was produced. Mr Monteith denied receiving or remembering receiving any such notice of the exercise of the option. The learned trial judge had ample evidence from which he could find, as he did, that there was no exercise of the option.

The conduct of the appellant, and his activities culminating with the registration of the title to the premises in his name in 1984, is consistent with knowledge that he was aware that he was not exercising an option to purchase, but was taking steps to effect a transfer simpliciter to himself, without any authority to do so.

In September 1982, the respondent knew that he had not up to then exercised his option to purchase. The option had lapsed on 2nd May 1982. His request to Mr Monteith to send the transfer to Victoria Mutual Building Society was unrelated to any valid exercise of the option to purchase. Victoria Mutual Building Society, in the person of Raymond Anderson, having seen the Transfer should have returned it to Mr Monteith. As mortgagees, Victoria Mutual Building Society, had no valid reason to be concerned with a document of Transfer simpliciter, in initiating mortgage transactions. Victoria Mutual Building Society had no valid reason in law to believe that the appellant was the proprietor of the premises.

On 8th July 1981, when Workers Bank by letter signed by the said Mrs Merlene Graham to Victoria Mutual Building Society indicating an intention to settle the mortgage on the said premises, she asked for, in exchange for the bank cheque,

> " ... the relevant certificate of title in the name of Franklyn Grier." (Emphasis added).

There was then no such Title in the name of Franklyn Grier, the appellant, in respect of the said premises.

The letters of 8th July 1983, and 4th August 1983, to Victoria Mutual Building Society from Workers Bank, also signed by Mrs Merlene Graham, indicating that the mortgage held by Victoria Mutual Building Society had been settled on 9th June 1983, are indeed curious. They both requested that Victoria Mutual Building Society send them the original Transfer in relation to the said premises. The fact that Victoria Mutual Building Society had the original Transfer, must have been communicated to the writer by the appellant.

Workers Bank as new mortgagees, had no right as mortgagees to the said Transfer, in any transaction in relation to the mortgage. It also had its statutory power of sale. Workers Bank was therefore also seeking to have the said Transfer, on behalf of the appellant, for a purpose unconnected with any transaction in relation to a mortgage.

Furthermore, the appellant had no valid right as lessee to create a "second mortgage" on the said property in favour of Workers Bank, in 1983. He was not the proprietor of the said premises. Section 103 of the Registration of Titles Act reads:

> **"103.** The proprietor of any land under the operation of this Act may mortgage the same by signing a mortgage thereof in the form in the Eighth Schedule, and may charge the same with the payment of an annuity by signing a charge thereof in the form in the Ninth Schedule."

It was therefore quite inaccurate, to say the least, when by letter dated 3rd October 1983, from Messrs Vaccianna & Whittingham and captioned "To whom it may concern", they advised, at page 113:

> " ... that Mr Franklyn Grier is the new owner of the abovementioned premises and accordingly is entitled to possession thereof,"

thereby facilitating the appellant to represent himself as the proprietor of the said premises.

I agree with Panton, J., when he found, at page 28:

> "The activation of the blank transfer form was done by the first defendant in circumstances where he clearly knew he had no authority or basis so to do. The activation of this transfer form was unauthorized, and calculated to deceive. The second

> defendant's letter to Victoria Mutual Building Society makes it clear that he had not heard from the plaintiff. It is also clear that the first defendant had not heard from the plaintiff."

Here Panton, J., probably meant the "undated" transfer form. The transfer form was left undated when it was signed in May 1977, by the appellant and the respondent in anticipation of and to facilitate a valid exercise of the option. Its activation in circumstances unconnected with the valid exercise of the said option would have been, at the least, unauthorized. In the circumstances of the case it was fraudulent.

A forged document is a document that talks a lie about itself. The insertion of the date of "7th December 1979" is not referable to any significant occurrence in the history of its existence. If the date purports to indicate that that was the time of the exercise of the option or that it was the agreed date of a transfer of the premises, both would have been untrue.

The Transfer dated 7th December 1979, was registered by Workers Bank on behalf of the appellant on 12th January 1984, purportedly as a consequence of the valid exercise of an option to purchase. That was untrue in the circumstances.

It was more curious and inexplicable in view of the correspondence from Workers Bank exhibited in this case, and the evidence of the appellant, that Mrs Merlene Graham of Workers Bank was assisting him, that a letter dated 15th September 1987, of that nature was written. It reads at page 117:

> "September 15, 1987
>
> Messrs Milholland, Ashenheim & Stone
> Attorneys-at-Law
> 11 Duke Street

Kingston

Attention: Ms Janet Morgan

Gentlemen:

Re: Volume 1155 Folio 537 –
Tavares Ellis Bancroft

I act on behalf of Workers Savings & Loan Bank, who have passed on to me your letters on this matter.

My instructions are that my clients have not located any correspondence between the firms/persons mentioned in your letter, and themselves. We however attach a copy of a letter from Mr. B.K. Monteith, Attorney-at-Law, to Victoria Mutual Building Society which may be of help to you.

My instructions also indicate that the Transfer was not registered by my clients or any persons acting on their behalf. We trust that the persons/firms mentioned by you will be able to provide you with the information you require.

Yours faithfully
VALERIE ALEXANDER
ATTORNEY-AT-LAW." (Emphasis added)

The respondent complains of fraud on the part of the appellant.

I agree with Panton, J., when he found on page 29:

> "All the circumstances in my judgment, point unequivocally to the first defendant being involved in fraudulent activity in relation to the registration of the transfer. There is no allegation of a mistake having been made. If there has been no error, then clearly that which has been done was done deliberately."

The appellant effected the removal of the Transfer from the possession of Mr Monteith into that of Victoria Mutual Building Society for a purpose unrelated to any valid exercise of the option or any necessary activity connected with a mortgage. He caused to be presented for registration the Transfer with a date

7th December 1979 purporting that it was activated within the option period. He caused himself to be represented as the proprietor of the said premises, well knowing that he was not, thereby dealing with the creation of and `the discharge of mortgages contrary to what he was authorized to do. He had the full monetary benefit of collecting rental for himself from tenants to whom he had sublet flats on the premises. His conduct was calculated to unlawfully and fraudulently deprive the respondent of his rights on the said property. The appellant had the legal estate in the property transferred to him without any circumstances arising authorizing him to do so, without paying the purchase price of his purported purchase, namely $55,000.00 or giving an account setting off the sums paid. In so doing, he was guilty of express fraudulent conduct. In such circumstances, the respondent had an equity against the appellant to have the legal estate re-transferred to him. ***(Re Breskvar v Wall*** (1971) 126 C.L.R. 376).

I agree with the decision of Panton, J. and I would therefore dismiss the appeal.

ORDER:

BINGHAM, J.A.:

By a majority appeal allowed. Judgment of the Court below set aside .

It is declared and ordered as follows:

(1) That the defendant/appellant is the owner of land originally registered at Volume 1155 Folio 537 of the Register Book of Titles and now registered at Volume 1227 Folio 84.

(2) That the Registrar of Titles cancel the entry in the Register Book of Titles dated 17th May, 1990 registering the said land in the plaintiff/respondent's name.

(3) That the Registrar of Titles register the said defendant/appellant as the proprietor of the said land.

(4) That the Registrar of The Supreme Court take an Account of all monies found to be due to the plaintiff/respondent from the defendant/appellant and all such monies be paid to the said plaintiff/respondent.

Two thirds of the costs both here and in the Court below awarded to the defendant/appellant to be agreed or taxed.