JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 17/96

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	LIFE OF JAMAICA LTD	2ND DEFENDANT/APPELLANT
AND	BROADWAY IMPORT & EXPORT LIMITED	PLAINTIFF/RESPONDENT
AND	MICHAEL LEVY	1ST DEFENDANT/RESPONDENT

SUPREME COURT CIVIL APPEAL NO: 33/96

BETWEEN	MICHAEL LEVY	1ST DEFENDANT/APPELLANT
AND	BROADWAY IMPORT & EXPORT LIMITED	PLAINTIFF/RESPONDENT
AND	LIFE OF JAMAICA	2ND DEFENDANT/RESPONDENT

Dennis Goffe, Q.C. and Mrs. Shanti Williams for Life of Jamaica instructed by **Myers Fletcher & Gordon.**

Lord Gifford, Q.C. and Miss Nancy Anderson instructed by **Mrs. Pamela Gayle of Pamela Shoucair Gayle & Co** for Broadway Import & Export.

Earle DeLisser and Anthony Pearson for Michael Levy instructed by **Messrs Playfair Junor Pearson & Co.**

June 17, 18, 19, July 28, 29, 30 & 31 & October 27 1997

RATTRAY, P

This appeal has to do with priority of equitable interests. The premises concerned is situated at 13 Mandeville Plaza, Mandeville in the parish of Manchester registered at Volume 1048 Folio 73 of the Register Book of Titles. The owner of the property is the first named defendant/respondent Michael Levy (hereinafter referred to

as "Levy"). By a lease agreement in writing dated 1st April, 1991 Levy agreed to lease to the plaintiff/respondent Broadway Import and Export Limited (hereinafter referred to as "Broadway") the said property for a term of five (5) years at the rate of $10,000.00 per month payable one year in advance. The lease was,

> "subject to the covenants and powers implied under the Registration of Titles Act unless hereby negatived or modified and subject also to the covenants, conditions and stipulations hereinafter contained in an option to purchase the lease premises within two (2) years from the 1st day of April, One Thousand Nine Hundred and Ninety-one, that the sale price of the building will be 2 million dollars net."

Broadway took possession of the said premises having met the conditions laid down in the lease and openly conducted its business there as a retail outlet for general grocery provisions and household furnishings, bedspreads, sheets and other household items. The lease agreement was however not registered in the Office of the Registrar of Titles and thus did not appear on the Certificate of Title for the said property. The business carried on by Broadway was publicly identifiable by large signs with bold letters and flashing illuminations. Acting on behalf of Broadway in this transaction was Mr. Richard Morgan who gave evidence in the action.

In December 1992 Levy visited Morgan to enquire if Broadway was buying the place. Morgan replied in the affirmative. Later an agent for Levy, a Mr. Grant, attended on Morgan stating that Levy was asking Morgan to cancel the lease and that Morgan would be paid $800,000.00. Morgan told Grant that the company would be exercising its option to purchase and was not interested in cancelling the lease. A letter from Mr. Grant to Morgan dated 25th January, 1993 evidences the efforts made by him on behalf of Levy to have the lease cancelled and payment of $800,000.00 by Levy to Broadway. It is buttressed by a letter of the same date from the legal firm of Robertson, Smith, Ledgister & Co representing Levy and to the same effect. This offer was rejected by Broadway.

It would subsequently emerge that Levy's anxiety to purchase Broadway's interest in the property was as a result of Levy having entered into a sale agreement with Life of Jamaica Ltd (hereinafter referred to as "LOJ") to purchase the property for the sum of $4.4m. The completion date in relation to the sale agreement was the 30th November, 1992. With regard to the sale agreement LOJ had lodged a caveat in the Office of the Registrar of Titles on the 19th of October, 1992.

Broadway duly exercised the option to purchase contained in the lease by letter dated the 21st of January 1993 and subsequently required Levy to advise as to how he intended to proceed with respect to the said exercise of the option. In protection of the exercise of the option Broadway lodged a caveat dated 9th February, 1993 against the title to the premises in the Office of the Registrar of Titles. Following this, a frantic effort was made by Levy through his Attorney Miss Kathryn Phipps, in an offer made in writing, to pay to Broadway the sum of One Million Dollars ($1m) in consideration of Broadway "not exercising the option to purchase contained in the lease agreement between the parties". This offer was refused.

By letter dated 22nd July, 1993 Broadway through its Attorney-at-law sent a Manager's cheque for $2,286,491.00 to Miss Phipps, the Attorney-at-law for Levy to cover the purchase price of Two Million Dollars ($2m) stated in the lease agreement as payable on the exercise of the option as well as the relevant costs. The cheque was duly lodged to the account of the Attorney-at-law.

By letter dated 17th September 1993, Miss Phipps returned the cheque to Messrs. Piper & Samuda, Attorneys-at-law for Broadway, who promptly sent back the cheque to Miss Phipps in a letter of the 27th of September. Once again by letter dated 1st October, 1993 Miss Phipps returned the cheque to Piper & Samuda who again on the 7th of October returned the cheque to Miss Phipps.

Consequently, the plaintiff brought action in the Supreme Court for declarations as to the validity and the enforceability of the lease agreement, the option to purchase

and the exercise thereof, as well as for an injunction protecting the right of the plaintiff to the possession of the property and restraining interference from Levy. Broadway also sought an order for specific performance of the option.

By an order of the Supreme Court dated the 28th of July, 1993, LOJ was added as a defendant.

In an amended Statement of Claim filed on the 8th of April, 1993 under the heading "Particulars of Breach" the plaintiff Broadway stated:

> "Despite the option to purchase in favour of the Plaintiff, the First Defendant in or about October 1992 entered into an agreement to sell the said premises to Life of Jamaica Limited and caused Life of Jamaica Limited to register a Caveat numbered C735992 against his Title to the said premises in purported protection of its alleged interest therein."

The reason for the efforts of Levy to pay up to $1m to be released from his obligations with respect to the option therefore becomes clear. LOJ had agreed to purchase from Levy the property for $4.4m a full $2.4m more than Broadway was obliged to pay to Levy under the option. LOJ had protected its interest by caveat lodged on the 14th October, 1992.

At the time of the agreement for sale between Levy and LOJ, Broadway was in open occupation of the premises. Broadway however, had not registered its lease at the Office of the Registrar of Titles which would have given it a legal interest nor had it lodged a caveat with regard to its interest under the lease. Both LOJ and Broadway therefore had an equitable interest in the property. The question was whose equitable interest was predominant?

Langrin J, found that Broadway's interest was first in time and that it was not defeated by LOJ's equity. The challenge by LOJ to this finding is the crux of this appeal.

The chronology is important. The sale agreement between Levy and LOJ was entered into in September 1992 at a time when Broadway was openly in possession

of the premises and publicly trading therefrom. LOJ's caveat was lodged on the 14th October, 1992. Broadway's option to purchase was exercised on January 21, 1993, and a caveat lodged in respect of this exercise on February 9, 1993.

The state or imputed state of knowledge of LOJ with respect to Broadway's interest at the time it entered into the agreement to purchase with Levy is important. Levy in giving evidence said:

> "I admitted that I told Mr. Bird acting on behalf of LOJ that there was a tenant on the premises."

He further stated:

> "I did not bother to tell Mr. Bird about the lease and neither about the option either. ... I told him I had a month to month tenancy."

The Attorney-at-law for LOJ Sheryl Grant gave evidence that Lindell Smith Attorney-at-law for Levy "told me that the property was occupied but he would be serving 30 days notice on occupant to vacate the premises." In cross-examination she further said, "we know someone was in the premises as tenant - but not the nature of tenancy." LOJ never sought to find out from Broadway what was the nature of its tenancy.

It is however interesting to examine the interrogatories administered to Levy by Broadway as the answers thereto are of some importance:

> "1. Did the First Defendant (Levy) inform or advise the Second Defendant (LOJ) of the existence of the Lease Agreement which was executed by him in favour of the Plaintiff at the time of negotiations for or entering into the said Agreement for sale between them?
>
> ANSWER : In answer to question 1, the First Defendant says that the Second Defendant was aware that the Plaintiff was a tenant of the premises. The terms of their tenancy was never discussed.
>
> ...
>
> 3. If the answer to the first interrogatory is no, what enquiries, if any, were made by the Second Defendant of the First Defendant in relation to the status of the occupants of the said premises at the

time of negotiations for or entering into the said Agreement for Sale between them?

ANSWER: The Second Defendant did not make any enquiries as to the status of the occupants at the time of negotiations for entering into the said Agreement as the understanding was that they were ordinary tenants."

The answers to the interrogatories administered by Broadway to LOJ are also important:

"1. Did the First Defendant inform or advise the Second Defendant of the existence of the Lease Agreement which was executed by him in favour of the Plaintiff at the time of negotiations for or entering into the said Agreement for Sale between them?

ANSWER: The Second Defendant was not advised or informed by the First Defendant of the existence of a Lease Agreement executed by him in favour of the Plaintiff at the time of negotiations for or entering into the Agreement for Sale between them.

...

3. If the answer to the first interrogatory is no, what enquiries, if any, were made by the Second Defendant of the First Defendant in relation to the status of the occupants of the said premises at the time of negotiations for or entering into the said Agreement for Sale between them?

ANSWER: At the time of entering into the Agreement for Sale with the First Defendant, the Second Defendant enquired whether the property was presently occupied. The First Defendant advised that the property was occupied but that the tenant would be given notice to quit and that the property would be vacant on the date set for completion.

4. On what date was it first known to the Second Defendant that the Plaintiff was in occupation of the said premises?

ANSWER: It was first known to Second Defendant that the Plaintiff was in occupation of the premises when negotiations for the purchase of the premises commenced in or about July 1992.

5. How did it come to the attention of the Second Defendant that the Plaintiff was in occupation of the said premises.

ANSWER: It came to the attention of the Second Defendant that the Plaintiff was in occupation of the premises when the Second Defendant was so advised by the First Defendant's real estate Agent D.C. Taveres and Finson Company Limited.

6. Was the Plaintiff in occupation of the said premises at the time when the Second Defendant commenced negotiations with the First Defendant for the purchase of the premises?

ANSWER: The Plaintiff was in occupation of the premises at the time when the Second Defendant commenced negotiations for the purchase of the premises.

7. Was the Plaintiff in occupation of the said premises at the time when the Second Defendant entered into the Agreement for the purchase of the said premises from the First Defendant?

ANSWER: The plaintiff was in occupation of the premises at the time when the Second Defendant entered into the Agreement for the purchase of the premises from the First Defendant.

8. What acts, if any, were known by the Second Defendant to have been taken by the First Defendant to facilitate the completion of the Agreement for Sale between them prior to the 29th March, 1993?

ANSWER: The following acts were known to the Second Defendant to have been taken by the first Defendant to facilitate completion.

(a) On October 6, 1992 and November 3, 1992 the First Defendant advised that he had commenced negotiations with the Plaintiff to arrive at a settlement in respect of the termination of the Plaintiff's Lease of the premises."

It is important to note that LOJ did not lodge its caveat until the 14th October, 1992 at a time when it was aware that Broadway had a lease of the premises.

Mr. Goffe, Q.C. on behalf of LOJ has submitted that although Broadway's equity was prior in time to that of LOJ's it was postponed to LOJ's equity by virtue of

Broadway's failure to lodge a caveat which would have notified LOJ of the existence of Broadways equity at the time of the negotiation between Levy and LOJ.

The lodging of a caveat as provided by section 139 of the Registration of Titles Act ensures that before any person can be registered as transferee or proprietor of the property caveated or any instrument affecting an estate or interest in the property may be registered, the Registrar of Titles must notify the person seeking to register the relevant instrument as well as the registered proprietor of the existence of the caveat so as to allow those persons to summon the caveator to attend before the Supreme Court or a Judge in Chambers to show cause why the caveat should not be removed. The purpose of the caveat is clearly stated in the statute.

Mr. Goffe, Q. C relies heavily on the Jamaican case from our Court of Appeal of **Barclays Bank DCO v. Administrator General for Jamaica and Ransford Hamilton** (1973) 20 WIR 344 for his proposition that the holder of an equity that is prior in time is postponed to the later equity,

> "If by his act or omission the holder of the prior equitable interest has contributed to a belief in the holder of the subsequent equitable interest when he acquired his interest, that no outstanding equitable interests were in existence."

Fox, J.A. in his judgment at page 348 of the report stated:

> "I venture to state the principles evolved in Australia which are relevant to the problem before this Court."

They were as follows:

> "(1) priority afforded by time to an equitable interest in registered land is not lost unless there is a failure to lodge a caveat;
>
> (2) an omission to caveat will not of itself necessarily warrant postponement of a prior equitable interest;
>
> (3) postponement occurs only if by his act or omission the holder of the prior equitable interest has contributed to a belief in the holder of the subsequent equitable interest when he acquired his interest, that no outstanding equitable interests were in existence;

> (4) the acts or omissions of the prior holder must also have either directly misled the holder of the later equitable interest, or must have amounted to an 'arming' of a third person with power to go out into the world under false colours and thereby to be able to mislead or to deceive the subsequent holder;
>
> (5) if the holder of a later equitable interest knows at the time he acquires his interest that an earlier interest exists, the holder of that prior interest will not be postponed."

The facts in **Barclays Bank vs. Administrator General & Hamilton** must be understood before such reliance can be placed upon it as Mr. Goffe, Q.C. has sought to do. In that case Mr. Hamilton having purchased land from one Reid for whose estate Barclays Bank had become the Administrator, at a time when Reid had applied for title but had not yet received it did not exercise any diligence in discovering when the title had been issued and had been placed in the hands of Reid. Reid lodged the title with Barclays Bank as security for an overdraft which he had received from the bank. He did not disclose to the bank that he had sold the property to Hamilton. The priorities to be determined between the Administrator of the Estate of Reid i.e Barclays Bank who held the title deeds, and Hamilton who had bought the property from Reid had to be determined. In the language of Fox, J.A.:

> "I take the view that by failing to make those enquiries concerning the title which he ought to have made, Hamilton armed Reid with power to go out into the world under false colours. By omitting to lodge a caveat in the Titles Office in protection of his equitable position, Hamilton failed to disarm Reid and placed him in a position where he was able to induce a belief in Garcia (the bank's representative) and other officers of the appellant bank that the title to lot 180 was clear of any outstanding interest. In this situation equitable principles well established in Australia and England indicate a decision in favour of the bank's claim."

In the present case what is the act of Broadway which armed Levy with the power to go out into the world under false colours? The omission to lodge a caveat was seen by Fox J.A. as a failure to disarm Reid, but Reid had first to be armed before

Hamilton's failure to caveat could act as a failure to disarm him. There is also another important difference between both cases. Fox, J.A. specifically found that:

> "There is no evidence to support a finding that prior to the execution of the equitable mortgage, the bank was aware of Hamilton's possession."

He further held as valid a submission:

> " ... that the weight of authority supported the proposition that constructive knowledge of a tenant's interest in land required as a base, evidence that the person to be affected had 'actual knowledge' of the tenant's possession of the land."

In the instant case LOJ had actual knowledge of Broadway's possession of the premises. This establishes a foundation upon which the determination can be made as to whether LOJ had constructive knowledge of Broadway's interest in the premises. Such constructive knowledge can be ascribed to a person who refrains from making enquiries which he ought to have made and thus avoids coming into possession of information which would have led him to discover the interest of the person with the prior equity. LOJ made no enquiries of Broadway despite the open possession of the premises by Broadway. It would seem to me that in such a situation the reasonable thing would be for LOJ to have enquired of Broadway under what circumstances Broadway was occupying the property.

In my view the evidence establishes that LOJ's failure to make enquiries from the person in open occupation carrying on a business on the premises was a neglect to make such enquiries as would have been made in the circumstances by a prudent person. Therefore, constructive knowledge must be imputed to LOJ.

In my view the purpose of the caveat in the Jamaican jurisdiction is the same as it is in the Australian jurisdiction under the torrens system common to both jurisdictions. Lord Gifford, Q.C. for Broadway referred us to the case of **J.& H. Just (Holdings) Pty Limited v. Bank of New South Wales and Others.** Vol. 45 Australian

Law Journal at page 625 in which Barwick CJ examined the nature and purpose of the caveat at page 627 and stated as follows:

> "Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealing for registration. The purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice."

In Jamaica caveats are not noted on the certificates of title. The learned Chief Justice cited Dixon L J in **Lapin v. Abigail** (1930) 44 CLR 166 at page 204 as follows:

> "The act or default of the prior equitable owner must be such as to make it inequitable as between him and the subsequent equitable owner that he should retain his initial priority. This, in effect, generally means that his act or default must in some way have contributed to the assumption upon which the subsequent legal owner acted when acquiring his equity."

And the Chief Justice continued:

> "In my opinion, the failure to lodge a protective caveat cannot properly be said necessarily to be such an act or default."

And finally at page 628:

> "In any case the failure by such a person to lodge a protective caveat cannot of itself properly be held to be an act of fulfilling the requirements to which I have referred of conduct which will deprive a prior equity of its priority. As I have said the purpose of the caveat is protective: it is not to give notice. The holder of the subsequent equity in my opinion could not properly rely upon the absence of any notification in the register book of the lodgment of a caveat as a representation or as the basis for a conclusion that no equitable interest in the land existed in any person."

The Registration of Titles law does not destroy the principle that the open possession of a tenant is notice that the tenant has some interest in the land or property occupied and any purchaser having notice of that fact is bound to make a prudent enquiry as to what that interest is.

The learned trial judge in assessing the damages suffered by LOJ as a consequence of Levy's breach in contracting to sell LOJ property occupied by Broadway under an agreement to lease between Levy and Broadway and containing an option to purchase by Broadway at a stated price, found that LOJ would have had actual knowledge of the plaintiff's occupation and was therefore fixed with constructive knowledge of the tenant's right including the option to purchase. In those circumstances, the second defendant ought reasonably to have foreseen that such loss was likely to occur. The second defendant was therefore only entitled to a refund of his deposit of $880,000.00 with interest at 25% per annum.

Mr. Goffe has submitted that since the judge in his view correctly stated that the measure of damages for breach of a contract is calculated by estimating the value of the loss of the bargain, he therefore arrived at his assessment on an incorrect basis.

In my view the judge's statement with regard to the measure of general damages is a general statement of the law but each case has to be looked at in its own light. The judge was therefore correct in arriving at his conclusion as to what was the proper measure of damages in the circumstances of this particular case.

Levy also appealed the judgment of Langrin J, on the basis that the learned trial judge was wrong in law in not finding that the option to purchase was subject to the covenants and conditions and stipulations contained in the lease. He submitted before us that having found that there was breach of covenant in that Broadway allowed another party to carry on a small business on the premises that default would have eliminated the option. A reading of the lease agreement clearly shows that the option was not subject to those covenants. Mr. DeLisser has also urged us to find that there is no consideration stated for the option. The option being collateral, the consideration for the collateral contract is provided by the entering into the main contract by the parties. This submission therefore also fails.

In my view, the learned trial judge came to a correct conclusion on the issues of fact as well as law which arose in this case and set out lucidly in his judgment the very valid reasons on which he arrived at his conclusion in making in favour of the plaintiff Broadway -

> "(i) . A Declaration that the Lease Agreement dated the 1st June, 1991 between the Plaintiff as lessee and the First Defendant as Lessor in respect of premises situate at 13 Mandeville Plaza, Mandeville in the parish of Manchester being the premises registered at Volume 1048 Folio 73 of the Register Book of Titles is valid and enforceable by the Plaintiff against the First Defendant.
>
> (ii) A Declaration that the option to purchase contained in the aforesaid Lease Agreement is valid and enforceable by the Plaintiff against the First Defendant.
>
> (iii) A Declaration that the Plaintiff validly exercised the aforementioned option to purchase by letter dated January 21, 1993 from the Plaintiff to the First Defendant.
>
> (iv) An Injunction restraining the First Defendant whether by himself his servants or agents or otherwise from interfering with the Plaintiff's right to possession and/or quiet enjoyment of the aforesaid premises.
>
> (iv) An Order for Specific Performance of the option to purchase in the Lease dated 1st June, 1991 between the First Defendant as Lessor and the Plaintiff as Lessee."

The learned trial judge also correctly entered judgment for the plaintiff against the second defendant and in respect to this ordered that the first defendant refund to LOJ the deposit of $880,000.00 with interest at 25% per annum. We agree with the orders made by the learned trial judge as well as his order in relation to costs.

The appeals therefore of both the first and second defendants/appellants are dismissed with costs to the plaintiff/respondent in the same terms as the Order for costs made by Langrin J in the Court below.

BINGHAM, J.A.:

Having read in draft the judgment of the learned President in which he has fully rehearsed the facts and identified the issues raised before us in these appeals, I am in agreement with his reasoning and the conclusion reached that the appeals be dismissed in terms of the orders made by the learned trial judge.

As the appeal by Life of Jamaica Limited also raises the very important question as to the priority of competing equitable interests under the Torrens System of Registration, I am minded, therefore, to add some observations of my own.

The chronology of the events leading up to the dispute and which are not in issue are best taken from the judgment of Langrin, J., viz.:

> "The plaintiff entered into a five year lease agreement with the first defendant on June 1, 1991. The lease agreement contained an option to purchase. The lease agreement was not registered and no caveat was lodged. The first defendant entered into a sale agreement with the second defendant in September of 1992. At the time, the plaintiff was in possession of the premises the second defendant was aware of his tenancy. On the 14th October, 1992 the second defendant lodged a caveat claiming an interest under and by virtue of the agreement for sale. The plaintiff exercised the option to purchase on January 21, 1993 and lodged a caveat on February 9, 1993 claiming an interest pursuant to the option to purchase which it exercised."
> [Emphasis supplied]

The question which arose for determination, therefore, was as between the plaintiff (Broadway) and the second defendant (Life of Jamaica) whose interest was entitled to priority?

Langrin, J. based his judgment on the following facts:

> "In my judgment, the second defendant had not been prejudiced by the existence of the prior equitable interest, namely the option to purchase since it was always within his power to ascertain the rights of the plaintiff tenant of whom on his own admission he was aware had occupied the premises. The absence of a caveat by the plaintiff in these circumstances did not induce the second defendant to enter into the agreement to purchase the land. The act or default of the prior equitable owner must be such as to make it inequitable as between him and the subsequent equitable owner that he should retain his initial priority."

Mr. Goffe, Q.C. and Mr. DeLisser, for the appellants Life of Jamaica and Michael Levy respectively, have challenged the findings of the learned judge as to the priority issue as well as upholding the option as valid. As to the submissions in so far as they touched on the latter issue, the observations of the learned President supporting the approach taken by Langrin, J. below are sufficient to dispose of that question. In my view, the lease document, in so far as the option clause contained therein falls to be considered, the wording of the document is clear as to its terms and has to be construed and given effect to, therefore, within the four walls of the agreement.

Mr. Goffe, Q.C. for his part has submitted that it was Broadway's failure to register its caveat to protect its option to purchase which operated to lead Life of Jamaica to enter into an agreement to purchase the property in the belief that no prior encumbrances were in existence Hence Broadway's equity ought to be postponed to that of Life of Jamaica.

In examining this submission, one needs to be reminded that one is here considering the question of priority as between two equitable interests. The maxim applicable being "Qui prior est tempore portior est jure", who is first in time is first in right. The mere failure of the holder of the prior equitable interest to lodge a caveat, therefore, would not necessarily result in that holder being postponed to the holder of a later equitable interest. On the facts in this case, therefore, one would need to look at the evidence in the light of the authorities in order to determine whether it was Broadway's inaction in not caveating that resulted in Life of Jamaica being misled by the defendant Levy.

The starting point is to examine the steps taken by Life of Jamaica in enquiring as to the true nature of Broadway's interest in the demised premises before entering into the agreement for sale in September, 1992. As Life of Jamaica was aware that Broadway was in open possession as early as July, 1992, when they first expressed an interest in the property they were clearly under a duty to enquire as to the nature of their occupancy. Mr. Goffe, Q.C. nevertheless contends that Life of Jamaica

was only concerned to examine the Register as to the original certificate of title to the premises to determine what, if any, existing encumbrances were attached thereto. Having done so to their satisfaction, their duty was complete. They were not obliged to enquire from Broadway who were in occupation of the premises.

In my view, this submission is untenable for the reason that priority, as between competing holders of equitable interests, falls to be determined not on the state of the Register but by the doctrine of notice. Section 71 of the Registration of Titles Act, which is in pari materia with section 43 (a) of the Real Property Act (Australia), is concerned only with registered interests, e.g. a registered fee simple etc. The authorities from Australia which operates under a similar system afford some guidance in resolving similar problems. In this regard, a similar submission was advanced by leading counsel for the appellant bank in *Barclays Bank v. Administrator General of Jamaica and Ransford Hamilton* [1973] 20 W.I.R. 344, and rejected by the Court of Appeal (vide dictum of Fox, J.A. at page 352 (F-H).

At this stage, another observation needs to be made, viz., in what manner is the question of priority of competing equitable interests governed by the doctrine as to notice? For example, if the holder of a subsequent equitable interest is aware at the time of his acquiring his interest that a prior equitable interest is then in existence, can he succeed in claiming priority over the holder of that earlier interest? In determining

this question as to notice, one is here dealing with knowledge both actual and constructive. The evidence here touching on this question was most revealing. Miss Sheryl Grant, the in-house attorney at Life of Jamaica, at the time of the agreement for sale testified that:

> "I am an Attorney-at-Law. I work at National Housing Corporation. In September 1992 I was at L.O.J. I had conduct of sale in the property the subject of action. Mr. Levy had an attorney who was Lindell Smith.
>
> Prior to agreement of sale I made enquiries of Mr. Smith re occupancy of premises. He told me that the property was occupied but he would be serving 30 days notice on occupants to vacate the premises.
>
> After the conversation we amended draft to read 'vacant possession'.
>
> We did the usual search of title for caveats as well as incumbrances on title. We did not find any incumbrances on the title.
>
> As a result of search we did not think it necessary to make any enquiries."
> [Emphasis supplied]

The "draft" referred to is clearly a reference to the draft agreement for sale and "enquiries" can be interpreted as a reference to enquiries from Broadway who were in occupation before the agreement for sale was executed.

The evidence contained in information furnished to Broadway's attorneys by Life of Jamaica in Interrogatory No. 8, however, places a somewhat different picture on what facts were in Life of Jamaica's

possession at the time the agreement was signed. In their answer to the interrogatory, Life of Jamaica's response was:

> "On October 6, 1992 and November 3, 1992 the First Defendant (Levy) advised that he had commenced negotiations with the Plaintiff (Broadway) to arrive at a settlement in respect of the termination of the Plaintiff's Lease of the premises."

This was a far cry from a monthly tenancy for which a notice to quit would be served on the tenants.

It is against this background that one now needs to examine the authorities relating to this question in determining as to how the learned judge dealt with the matter of priority.

Mr. Goffe, Q.C., for the appellant Life of Jamaica, in support of his submissions, relied on *Barclays Bank v. Administrator General of Jamaica and Ransford Hamilton* (supra). The facts in this case may be summarised as follows:

In 1950 Hamilton entered into an agreement to purchase a plot of land from the deceased Reid. He went into possession of the land in 1958 and established a chicken farm. Hamilton did not make any enquiries at the Titles Office as to the state of the Register. In the interim, Reid (the vendor) had obtained the title in his name. He did not seek to execute a transfer in favour of Hamilton. He chose instead to apply to the bank (the appellant) for a loan. The bank, having inspected the title, searched the Register, found no encumbrances on the title against any dealings in

respect of the property. The Manager of the May Pen Branch of the bank, Garcia, on visiting the property did not see Hamilton in possession. The bank lodged a caveat to protect its equitable mortgage by deposit of the title deeds and proceeded to grant an overdraft facility to Reid. Reid died intestate in 1961, owing the bank over £1,000.

At the trial the learned judge found in favour of Hamilton, based on his going into possession of the property from 1958 and establishing a chicken farm and on his open and notorious occupation of the property. He found that the bank ought to have made such enquiries from persons in the area where the property was situated as to the occupancy thereof which would have pointed to Hamilton's interest in the property. Having failed to do so they were fixed with constructive knowledge of Hamilton's possession and accordingly his interest as purchaser of the property. On appeal it was held:

> "Held: (i) that since R.H. was entitled to demand and receive a certificate of title from G.R., and since he knew that there would be delay in the delivery of that title to him and, nevertheless, made no enquiries in connection therewith, and failed to file a caveat in protection of his equitable interest thereby providing G.R. with an opportunity to commit a fraud against the appellant, his interest, though prior in time, must be postponed to the appellant's equitable mortgage;
>
> (ii) that in the particular circumstances of this case the appellant could not be said to have had any knowledge, actual or constructive, of the interest of R.H.
> [Emphasis supplied]

Fox, J.A., having summarised the law applicable to the question of priority and in quoting from an article by Professor Sackville entitled "Competing Equitable Interests in Land under the Torrens System" taken from Volume 45 of the Australian Law Journal (August 1971) page 396 stated the following principles as applicable to that case, which are also relevant to the issue before this court:

> "(1) priority afforded by time to an equitable interest in registered land is not lost unless there is a failure to lodge a caveat;
>
> (2) an omission to caveat will not *of itself* necessarily warrant postponement of a prior equitable interest;
>
> (3) postponement occurs only if by his act or omission the holder of the prior equitable interest has contributed to a belief in the holder of the subsequent equitable interest when he acquired his interest, that no outstanding equitable interests were in existence;
>
> (4) the acts or omissions of the prior holder must also have either directly misled the holder of the later equitable interest, or must have amounted to an 'arming' of a third person with power to go out into the world under false colours and thereby to be able to mislead or to deceive the subsequent holder;
>
> (5) if the holder of a later equitable interest knows at the time he acquires his interest that an earlier interest exists, the holder of that prior interest will not be postponed."

The Court of Appeal, determined the appeal in favour of the appellant bank. Fox J.A. in his judgment relied on the fact that the bank

had no knowledge, either actual or constructive, of Hamilton's occupation of the land in question. At page 353(E) the learned judge said:

> "There is no evidence to support a finding that prior to the execution of the equitable mortgage, the bank was aware of Hamilton's possession. To the contrary, the evidence is that Reid allowed Garcia to understand that he was in occupation of lot 180. There is no evidence that Garcia deliberately shut his eyes to any means of obtaining knowledge of Hamilton's possession. It is impossible to fix the bank with 'actual knowledge' of Hamilton's occupation of the land."

It was this lack of knowledge of Hamilton's possession of the property, the subject-matter of the dispute, which the learned judge saw as being at the heart of the case and was the determining factor in favour of the bank obtaining priority.

As Life of Jamaica was from the outset aware of Broadway's occupation of the property in dispute, and having, therefore, actual knowledge of Broadway's possession, on the facts in this case, Life of Jamaica was fixed with notice of Broadway's interest, including the option to purchase. This is, in my view, sufficient to dispose of the issue of priority as between Broadway and Life of Jamaica. For the sake of completeness, however, I shall cite a few authorities all relied on by the respondent and which support this conclusion, viz.:

1. *Daniels v. Davidson* [1809] 16 Ves. 437;
2. *Barnhart v. Greenshields* [1853] 9 Moo P.C. 18; 14 E.R. 204;

3. *Hunt v. Luck* [1902] 1 Ch. 428;

4. *Smith v. Jones* [1954] 2 Ch. 823 at 827;

5. *J & H Just (Holdings) Pty Limited v. Bank of New South Wales and others* Vol. 45 Australian Law Journal Reports 625.

In *Daniels v. Davidson* (supra), Lord Eldon, L.C. in dealing with the question of competing equities as between a tenant in possession with an option to purchase and a subsequent "purchaser", in applying the doctrine of notice said:

> "My opinion therefore considering this as depending upon notice is that this tenant, being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances all together give him an equity, repelling the claim of a subsequent purchaser who made no enquiry as to the nature of his possession."
> [Emphasis supplied]

This judgment was followed by the Honourable T. Pemberton Leigh in *Barnhart v. Greenshields* (supra), a decision of the Board of the Privy Council. The headnote reads as follows:

> "Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor. This equity of the tenant extends not only to interests connected with his tenancy but also to interests under collateral agreements."
> [Emphasis supplied]

The underlined words would include an option to purchase.

Later down in the judgment, the learned judge, in delivering the advice of the Board, said:

> "With respect to the effect of possession, merely we take the law to be that if there be a tenant in possession of land a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that equity of the tenant extends not only to interests connected with his tenancy but also to interests under collateral agreements as in *Daniels v. Davidson* (supra)the principle being the same in both classes of cases namely that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of this fact is bound, according to the ordinary rule, either to enquire what that interest is or to give effect to it, whatever it may be."

Further, in *Smith v. Jones* (supra) Upjohn, J. (as he then was) citing the dictum of Lord Romilly, M.R. in *Taylor v. Stibbert* (1794) 2 Ves. 437; 30 E.R. 713 said:

> "Of course, the purchaser is bound by the rights of the tenant in occupation - that is quite clear. As is shown by earlier cases, notably, I think, *Taylor v. Stibbert*; he is not entitled to assume that the tenant is in possession from year to year. He must look at the agreement, and if as in *Daniels v. Davidson* the tenant has not only a tenancy agreement but also an option to purchase, he is bound by that also."
> [Emphasis supplied]

The latter underlined words would assume particular significance in the light of the conflicting information which Life of Jamaica was in receipt of from Levy's attorneys concerning the nature of Broadway's interest in the demised premises. As this was acquired prior to the

agreement for sale being executed, ordinary prudence dictated that apart from what was their legal duty (to enquire from Broadway's principals as to the nature of their interest in the premises), they were obliged on being made aware that Broadway were lessees of the premises to call for and inspect the lease document in order to determine the true nature of their interest in the property.

As *Hunt v. Luck* and *J & H Just (Holdings) Pty Limited v Bank of New South Wales and others* referred to (supra) were both decided based on the application of similar principles, there is no need to go to an examination of these cases for to do so would merely be to multiply authorities decided along similar lines. As the earlier authorities establish that occupation of land by a tenant is constructive notice to a purchaser of all that tenant's rights, it is clear on the facts in this case that it was the failure of Life of Jamaica through its attorneys to make such reasonable and prudent enquiries from Broadway's principals as to the nature of their interest in the demised property, choosing to rely instead on such information as Levy chose to furnish them with that led Life of Jamaica to enter into the agreement for sale. They accordingly based on their actual knowledge of Broadway's occupation as lessees of the premises, were fixed with constructive notice of Broadway's interest in the premises including their option to purchase.

For these reasons, I would uphold the conclusion reached by the learned judge below on the issue of priority.

The issue of damages

Mr. Goffe, Q.C. submitted that here the learned trial judge fell into error in not awarding to Life of Jamaica damages based on the difference between their contract price and the present valuation of the premises, being $4.1 million. This he submitted, would be the proper measure of damages based upon their loss of bargain from the aborted agreement for sale. The learned trial judge, in my view, correctly awarded damages to Life of Jamaica, limited to a return of their deposit being $880,000 and interest fixed at 25% per annum calculated at the commercial rate.

Having found that Life of Jamaica was not without some measure of blame, as being aware of Broadway's occupation of the premises they failed to take such reasonable and prudent steps to enquire from them as to the nature of the interest in the property, and, were fixed thereby with constructive notice of the option to purchase, it followed that as they were never in a position to call for a conveyance to them of the legal estate, their claim in damages would have been limited, as the learned judge correctly found, to the return of their deposit with interest at the commercial rate.

It was these reasons that led me to the view as set out at the commencement of this judgment.

HARRISON, J.A.

I have read the judgment of the learned President and my brother Bingham, J.A. and I agree with their reasons. However, in respect of the damages awarded to the second defendant/appellant against the first defendant/respondent, I wish to make a comment.

The plaintiff/respondent (Broadway) by an agreement dated the 1st day of June, 1991, leased premises at 13 Mandeville Plaza, Mandeville, in the parish of Manchester, from the first defendant/respondent (Levy) for a period of five years as from the said date, with an option to purchase the said premises exercisable within two years from the said date.

In October, 1992, Levy entered into an agreement with the second defendant/appellant (Life of Jamaica) to sell the said premises for $4,440.000. Levy was then fully aware that Broadway had the right up to June, 1993, to exercise the option to purchase and therefore if validly exercised he would not have been able to give a good title.

In December 1992, Levy through his agent offered to pay Broadway $800,000.00 if Broadway would cancel the lease and as a consequence, the option . Broadway refused.

By letter dated the 21st day of January, 1993, to Levy, Broadway exercised its option to purchase

By letter dated the 25th of January, 1993, Levy through his attorney-at-law undertook to pay to Broadway the sum of $800,000.00 if it signed a "cancellation of lease" document. Broadway did not comply.

The general rule in respect of a breach of contract for the sale of land is that the damages recoverable by the party not at fault is the value of the loss of bargain that is, to put the plaintiff in the same position as if the contract had been performed. However, by the rule in **Bain vs. Fothergill** (1874) L.. 7 H.L. 158, there is an exception to the general rule where the seller of land is unable to complete the contract because of a defect in title. The purchaser's damages will not be by way of a loss of bargain, but restricted to a refund of the deposit and costs of investigation of title. The rule, however does not apply where the said seller was fraudulent or acted in bad faith.

In **Goffin vs. Holder** (1921) 90 L.J. Ch. 488, the defendant who had a good title, granted to the plaintiff an option to purchase land. Having contracted to sell the land to the plaintiff, the defendant sold it to a third party. It was held that the plaintiff could recover damages for loss of bargain. The modern cases however tend to restrict the rule in **Bain vs. Fothergill.**

In **Ray vs. Duce** [1986] 2 All E.R. 482, purchasers exercised an option to purchase with knowledge at the time of exercising the option that the vendor would have a difficulty in making a good title, which difficulty was not voluntarily created by the vendor. The vendor was unable to give good title to the purchasers. The damages recoverable by the purchasers for breach of the option agreement was limited to the expenses they had incurred. If the loss likely to result from the breach of contract would

have been in the contemplation of the parties at the time the contract was made, the party not at fault would be entitled to recover only the reasonably forseeable loss - **Victoria Laundry (Windsor) Ltd. vs. Newman Industries Ltd.** [1949] 2 K.B. 528.

In the instant case, the learned trial judge found that Life of Jamaica had "actual knowledge of the plaintiff's occupation, and was affixed with constructive notice of the tenant's right including the option to purchase." He quite rightly found that:

> "in these circumstances the second defendant ought reasonably to have foreseen that such loss was likely to occur."

Life of Jamaica was not without some degree of fault, and with such foresight attributable to it. Although Levy acted in bad faith by entering into the contract of sale with Life of Jamaica well knowing that it was unlikely that it could give a good title, Life of Jamaica was also fixed with that knowledge.

Paradoxically, the conduct of Levy sounds in tort, which would entitle the person wronged, to damages calculated to restore it to the position it would have been, had the tort not been committed, namely a refund of deposit and expenses incurred. However, the claim is in contract.

I agree with Langrin, J. that Life of Jamaica is not entitled to damages for a loss of bargain, but to a refund of deposit and interest, as awarded.

RATTRAY, P.

Appeals dismissed. Order of Langrin J of 1st March, 1996 affirmed. Cost of appeals to the plaintiff/respondent to be taxed if not agreed to be paid by both appellants. The second defendant/appellant (Life of Jamaica) will recover whatever costs it pays to the plaintiff/respondent (Broadway) as well as its own costs from the first defendant/appellant Michael Levy.