[2011] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 32/2009

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA

BETWEEN	**NEW FALMOUTH RESORTS LIMITED**	**APPELLANT**
AND	**INTERNATIONAL HOTELS JAMAICA LIMITED**	**RESPONDENT**

Miss Carol Davis and Mrs Julliet Mair-Rose for the appellant

Dr Lloyd Barnett and Walter Scott instructed by Weiden Daley of Hart Muirhead Fatta for the respondent

12, 13, 14 July 2010 and 15 April 2011

PANTON P

[1] I have read in draft the reasons for judgment written by my learned brother, Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

MORRISON JA

Introduction

[2] The respondent ('IHJ') is the owner and operator of the Starfish Hotel (formerly the Trelawny Beach Hotel) ('the hotel') in the parish of Trelawny. This appeal concerns

the ownership of a parcel of land consisting of 4¾ acres, known and described as lot 3A, which is registered at Volume 1066 Folio 929 of the Register Book of Titles in the name of the appellant ('NFR') as proprietor. Lot 3A, which is adjacent to the hotel, has for several years been used as part of the hotel operations for the purposes of tennis courts, a riding stall, a playing field and a settlement pond for sewage treatment.

[3] By an action commenced in the Supreme Court on 24 October 2002, NFR claimed against IHJ for an order for possession of lot 3A, contending in its further amended statement of claim filed on 5 July 2006 that IHJ's possession of the land has either been as a trespasser or in the alternative as a tenant at will. IHJ on the other hand contends that it has been in possession of lot 3A as purchaser in possession, pursuant to an agreement for sale dated 17 February 1982 ('the agreement'), between NFR as vendor and National Hotels and Properties Limited ('NHP') as purchaser, in respect of which IHJ is the ultimate assignee. In an action tried before him over six days ending on 26 February 2006, on 20 February 2009 Hibbert J gave judgment dismissing NFR's claim, with costs to IHJ. In this appeal NFR challenges this decision, contending that the learned judge fell into error in a number of respects.

The background

[4] In 1978, NHP purchased the hotel from Trelawny Resorts Limited. At the time of purchase and, it appears, for some time thereafter, it was thought that lot 3A, upon which the hotel's tennis courts were situated, formed part of the land that had been

acquired by NHP. However, in 1982 (at a time when NHP was considering a sale of the hotel) it was discovered that lot 3A was not in fact part of the hotel property, but was owned by NFR. Contact was accordingly made with NFR and discussions ensued between NHP, represented by its managing director Mr Hugh Dyke, and Mr John Phelan 111 ('Mr Phelan'), who represented himself to be the managing director of NFR. Also involved in the discussions were an attorney-at- law representing NHP and Mr Vincent Chen, an attorney-at-law and partner in the firm of Clinton Hart & Co, representing NFR. In due course, Mr Chen prepared the agreement whereby NFR agreed to sell and NHP to purchase lot 3A for the sum of $184,000.00. The agreement was signed by Mr Phelan on behalf of NFR on 17 February 1982 and a cheque for $62,000.00, representing the deposit payable under the agreement, was on the same day paid into Mr Chen's firm on behalf of NHP.

[5] With regard to possession, the agreement provided for vacant possession on completion and also stated that "The purchaser is the existing tenant under a tenancy agreement of part of the said land". The completion date was to be on or before 31 March 1982, "in exchange for Duplicate Certificate of Title registered in the name of the Purchaser and the payment of the balance of purchase money and costs in full". Time was not made of the essence of the agreement. Completion did not take place as scheduled and, in a letter dated 28 April 1982 ('the 28 April 1982 letter'), Mr Chen (who under the terms of the agreement had carriage of sale), wrote to NHP's attorneys in the following terms:

> "We have your letter of April 26, 1982. We have consulted with Mr. John Phelan the Managing Director and duly authorized agent of the Company who has authorized us to advise you that your client may take possession of the land purchased under the Agreement for Sale. In the circumstances, the Vendor will not claim interest on the balance of purchase money so long as completion takes place within a reasonable time after the Vendor has cleared title.
>
> We trust that the foregoing will meet your client's approval."

[6] From a perusal of the certificate of title for lot 3A, it is clear that Mr Chen's reference in this letter to the vendor needing time to clear title had to do with the fact that, as at the date of signing of the agreement, mortgage no. 294304 in favour of a company known as Chisholm & Company Limited was endorsed on NFR's title registered at Volume 1066 Folio 929, to secure the sum of $50,000.00 with interest. Title was not in fact cleared until 18 December 1998 when, in Supreme Court Suit Number E 47 of 1983, between NFR as plaintiff and Chisholm & Company Ltd and J Henry Chisholm as defendants, Edwards J granted the declaration sought by NFR that mortgage number 294304 was null and void. The court also declared that NFR was the legal and beneficial owner of lot 3A.

[7] By a Deed of Assignment dated 30 December 1989, NHP assigned the agreement and all its estate, right, title, benefit, advantage, property, claim and demand whatsoever of NHP in or to the property comprised in the agreement to Linval Limited absolutely, subject nevertheless to the obligations on the part of [NHP] contained in the

agreement. Two days later, on 22 December 1989, Linval Limited changed its name to International Hotels Limited and, by Deed of Assignment dated 22 May 2000, assigned all its estate, rights, title, benefit, advantage, property, claim and demand whatsoever in the agreement and in or to the property comprised in it to IHJ, subject again to the obligations of International Hotels Limited contained in the agreement.

[8] By letter dated 30 August 2001, Messrs Hart Muirhead Fatta ('HMF'), acting as attorneys-at-law for IHJ, wrote to NFR to point out that, as a result of the judgment of Edwards J referred to in para. [6] above, NFR was "now in a position to fulfill its obligation under [the agreement]...". The letter accordingly requested that NFR take immediate steps to bring the agreement to completion by the execution of a transfer of lot 3A in IHJ's favour and delivery to it of the Duplicate Certificate of Title, in exchange for payment of the balance purchase price (net of the deposit of $62,000.00) due to NFR under the agreement. In that letter, HMF also advised that "The benefits and liabilities under [the agreement] were duly assigned by NHP to Linval Limited which changed its name to International Hotels Limited...[a] the assets and liabilities of IHL were transferred to International Hotels (Jamaica) Limited (IJHJL)". NFR responded swiftly, by letter dated 6 September 2001, over the signature of James H. Chisholm, who was described in the letter as "Chairman & Managing Director" of the company. NFR asserted that neither NFR nor "its legally appointed Managing Director from January 1973" was a party to "any purported agreement of sale" to NHP, and also denied having received the sum of $62,000.00. NFR observed that "We now understand from you that, IHJL is responsible for the liabilities of NHP", and the letter

ended with request to IHJ to advise NFR "about PAST, DUE AND OWING RENTAL OF THE TENNIS COURTS on our property..." (capital letters in the original). NFR followed this letter up with another dated 28 September 2001 to IHJ, in which it advised that IHJ was "squatting on our property" and gave notice to IHJ to vacate the property on or before 27 October 2001.

[9] As a result of the position taken by NFR in the correspondence described in the previous paragraph, on 12 December 2001 IHJ filed suit against NFR (suit number E 616 of 2001) claiming specific performance of the agreement. A statement of claim was filed in this action on 5 March 2002 and a defence, in which NFR challenged the authority of Mr Phelan to sign the agreement as well as the efficacy of the chain of assignments pursuant to which IHJ claimed to be entitled to maintain the action against NFR, was filed on 12 August 2002. The pleadings on both sides have since been amended (by IHJ, on 12 February 2007, to add a further claim to lot 3A under the Limitation of Actions Act and by NFR, on 18 March 2009, to add a further plea by way of defence that the letter of possession dated 28 April 1982 relied on by IHJ amounted to a variation of the original agreement between the parties which was unenforceable by IHJ for want of consideration and in any event did not have the effect of giving IHJ possession of lot 3A). It is not at all clear, and no reason was given to us, why this action has not been brought on for trial.

[10] By notice to quit dated 13 August 2002, NFR again gave notice to IHJ to vacate lot 3A, citing as its reason for doing so the fact that the "said premises are required by

[NFR] for his own use" and, IHJ having remained in possession of lot 3A, NFR filed the action with which we are concerned in this appeal on 24 October 2002.

The pleadings

[11] By its generally endorsed writ of summons filed under the rules of civil procedure then in force (the CPR would come into effect as of 1 January 2003), NFR's laconic claim against IHJ was "for possession of premises known as Lot 3A part of New Court Trelawny and registered at Volume 1066 Folio [sic] [929] and for damages for use and occupation for trespass to [NFR's] land". In its original statement of claim filed on the same date as the writ, dated 5 July 2006, NFR asserted that IHJ had, since May 2000, been in wrongful possession of lot 3A "as trespasser/ and in the alternative as a tenant of the said land" (para. [2]). Further that, without NFR's consent or the approval of the Trelawny Parish Council, IHJ had "on or about 2001 constructed a sewage pond on the said land" (para. [3]) and had failed to vacate the land after service of notice to quit on it on 13 August 2002, as a result of which NFR had suffered loss and damage and claimed for mesne profits and the cost of removing the sewage ponds. However, no particulars of special damages were provided. In addition, NFR also claimed for an order for recovery of possession of lot 3A.

[12] NFR amended its statement of claim twice, firstly on 17 June 2003 to provide the particulars of special damages omitted from the original and secondly on 5 July 2006

updating those particulars to claim the total sum of $118,200,000.00 for mesne profits and the sum of $10,350,265.00 representing the cost of removal of the sewage ponds.

[13] In its defence filed on 28 November 2002, IHJ referred to the agreement, the letter of possession dated 28 April 1982 written by Mr Chen to NHP, the chain of assignment from NHP through to IHJ, suit number E 616 of 2001 and accordingly denied that NFR was entitled to damages or to an order for possession of lot 3A.

[14] On 3 June 2005, this defence was amended to add a reference to the Limitation of Actions Act, averring that as a result of NHP's continuous possession of lot 3A from 1982 and its own continuous possession from 1989, the action against IHJ for recovery of possession was barred by the operation of section 30 of the Act (para. 10A). However, for reasons which are not clear, the amended defence was not before the trial judge and Hibbert J's judgment, to which I shall next come, certainly makes no reference to the limitation point at all.

[15] There was no reply to the defence, but in its pre-trial memorandum filed on 16 May 2003, NFR indicated that, in response to the position taken by IHJ in its defence that it was entitled to rely on the agreement, it would contend that (a) IHJ could not do so, for the reason that at the material time John Phelan 111 was not authorised to sign any agreement on behalf of [NFR], and [NHP] were aware of this, (b) that the agreement was statute barred, and (c) that IHJ is not a proper assignee of [NHP].

The evidence at trial

[16] Witness statements were exchanged on behalf of both parties and a number of the witnesses also gave oral evidence before Hibbert J, including Mr Chisholm himself, Mr Dyke and Mr Chen (who gave evidence for IHJ). Among the several items of documentary evidence tendered and admitted at the trial were minutes of the meetings of the board of directors of NFR from 1968 - 1982 (exhibits 1 – 6 and exhibit 8); a memorandum dated 21 June 1982 signed by the persons described in it as the directors of NFR (exhibit 7); the articles and the memorandum of association of NFR (exhibits 10 and 11); court documents from the United States District Court for the Southern District of the State of Texas, from which it appeared that Mr Phelan had been declared a bankrupt in that state in or around 1972; and certified copies of the annual returns filed by NFR with the Registrar of Companies for the years 1970 – 1972 (exhibits 14 – 16), 1981 – 1984 (exhibits 17 – 20) and 1988 – 1990 (exhibits 21 - 23). Also tendered in evidence were copies of correspondence written by Mr Chisholm to various persons, including the Registrar of Companies.

[17] The documentary evidence disclosed that NFR was incorporated in 1967 by members of the Phelan family (Mr Phelan, David Phelan and Frank Phelan). Mr Chisholm joined NFR in 1973 and was appointed to the board of directors and made managing director of the company in January of that year. The minutes of a meeting of the directors on 22 February 1973 record the election of David Phelan to be chairman of the company, with "the absolute authority of his [fellow Directors and the company]...to

remove the Managing Director of [NFR] without any prior notice; if, the Managing Director fails to carry out satisfactorily [his] duties...and to immediately appoint a successor". Further, at that same meeting, it was resolved that Mr Chisholm, as managing director, should have as from the date of the meeting "the absolute authority of his [fellow Directors and the company]..." with regard to signing contracts and transfers for the sale and purchase of real estate by the company, the appointment of bankers, auditors, attorneys-at-law and the like. A handwritten note, purporting to be minutes of a meeting of the board of NFR on 24 November 1981, at which John and Frank Phelan were present, recorded a decision to appoint Mr John Phelan as managing director in place of Mr Chisholm (who, it was noted, was "no longer with the...company"). In a memorandum dated 21 June 1982, signed by Mr Phelan, Messrs David and Frank Phelan, and Mr Chisholm, as directors of NFR (exhibit 7), the signatories recorded their agreement to waive all notice requirements for the holding of a meeting of the board on that day (see para. [35] below). The minutes of the meeting of the board that then ensued (exhibit 8) reveal that the chairman, having withdrawn a request for the confirmation of the handwritten minutes of the meeting of 24 November 1981, moved a resolution (pursuant to the powers given to him by the meeting of 22 February 1973) to appoint Mr Phelan as managing director as of 24 November 1981, "the date when Mr James H. Chisholm was dismissed from the post". Those minutes also record that the directors passed the following resolution (with Mr Chisholm being the sole dissenter):

> "THAT the Sale Agreement dated February 17, 1982, and presented at this meeting be approved and that the

> authority vested in John Phelan by the Board of Directors to act for and on behalf of the Board in such transactions be endorsed."

[18] As to Mr Phelan's bankruptcy in Texas in 1972, the only evidence concerning this (apart for the actual court documents referred to in para. [16] above) came from an affidavit sworn to by Mr Phelan himself in yet another of the series of litigation involving Mr Chisholm, the Phelans and NFR in connection with the company (suit number E. 261 of 1992, ***James Henry Chisholm v NFR***), which was filed by Mr Chisholm as an exhibit to an affidavit sworn to by him in these proceedings. In that affidavit, Mr Phelan confirmed that he had been adjudged bankrupt by an order of the United States Southern District Court for Texas on 12 July 1972 and that he had been discharged from bankruptcy by a later order of the same court made on 30 October 1974. Mr Phelan stated further that he had resigned as a director of NFR during the course of 1971 and that he had "thereafter had no dealings with the company as a Director or other officer thereof until after I had been discharged from bankruptcy" (para. 26 of the affidavit sworn to on 30 October 1992).

[19] However, the Annual Returns for the years ended 31 December 1981, 1982, 1983 and 1984 all list Mr Phelan as a shareholder and director of NFR.

[20] In his *viva voce* evidence at the trial, Mr Chisholm took issue with much of the documentary evidence, describing what was recorded in several of the board minutes as either "incorrect", "not accurate" or "fraudulent". He could not recall signing any

annual returns on behalf of NFR and stated that he had advised the Registrar of Companies that they were "not correct". In 1981 and in 1982, Mr Phelan was not a member of the board of the company and between 1982 and 1984 the only directors were himself and David Phelan. Neither Mr Chen nor the firm of Clinton Hart & Co was authorised at the material time to act as attorneys-at-law for the company.

Hibbert J's judgment

[21] In a carefully written judgment handed down on 20 February 2009, Hibbert J found for IHJ, resolving such conflicts of fact as there were between the documentary evidence and Mr Chisholm's evidence in favour of the former. Thus, he considered that the evidence, in particular the contents of the annual returns and the various board minutes, "clearly demonstrates that at the time of the agreement for sale, John Phelan 111 was regarded by N.F.R. as a director of the company" (page 6 of the judgment). Further, that even if there was a defect in Mr Phelan's appointment or qualification as a director of the company, the effect of section 172 of the Companies Act ('the 1965 Act') was to preserve its validity, which was also the common law position on the ostensible authority of directors, as reflected in cases such as ***Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd and another*** [1964] 2 QB 480. Moreover, the judge found, "the ratification of the agreement for sale at the meeting of the board of directors held on the 21st June 1982 should lay to rest any questions as to the validity of the agreement for sale" (page 8).

[22] With regard to the assignments of the agreement by NHP to Linval Ltd and by that company (after its change of name) to IHJ, the judge considered that those assignments would have been validly made even in the absence of notice to NFR. But in any event he also found as a fact that notice of the assignments had been given to NFR "thereby making the assignment to [IJH] complete as between N.F.R. and [IHJ]" (page 12) and thus entitling IHJ to possession of lot 3A pursuant to the 28 April 1982 letter.

[23] Finally, Hibbert J found that IHJ was not affected by laches and that it was therefore not in possession of lot 3A as either a trespasser or a tenant of NFR, which was accordingly not entitled to the order for possession which it sought.

The appeal

[24] NFR filed some 12 grounds of appeal in all, and these were met by a counter notice of appeal filed on behalf of IHJ advancing 12 additional bases upon which the decision of the judge might be supported. The following, it appears to me, are the issues which arise from the grounds of appeal and the counter notice of appeal:

(i) The validity of the agreement;
(ii) the effect of the assignments;
(iii) the position of IHJ as occupiers of lot 3A;
(iv) the questions of laches and limitation.

The submissions

[25] On the first issue, Miss Davis attacked the validity of the agreement on a number of grounds, the primary one of which was that Mr Phelan was not a director of NFR at the time he signed it, because he had ceased to be a director by way of resignation and/or by virtue of his having been declared a bankrupt in Texas in 1972, and had not been validly reappointed. No reliance can be placed on section 172 of the 1965 Act, because there is no evidence that Mr Phelan was ever appointed a director after his resignation in 1971 (***Morris v Kanssen*** [1946] AC 459). He accordingly had no authority to enter into the agreement on behalf of the company and the purported ratification of it by the directors was of no legal effect, because at the material time the only person clothed with the requisite authority to act on behalf of the company was Mr Chisholm and he had not approved the purported ratification. But in any event, Miss Davis contended further, the agreement was expressly made subject to a special condition that the vendor should obtain exchange control approval from the Bank of Jamaica and, such approval not having been obtained, the agreement was not binding on either party. In support of these submissions, Miss Davis referred us to a number of authorities, including ***Freeman & Lockyer*** (to which the judge had also made reference) and ***Aberfoyle Plantations Ltd v Khaw Bian Cheng*** [1960] AC 115, as well as to Chitty on Contracts, 26th edn, para. 796 and Sealy and Worthington's Cases and Materials on Company Law, 8th edn, page 143.

[26] As to the second issue (assignment), Miss Davis referred us to section 49 (f) of the Judicature (Supreme Court) Act in support of the submission that, in order to be effective, notice of an assignment must be given to the debtor or person from whom the assignor would have been entitled to claim the debt or chose in action assigned. In this regard we were also referred to Halsbury's Laws of England (5th edn, vol. 13, para. 72) and the case of ***Warner Bros. Records Inc. v Rollgreen Ltd and others*** [1976] QB 430. In the instant case, Miss Davis submitted, no notice of assignment of the agreement to Linval and ultimately to IHJ was given to NFR by NHP, with the result that IHJ was not a proper assignee of the agreement and could not therefore rely on any right to possession arising thereunder.

[27] On the third issue (possession) Miss Davis made a submission in three parts, firstly that the purchaser was not entitled to possession of the property under the agreement until completion and the agreement has to date not been completed (and even if the 28 April 1982 letter could be read as a variation of the agreement to permit possession before completion, it was not evidenced by any writing signed by the parties sufficient to meet the requirements of the Statute of Frauds); secondly, that even if the 28 April 1982 letter did constitute valid permission to the purchaser to take possession prior to completion, there was no evidence that NHP had taken possession in pursuance of this permission; and thirdly, that even if NHP had in fact gone into possession pursuant to the letter, it did so as a licensee and the licence had been terminated "at latest by the Notice to Quit dated 2002". On this last point, it was also contended that the licence was in any event personal and as such non assignable. For these

submissions, Miss Davis relied on Emmet's Notes on Perusing Titles and on Practical Conveyancing, 16th edn, pages 200 - 202, Halsbury's Laws, 4th edn reissue, vol. 42, para. 119, Gray's Elements of Land Law, 2nd edn, pages 680 -681, Chitty, paras 197 and 1601, ***Ball v Cullimore at al*** (1835) 150 ER 51, ***Francis Jackson Developments Ltd v Stemp*** [1943] 2 All ER 601 and ***Sale v Allen*** (1987) 36 WIR 294.

[28] On the issue of laches, Miss Davis submitted that the learned trial judge had erred in finding that IHJ was not affected by laches, since this issue was not before him; alternatively, that the finding that IHJ was not guilty of laches was against the weight of the evidence. And on the question of limitation, she submitted succinctly that "the Contract would be outside the limits permitted by the Statute of Limitations".

[29] In response to these submissions, Dr Barnett for IHJ submitted firstly, with regard to the impact of Mr Phelan's bankruptcy on his status as a director of NFR, that even if he had been adjudged bankrupt and his foreign bankruptcy was cognisable under Jamaican law (which Dr Barnett described as "doubtful"), it is clear that by the time the agreement was entered into he had been discharged from bankruptcy and he had been treated by NFR as a director and represented as having the necessary authority, as could be seen from the annual returns (some of which had been signed by Mr Chisholm himself) and the board minutes. But further, Dr Barnett pointed out, section 172 of the 1965 Act provided that the acts of a director or manager remained valid notwithstanding any defect that may afterwards have been discovered in his appointment or qualification. Section 34(1)(b) of the 1965 Act in any event also

provided for the making of a contract required to be in writing on behalf of a company by it being signed on the company's behalf by any person acting under its express or implied authority as its agent, whether that person is a director or not. In this regard, Dr Barnett also placed reliance on the principles of the common law, which protects the dealings of third parties with authorised representatives of a company acting in good faith (***Mahoney v East Holford Mining Co.*** (1875) LR 7 HL 869, ***Royal British Bank v Turquand*** (1856) 119 ER 886, ***Clay Hill Brick & Tile Co. v Rawlings*** [1938] 4 All ER 100, ***Uxbridge Permanent Building Society v Pickard*** [1939] 2 KB 248 and ***Freeman & Lockyer***). And finally on this point, Dr Barnett adverted to the fact that the actions of both Mr Phelan and Clinton Hart & Co in entering into the agreement on behalf of NFR had been expressly ratified by the board of NFR at its 21 June 1982 meeting, thus effectively determining any question of the validity of the agreement (***Reuter v The Electric Telegraph Company*** (1856) 119 ER 892, ***Hopper v Kerr, Stuart & Co Ltd*** (1900) LT 329).

[30] As to the question of exchange control, Dr Barnett expressed a doubt whether NFR could rely on this point at this stage, having not pleaded it (***Morrell v Workers Savings & Loan Bank*** [2007] UKPC 3), but he nevertheless went on to submit that, by virtue of the provisions of section 33 of the Exchange Control Act, as it then stood, there had been no necessity for exchange control approval in this case in the first place. Further, and in any event, that Act had been progressively amended and had since been repealed by the Exchange Control (Repeal) Act 1992, with the result that the

question of exchange control approval was "irrelevant to the completion of this transaction" (***Friend v Tulloch*** (1994) 31 JLR 27).

[31] With regard to the efficacy of the assignment of the agreement to IHJ (issue (ii)), Dr Barnett challenged Miss Davis' assertion that notice of an assignment was necessary to perfect it in all cases, pointing out the distinction between a legal or statutory assignment and an equitable assignment. He referred us to a number of cases on the point (***Gorringe v Irwell India Rubber Works*** (1886) 34 Ch D 128, ***Holt v Heatherfield Trust Ltd*** [1942] I All ER 404 and Cheshire & Fifoot's Law of Contract, 9th edn, pages 494-5), but he also submitted that in any event notice of the assignment had been given to NFR in the instant case, as the trial judge had found on "overwhelming and compelling evidence". On general principles governing the approach of appellate courts to findings of fact by the courts below, there was therefore no basis upon which this court should interfere with the judge's findings on this point (***Industrial Chemical Co. (Jamaica) Ltd v Ellis*** (1982) 35 WIR 303). (Dr Barnett's submission on this point closely resembles the observation made by Miss Davis in her written submissions that "the court will be reluctant to interfere with the exercise of a trial judge's discretion unless it can be shown that the judge's discretion was based on a misunderstanding of the law or evidence before him or if the inferences drawn were not open to him based on the evidence...".)

[32] On the third issue (possession), Dr Barnett was content to say that on 28 April 1982, Linval Ltd, IHJ's predecessor in title, took possession of lot 3A, not as lessee, but

as purchaser, and that this is the basis upon which IHJ has been in possession since December 1989 (that is, the date of the assignment of the agreement to IHJ). There could be no question of lot 3A having been rented or licensed, since there was no agreement to create a tenancy or a licence and no rent or licence fee had ever been agreed or paid. However, Dr Barnett also submitted, if the giving of early possession amounted to a variation of the agreement which required consideration, then the forbearance of NHP from taking action against NFR for breach of contract was good and sufficient consideration (relying on ***Alliance Bank Ltd v Broom*** (1864) 62 ER 631).

[33] On the question of laches, Dr Barnett pointed out that there had been a consensual postponement of the time for completion in this case, the parties having agreed that the transfer of title would await the clearing of the title. In these circumstances, no cause of action arose in IHJ's favour before Edwards J gave judgment in December 1998 in suit number E. 47 of 1983 (see para. [[6] above) and no question of either laches or limitation could arise in this case (Spry, The Principles of Equitable Remedies, 3rd edn, pages 415 – 422; Sharpe, Injunctions and Specific Performance, 1983, paras 82-89 and ***Williams v Greatrex*** [1956] 3 All ER 705) . In any event, with regard to limitation, the statute not having been pleaded by NFR, it could not now seek to rely on it (***The Jamaica Flour Mills Ltd v The Administrator General for Jamaica*** (1989) 26 JLR 154).

This court's approach to findings of fact on appeal

[34] In ***Industrial Chemical Co (Jamaica) Ltd v Ellis***, it was held by the Privy Council that an appellate tribunal should only upset findings of fact by a trial judge if it is satisfied that, on evidence the reliability of which it was for him to assess, the judge had plainly erred in reaching his conclusions of fact; and the appellate tribunal should be even more cautious when it does not have the advantage of seeing a verbatim transcript of the evidence. This is, of course, no more than a modern restatement of a long established principle (as to which see, for instance, ***Watt (or Thomas) v Thomas*** [1947] AC 484) and describes the approach which I propose to take to Hibbert J's findings in this matter.

Issue (i) – the validity of the agreement

[35] NFR's primary challenge to the validity of the agreement is based on the contention that Mr Phelan, who signed it on behalf of the company, was not a director at the material time and therefore had no authority to act on its behalf. Although, as Dr Barnett pointed out, this contention was never pleaded by NFR, it is clear from Hibbert J's judgment that it was a major part of NFR's case in the court below, as indeed it turned out to be on the appeal as well. While there is no question that Mr Phelan was appointed one of the first directors of NFR after its incorporation in 1967, article 97(c) of the articles of association of the company ('the articles') provides that the office of a director shall be vacated if he becomes a bankrupt or enters into any arrangement with his creditors. Therefore, in reliance on the evidence (as well as on

his own admission) that Mr Phelan was adjudged a bankrupt in the state of Texas in 1971, NFR contends that Mr Phelan thereupon ceased to be a director of the company and that there is no evidence that he was ever reappointed. Although, as Dr Barnett also pointed out, the effect of a foreign bankruptcy has not been established, I am prepared to approach the matter on the basis that the bankruptcy order made by the Texan court in 1971 put Mr Phelan in the same position as he would have been in had the order been made in Jamaica, with the result that he falls to be treated as having vacated office as a director by reason of the order. There was also, in any event, some evidence coming from Mr Phelan himself that he had voluntarily resigned as a director in 1971.

[36] However, it is also clear from Mr Phelan's own undisputed evidence that he was discharged from bankruptcy by the Texas court on 30 October 1974, thus removing any known obstacle to his resuming his position as a director of NFR thereafter. Although the evidence does not point directly to his reappointment as a director, there was, it seems to me, considerable evidence to suggest that, by the time of the signing of the agreement in 1982, Mr Phelan was regarded, treated and held out by NFR as a director of the company. Thus, the annual returns filed by the company for the years 1981 - 1984 and 1988 - 1990 all listed Mr Phelan as a director, while a memorandum dated 21 June 1982 (to which reference has already been made – see para. [17] above), signed by Mr Phelan, Messrs David and Frank Phelan and Mr Chisholm as directors, stated the following:

> "We, the undersigned being directors of [NFR] do hereby waive all requirements as to the length of time for the holding of a Directors' Meeting and all formalities in relation to the giving of notice in respect of the said meeting."

[37] Further, the minutes of the meeting of the board of NFR on 21 June 1982 record that the board at that meeting passed a resolution, which it had been attempted to pass at an earlier meeting of 24 November 1981, confirming the appointment of Mr Phelan as managing director of the company, with effect from 24 November 1981, in place of Mr Chisholm. Such an appointment, it seems to me, plainly presupposes that Mr Phelan had in fact been reappointed as a director at some point before that date. And finally, as far as the facts go, the meeting of the board on 21 June 1982 approved in express terms the agreement entered into on 17 February 1982 and confirmed "that the authority vested in John Phelan by the Board of Directors to act for and on behalf of the Board in such transactions is endorsed".

[38] I therefore think that Hibbert J's conclusion that the evidence "clearly demonstrates that at the time of the agreement for sale, John Phelan 111 was regarded by N.F.R. as a director of the company" was amply justified and that, Miss Davis' spirited efforts notwithstanding, no reason has been shown to disturb the judge's findings in this regard.

[39] As to what should flow from this finding as a matter of law, Hibbert J considered, in reliance on section 172 of the 1965 Act, that even if there was a defect

in the appointment or qualification of Mr Phelan as a director, this would not necessarily render his acts invalid. That section (which is now to be found in identical form in section 176 of the Companies Act 2004), provides that "The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification" (and see, to similar effect, article 114). However, in ***Morris v Kanssen***, it was held by the House of Lords that the purpose of section 143 of the Companies Act 1929 (the precursor to section 172 of the 1965 Act) and the then equivalent to article 88 was to provide a machinery to avoid questions being raised as to the validity of transactions where there had been a slip in the appointment of a director, but "cannot be utilized for the purpose of ignoring or overriding the substantive provisions relating to such appointment" (per Lord Simonds, at page 472). It is therefore necessary in seeking to apply the section to make what Lord Simonds described (at page 471) as "a vital distinction" between cases in which there has been a defective appointment and cases in which there is no evidence that there has ever been any appointment at all and accordingly where, as in ***Morris v Kanssen***, the evidence pointed to non-appointment of the affected persons as directors, rather than to a defective appointment, the House of Lords held that the section could not be prayed in aid to validate their appointments.

[40] In the instant case, there being no evidence whatever of any purported (or defective) reappointment of Mr Phelan as a director in the post 1974 period, I therefore agree with Miss Davis that section 172 cannot apply in these circumstances.

[41] But that is not, it seems to me, an end to the matter. The principle that a company, as an artificial entity, can only act through its officers and directors, whose powers are described and limited by the company's articles of association, is a commonplace of company law. So too is the rule that all persons dealing with a company are fixed with constructive notice of its memorandum and articles, which are public documents and as such open to inspection by all (see ***Freeman & Lockyer***, per Willmer LJ at page 491-2). It is precisely because third parties dealing with a company, who, although deemed to have knowledge of the restrictions on the exercise of the powers of directors in the articles, are nevertheless unlikely as a practical matter to be familiar with the often complex internal organisation of companies, that the common law also developed special rules to provide some measure of protection for third parties by mitigating the dilemma which a strict application of the doctrine of constructive notice can produce (see generally Gore-Browne on Companies, 44th edn, chapter 5). This is the mischief which the well known common law rule in ***Turquand's case*** seeks to address, by providing that persons dealing with a company are not obliged to inquire into the internal proceedings of the company but can assume that all acts of internal management have been properly carried out, save where a third party knows of, or is put on inquiry as to, the failure of the company to adhere to its own procedures (see Company Law, by Brenda Hannigan, 2nd edn, paras. 8-41 and 8-42).

[42] It is in this context as well that the common law rules relating to the actual and ostensible (or apparent) authority of an agent, such as a director, were developed and the classic exposition of the applicable principles is still that of Diplock LJ (as he then

was) in ***Freeman & Lockyer***, where he distinguished the actual from the ostensible authority of an agent in this way (at pages 502-3):

> "An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor. It may be that this rule relating to 'undisclosed principals', which is peculiar to English law, can be rationalized as avoiding circuity of action, for the principal could in equity compel the agent to lend his name in an action to enforce the contract against the contractor, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract.
>
> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

[43] Diplock LJ went on in the same judgment to suggest (at pages 503-504) that, while the representation which gives rise to apparent or ostensible authority may take a variety of forms, the commonest is representation by conduct, that is, by permitting the agent to act in the management or conduct of the principal's business. That very learned judge then stated the result of the application of this principle in the corporate context to be as follows (page 505):

> "Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorized to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such 'apparent' authority that the agent had authority to contract on behalf of the company."

[44] Applying these principles to the instant case (in which no question that the board of directors acted outside of their powers under the articles arises), it therefore appears to me that, by its representation to the world at large in the successive annual returns filed with the Registrar of Companies that Mr Phelan was a director of NFR

during the relevant period, the company is estopped from denying to IHJ that he had the authority to enter into the agreement on behalf of the company.

[45] Further, it will be recalled that at its meeting of 21 June 1982, the board of IHJ passed a resolution expressly approving the agreement and endorsing the authority of Mr Phelan to act for and on behalf of the board in "such transactions". In the light of this unequivocal action by the board of NFR, it seems to me that IHJ is also able to rely in this case on the equally well established principle of the law of agency that the acts of an agent on behalf of the principal outside of his actual authority may be adopted and ratified by the principal, who will then be liable to third parties in respect of those acts. The older cases cited by Dr Barnett (***Reuter v Electric Telegraph Co*** and ***Hooper v Kerr and others***) are express authority for this principle in the company law context and in Gower and Davies' Principles of Modern Company Law (8th edn, para. 7-21) the operation of the principle is stated in this way:

> "The company thus has an option to take up the transaction or to treat it as not binding on it. Determining who has the power to ratify the transaction is a matter for the company's constitution. There is no requirement in the Act, as there is for breaches of directors' duties, that ratification must be by the shareholders. Normally, it is a matter of finding who, under the company's constitution, does have actual authority to enter into the transaction and securing their approval of it. However, it is not necessary that ratification should take the form of an express decision to approve the transaction. Ratification can be implied from conduct and the conduct may amount to ratification if the company has knowledge of the essentials of what the agent has done, even if it did not know that the agent had acted without authority. If there is ratification, it has retrospective effect, i.e. it renders the

> transaction with the company binding on it as from the time
> it was entered into by the agent."

[46] In the case of NFR, article 87 provides that "The business of the company shall be managed by the Directors..." and it appears to me that, on this basis, there being no constitutional limitation in the articles in respect of contracts of this nature, the directors were undoubtedly clothed with the authority to enter into contracts (such as the agreement) on behalf of the company. Miss Davis' submission that Mr Chisholm was the only person clothed with authority to ratify Mr Phelan's actions appears to me to ignore completely the meeting of the board on 21 June 1982, in which a resolution was passed confirming the appointment of Mr Phelan as managing director in place of Mr Chisholm. (It also ignores the fact, which did not escape Hibbert J's attention - see page 12 of his judgment - that in suit number E. 47 of 1983 Edwards J had held in clear terms that the termination of Mr Chisholm's appointment as managing director of NFR was valid.) It seems to me that as of that date, at the latest, it could not be successfully maintained that Mr Chisholm was the sole person clothed with the authority of the board to enter into contracts on behalf of the company. In my view, it follows from this that, as Hibbert J also concluded, the actions of Mr Phelan were validly ratified and the agreement properly approved by the board at its meeting of 21 June 1982.

[47] I have so far been discussing the question of the validity of the agreement purely from the standpoint of Mr Phelan's status as a director of NFR. However, the point may also be made that, even if I am entirely wrong in the conclusions to which I

have come on that question, the agreement may nevertheless yet be preserved by the operation of section 34(1)(b) of the 1965 Act, which provided that "a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person under its authority express or implied". It is clear from this section that it is quite possible for a contract to be validly entered into on behalf of a company by any person (not necessarily a director) acting under the authority of the company. In other words, as Dr Barnett submitted, Mr Phelan need not have been a director of the company at all in order to have acted as its agent.

[48] The final matter which arises on the issue of the validity of the agreement relates to the question of exchange control, special condition (2) of the agreement having made it subject "to the vendor obtaining Bank of Jamaica Exchange Control approval". It is not entirely clear why it was thought necessary to include special condition (2) in the agreement in the first place, since the statutory requirement of approval from the central bank, as it stood in 1982, related to transfers of property situated in Jamaica to persons resident outside of Jamaica (section 33). Indeed, Mr Chen's evidence was that, while he did not himself think any such approval was necessary, he nevertheless included the special condition in the agreement because it was already in an earlier draft of the agreement previously prepared by another attorney-at-law. Be all of that as it may, what is clear is that in 1992, beginning with The Exchange Control (Removal of Restrictions) Order, 1992 (which became effective on 24 April 1992), the exchange control regime was progressively liberalised,

culminating in The Exchange Control (Repeal) Act, 1992 (which came into force on 14 August 1992), by which exchange controls were abolished altogether.

[49] Miss Davis relies very heavily on the decision of the Privy Council in ***Aberfoyle Plantations Ltd v Khaw Bian Cheng***, in which it was held that where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled before that date. On this basis, Miss Davis' submission was that the requirement to obtain exchange control approval was a condition precedent to the contract becoming binding on the parties and that, since there is no dispute that such approval was never obtained, and that the completion date of 31 March 1982 had long passed, the agreement was not binding on either party.

[50] I am unable to accept this submission. In the first place, it was held as long ago as 1964, in ***Watkis v Roblin*** (1964) 6 WIR 533 (and later confirmed by ***Grant v Williams*** (1987) 24 JLR 297), that a breach of exchange control legislation went to performance of the contract and not to its formation. It follows from this that, if the requirement for exchange control approval had remained in force at this time, the completion date having passed, the agreement, though it would remain valid, could not be completed without such approval being first sought and obtained. But secondly, in the light of the complete repeal of the Exchange Control Act, it seems to me that this is now wholly academic and that, since approval from the central bank is no longer necessary, special condition (2) has long ceased to be of any relevance and the agreement may now be lawfully completed without reference to it. Clear support for

this analysis may be found in the decision of the Privy Council in ***Friend v Tulloch*** (1994) 31 JLR 27, which was a case in which the repeal of the Exchange Control Act was held to have rendered unnecessary the ministerial approval that had previously been required as a precondition to completion by an implied term in a contract for the sale of real property.

Issue (ii) – the effect of the assignments

[51] Assignment is the process by which the benefit of a contract may be transferred to a third party. Treitel (The Law of Contract, 12th edn, para. 15-001) describes the process in this way:

> "This is a transaction between the person entitled to the benefit of the contract (called the creditor or the assignor) and the third party (called the assignee) as a result of which the assignee becomes entitled to sue the person liable under the contract (called the debtor). The debtor is not a party to the transaction and his consent is not necessary for its validity."

[52] Miss Davis submitted, in reliance on section 49 (f) of the Judicature (Supreme Court) Act that, in the absence of notice to NFR of the assignment to IHJ, IHJ is not entitled to the benefit of the provisions of the agreement. Section 49 (f) provides as follows:

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to

> receive or claim such debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or thing in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor;
>
> Provided always that if the debtor, trustee, or other person liable in respect of such debt or thing in action, has had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or thing in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may if he thinks fit pay the same into the Supreme Court under and in conformity with the provisions of the laws for the relief of trustees."

[53] Section 49 (f) prescribes the procedure for the statutory assignment of choses in action. It reflects a provision which was first enacted in England in substantially similar terms in 1873 (Judicature Act, 1873, section 25(6)) and is now to be found in section 136(1) of the Law of Property Act, 1925. Before 1873, although there was no general right of assignment of contractual rights at common law, such rights were always assignable in equity, which took the view that "choses in action were property which ought, in the interest of commercial convenience, to be transferable" (Treitel, para. 15-006). In considering this question, it is important to bear in mind that the introduction of a statutory method of assignment did not affect the process of equitable assignment in any way, since, as Lord Macnaghten observed in ***Brandt's Sons & Co v Dunlop Rubber Company*** [1905] AC 454, 461, "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree".

[54] No particular form of words is required in order to constitute a valid equitable assignment and once it appears that "the intention of the assignor clearly is that the contractual right shall become the property of the assignee, then equity requires him to do all that is necessary to implement his intention" (Cheshire and Fifoot's Law of Contract, 9th edn, page 495). As to the question of notice, while this is an explicit requirement in the case of a statutory assignment, in equity it makes no difference to the validity of the assignment as between assignor and assignee. In this regard, Hibbert J made reference (at page 9 of his judgment) to ***Gorringe v Irwell India Rubber and Gutta Percha Works***, a case which was also cited to us by Dr Barnett, in which Cotton LJ said this (at page 132):

> "It is contended that in order to make an assignment of a *chose in action*, such as a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the title of the assignee to prevail against subsequent assignees. That is established by *Dearle v Hall*, but there is no authority for holding this rule to apply as against an assignee of the debt. Though there is no notice to the debtor the title of the assignee is complete as against the assignor."

[55] Absence of notice does not therefore affect the efficacy of the transaction as between the assignor and the assignee and, until notice is given, the assignment is an equitable assignment, requiring nothing more from the assignor to become a legal assignment. Thereafter, as Atkinson J observed in ***Holt v Heatherfield Trust Ltd*** (at page 407), "The assignee may himself give notice at any time before action is brought, and, further than that, even before notice he may sue in his own name, provided that

he makes the assignor a party to the action, as plaintiff if he consents, and as defendant if he does not consent".

[56] Which is not to say that there is no advantage to the giving of notice to the debtor, even in the case of an equitable assignment. While no notice is necessary to perfect the assignee's title as between himself and the assignor, notice will serve to perfect the title of the equitable assignee against the debtor (which is the point emphasised by ***Warner Bros. Records Inc v Rollgreen Ltd and others***, to which we were referred by Miss Davis). This in turn will protect the assignee from being bound by a subsequent payment made by the debtor to the assignor in ignorance of the assignment and will also give the assignee priority over other assignees (see Cheshire and Fifoot, op. cit., pages 494-5). Further, as Treitel observes (at para. 15-022):

> "Notice may also turn the assignment into a statutory assignment, in which case the debtor is liable to be sued by the assignee alone: he can no longer insist that the assignor be made a party to the action. Where the assignment is statutory, the debtor ceases, as soon as notice has been given, to be liable to the assignor and becomes liable to the assignee."

[57] Thus, as Hibbert J concluded (at page 11 of his judgment), correctly in my view, "the purpose of giving notice is to protect the rights of the assignee". It therefore seems to me that Dr Barnett's submission that, in the instant case, IHJ, as assignee, is entitled to rely on the fact of the assignments in answer to NFR's claim is entirely

correct and that the learned judge was right to reject Miss Davis' submission that, in the absence of notice of the assignments to NFR, IHJ was not entitled to the benefit of the agreement.

[58] But Hibbert J also went on to find as a fact that, in any event, notice of the assignments was given to NFR by HMF's letter of 30 August 2001, which had the result of perfecting the assignments as against NFR as well. It appears to me that that finding is fully supported by the evidence and that no basis has been shown for this court to interfere with the clear finding of the trial judge in this regard. (Indeed, it is of interest to note that NFR's response to the letter from HMF included the statement that "We now understand from you that I.H.J.L. is responsible for the liabilities of NHP" and concluded with a demand for "PAST, DUE AND OWING RENTAL OF THE TENNIS COURTS on our property..." – see para. [8] above.) With respect to Miss Davis' complaint that that letter was "not contemporaneous with any of the assignments but came 19 years after the date of [the agreement]", it is clear from the authorities that there is no prescribed time for the giving of notice and Treitel observes (at para. 15-020) that it need not be given "at the time of the assignment...and is effective so long as it is given before action is brought". Further, in ***Holt v Heatherfield Trust Ltd***, it was held that the notice becomes effective as at the date on which it is received by or on behalf of the debtor.

Issue (iii) - the position of IHJ as occupiers of lot 3A

[59] It is clear from the undisputed evidence in the case that lot 3A has been in use as part of the hotel operations conducted on the rest of the property from 1978, which is the date on which the hotel was first acquired by NHP. It was initially used for the purposes of the hotel's tennis and horseback riding activities, and a playing field, which was used as a staff playground. At some later date, the playing field came to be used for the purpose of a sewage treatment pond and related plant and equipment, to dispose of pre-treated liquid waste from the hotel (see the expert report of Mr Robert Evans, which was appended to his witness statement dated 10 March 2006). The use of lot 3A for these purposes continued through the date of the agreement in February 1982 and, as the again undisputed evidence shows, right up to the present time. Specifically, on 28 April 1982, which is the date of the letter from Mr Chen of Clinton Hart & Co to the attorneys for NHP authorising it, as purchaser, to take possession of lot 3A (see para. [5] above), lot 3A was still being used as part of the hotel property and this remained so on 20 December 1989, which is the date of NHP's assignment of the agreement to Linval Ltd, through which IHJ now claims a right to possession lot 3A.

[60] On this state of the evidence, Hibbert J, having concluded that notice of the assignments had in fact been given NFR, "thereby making the assignment to [IHJ] complete as between N.F.R. and [IHJ]", went on to say the following on the question of possession (at page 12):

> "[IHJ] would then have all the rights conferred upon NHP under the agreement for sale entered into on the 17th February, 1982, and would therefore have the right to possession which was given to [sic] N.F.R. in the letter dated 28th April 1982 from Clinton Hart and Company, acting on behalf of N.F.R. to Myers, Fletcher and Gordon acting on behalf of NHP"

[61] It is clear that, as Miss Davis accepted, the reference in the above quotation to the right of possession given "to N.F.R." should read "by N.F.R.". However, Miss Davis contended with some force that the judge fell into error in his conclusion on this point, for the following reasons (see para. [27] above): (i) the agreement provided for vacant possession on completion, so the giving of possession before completion by the 28 April 1982 letter amounted to a variation of the agreement for which no consideration was given and which was not signed by the parties; (ii) there is no evidence that NHP went into possession pursuant to this letter; and (iii) the letter gave NHP a licence (which was personal and therefore non-assignable), which had been terminated by NFR's notice to quit.

[62] With regard to Miss Davis' first point, it is well established that the phrase "vacant possession on completion" describes an obligation of the vendor, which will in fact be implied in a contract for the sale of land which discloses no tenancies and is silent as to vacant possession (see ***Cook v Taylor*** [1942] 2 All ER 85, 87, per Simonds J, and Megarry & Wade's Law of Real Property, 7th edn, para. 15-089). Accordingly, the use of the phrase in the agreement in the instant case is in my view apt to convey no more than that the vendor (NFR) undertook to ensure that upon completion there

would be no impediment to the purchaser (NHP) taking immediate possession (such as, for example, an existing tenancy or licence in favour of a third party).

[63] As Miss Davis accepted in her written submissions (at para. 38), the reference in the agreement to NHP being "the existing tenant under a tenancy agreement" was plainly an error, since there was no evidence of the existence of any such agreement. But that error aside, the reference does provide a clear acknowledgment in the agreement itself that NHP was in fact already in possession of lot 3A (either by itself or by persons claiming through it), thus rendering the provision for vacant possession entirely otiose. Further it seems to me that in these circumstances what the 28 April 1982 letter did was to provide formal sanction to an existing factual situation and, importantly, to establish a basis for NHP's continued possession of lot 3A pending completion (since otherwise, on the authority of ***Sale v Allen*** (1987) 36 WIR 294, NHP would have been caught by the ordinary rule that a purchaser in possession before completion is liable to pay interest to the vendor on the unpaid balance of the purchase money). I will come shortly to discuss the legal character of NHP's possession of lot 3A pursuant to this letter (see para. [63] below).

[64] In the light of the evidence in the case to which I have already referred, and the discussion in the last two preceding paragraphs, it follows that Miss Davis' second point (that there is no evidence that NHP took possession pursuant to the 28 April 1982 letter) must similarly fall away completely. But it is not in any event clear to me how,

even if it could successfully be maintained that NHP did not go into possession on the basis of that letter, that fact could have any effect on the right to possession pending completion of the agreement which the letter by its express terms plainly conferred upon NHP.

[65] Miss Davis' final point on this issue was that the 28 April 1982 letter gave NHP a licence, which was terminated by NFR's notice to quit. In support of this position, we were referred to Emmet's Notes on Perusing Titles and on Practical Conveyancing, where it is stated (at page 200) that "A purchaser who is allowed to enter into possession of premises before completion, paying a periodic sum, may be a tenant or a licensee". There are indeed some earlier authorities in which the purchaser in possession was treated as a tenant at will (Miss Davis referred us to two of them, that is, ***Ball v Cullimore, et al*** and ***Francis Jackson Developments Ltd v Stemp***, and a third may also be found in an old decision of the predecessor to this court in ***Nixon v Richards*** (1922) Clark's Reports 95).

[66] However, the well known decision of the House of Lords in ***Street v Mountford*** [1985] AC 809 emphasises that that result will depend in every case on whether the particular agreement under consideration bears the hallmarks of a tenancy, namely the grant of exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. If the agreement satisfies all the requirements of a tenancy, the parties cannot alter its legal effect by insisting that they created only a licence. But there may nevertheless be cases in which it is clear from the surrounding

circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy, such as, for example, "occupancy under a contract for sale of the land" (per Lord Templeman, at page 827). Thus in ***Essex Plan Ltd v Broadminster*** (1988) 56 P. & C.R. 353, Hoffmann J (as he then was) concluded on the facts of the case that, applying ***Street v Mountford***, entry into occupation under an agreement which conferred an option on the occupant to call for a long lease of the premises and which constituted an immediate equitable interest in the land pending the exercise of that option, "was ancillary and referable to that interest" (per Hoffmann J at page 356) and therefore created a licence. (It is also of interest to note that the English Standard Conditions of Sale now make special provision for this situation by providing that the purchaser in possession is in these circumstances to be regarded as a licensee and not a tenant of the vendor – see Halsbury's Laws of England, 4th edn reissue, vol. 42, para. 119.)

[67] In his very useful work on Commonwealth Caribbean Land Law (2007), Mr Sampson Owusu concludes that the intention of the parties is therefore an important determinant of the true nature of the relationship, citing another older decision of this court's immediate predecessor in ***Bramwell v Gordon*** (1957) 7 JLR 88, which was a case in which a purchaser had been let into possession of land under a contract for sale after having paid more than half of the purchase price to the vendor and had given a promissory note for payment of the balance by instalments. Rennie J observed (at page 91) that it was "now settled law that one must look to the intention of the parties to ascertain whether the relationship of landlord and tenant has been created" and

concluded (at page 94) that the purchaser "was holding under a licence from the vendor which could not be revoked unless and until he was in default under the agreement".

[68] I would therefore conclude from the above discussion that a purchaser who enters into possession of property before completion may, depending on the intention of the parties and the surrounding circumstances, be either a tenant or a licensee. Generally speaking, if the purchaser is granted exclusive possession of the property in consideration of the payment of a periodic sum or a premium (described by Hoffmann J in ***Essex Plan Ltd v Broadminster***, at page 355, as "the badges of tenancy"), he will be regarded as a tenant, irrespective of whatever label the parties themselves may have chosen to attach to the relationship. But the grant of exclusive possession will not necessarily mean in every case that the purchaser holds the land as a tenant, as there will be cases in which it is clear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy, such as a licence pending completion of a contract for the sale of the property.

[69] In the instant case, it therefore appears to me, in agreement with Miss Davis on this point, that the 28 April 1982 letter constituted NHP a licensee of lot 3A. While by its terms it did grant exclusive possession of lot 3A to NHP, it did not call for either the payment of a periodic sum or a premium and, from its terms and the surrounding circumstances generally, it was clearly referable to the agreement to purchase the property.

[70] However, I cannot accept, as Miss Davis submitted further, that the notice to quit given to IHJ on NFR on 28 September 2001 was effective to terminate the licence. While it is well established that a purely gratuitous licence may be revoked at any time on reasonable notice (Megarry & Wade, op. cit., para. 34-003), it is equally well established that a contractual licence "may be revocable or irrevocable according to the express or implied terms of the contract between the parties" (see Halsbury's, 3rd edn, volume 23, para. 1026). In the instant case, the position as at 28 April 1982 was that the beneficial interest in lot 3A had already passed in equity to NHP upon the signing of the agreement on 17 February 1982 (Megarry & Wade, op. cit., para. 15-052). Further, the contractual completion date (31 March 1982) had also passed and NFR was not in a position to complete the agreement because it had not yet "cleared title". In these circumstances, the inference appears to me to be clear, as Dr Barnett submitted in his further written submissions, that the giving of possession to NHP by NFR upon terms that NFR would "not claim interest on the balance purchase money so long as completion takes place within a reasonable time after [NFR] has cleared title", was in consideration of NHP's forbearing to sue for specific performance of the agreement, which it was entitled to do at that point in the light of NFR's failure to complete. The case cited by Dr Barnett on this point, ***Alliance Bank (Ltd) v Broom***, is a case in which, the creditor having refrained from taking steps to enforce payment of a debt in circumstances in which it was entitled to do so, upon the debtor agreeing to give certain security for payment of the debt, it was held that "the circumstances necessarily involve the benefit by the debtor of a certain amount of forbearance, which he would

not have derived if he had not made the agreement" (per Kindersley V-C, at pages 632-633). In the instant case, NHP accordingly falls to be treated, in my view, as a contractual licensee under, as in ***Bramwell v Gordon*** (see para. [66] above), an implied term that its licence would not be revoked unless and until NHP was in default under the agreement.

[71] I have not lost sight of Miss Davis' final point on this issue, which was that the licence granted to NHP was personal and was therefore not assignable. It is indeed the law that, even without an express stipulation that it should be non-assignable, the benefit of a contract cannot be assigned if it is clear that the party bound by the contract to grant that benefit intended to deal only with the other contracting party entitled to receive the benefit. Examples of such contracts are those which involve personal confidence between the parties, the most common example of which is in the case of employment contracts (Treitel, op. cit., paras 15-050 – 15-057). There is, it appears to me, nothing in the instant case to suggest that the grant of the right of possession by NFR to NHP fell into this category (and no basis for contending otherwise was advanced by Miss Davis). I do not therefore think that this submission can succeed.

[72] NFR's claim to possession in this case was based on the assertion that IHJ was in wrongful possession of lot 3A "as trespasser/and in the alternative as a tenant of the said land". In the light of the foregoing discussion on this issue, it appears to me that NFR has failed to establish that IHJ is in possession of lot 3A as either a tenant whose

tenancy has been properly terminated or as a trespasser. It therefore appears to me that Hibbert J was perfectly correct in his conclusion (see para. [60] above) that IHJ was entitled to all the rights conferred upon NHP under the agreement, and therefore had the right to possession which was given to NHP by virtue of the 28 April 1982 letter.

Issue (iv) – laches and limitation

[73] This issue can be more shortly dealt with. With regard to laches, Hibbert J found that IHJ was not affected by laches. As Dr Barnett commented, NFR has taken a curious, and on the face of it, contradictory stance on this issue on appeal, on the one hand contending (ground 3L) that the judge erred in considering the question of laches, that issue not having been before him, while on the other hand arguing that IHJ has been guilty of unreasonable delay in completing the agreement (ground 3M).

[74] I think it is sufficient to say the following with respect to laches. In the first place, time was not of the essence of the agreement and it is clear from the 28 April 1982 letter that the parties had agreed to postpone completion to a date "within a reasonable time after [NFR] has cleared Title". Title was not cleared (through no fault of IHJ) until 18 December 1998 when Edwards J gave judgment in suit number E. 47 of 1983 (see para. [5] above), granting the declarations sought by NFR that mortgage number 294304 was null and void and that NFR was the legal and beneficial owner of lot 3A. (Interestingly, we were told during the argument that, despite Edwards J's judgment, the mortgage remains endorsed on the title to lot 3A.) Thereafter, a demand

was made on NFR by letter dated 30 August 2001 from HMF, on behalf of IHJ, for completion of the agreement (see para. [8] above), but this demand was met by a repudiation by NFR of the agreement, which in turn led to the filing by IHJ on 12 December 2001 of suit number E 616 of 2001 against NFR for specific performance of the agreement (see para. [9] above), as well as the current proceedings. In these circumstances it appears to me to be impossible to say that IHJ has been guilty of any unreasonable delay in either the commencement or the prosecution of proceedings in this matter, thus making it unjust to grant it the relief it claims, which is the touchstone for the establishment of the existence of laches (see Spry, The Principles of Equitable Remedies, 3rd edn, page 415).

[75] And finally, on the question of limitation, I would only say that not only was it not pleaded by either party, it is wholly unclear to me how it would arise on the facts of this case. At all events, no basis has been shown for NFR's distinctly obscure statement in its written submissions (at para. 123), that "the Purchaser is guilty of laches, and the Contract would be outside the limits permitted by the Statute of Limitations".

Conclusion

[76] In the light of all of the foregoing, I have accordingly come to the conclusion that NFR has not make good its claim for possession in this matter on either of the bases put forward by it and that Hibbert J was entirely correct to dismiss the claim with costs to IHJ. I would therefore similarly dismiss the appeal, confirm the order for costs

made in the court below and order that NFR is to pay IHJ's costs in this court, such costs to be taxed, if not sooner agreed.

PHILLIPS JA

[77] I too have read the draft judgment of Morrison JA and agree with his reasoning and conclusion.

PANTON P

ORDER:

Appeal dismissed. Costs of the appeal and in the court below to the respondent to be agreed or taxed