JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 46/84

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

BETWEEN	VAL BENJAMIN THOMAS	DEFENDANT/APPELLANT
A N D	CRAMPAD INTERNATIONAL MARKETING CO. LTD.	FIRST PLAINTIFF/RESPONDENT
A N D	CLOVER BROWN	SECOND PLAINTIFF/RESPONDENT

Messrs. C.M. Daley and L. Heywood for Appellant

Mr. W.B. Frankson, Q.C. for First Plaintiff/Respondent

Mr. R. Codlin and Mrs. Barbara Lee for Second Plaintiff/Respondent

March 17, 18, 19, 20; April 14, 15, 16, 17, 18;
May 7, 8, 9, 1986 and April 10, 1987

KERR J.A.:

The appellant as owner of 6 Marvic Close, St. Andrew, by an agreement dated 15th August, 1980 leased those premises, including a dwelling-house and furniture, to the first plaintiff, a Company incorporated in and under the laws of Jamaica, for a term of three years. The second plaintiff and her father, Ronald Brown, were Directors of the Company. The second plaintiff was the Company's nominee in occupation as permitted by Clause 3 of the Agreement.

On June 1, 1982, the appellant claiming that his right of entry had accrued on the expiration of a notice to quit, entered the demised premises and ejected the second plaintiff. By writ filed 8th June, 1982, the plaintiffs jointly brought an action

against the appellant claiming damages for trespass to land, trespass to goods, forcible dispossession and praying for an injunction to restrain the defendant "from trespassing or remaining in possession of the demised premises."

On the basis of affidavits filed by and on behalf of the plaintiffs an interlocutory injunction was granted in the terms prayed.

The plaintiffs' claims were unconditionally denied and contested in the pleaded defence of the defendant who counter-claimed for damages and recovery of the premises on the following grounds:

(1) Deterioration of the premises by the neglect or default of the plaintiffs or by breaches of express covenants in the lease.

(2) The lease agreement having been terminated by an effective notice in accordance with a specific term in the lease, the defendant had lawfully exercised his contractual right to re-take possession and the interlocutory injunction was based on false claims and affidavits.

(3) The dwelling-house was required as a residence for the defendant and his family.

(4) Damages for breach of covenants and for the wrongful occupation of the premises.

Vanderpump J., despite strenuous objections by the defence acceded to an application on behalf of the plaintiff company made after the close of the defence and granted an amendment to the plaintiffs' claim by adding a claim for specific performance on the basis of an allegation in the statement of claim that there had been an exercise of the option to purchase contained in the lease. On the claim so amended, the learned judge gave judgment for the plaintiff for an order for specific performance of a contract of sale of 6 Marvic Close. In addition, on the claims for trespass he gave to the first plaintiff nominal damages of $500.00 and to the second plaintiff $5,000.00.

On the counter-claim he gave judgment for the defendant for $19,719.00 for damages for breach of covenants against both respondents and against the second named planntiff for $9,296.00 being reimbursement to the defendant for the employment of security guards due to the delay in resuming possession after the defendant in obedience to the injunction had relinquished occupation. Consistent with the order for specific performance the defendant's claim for recovery of possession was rejected. The learned judge's reasons for judgment were fully set out in his written judgment dated 6th July, 1984.

On appeal the appellant sought variation of the judgment to the following extent:

(i) That the judgments and award of damages in favour of the plaintiffs be set aside.

(ii) That an order for possession be granted him against the first plaintiff.

(iii) That certain claims for damages disallowed by the learned trial judge be granted to the appellant.

In turn, the respondents by respondents' notices sought a variation of the judgments on the counter-claim by setting aside the judgments in favour of the appellant and substituting judgments in favour of the respondents.

The first ground argued by the appellant was of a preliminary nature in that (i) it challenged the jurisdiction of the trial judge in the absence of consent by the defendant to grant the application to amend the statement of claim so as to include a cause of action which arose after the writ had been filed; and (ii) contended that in any event in granting the amendment the Court did not exercise its discretion judicially.

Now the plaintiffs' statement of claim contained the following averments relevant to this question:

"1. ....

5. That before the said lease was terminated the Defendant purportedly served a Notice on the Plaintiff in accordance with the terms of the said lease seeking to bring the lease to an end.

6. That the said Notice was defective, in that, among other things it did not specify the exact period of its duration neither did it conform with the provisions of the Rent Restrictions Act.

....

11. Further or in the alternative the Plaintiffs will say if which is not admitted the said Notice aforesaid was valid and the term in the said lease was determined the Plaintiffs held over and thereby became a tenant protected by the Rent Restrictions Act under the said terms and conditions stipulated in the lease aforesaid. The Plaintiffs will further say that the entry by the Defendant upon the said premises as hereinbefore described constitutes a breach of a statutory duty and the Plaintiffs fall within the category of persons whom the statute intends to protect.

12. That in the month of June 1982 the Plaintiff delivered a letter to the Defendant together with a cheque for $15,000.00 pursuant to its right to exercise the option contained in the said lease and the Defendant tore up the cheque and stated that he wanted the premises."

In response, both in the stated defence and in the counter-claim, defendant countered that the notice was valid, that the first plaintiff being a Company was not entitled to the security of tenure as a statutory tenant under the Rent Restriction Act and in response to paragraph 12 pleaded thus:

"In answer to paragraph 12 of the Statement of Claim the Defendant admits that on the 10th of June, 1982 he received a letter from the first Plaintiff's Attorneys-at-Law dated 9th June, 1982 together with a cheque for $15,000.00 in the purported exercise of an option which the first Plaintiff alleged it had and the Defendant tore the said cheque in the presence of a representative of the first Plaintiff and informed the said representative

> "that the first Plaintiff had no option to exercise and that he was not selling his house. The Defendant subsequently returned the torn cheque unnegotiated to the first Plaintiff's Attorneys-at-Law through the Defendant's Attorneys-at-Law by letter dated 11th June, 1982 rejecting the said purported exercise of an alleged option. The Defendant denies that on the 9th of June, 1982 the Plaintiffs had any option pursuant to the terms of the lease agreement or that any alleged option was properly exercised. The Defendant will rely on the Plaintiffs' aforesaid conduct as evidence of the mala fides of the Plaintiffs in the relationship between the Plaintiffs and the Defendant touching the said lease agreement and of the intention of the Plaintiffs to use their alleged possession after the due termination of the said agreement to ground a false claim to an option."

In his judgment Vanderpump J. said that the writ contained:

> "No breach of contract, that appeared later as Section 12 of the Statement of Claim. This was clearly a new cause of action and was accordingly an irregularity. In his closing address Mr. Daley asked that it be dismissed. He cited Brickfield vs. Newton [1971] 3 All E.R. 323, 333-4. What he should have done is to have made an application to set aside the irregularity: 02 R2. He did not do that. He filed a defence which resulted in a waiver of the irregularity. He cannot now complain."

Before us Mr. Daley submitted in effect that the learned judge was not competent to grant the amendment since at the time of the filing of the writ, the cause of action had not yet arisen. The writ dated 7th June, 1982 was filed in the Registry of the Supreme Court on the 8th June, 1982 and the purported exercise of the option was made on June 10, 1982.

The Learned Trial Judge in his judgment at p. 14 (p. 120) did specifically note that the option was exercised on 10th June, though apparently he did not appreciate its significance.

In reply Mr. Codlin submitted that when parties pleaded summaries of the facts upon which they are relying for their respective cases and called evidence in support, they vested the

Court with jurisdiction to determine all the issues raised and dealt with and the question for this Court would be whether there was evidence upon which the learned trial judge could have decreed specific performance. If there was, then the Court of Appeal should not interfere. He sought support in Order 18 Rule 15 and which is applicable to Jamaica by virtue of Section 686 of the Judicature (Civil Procedure) Code Act which reads:

> "A Statement of Claim must not contain any allegations or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as or included or form part of the facts giving rise to a cause of action so mentioned."

Section 48(7) of the Judicature (Supreme Court) Act which provides:

> "All matters so in controversy between the said parties respectively may be completely and finally determined and multiplicity of proceedings avoided."

and the general powers of amendment in Section 259 of the Judicature (Civil Prodedure) Code Act.

Both the statutory provisions and the Rule of Court referred to are unhelpful to Mr. Codlin. The general jurisdiction conferred on the Court must be read and construed as relating to matters properly before the Court. The Rule quoted by Mr. Codlin is more against him than for him. In that regard the essential fact giving rise to the cause of action for breach of contract was the alleged exercise of the option which was non-existent at the time the writ was filed. Therefore it could not be "mentioned in the writ", it is entirely different, is not included and does not form part of the facts mentioned in the writ. Accordingly, I am constrained to hold that the learned trial judge erred in entertaining the application for amendment.

In support of his alternative submission that in any event the learned trial judge, even if he was competent to grant the amendment, erred in the exercise of his discretion, Mr. Daley submitted that neither the writ nor the Statement of Claim contained a claim for specific performance and that the learned judge was correct when he held that in the writ there was no claim for breach of contract. However, he contended that the learned trial judge erred in holding that a breach of contract appeared in the Statement of Claim. The allegations in paragraph 12 of the Statement of Claim were simple recital of facts relevant to the defendant's conduct and on which plaintiff was relying to support his claim for trespass and was so treated by the defendant in his pleaded defence and that up to the close of the pleadings there was no reference to the terms of the contract, the alleged breach or the remedy sought.

Further, the rule is that after all the evidence is in on both sides, leave to amend will generally be refused subject to certain exceptions. In support he cited Edevain v. Cohen, 43 Ch.D. p. 190; James v. Smith (1891) 1 Ch.D. 384; and Loutfi v. C. Czarnikow Ltd., (1952) 2 All E.R. 823. The claim for specific performance was not only a new claim but was entirely different in nature and consequences. Accordingly, the amendment at this late stage precluded the defence from raising against the grant of such a discretionary equitable remedy certain pleas e.g. laches, that the option offended the perpetuity rule, or that the contract was invalid for uncertainty.

On this point it is enough to say that the pleadings support Mr. Daley's contention. There was at the time the pleadings were closed no claim for breach of contract. Despite Mr. Codlin's eloquent endeavours that the issues were sufficiently ventilated at the hearing to warrant the amendment, the application had all the ear marks of an afterthought. The defence

could not have anticipated on the issues defined by the pleadings that a claim for breach of contract with a prayer for specific performance would arise for determination at the trial. As was said in the Loutfi case at 823:

> "Unless there is very good ground and strong justification for so doing, the Court should be reluctant to grant amendments to pleadings after the close of the case but before judgment, even though it has been indicated in the course of the hearing that some amendment might be asked for."

In the instant case there was no such early indication. When the remedy sought was a discretionary one and the grant of the amendment of such a late stage precluded the other party from pleading and tendering evidence of matters that would be relevant to the exercise of that discretion, the justice of case would be against the grant of such an amendment and should not have been granted.

For these reasons I am of the opinion that the order for specific performance cannot stand.

Before dealing with the other questions raised on appeal it seems convenient to refer to certain facts.

In 1980, the defendant and the Browns were on friendly terms. The defendant in contemplation of migrating to Nigeria had discussions with Ronald Brown concerning the sale of 6 Marvic Close. Defendant's wife and family were then living abroad. Brown consulted Attorneys, Raphael Codlin and Company, concerning the preparation of an agreement for sale. The draft agreement, however, was never executed by either party because of disagreement over its form and content. According to Brown at Thomas' suggestion Eric Desnoes was engaged. The end result was the lease agreement between the Company and the defendant containing an option to purchase. Pursuant to the lease agreement, the second plaintiff as nominee entered into occupation of the premises.

Defendant's plans to migrate fell through and in September 1981 he so informed the Browns and also that he was desirous of resuming possession of 6 Marvic Close as a residence for himself and his family. Apparently peaceful persuasion not being effective, on the advice of his lawyers, Messrs. Daley, Walker & Lee Hing, he served on the plaintiff company and its nominee in occupation a notice prepared and signed by them on his behalf. The operative parts of which notice read:

> "As Attorneys at Law for VAL BENJAMIN THOMAS, your Landlord, WE HEREBY GIVE YOU NOTICE TO QUIT and DELIVER up to VAL BENJAMIN THOMAS, possession of premises at 6 Marvic Close, Red Hills Post Office in the parish of Saint Andrew, which you hold of VAL BENJAMIN THOMAS as Tenant thereof under the terms of a lease agreement dated the 15th day of August, 1980 on the 1st day of June, 1982 next or at the end of the complete month of your tenancy which will expire next after the end of six months from the service upon you of this Notice.
>
> AND WE REQUEST you to acknowledge receipt of this Notice by signing and returning the duplicate Notice enclosed herewith.
>
> DATED the 23rd day of November, 1981."

The following terms, conditions and stipulations in the agreement are directly relevant:

> "THE LESSOR agrees to let the premises for the occupancy of CRAMPAD INTERNATIONAL MARKETING COMPANY LIMITED or its nominee. Should the Lessee wish to change the occupancy the permission of the Lessor must be obtained and the Lessor hereby covenants that such permission would not be unreasonably withheld.
>
> The rental shall be at the annual rate of FOURTEEN THOUSAND FOUR HUNDRED DOLLARS ($14,400.00) per annum or THREE THOUSAND SIX HUNDRED DOLLARS ($3,600.00) quarterly to be paid at the beginning of each quarter as of the 1st day of August, 1980."

Then follows the usual terms relating to payment of rates, taxes and utilities, covenants by the lessee as to the remedying of certain damage, right of inspection by the lessor, against structural or other alterations, restrictions on user and in the mutual covenants the following:

(v) At any time during this Agreement prior to three months before its termination for the consideration of ONE DOLLARS ($1.00) the receipt of which sum is hereby acknowledged the lessor hereby grant to the Lessee the option to purchase the leased premises at a price or consideration, the exchange in ONE HUNDRED AND FIFTY THOUSAND DOLLARS (J$150,000.00) of the sum of TWO HUNDRED AND SIXTY-TWO THOUSAND DOLLARS FIFTY CENTS (US$262,000.50) and on the Lessee taking up this option the Lessee agrees to pay the amount of ten percent (10%) of the purchase price of the balance within thirty (30) days thereafter.

(vi) If either party wishes to terminate this Agreement at any time before the expiration of the said term he or she shall give the other party not less than SIX MONTHS (6) notice thereof.

(vii) All notices shall be deemed served two (2) days after the posting thereof by prepaid registered letter at any post office in Jamaica addressed to the respective parties at their address set out in the first paragraph hereof."

The date of the service of the notice was contested. The defendant said it was the 24th November, 1981. Both second-plaintiff and Ronald Brown denied that service of the notice was effected in November 1981, the second-plaintiff saying that she saw notice in her office in March 1982. It was only during her cross-examination that through her lawyer the half-hearted concession was made:

"Mr. Codlin states that with the consent of counsel on both sides, second-named plaintiff, without admitting the defendant's contention, does not wish to offer any further contest as the date of service of Exhibit 2B. (The copy notice with service admitted by the second-plaintiff)."

Now in support of the claim for trespass and wrongful ejectment, the plaintiffs called as witness:

(1) Diane Campbell, domestic helper as to the defendant coming to Marvic Close on the 1st June, 1982, at about 9:30 a.m.; of burning off the padlock, opening the gate and taking possession of the premises.

(2) Sydney Rose, Assistant Superintendent of police, who in response to complaints by the Browns attend at No. 6 Marvic Close where he saw the defendant who told him he had given the respondents six months notice which had expired.

(3) Clover Brown second plaintiff who gave evidence of receiving certain information on 1st June while at work at the Company's office in Kingston 20 and of going to the Red Hills Police Station and of accompanying the Police Officers to 6 Marvic Close, where she found the gate locked; of the conversation between defendant and the Assistant Superintendent; of her furniture and belongings being removed from the house and packed in an open area; of about twenty men including security guard being in the yard; of her resumption of possession on 23rd July and a list of things missing and damaged - including cash amounting to $65,000.00. (This claim from money lost was firmly rejected by the learned trial judge for reasons that brook no challenge).

The defendant while admitting his entry, in evidence said in effect that he took all the necessary precautions to prevent damage or loss to the appellant's property, and he had stored them in a safe place. He maintained his stand that his entry was peaceful and in exercise of a right of re-entry that had accrued.

In finding for the plaintiffs in trespass the learned trial judge held in effect that (i) the notice was invalid, (ii) that the plaintiffs were rightly in possession and (iii) that the option contained in the lease was properly exercised.

Before us, as in the Court below, a good deal of the argument centred around the form of the notice. For the plaintiffs it was contended that the notice was ineffectual to terminate the lease at common law. Mr. Frankson submitted that the lease was for a term of years certain and the rental was payable quarterly on specified dates.

Assuming that the lessor under the terms of the lease was entitled at any time to serve six months notice to terminate

the lease, the notice must be so framed as to give effect to the quarterly period stipulated in the lease. To do otherwise would create a hiatus or a fraction of a rental period. Accordingly, the effective date of termination must conform with some period in the lease i.e. in the instant case at the end of a quarterly period stipulated for the payment of rent. Submissions along those lines found favour with Vanderpump J. On this he had this to say:

> "Mr. Frankson has submitted with some force that if a Notice is to terminate the lease it must be on a date certain and a date which must be ascertained or ascertainable from looking at the lease itself. Where Lessor got 1st June 1982 from nobody can explain. Reference to the lease shows that the rental is payable quarterly at the beginning of each quarter as of the 1st day of August, 1980. The six months could end on the last day of two of these so-called quarters. Then the alternative would have some meaning. The alternative in a Notice is put there for a reason namely so that an error as to the specific day mentioned in the first part may not invalidate the Notice. If the computation be wrong the general words in the alternative will save the Notice and make it valid. For instance in a tenancy from year to year in the absence of express stipulation it may be determined by a ½ year's Notice expiring at the end of some year of the tenancy. So that in a Notice of this sort after first mentioning the day which is believed to be the anniversary of the commencement of the tenancy to add these general words: 'or at the end of the year of the tenancy which will expire next after the end of one ½ year from the date of the service of this Notice' should in case the date be wrong..............................
>
> The effect of mutual covenant (vi) that the tenancy shall be terminable <u>at any time</u> by Notice of not less than 6 months is that such Notice may be given for any date notwithstanding that the date is not an anniversary of the commencement of say a quarter or really two quarters it is not tied to any period of the tenancy. So that an alternative is not necessary here. It confuses the issue and only serves to make it invalid. The term begins on 1st August 1980. So that by the alternative it would be six months from the 24th November 1981 plus one month of tenancy which would take First named Plaintiff to the end of June. [<u>Phipps vs. Rogers</u> (1925) 1 K.B. 14, 27] - 'Although no particular form need be followed there must be plain unambiguous words claiming to determine the existing tenancy at a certain time .... the day

> 'of termination must be the right date.'
> Hankey vs. Clavering (1942) 2 All E.R. 311, 313-14] - 'Notices of this kind given under powers in leases of this description are documents of a technical nature, technical for this reason that if they are in proper form they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They are not consensual documents.'
>
> Here the recipient of Exhibit 2 must be in a quandary. She is confronted with two dates - 1st June 1982 or the 30th June 1982, the latter by calculation, not difficult. Which is the right date? It is not certain. It does not claim to determine the tenancy at a certain time. The time is uncertain either 1st June or 30th June! So the Notice cannot be valid to determine this lease. I so hold."

This finding of the learned trial judge was challenged by Mr. Daley on the following ground:

> That the learned trial judge erred in law in holding that the notice to quit served on the first-named plaintiff was not valid to determine the lease.

In support he argued that the notice was in accordance with the provisions contained in the agreement and met the criteria stipulated therein. These were (i) that the notice may commence at any time, (ii) it should not be less than six months; and (iii) it was a notice to terminate the lease, and it was to take effect on the 1st June 1982. The alternative words were included, in the event the notice was not served before the 1st December 1981. He adverted to the original abandoned contention that the notice was short served but, that in any event the plaintiffs had understood that the effective date was the 1st of June. Mr. Daley submitted there was no room for ambiguity - the completed month of tenancy which ends six months after service was 31st May.

On the question of ambiguity Mr. Codlin with remarkable ingenuity submitted that on a liberal reading of the notice one could deduce at least six or seven different dates of termination, namely 23rd May, 31st May, 1st June, 23rd June, 30th June, 1st July and 23rd August.

In the light of these ambiguities argued Mr. Codlin the notice is invalid.

It seems convenient at this stage to look at some of the cases and authoritative works cited or referred to in argument.

In Woodfall's Landlord and Tenant - 26th Edition at p. 993, under the heading "CERTAINTY OF NOTICE TO QUIT" there is the following helpful statement:

> "A notice to quit must be clear and certain, so as to bind the party who gives it and to enable the party to whom it is given to act upon it, at the time when it is given."

and later at p. 994 in interpreting "On or before":

> "A Notice to quit 'on or before' a specified date is valid; it has effect as an irrevocable notice to determine the tenancy on that date, at the same time offering to accept a determination on any earlier date of the tenant's choice."

The case of Phipps vs. Rogers (supra) is merely illustrative of an ambiguous notice. The ambiguity was concerned with whether the parties had in contemplation calendar months or lunar months. At that time "month" in a document meant lunar month. It is unhelpful in the instant case.

In Hankey v. Clavering (supra) the headnote reads:

> "The appellant was the lessee and the respondent the lessor of certain premises for a term of 21 years from Dec. 25, 1934. The lease provided, inter alia, that either party, by giving 6 months' notice to the other, could determine the lease at the end of 7 or 14 years. The first 7 years expired on Dec. 25, 1941, and on Jan. 15, 1940, the respondent wrote to the appellant's solicitors a letter by which he purported to determine the lease by notice running from June 21 and expiring on Dec. 21, 1941. On Mar. 5, 1940, the respondent again wrote to the appellant's solicitors and he asked them to confirm that they accepted his letter of Jan. 15 as terminating the lease on Dec. 21, 1941. On Mar. 8, 1940, the solicitors acknowledged the receipt of both letters and their reply concluded with the words 'Our instructions are such that we are able to inform you that the notice therein contained is properly served upon us':"

HELD:

> "(i) The notice to determine the lease was invalid as it was not in accordance with the provision in the lease on that behalf in that it purported to determine the lease on Dec. 21, instead of Dec. 25.
>
> (ii) The solicitors' letter of Mar. 8, 1940, amounted only to an acknowledgment that the notice had been properly served on them and not to an admission of its validity."

In dealing with the question as to the validity of the notice Lord Greene said at pp. 313-4:

> "Notices of this kind, given under powers in leases of this description, are documents of a technical nature, technical for this reason, that if they are in proper form they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They are not consensual documents; they are documents which must do the thing which the proviso in the lease says they are to do; they must on their face and on a fair and reasonable construction do what the lease says they are to do."

and then specifically thus:

> "....... In the present case what the respondent purported to do by the notice on its face was to bring the lease to an end on Dec. 21, and if he had said: 'I hereby by this notice give you 6 months' notice to determine your lease on Dec. 21, 1941,' he would have been attempting to do something which he had no power to do; and however much the recipient might guess, or however certain he might be, that this was a mere slip, it would not cure the defect because the document immediately it is despatched is a document which is incapable on its face of producing the necessary legal consequence."

This case is distinguishable from the instant case. In Hankey's case there were no express provisions as in the instant case enabling the landlord to give notice "at any time". Accordingly, in Hankey's case the landlord was confined to a date corresponding with the anniversary date.

More directly in point is the case of W. Davis (Spitalfields), Ltd. v. Huntley and Others (1947) 1 All E.R. 246. In that case the lease was determinable by three calendar months' notice at any time and the landlords gave the tenants a

notice to quit in the following form:

> " 'We must give three months' notice to terminate the lease,' without specifying the date on which possession is to be given."
>
> It was held that:
>
> "The notice to quit was valid and the period of three months commenced to run from the date of its receipt by the tenants."

A similar decision was reached in Land Settlement Association Ltd. v. Carr (1944) 2 All E.R. 126; (1944) K.B. 67. The headnote in the All England Report reads:

> "The respondent association developed a smallholdings scheme on a co-operative basis and for the purposes of the scheme required to retake possession as soon as possible of the holdings of which the tenants proved unsuitable for the purpose. They let a holding to the appellant for a period of 364 days and then for a further period of 364 days and thereafter for successive periods of 364 days determinable nevertheless as provided in the agreement. The provision for determination was that the agreement might be determined by either party at any time during the currency of the said term or successive period on giving 3 calendar months' previous notice in writing. The letting commenced on Oct. 1, 1939. On Aug. 23, 1943, the association gave the appellant notice to quit on Nov. 30, 1943. It was contended that the Agricultural Holdings Act, 1923, applied and that the notice was insufficient in length and, further, that, in any event, the notice should have expired at the expiration of one of the periods of 364 days."

In his judgment Luxmoore, L.J. concluded on this ironic note:

> "It seems to me that the phrase 'at any time' refers to the determination of the tenancy and not to the giving of the notice. The argument of counsel for the appellant that the only valid notice that can on the true construction of the clause be given is one which expires at the end of one of the periods created by the agreement seems to me to give no sensible meaning to the words 'at any time,' for there is no need to give the parties power to give notice at any time, if in fact the only notice that can be effective is one which operates at the end of one of the periods created."

In the same vein was the reasoning and decision - H. & G. Simonds, Ltd. v. Heywood (1948) 1 All E.R. 260. Accordingly, the terms of the lease agreement permitted the defendant to give the first plaintiff not 'less than six months' at any time'. The notice was therefore in keeping with the terms in the agreement.

As to the question of ambiguity, it is not unusual or improper to include in a notice to quit an alternative computable date to guard against the notice being invalid because on the named date it would have been inadequate from short-service - (Sidebotham v. Holland (1895) 1 Q.B. 389). Indeed it is prudent to do so, where under the terms of the tenancy, the notice to be effective must expire on a particular date and that date to the landlord was uncertain - see **Crate v. Miller** (post). Where, however, the terms of the tenancy or lease expressly permits the parties to pick their date for the termination of the tenancy it is unnecessary to include in the notice an alternative computable date. In the instant case it would be sufficient for the notice to read "six months from the date of service." The form of notice here is illustrative of slavish obedience to precedent and disregard for the necessities of the moment. Mr. Daley to justify the defendant's entry on the 1st June submitted that the tenancy ended on the 31st May and he came to that conclusion by resort to the computable date in the words "or at the end of the complete month of your tenancy which will expire next after the end of six months from the service upon you of this Notice," which according to him, means that the lease was determined thereby on the 31st and the defendant's right of re-entry accrued on the 1st June. He cited in support Cutting v. Derby (1775-1802) All E.R. Rep. 520. In that case a "Notice to quit under S. 1 of the Landlord and Tenant Act, 1730, which provides that after

demand made and notice in writing given for delivering possession persons holding over lands, etc. after the expiration of leases are liable to pay double rent, may be given before the expiration of the term. It was held "that a tenant is entitled to remain in possession of the demised premises until midnight of the last day of term". The facts of the case as set out at p. 520 are important:

> "One Hunt granted a lease of the farm to one West for eleven years from Oct. 10, 1763, at £103 per annum, and devised the rent and revision to the plaintiff and Mr. James Safford and their heirs, as tenants in common. West entered and held till February, 1772, when, by consent of Safford, he assigned the residue of the term to the defendant, who entered accordingly. Safford also entered into an agreement with the defendant, without the knowledge of the plaintiff, for an additional term of fourteen years, to which the plaintiff, when apprised of it, at first objected, but afterwards acquiesced. The leases were then drawn, but the defendant refused to execute, and threatened that he would hold the farm as long as he could.
>
> On Sept. 30, 1773, the plaintiff gave a written notice to the defendant to quit his undivided moiety at the expiration of the term on Oct. 10, 1774; and again repeated the like notice on Oct. 7, 1774, or to pay double value as required [by the Act]. On Oct. 10, 1774, at noon, the plaintiff went on the premises, and demanded possession, which was refused; and again in the afternoon, and the same evening, he turned a score of lambs on the premises, which, on Oct. 11, the defendant turned off, and held the premises till Oct. 10, 1775."

In his judgment Grey, C.J. said:

> "I am satisfied that the notice to quit may be previous to the expiration of the term. It prevents surprise, and is most for the benefit of both landlord and tenant. The only objection to it is the order in which the words stands in the Act of Parliament, which weighs little against the sense and convenience of the other construction. The second objection is that the notice to quit and demand of possession are on Oct. 10, whereas the lease did not expire until the 11th. At the utmost, the lease expired and the tenant ought to quit, the minute after midnight. If so, the difference is trifling, and not to be attended to in a motion for a new trial, which ought always to be founded on the true justice of the case, which is with the plaintiff, and not on little quirks and niceties."

A somewhat similar decision was arrived at in Crate v. Miller [1947] K.B. 946; [1947] 2 All E.R. 45:

The All England Report headnote reads:

> "A tenant occupied a furnished room on a weekly tenancy commencing on a Saturday. A notice to quit dated July 5, 1946 (which was a Friday) from the landlord's solicitors, was in the following terms: 'We hereby give you notice that the landlord will terminate your tenancy on Friday, July 19, 1946, or at the end of the next complete week of your tenancy from the date hereof, on which date you are hereby required to quit and deliver up possession':
>
> Held: (i) in all cases of periodical tenancy whether yearly, quarterly, monthly or weekly, the same principle is to be applied, and a valid notice to quit must be expressed so as to terminate the tenancy at the end of a current period; a notice to quit on either the 'anniversary' of the date of commencement of the tenancy or on the day before can be construed as a notice to quit when the current period in question is ended; and, therefore, the notice to quit on Friday, July 19, 1946, was effectual to terminate the tenancy."

As will be seen the notice in that case contains an alternative clause but the validity of that alternative clause was neither debated nor decided.

It seems clear therefore that resort to the computable date will only be necessary if the named date would render the notice invalid because of short-service. In both Cutting v. Derby and Crate v. Miller, the landlord was not expressly permitted by the terms of the tenancy to pick his time for the termination of the tenancy as in the instant case, the Court was concerned as to whether or not the notice was short served and was called upon to determine whether the termination of the tenancy as required by the notice was at the end of a period.

Where the landlord is free to pick the date for termination of the tenancy and in his notice has given a named date which would give the necessary time to quit, it would be illogical and

unreasonable for him to demand possession at an earlier computable date based upon an unnecessary alternative included in such notice. In the instant case, the landlord has expressly named the 1st June as the date for termination of the tenancy and it is not open to him to say that the computable termination is on 31st May. In my opinion his entry was premature and on that basis an action for trespass is maintainable.

Before Vanderpump J., the validity of the notice was also assailed from an entirely different aspect. It was agreed by all that the premises were 'controlled premises' within the meaning of and subject to the Rent Restriction Act. On behalf of the respondents, it was submitted that the notice did not comply with the requirements of the Rent Restriction Act (hereinafter referred to as the Act) and was therefore ineffective to terminate the tenancy. The learned trial judge was persuaded by this argument and found that:

> "The Notice is therefore of no effect and the lease still alive on the 10th June and the option exercisable when plaintiff sought to exercise it and did exercise it."

En route to this conclusion Vanderpump J. considered the judgment in Reidy vs. Walker (1933) 2 K.B. 266, contrasted Section 5(1)(d) of the English Rent and Mortgage Interest Restriction Act with Section 25(1)(e) of the Rent Restriction Act (Jamaica) adverted to dicta in Skinner vs. Geary (1931) 2 K.B. 546 and Errington vs. Errington (1952) 1 K.B. 296, rejected the contention that a company could not be a statutory tenant, and held:

> "Although Second-named Plaintiff had exclusive possession of these premises there was clearly no relationship of Landlord and Tenant between First-named and Second-named Plaintiff nor indeed of principal and agent. '(She) had a mere personal privilege to remain there with no right to assign or sublet. As such she had no right at law to remain but only in Equity and Equitable rights now prevail' Exhibit 1 refers to

> "First-named Plaintiff or its nominee being in occupation and covenant 1 to damage done to the ..... premises by reason of the default of the Lessee ... his (sic) ...... agents. Defendant states that she is agent of First-named Plaintiff in the sense that she is its representative. So that Second-named Plaintiff is at once the nominee and representative of First-named Plaintiff in exclusive possession of these premises and can be regarded as a licensee of First-named Plaintiff. So that First-named Plainfiff can be regarded as being in possession through her, its licensee."

and finally as referred to ante, that the notice did not comply with Section 31 as no reason within the contemplation of the Act was stated therein.

Consistently with the stand he took then, before us Mr. Daley submitted in effect that where, as in the instant case, the lease agreement contains its own provisions for determination, the agreement can only be determined in accordance with those provisions. The notice was in accordance with the terms in the agreement and the contractual tenancy was thereby determined.

Secondly, an option contained in a lease is "collateral to, independent of and not incidental to the relation of landlord and tenant." Woodall v. Clifton (1905) 2 Ch. at p. 279. Accordingly, the Act could not affect or determine the right of the parties created by contract and the learned trial judge erred in so holding. He further submitted that there was a distinction between terminating the contract by notice under the provisions of the contract and terminating the tenancy statutorily - (See Woodfall Landlord and Tenant - 27th Edition Vol. II #2461). In any event, the first plaintiff, being a company is not within the protection of Section 28 of the Act and the second plaintiff being a mere nominee or agent of the first plaintiff and not a sub-tenant, the protection is not available to her in her personal capacity. He cited in support

statements from Haskins vs. Lewis (1931) 2 K.B. p. 1, Reidy v. Walker (supra) and Skinner v. Geary (1931) 2 K.B. 546.

In his reply, Mr. Frankson extended himself and was expansive. He submitted in effect that the interpretations of certain provisions of the English Act were unhelpful as the Jamaican Act is not in pari materia with the English Rent Restriction Acts and therefore, the Jamaican Act must be interpreted according to the canons of construction and with due regard to the aims and purpose of our Act.

Upon so interpreting the Act, it accordingly restricted parties from contracting outside its provisions and in so far as the lease or tenancy agreement between the landlord and tenant is concerned, it was obligatory on the parties to conform strictly with the provisions of the Act. In that regard he referred in particular to Sections 25, 28 and 31 of the Act. Therefore argued Mr. Frankson the provisions of the Act relating to the termination of the tenancy of controlled premises must comply with Section 31 of the Act and any notice given without the reason being one expressly described in Section 25, is invalid to terminate the tenancy. In that regard, Section 25 is exhaustive of all the reasons available to a landlord seeking recovery of possession. The notice in the instant case was therefore ineffective to terminate the tenancy.

Alternatively, assuming that the notice was effective to terminate the contractual tenancy, then a statutory tenancy came into being and the respondent company was entitled to hold over by virtue of Section 28 of the Act and was entitled to all the terms and conditions of the original tenancy including the option. Turning more specifically to the terms of the option, Mr. Frankson, accepted as correct Mr. Daley's statement that the option was an independent transaction. Therefore, it contained

within its terms all the conditions of the contract except for matters arising by necessary implication. Accordingly, the duration of the option was for three years less three months. Further, even if the notice to quit was valid to terminate the lease it would have no effect upon the option because upon execution of the lease, the respondent company acquired an estate in the property for three years and that the mutual covenant to terminate the lease, does not expressly or by necessary implication affect the obligations of the party set out in the option. There was therefore neither authority in law nor in practice to justify the incorporation of conditions in the option save as is expressly set out in the option. The lessor could not by notice to quit whittle down the time for exercising the option.

Mr Codlin, who followed, submitted that the statutory tenancy preserved such terms of the contractual tenancy as were consistent with the provisions of the Act and inter alia saddled the parties with the burden and endowed them with the benefits of the contractual tenancy. The option in the lease is a term consistent with the Act and accordingly even if the contractual tenancy had been brought to an end Section 28 would have saved the terms relating to the option; that the company in occupation of the house is entitled to the benefit of the Act and the parties to the agreement contemplated thereby that the nominee of the plaintiff company would occupy the premises. There was nothing in the Act to prevent a company from being the tenant in possession of a dwelling-house through its nominee. Accordingly, the second plaintiff enjoyed the protection of Section 28 of the Act. He rested his submissions on the reasoning and conclusion of the learned trial judge. Alternatively, the second plaintiff should be equated to a sub-tenant because she had a contractual relationship with the

plaintiff company. To hold that a company could not be a statutory tenant would defeat the purpose and intendment of the Act.

The following sections of the Act are directly relevant to the question of the validity of the notice:

NOTICE

Section 31(1)

"No notice given by a landlord to quit and controlled premises shall be valid unless it states the reason for the requirement to quit."

RESTRICTIONS ON RECOVERY

Section 25

"(1) Subject to section 26, no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom, shall, whether in respect of a notice to quit given or proceedings commenced before or after the commencement of this Act, be made or given unless

(a) (b) (c) (d) ....

(e) the premises being a dwelling-house or a public or commercial building, are reasonably required by the landlord for -

(i) occupation as a residence for himself or for some person wholly dependent upon him, or for any person bona fide residing or to reside with him, or for some person in his whole-time employment; or

(ii) use by him for business, trade or professional purposes; or

(iii) a combination of the purposes in sub-paragraphs (i) and (ii)."

The provisions of Section 26 are specifically concerned with public or commercial buildings and set up a regime with regards to notice to quit in relation to the tenancy of those premises.

Now I do not interpret Section 31 of the Act as imposing any general fetter upon the freedom of contract so as to preclude parties to a lease agreement including therein mutual convenants to determine the contractual tenancy before its term expires. Accordingly, it follows that a notice which refers to and complies with the terms of a lease agreement would be valid to determine that lease.

However, it may not be sufficient to maintain an action for recovery of possession of controlled premises so far as the reasons stated therein if a statutory tenancy succeeds the lease. I am fortified in this view by this passage from Woodfall Landlord and Tenant Vol. II, 27th Edition at p. 1322 # 2461.

> "Distinction between terminating the contract and terminating the tenancy -
>
> The Act does not prevent the contractual relationship being terminated in manner provided by the contract; what it does is to continue the tenancy statutorily notwithstanding the termination of the contractual relationship. So where a lease enables either party to determine it at the end of seven or fourteen years by giving six months' notice in writing the landlord (meaning here the landlord at common law) can effectively cut down the term demised by a common law notice exercising the power to determine; the tenancy then continues under the Act until service of a statutory notice to terminate it."

Accordingly, having found that the notice was effective to terminate the contractual tenancy, I now consider the question whether or not a statutory tenancy existed in the instant case.

Section 25 (1) deals with restrictions on the recovery of possession of controlled premises. What is clear is that for a landlord to obtain an order for possession of controlled premises the reason for requiring possession must be within the contemplation of Section 25 (1) (see unreported case of McQuick v. L. & V. Realties Ltd. - R.M.C.A. No. 13/82 - judgment delivered

April 25, 1982). While invariable those reasons may properly and conveniently be included in a notice to quit there are others for which the sub-section itself provides a time frame and which from their very nature may not be dependent on any notice given by the landlord or may be of such a nature as could not be conveniently included in a notice. However, be that as it may, in the instant case the pivotal question on this aspect of the appeal is whether or not the company is a statutory tenant within the contemplation of Section 28 which provides:

> "(1) A tenant who, under the provisions of this Act, retains possession of any premises, shall, so long as he retains possession, observe and be entitled whether as against the landlord or otherwise, to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the original contract of tenancy:
>
> Provided that, notwithstanding anything in the contract of tenancy, a landlord who obtains an order for the recovery of possession of premises or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant.
>
> ....
>
> (3) Where the interest of a tenant of a dwelling-house is determined, either as the result of an order for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been sub-let either with the consent of the landlord or in accordance with express authority conferred by or under the tenancy agreement or lease shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

Now in dealing with this question Vanderpump J. said:

"Mr. Daley has always contended that the Rent Restriction Act does not apply to 6 Harvic Close. He says so because of the English Common Law on the subject notably Reidy vs. Others. Walker vs. Others, referred to as Reidy vs. Walker (1933) K.B. 266, 270, 272. The Rent and Mortgage Interest Restriction Act 1923 substituted a new section 5 in the 1920 Act and the Court of Appeal there were construing section 5(1)(d) thereof.

It reads:

'5(1) No order or judgment for the recovery of possession of any dwelling house to which this Act applies or for the ejectment of a tenant therefrom shall be made or given unless -

(d) The dwelling house is reasonably required by the Landlord for occupation as a residence for himself or for any son or daughter of his over 18 years of age or for any person bona fide residing with him or for some person engaged in his whole time employment .... and..... the court is satisfied that alternative accommodation is available which is reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards the extent, character and proximity to place of work.'

'In 1931 Skinner vs. Geary had held that the fundamental principle of the Rent Restriction Acts was to protect a tenant who is residing in the house, a tenant to be entitled to such protection must be in personal occupation or actual possession of the premises in respect of which he seeks that protection .... right of a statutory tenant is a purely personal right to occupy the house as his home.'

This case was applied in Reidy vs. Walker (above) where it was held that a Limited Liability Company could not be a tenant under these Acts as a company could not be described accurately as a tenant who is residing in a house or who is in personal occupation or possession of the premises ... still less that the house is the company's home as 'before a person can become a statutory tenant his occupation must have an essential domestic quality'. 'A company cannot eat or sleep!'

> "Similarly a legal persona cannot have a family! So that Section 5(1)(d) connotes a living, breathing tenant as such I would say.
>
> On the other hand Section 5(1)(i) '....... unless the dwelling house consists of or includes premises licensed for the sale of intoxicating liquor and the tenant has committed an offence as holder of the licence etc.' Nothing against a tenant in this subsection being a Limited Liability Company, it seems."

He then contrasted Section 5(1) of the English Act with Section 25(1)(e) of the Act thus:

> "It will be seen that this section [Section 25(1)(e)] stops short of the English Section 5(1)(d) of the 1920 Act as amended. It does not have the alternative accommodation suitable to the needs of the tenant and his family provision.
>
> As it stands there is nothing against a Limited Liability Company being a tenant. The decision in Reidy vs Walker could not apply to this section as it is different."

He then quoted with evident approval the following passage from Skinner v. Geary (1931) 2 K.B. 565:

> "...... A man may remain in possession in law even if he is not physically upon the premises if he is occupying the premises by a licensee ......" (per Greer J.)

and thus from Errington v. Errington (1952) 1 K.B. 298:

> "..... although a person who is let into exclusive possession is prima facie to be considered to be a tenant nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy ..... if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted possesion with no interest in the land he will be held to be a licensee only." (per Denning L.J.)

and sought support for his conclusion that the company was being in possession through its licensee in the Dicta of Acton J. in Reidy vs. Walker at p. 270:

> "..... The argument advanced that a company may be such a tenant i.e. one which without reference to the authority of the Court of Appeal seems to me speaking for myself to be impeccable. I should have thought that a company may be in possession or in occupation of premises including a dwelling-house through the medium of some caretaker or other occupant to whom is entrusted the duty of living and it may be taking care of some house to which the Acts apply ..... He (Mr. Morle for Defenfants) contended that for purposes of the Act possession and occupation should be regarded as meaning no more and no less than what such words mean at Common Law."

In short, Vanderpump J. declined to follow Skinner v. Geary and Reidy vs. Walker. He held that the company was entitled to the protection of Section 28 of the Act.

Now in Haskins v Lewis (1931) 2 K.B. p. 1 the facts are summarised in the headnote thus:

> "A house and shop were let to a tenant in 1900. The house consisted of two rooms in the basement, a shop and parlour on the ground floor, two rooms on the first floor and two rooms on the second floor. The tenant originally carried on a tailor's business in the shop and resided in the house with his family. Subsequently he ceased to carry on the tailor's business and his daughter carried on a drapery business on the ground floor, and his son carried on a betting business on the first floor. In 1927 the tenant moved to another house where he resided with his family; he then sub-let the two rooms in the basement to one sub-tenant as a residence, and the two rooms on the second floor to another sub-tenant as a residence. The landlord served notice to quit upon the tenant, and then commenced proceedings in the county court to recover possession of the premises. The tenant relied upon the protection given by the Rent Restriction Acts. The county court judge found as a fact that the ground floor and the first floor constituted business premises, and that the tenant had sub-let the remainder of the premises and so parted with possession of them. He accordingly held that the tenant was not entitled to the protection of the Rent Restriction Acts and gave judgment for the landlord for possession."

In the Court of Appeal Scrutton L.J. in his judgment observed (p. 9):

> "The Acts have been passed without those framing them having any clear idea whether they were conferring property on the tenant or whether they were conferring a privilege of personal occupation and the Courts have very slowly - and I do not think that they have finished yet - been trying to frame a consistent theory of what must happen. To begin with, in Keeves v. Dean [1924] 1 K.B. 685 the Court had to face the question whether a statutory tenant could assign his right, and decided that he could not; but the Court expressly reserved the question whether he could sub-let. In Roe v. Russell [139 L.T. 382; 44 Times L.R. 565] the Court had to face the question whether a statutory tenant could sub-let part of the premises, the Act 1923 having in the meanwhile said that if he sub-let the whole of the premises he lost whatever rights he had in the tenancy."

Then later after referring to the facts of the case said (p. 14):

> "That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it. That, I understand, is the principle which Swift J. intended to lay down in Hicks v. Scarsdale Brewery Co. [1924 W.N. 189]. The result is, therefore, in my view, that for those reasons the landlord is entitled to say that the whole of the tenant's title to these premises has gone. I think that can be done by making an order for possession, and if it is said that an order for possession will enable the bailiff to turn out the sub-tenants, I think the answer is that the operation of s. 15, sub-s. 3, of the Act of 1920 shows that that result cannot happen."

This sub-section (S. 15(3)) is ipsissima verba with Section 25(3) of the Jamaican Act quoted ante. Romer L.J. in the same vein at p. 18 said:

> "It has frequently been pointed out in the Courts, and it has been pointed out once more by Scrutton L.J. in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession.

Greer, L.J. on this question was "dubitante".

In Skinner v. Geary (1931) 2 K.B. Scrutton L.J. said at p. 561:

> "A non-occupying tenant was in my opinion never within the precincts of the Acts, which were dealing only with an occupying tenant who had a right to stay in and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and who has no intention of returning to it."

and later at p. 564:

> "For the reasons I have given the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return. If it were to be held otherwise odd consequences would follow. The appellant in this case has contented himself with living in one house and claiming another. Suppose he had a number of houses. One object of the Acts was to provide as many houses as possible at a moderate rent. A man who does not live in a house and never intends to do so, is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by other people. To treat a man in the position of the appellant as a person entitled to be protected, is completely to misunderstand and misapply the policy of the Acts."

In Reidy v. Walker (supra) the headnote reads:

> "For some years before 1912 the defendant W. had been the tenant of a cottage which came within the Rent Restriction Acts. In 1912 the defendant company, W. & Co., was incorporated and the tenancy was assigned to it. Thereafter, the defendant company continued to be the tenant, and the cottage was occupied by a caretaker. Subsequently, the contractual tenancy was terminated by a notice to quit. In an action to recover possession:
>
> Held, that a limited company could not be a tenant to whom the Rent Restriction Acts applied, and, therefore, the defendant company was not entitled to the protection of those Acts."

The decision in the more recent case of S.L. Dando, Ltd. v. Hitchcock and Another (1954) 2 All E.R. p. 335 affirmed the principle that protection is afforded by the Rent Restriction Acts only to a tenant in personal occupation of a dwelling house. The facts are summarised in the headnote thus:

"A landlord let a dwelling-house subject to the provisions of the Rent Restriction Acts to a tenant on an agreement which provided that: 'Either the tenant or his present manager [A.P.] is to reside on the premises and not to part with the possession of any part thereof'. The tenant did not reside in the dwelling-house, but his manager, A.P., resided there. A.P. subsequently became his partner. Following notice to quit, the landlords brought an action to recover possession of the house."

In his judgment Denning L.J. said at p. 336:

"In my opinion, the principle on which this case should be decided was stated by Lord Wright in Hiller v. United Dairies (London) Ltd. [1934] 1 K.B. 57; 103 L.J.K.B. 5; 150 L.T. 74; 31 Digest, Replacement, 660, 7618], where he said [(1934) 1 K.B. 61]:

'If the rights under the Acts which are given to the statutory tenant are as this court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted'."

On the face of it, it would appear that to exclude a limited liability company from the protection of Section 28(1) involved reading into the sub-section the words "except where the tenant is a limited liability company." To do so would be contrary to the canons of construction since the inclusion of those words would not be necessary to give meaning and effect to the provision. However, it seems clear that the decisions in the English cases do not rest on any such device but upon the realistic view that as protection of occupancy by a statutory tenancy under the Act was intended for the benefit of the tenant in personal occupation of dwelling-house as his home, and that, although a limited company may be the contractual tenant of a dwelling-house, because it is not in personal occupation when the contractual tenancy ends it is incapable of "retaining possession" within the contemplation of those Acts.

The Jamaican Act like the English Act aims at giving security of tenure to tenants of "controlled premises" within the ambit of the Act. The fact that the Jamaican Act embraces in one Act, restrictions on recovery of public and commercial premises within the same Act would not render inapplicable the reasoning in the cases cited because (i) the Act sets up its own regime in relation to public and commercial buildings and (ii) the commonsense recognition that in relation to a dwelling-house retention of possession must be as a home and a company is physically incapable of so doing.

Vanderpump J.'s contrast between Section 5(1)(1) of the English Act and Section 25 (1)(c) of the Jamaican Act does not support his conclusion. Those provisions deal with exceptions to the restrictions on recovery of demised premises and not with the conditions giving rise to the existence of statutory tenancy.

A company, because it has no physical presence, could be the contractual tenant of numerous dwelling houses at the same time. To hold that a company at the termination of a contractual tenancy may become a statutory tenant would confer upon this incorporeal persona the undesirable ubiquity of being notionally, indefinitely and simultaneously in occupation of several dwelling-houses while human-beings are in need of a home.

It is open to a limited company to render Section 28 applicable to its employees by making them sub-tenants of dwelling-houses of which they are contractual tenants [Haskins v. Lewis (supra)] but it may not wish to do so as an employee would be able to continue to occupy the dwelling-house as statutory tenant even after his employment has been terminated.

In the instant case the learned trial judge quite properly found that there was "no relationship of landlord and tenant between the first and second plaintiff" and that the second plaintiff "had a mere personal privilege to remain there

with no right to assign or sublet and can be regarded as a licensee of first-named plaintiff. On such findings, the second-named plaintiff is not entitled to the protection of tenure under Section 28 of the Act.

The defendant's claim that he needs the premises as a home for himself and his family is unchallenged.

For these reasons on the counter claim I would order recovery of possession.

The defendant had sought recovery of possession on the alternative ground that the plaintiff company in breach of the covenants in the lease had through default or neglect caused deterioration to the premises and chattels. This was not the reason given by the defendant to the plaintiff for requiring the premises when he gave the notice nor for his entry on the 1st June. This seems an after thought and accordingly I decline to entertain the arguments on this ground.

The third ground for recovery of possession as pleaded and argued by Mr. Daley was to the effect that when the interlocutory injunction was granted the plaintiffs were not in possession and the injunction was obtained by false claims and false affidavits.

I assume that the interlocutory injunction was in the same form as the interim order which reads:

> "(a) That the Defendent be restrained by himself, his servants, agents or otherwise from trespassing on premises 6 Marvic Close, St. Andrew or from possessing or remaining in possession of the said premises or in any other way by himself, his servants or agents or otherwise from interfering with the Plaintiff's quiet and peaceable enjoyment of the said premises and to immediately refrain from interfering with the Plaintiff's possession of the said premises in any way whatsoever."

Despite its roll-up form, the defendant, having ejected the plaintiff and having entered into possession, the injunction was mandatory rather than prohibitory. Notwithstanding, the complaint on appeal was concerned not with the appropriateness of the remedy but rather that it was obtained on false averments by or on behalf of the plaintiffs and in particular that the notice was served on 24th March and was therefore invalid for short-service.

Now because I found that the contractual tenancy expired on 1st June and that therefore defendant's entry was premature, it was not then necessary in treating with that aspect of the appeal to deal with Mr. Daley's submission that if defendant's right of entry had accrued even if in his manner of taking possession there was a forcible entry in breach of the Act 5 of Richard II C 7, that Statute did not per se confer a right of action and the learned judge erred in so holding. For this proposition he relied on the passage from Woodfall Landlord and Tenant - 27th Edition paragraph 2110.

On this I am in agreement with Mr. Daley; having regard to the purpose for which the Act of Richard II was enacted and the pugnacious period in which it came into force, it is reasonable to say that it did not confer a right of action per se if the entry was in exercise of a right of re-entry which had accrued to a landlord. On the other hand the Jamaican Rent Restriction Act in Section 27(1) provides:

> "Except under an order or judgment of a competent court for the recovery of possession of any controlled premises, no person shall forcibly remove the tenant from those premises or do any act, whether in relation to the premises or othewise, calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises."

Sub-section (2) makes the contravention of sub-section (1) an offence punishable by imprisonment for twelve months upon summary

conviction before a Resident Magistrate.

It is, therefore, enough to say that this provision has virtually sounded the death knell to self-help by a landlord in the recovery of controlled premises. The fact that a landlord may have an unanswerable claim for recovery of controlled premises would not entitle him to eject a tenant. Accordingly, in the light of this sub-section I am unable to say with any degree of certainty that had the affidavit been true and accurate as to the effective date of the notice the learned judge would not have granted the interlocutory injunction.

Turning to the terms of the option, it is beyond debate that the option is independent of and not incidental to the relationship of landlord and tenant and that when duly exercised by the offeree there comes into being a contract separate and distinct from the lease. Where therefore as in the instant case the option within its terms contains a life expectancy, in my view Section 28 cannot be prayed in aid to alter those terms.

In the instant case, by Clause v, the period during which the action is open to the offeree is defined thus:

> "At any time during this agreement prior to three months before its termination...."

This clause is followed by Clause vi - conferring power to terminate the agreement by not less than six months' notice from either party.

It is inescapably implicit that 'termination' in Clause V includes termination by act of parties and not merely expiration at the end of the term of years. Further, it was clearly within the contemplation of the parties that the life of the option should be related to the existence of the lease. This interpretation is neither unjus nor inconvenient to the lessee since the notice provision gives to the lessee three months

within which to exercise the option upon service of a notice to quit and three months prior to termination of the agreement.

A statutory tenancy is not, as Mr. Codlin argued, a continuation of the contractual tenancy; it comes into being only after the contractual tenancy ends. It is the successor to the contractual tenancy notwithstanding that the statutory tenant "shall so long as he retains possession observe and be entitled ..... to the benefit of all the terms and conditions of the original contract of tenancy." The option being independent and not incidental to the relationship of landlord and tenant, would not pass on automatically upon the coming into existence of the statutory tenancy and when it contains express terms defining its duration could not exist beyond the time of such duration. Accordingly, the contractual tenancy having been determined by notice on 1st June the option was not open for exercise on the 10th June.

The learned trial judge's finding that the option was properly exercised was further challenged by Mr. Daley who submitted that there was a patent ambiguity in the lease as to the purchase price of the demised premises and that that ambiguity lies in the following.

> "The lessor thereby grant to the lessee the option to purchase the leased premises at price or consideration the exchange in one hundred and fifty dollars (US$150.000.00) of the sum of two hundred and sixty two thousand dollars fifty cents (US$262,000.50)".

Eric Desnoes, the Attorney who prepared the lease agreement gave evidence that the basis for the preparation of that document was the unexecuted agreement for sale and that that agreement contained the reference to the current rate of exchange being $1.75 Jamaican dollars to US$1.00. At that rate of exchange $150,000.00 U.S. would be equal to $262,000.50 Jamaican.

In the light of that evidence it is crystal clear that there was an obvious mistake - the figures for U.S. and Jamaican dollars were erroneously transposed.

Now an offeree cannot by pouncing on an offer that to his knowledge erroneously states the selling price of property, thereby create a binding contract. For this proposition, I find support in the following: Cheshire and Fifoot - 7th Edition p. 224 under the heading "Unilateral Mistake".

> "In the case of unilateral mistake it is clear that if one party to the knowledge of the other is mistaken as to the fundamental character of the offer - if he did not intend, as the other well knew, to make the apparent contract - the apparent contract is a nullity and there is no need, indeed no room, for any equitable relief. However, although equity follows the law in this respect and admits that the contract is a nullity, it is prepared to clinch the matter by formally setting the contract aside or by refusing a decree for its specific performance [Wilding v. Sanderson (1897) 2 Ch. 534]. In Webster v. Cecil, for instance:
>
> > Cecil, who had already refused to sell his land to Webster for £2,000, wrote a letter to him in which he offered to sell for £1,250. Webster accepted by return of post, whereupon Cecil, realizing that he had mistakenly written £1,250 for £2,250 immediately gave notice to Webster of the error.
> >
> > This was operative mistake at common law for, at any rate in the case of sale of land, any mistake as to price 'must necessarily go to the whole substance of consideration at law.' Williams, Vendor and Purchaser (1st Edition) p. 679."

Implicit in the observation of the learned judge that the defendant should have sought rectification is a recognition that there was a mistake in the price as stated in the option.

Accordingly, even if the option was still open there was no proper exercise so as to create a binding contract.

DAMAGES

ON THE CLAIM

The challenge by the defendant appellant was to liability and not to quantum of damages. In his judgment, Vanderpump J. found that the entry on June 1, was premature and a trespass was occasioned thereby. I see no good reason for interfering with the judgment and award in damages for trespass.

ON THE COUNTER-CLAIM

The learned judge quite properly found damages for breach of covenants - $19,719.00 against both plaintiffs and damages against the second-named plaintiff only for $9,296, being costs of security guard for the period between the defendant - in obedience to the injunction - relinquishing possession and the second plaintiff resuming occupation - 20th June to 23rd July, 1982.

He denied the defendant's claims thus under the following heads:

> "No Mesne Profits recoverable as counter-claim fails [on claim for recovery of possession].
>
> RE DAMAGES FOR TRESPASS IN RESPECT OF THE FIXTURES, TOOLS AND FURNITURE -
>
> Not recoverable as plaintiff is not a trespasser. 'Particulars' dealing with losses occasioned by his (defendant) having to leave the premises on 19th June, 1982, not recoverable as plaintiff succeeds in the action and was justified in seeking and obtaining the interlocutory injunction."

The "particulars" as set out in the claim are:

(i)	Boarding of his son for whom no other alternative accommodation could be made - July and August to September, 8 weeks @ $100.00 per week	$ 800.00
(ii)	Defendant being displaced from his house, eating at hotel, sleeping in guest house - July - August, September	1,500.00

(iii)	Rental of furnished house due to unavailability of his house - October, November, December, 3 months @ $1,500.00 per month and still continuing	$ 4,500.00
(iv)	Expense incurred by family in Canada having given up their previous accommodation - July, August, September	3,000.00
(v)	Cost of security 57 days @ 24 hrs. per day @ $11.00 per hour.	15,048.00
		$24,048.00

The plaintiffs/respondents did not challenge the finding of joint liability on the plaintiffs nor the quantum of the awards, save Mr. Codlin's submission that damages for breach of the covenant were not recoverable as notice was not served on the tenant to give an opportunity to remedy the breach.

The learned trial judge carefully considred the evidence and itemised the amounts expended in restoration of the lawns and grounds and the damages to the furniture and fittings. The deterioration and damage were extensive and the evidence protrayed what amounted to wanton neglect. The plaintiffs were served with over six months notice to quit and at the end the place was in disrepair. The award of the trial judge in this regard was moderate and I see no good grounds for interfering.

Mr. Daley, however, was not content. He submitted that the learned judge erred in disallowing those claims for the reasons given. In the light of my finding that the defendant is entitled to possession the reasons given by Vanderpump J. no longer exist. However, in respect of my finding against the defendant in trespass and my interpretation on the effect of Section 27 of the Act, I am of the view that the defendant having wrongfully ejected the plaintiffs the emergency necessitating the expenditure particularised above resulted from that action and accordingly I would decline to award the damages so claimed.

As attendant on the Order for possession the defendant would be entitled to mesne profits in addition to the damages awarded by the learned trial judge.

As there is at present an Order on the injunction for the payment of rent, I would refer the quantum of mesne profits for assessment by a judge of the High Court.

Implicit in the reasons set out herein is that the cross-appeals in the respondents' notices based on the arguments that on the finding of the learned trial judge he should have entered wholly for the plaintiffs on both claim and counter-claim, must fail.

In the circumstances I would allow the appeal with the following consequential variations in the judgment:

(i) On the claim, that the Order for specific performance be set aside.

(ii) On the counter-claim, that an Order for possession be granted against the plaintiffs to quit and deliver up possession of No. 5 Marvic Close, St. Andrew on or before thirty days from the date hereof and, in addition to the damages awarded, mesne profits to be assessed by a judge.

(iii) That the costs of appeal be the appellant's, such costs to be taxed if not agreed.

CAREBERRY J.A.

This case took some twelve days of argument, plus lengthy written submissions, and I have had the benefit of reading in draft the judgments of Kerr and Campbell JJ.A. In what follows I shall do my best, at the risk of over-simplification, to indicate as shortly as I can my own views on this difficult matter. As to the facts, I propose to say no more than is necessary to make this opinion intelligible, as they have been fully reviewed in the draft judgments that I have had the priviledge of reading.

Basically this was a dispute between landlord and tenant. The Defendant/Appellant, Mr. Val Benjamin Thomas, (whom I will hereafter refer to as Mr. Thomas or the landlord), was the owner of a house at 6 Marvic Close, Red Hills, in the parish of St. Andrew. It appears that he was contemplating migrating from Jamaica, and was considering the sale of these premises, his family home. He entered into discussion with his friend Mr. Ronald Brown, the proprietor of the first named Plaintiff/Respondent, (whom I will hereafter refer to as Crampad International or the tenant). In the course of these discussions the parties attended on two attorneys, with a view to preparing a suitable agreement for sale. The parties to the proposed sale were to be Mr. Ronald Brown and his daughter Miss Clover Brown (the second named Plaintiff/ Respondent, whom I will hereafter refer to as Clover Brown, though she has since married). Their first attempt to put their intentions into a formal agreement for sale was before Mr. R. Codlin, attorney-at-law for Mr. Brown. The attempt failed: it appears that the parties were not ad idem on the sale price, or in the event on how the contract should be worded. It appears that Mr. Thomas wished a price of U.S.

$150,000.00 for his house, or the Jamaican equivalent at the then exchange rate of U.S. $1 to Ja. $1.75 and that Mr. Codlin expressed the view that the consideration must be expressed in Jamaican dollars. Be that as it may, nothing came of that agreement, neither signed it and apparently Mr. Thomas thought that another lawyer or attorney should be consulted. The parties took their problems to Mr. Eric Desnoes. There it seems that instead of a sale they agreed upon a lease for a period of three years, with an option to purchase as one of its terms. The parties to the lease were no longer the parties to the original proposed sale. Mr. Thomas was the landlord, but the tenant was now to be Mr. Brown's company, Crampad International. The lease was to be a lease of furnished premises to be used as a dwelling house only for the occupation of Crampad International, " or its nominee", (the nominee was to be Miss Clover Brown). Though the lease was dated the 15th August, 1980, its commencement date was to be the 1st August, 1980. (Apparently possession had been taken on that date). The rental was to be $14,400.00 per annumn, payable quarterly ($3,600.00) at the beginning of each quarter as from the 1st August, 1980. The lessor to pay the taxes, water rates and insurance, while the tenant was to pay for gas, telephone, electricity and to meet any increase in taxes that took place over the rate then payable between 1980-1983. The lease contained a great many of the covenants usual in such agreements, and I mention only those that were actively canvassed.

The Lease, in a section headed "The Lessor and the Lessee mutually agree" stated, inter alia:

"(v) At any time during this Agreement prior to three months before its termination for the consideration of ONE DOLLAR ($1.00) the receipt of which sum is hereby acknowledged the Lessor hereby grant (sic) to the Lessee the option to purchase the leased premises at a price or consideration, the exchange in ONE HUNDRED AND FIFTY THOUSAND DOLLARS (J. $150,000.00) of (sic) the sum of TWO HUNDRED AND SIXTY-TWO THOUSAND DOLLARS FIFTY CENTS (U.S. $262,000.50) and on the Lessee taking up this option the Lessee agrees to pay the amount of ten per cent (10%) of the purchase price of the balance within thirty (30) days thereafter.

(vi) If either party wishes to terminate this Agreement at any time before the expiration of the said term he or she shall give the other party not less than SIX MONTHS (6) notice thereof.

(vii) All notices shall be deemed served two (2) days after the posting thereof by prepaid registered letter at any post office in Jamaica addressed to the respective parties at their address set out in the first paragraph thereof."

To anticipate a little, I pause to note that having read the wording of the option several times, I must confess that as worded it makes no sense. It is explicable only on the basis that the sums for Jamaican and U.S. Dollars seem to have got transposed. At the then exchange rate of U.S. $1.00 to Ja. $1.75 U.S. $150,000.00 would find its equivalent in the sum of Ja. $262,500 (not $262,000.50). There appears not only to have been transposition but wrong arithmetic or a typist's error. Both your Lordships have reached this conclusion and it seems clear.

Possession was taken under the lease, the occupant being Miss Clover Brown. However, it appears that Mr. Thomas' plans to migrate altered. He decided to stay in Jamaica after all, and to bring his family back to the island. He no longer wished to sell his house, he wanted it back again for use as his family home. After speaking to Mr. Brown he consulted his attorneys Messrs Daley, Walker & Lee Hing. On his behalf they wrote to the tenant, Crampad International, by letter dated 23rd November, 1981, and sent by Registered Mail, headed

"Notice to Quit." The material part of the notice reads thus:

> "We hereby give you notice to quit and deliver up to Val Benjamin Thomas possession of premises at 6 Marvic Close, Red Hills Post Office in the parish of St. Andrew, which you hold of Val Benjamin Thomas as Tenant thereof under the terms of a lease agreement dated the 15th day of August, 1980 on the 1st day of June, 1982 next or at the end of the complete month of your tenancy which will expire next after the end of six months from the service upon you of this notice........."

Though it was at one time contended that the notice had not been properly served, this was abandoned by the tenant during the course of the trial and it was conceded that the notice was served on 24th November, 1981. It is therefore unquestioned that six months notice was given as required by clause (vi) set out above. What remained in issue was when did the notice expire; and was it a valid notice.

The Browns and their company did nothing about the matter during the pendency of the notice. In particular they took no step in this period to exercise their option to purchase under clause (v) set out above.

To put the matter shortly, on the morning of the 1st June, 1982, after some earlier warnings that he meant business, Mr. Thomas entered "with a strong hand" (to use the old phrase) and ejected the occupants and re-took possession of the premises. He alleges that he found them in a deplorable condition, requiring the expenditure of considerable sums of money to restore them to anything like their former glory. The trial judge at least found this in his favour. It also appears that he removed the furniture that the tenant had brought in and disposed of it on an enclosed but unroofed part of the building. Both parties consulted the local police: perceiving that this was essentially a civil matter the police declined to intervene. Miss Clover Brown and her family found that they had been

forcibly dispossessed. By writ filed on the 8th June, 1982, Crampad International and Miss Clover Brown, sued their landlord Mr. Thomas for trespass to land and trespass to goods in respect of his entry on the premises on the 1st June, 1982. They claimed damages for "wrongfully and forcibly dispossessing the Plaintiffs" and also an injunction to restrain him from trespassing or continuing to trespass on the premises. On the same day, the 8th June, 1982, Crampad International and Miss Clover Brown also took out an ex-parte summons for an interlocutory injunction against Mr. Thomas. On the 10th June, 1982 they obtained the interlocutory injunction limited in the first instance to a period of 21 days ending on the 2nd July, 1982. It restrained Mr. Thomas from trespassing on the premises, or from possession or remaining in possession thereof. It was subject to the Plaintiffs' undertaking to answer for any damages suffered by the Defendant as a result of the order.

Our records do not disclose what happened thereafter. But it appears that the interlocutory injunction was extended to trial, and the parties proceeded to attempt to count their losses and in leisurely fashion to file the pleadings in this matter. It also appears that two events of importance occurred in this period: The Plaintiffs re-entered into possession of the premises on or about 23rd July, 1982, though it had been available earlier, at least from 20th June, 1982, and they alleged that they found that their furniture and belongings had been damaged, some items were missing, including a large sum of money which Miss Clover Brown claimed to have left in a drawer on the premises.

Secondly, on or about the 10th June, 1982, after the writ had been filed, and on the same day on which Plaintiffs obtained their interlocutory injunction, they purported to exercise the option to purchase the premises. Apart from a

reference in the pleadings there is remarkably little evidence as to this. Mr. Brown in cross examination stated that he understood the price in the option to be J $150,000.00 i.e. not U.S. Dollars. He decided to exercise the option only after his daughter had been ejected. To use his own words "I am buying it because he threw them out of the house. I am going to pay him for the house, the agreement, have been waiting on Defendant to say when he needs the money." It appears that Mr. Brown did write purporting to exercise the option. He also claims to have sent a cheque for 10% of what he conceived to be the price. Neither the covering letter nor cheque have been seen. There is a suggestion that on receipt of them Mr. Thomas tore up both. The lack of evidence on this aspect of the matter shows, I think, that neither side at the trial attached any importance to it. The evidence that was led at the trial concentrated largely on the consequential claims that each was making: the Browns as to the circumstances of the ejectment, and what had been lost or damaged or stolen; while the landlord Mr. Thomas for his part was concerned with the damage to his property, and the amount needed to set it right.

As to the exercise of the option the learned trial judge was content to say:

> "In that same month of June 1982 the option was exercised by the first named Plaintiff who now seeks Specific Performance to compel Defendant to complete."

However, at a later section of his judgment he dealt with the matter at greater length. He said:

> "Defendant in September 1981 changed his mind and purported to revoke this option but Plaintiff could nevertheless (and did) exercise the option and compel defendant to sell him this house. This he did on the 10th June, 1982 by letter bearing date 9th June enclosing a cheque for $15.000. Whereupon Defendant tore the cheque and sought to deny the option. This he could not legally do. The option to purchase was thus validly exercised and a binding contract thereby made for the sale and purchase of this house .... from that moment the relationship became one of Vendor and Purchaser between the parties. The purchaser is in equity the owner of the property and he is entitled to say that he desires the existing position (sic: possession) of the house and its occupation not to be disturbed pending completion. In other words first named Plaintiff is entitled to stay at 6 Marvic Close pending completion as it was in possession at the date of the contract of purchase. Technically in possession as its ouster was unlawful and short lived."

I will return later to a consideration of the law as expounded in this passage. What it does established is the fact that the purported exercised of the option by the tenant took place on the 10th June, 1982, after the writ had been filed.

I turn briefly to the pleadings to see how the parties themselves saw the law suit into which they had plunged. It is I think, fair to remember that the Plaintiffs having sought and obtained an interlocutory injunction were so to speak compelled thereby to justify it not only in their writ, but in their statement of claim. The writ itself claimed damages for trespass to land and goods: it was content to allege that the defendant had unlawfully and forcibly entered 6 Marvic Close "which was in the lawful possession of the Plaintiffs and forcibly dispossessed the second Plaintiff." The writ did not itself gave any indication of the nature or basis of "the lawful possession" that has been disturbed.

The copy of the Statement of Claim which we have with papers is headed "Statement of Claim amended pursuant to the order of Mr. Justice Vanderpump on the 12th February, 1984". (This was after both Plaintiff and Defendant had closed their respective cases, and it appears that what was amended was the <u>Prayer</u>, and that the amendment then made was to add "4. Order for specific performance of the contract created by the option in the lease.") Your Lordships have set out the contents of the statement of claim at length. It is sufficient for me to observe that it alleged that the first Plaintiff had entered into possession under the written three year lease agreement dated 12th August, 1980; that the defendant had purported to determine the tenancy by a notice that was defective, as not specifying the exact period of its duration nor complying with the provisions of the Rent Restriction Act. The statement of claim went on to assert that on the 1st June, 1982 while the lease was still in force, the defendant had entered on the premises and forcibly dispossessed the first and second plaintiffs and had remained in possession wrongly until the 20th June, 1982 and that when the plaintiff re-entered (on that date) it was discovered that goods to the value of $169,898.00 belonging to the second plaintiff had been stolen from the premises. Alternatively, the plaintiffs claimed that they were entitled to remain on the premises, despite the notice, under the protection afforded by the Rent Restriction Act.

As an afterthought (it is the last substantive paragraph) the Plaintiffs alleged in paragraph 12:

> "12. That in the month of June, 1982 the Plaintiff delivered a letter to the defendant together with a cheque for $15,000.00 pursuant to its right to exercise the option contained in the said lease and the defendant tore up the cheque and stated that he wanted the premises."

The statement of claim continued:

> "By reason of the matters aforesaid
> the plaintiffs have suffered loss
> and damage and have been put to
> great expense."

It then gave particulars of the special damage claimed, and sought as its only remedy damages, and "such further and other relief as the Honourable Court deems fit."

There was therefore no claim for specific performance, and in as much as the option was allegedly exercised at an unspecified date in June, the trespass complained of having occurred on the 1st June, it is questionable whether the plaintiffs were alleging a right to possession based on the option, or merely setting it out as a matter in aggravation of their claim to damages.

The defence and counterclaim admitted the lease, and in effect said that the lease had been properly determined by a notice given in pursuance of a specific clause in the lease, and denied that the Plaintiffs were entitled to the protection of the Rent Restriction Act. As to the option the defendant pointed out that it had been exercised after the termination of the lease. The defendant then went on to claim that in any event he had the right to re-enter under the lease, and alleged that he had carefully stored the plaintiffs' items found on the premises in a safe place, and had requested the plaintiffs to remove them, which they had refused to do. Defendant had incurred the expense of employing security guards to protect the premises and the plaintiffs' goods. The defence also made the point that the second named plaintiff was never a tenant of his, or entitled to any relief as claimed. There then followed a counter claim as to the damage done to the premises and the repair work that had to be done to remedy the same, coupled with a claim for missing items of furniture (the premises had been let furnished), and a claim for loss consequent on the

grant of the interlocutory injunction, and a claim for mesne profits for being kept out of possession thereby, and a claim to recover possession.

The plaintiffs, in their reply, denied the matters claimed for in the counter claim, re-asserted those alleged in the statement of claim, and incidentally denied that the premises had been let furnished.

As remarked earlier, as pleaded, and as fought, this was substantially a landlord and tenant dispute: the tenant claiming a right to possession under the lease, and a disturbance of that right giving rise to a claim for damages in trespass; while the landlord claimed that he was the owner, entitled to possession, having validly determined the Tenancy. To this the tenant's response was (a) the tenancy had not been validly determined because the notice was bad; (b) even if the notice was good, they were entitled to the protection of the Rent Act, and had a statutory tenancy under it; (c) that so far as the period subsequent to the 10th June, 1982, was concerned, they had an additional claim in that they asserted that they had validly exercised the option to purchase in the lease. In addition there was in effect a claim by the landlord that the tenant was liable to him for "waste" or injury to the reversion, and also alleged that in consequence of the tenant's breaches he had a right of re-entry under the lease. Those then were the issues, and with respect to the learning and acumen displayed by learned counsel on both sides, so much time was spent arguing the component matters that arose, that the wood tended to get lost amongst the trees.

In his judgment, the trial judge appears to have, as to (a) found that the Notice was invalid, not on the ground that it was too short, or not in keeping with the provisions of the lease, but that in providing for an alternative date it had caused confusion that rendered it invalid. He interpreted it as providing for termination on either the 1st June or 30th June.

As to (b) the trial judge rejected the argument of the landlord that the Rent Act gave no protection in these circumstances, and found that it protected the tenant, that is the first named plaintiff, Crampad International.

In consequence of these two findings, and without distinguishing whether he was finding that the contractual tenancy still continued, or whether he was finding that the tenant now held under the statutory tenancy created by the Rent Act, the trial judge proceeded to hold that the option to purchase in the lease had been validly exercised, "the lease (being) still alive on the 10th June and the option exercisable when plaintiff sought to exercise and did exercise it."

The learned trial judge, in that section of his judgment headed "conclusion" held that the landlord was liable in trespass in respect of his entry on the 1st June. In so doing it appears that he relied both on the common law and on a breach of the Rent Act with regard to recovery of possession; both are mentioned, without distinguishing between them, as grounding a claim for damages for trespass.

He then went on to link both with what he held to have been a valid exercise of the option to purchase: in effect he treated the tenant's right to recover damages for trespass as resting on the common law invalidity of the notice, the provisions of the Rent Act, and also the exercise of the option to purchase.

As to the damages awarded for this trespass the trial judge rejected the claim made by the second plaintiff that some $65,000.00 in cash had been stolen, and seems to have been very sceptical as to the other items claimed to have been missing or damaged. He ruled that this was not a case for the award of exemplary damages, and awarded the 1st named plaintiff, Crampad International, $500.00 and the second named plaintiff,

Miss Clover Brown $5,000.00. The learned judge also made an order for specific performance against the defendant, Mr. Thomas, in favour of the plaintiff Crampad International.

As regards the counter claim by the landlord, it is somewhat difficult to follow what was awarded, but it seems that he awarded as against both plaintiffs the sum of $19,719.00 which seems to be an award of damages for sums spent as necessary to restore the premises to their proper condition, and as against the second plaintiff the additional sum of $9,296.00 as being the amount spent by the defendant on providing security guards to protect the premises and the second plaintiff's goods during the period that she failed to re-enter after the grant of the interlocutory injunction.

This interpretation of the awards made is supported or confirmed by the Formal Judgment entered on behalf of the plaintiffs.

The landlord, Mr. Thomas, appealed against this judgment, in so far as it related to the awards made in favour of the two plaintiffs, and the decree of specific performance. The main grounds of appeal have been set out in extenso in the judgment of Campbell J.A. and I do not repeat them. They in effect, challenge the findings of the Trial judge on points (a), (b), and (c) referred to above.

For their part the plaintiffs cross-appealed in respect of the award made to the landlord on the counter claim. It was said to be inconsistent with his finding in favour of the plaintiffs on their claim.

It is convenient to deal first with the decree of <u>specific performance of the option contained in the lease</u>.

Both Your Lordships have decided that this order cannot stand, and I, respectfully, am of the same opinion. There was no claim for specific performance in either the writ or the statement of claim as originally filed. The Record shows that it was not until after both plaintiffs and the defendant had closed their respective cases that an application was made, and granted, to amend the prayer in the Statement of Claim to add a claim for specific performance. The writ itself remained unamended. Further, the alleged right to specific performance could not arise until there had been a valid exercise of the option contained in the lease. That option was not attempted to be exercised until the 10th June, 1982, the writ having been filed on the 8th June, 1982.

While it is true that the Civil Procedure Code provides in section 259:

> "The court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purposes of determining the real question in controversy between the parties."

This power is subject to several limitation. It is old law that an amendment will be allowed if it is wanted to enable the question to be fairly tried, unless it is impossible to put the other party in as good a position as he would have been if the person seeking the leave to amend had pleaded correctly in the first place. See Edevain v. Cohen (1889) 43 Ch. D. 187 at 189 et seq. Here the defendant landlord could not be restored to the position in which he would have been had the issue been originally raised. To grant the amendment was in effect to start a completely new ball game after the match was over. Instead of merely construing the lease, one would have had to go into questions of mistake as to the price, whether the mistake was mutual, and whether the option was void for uncertainty

(it makes no provision for the payment of the price or completion), and a great many other matters.

Even if one assumed that this court had the powers of amendment contained in the revised version of the U.K. Order 20 rule 5, I do not find the decision in Brickfield Properties Ltd. v. Newton (1971) 3 All E.R. 328; (1971) 1 W.L.R. 862 (C.A.) at all applicable. It is one thing to say that if all the facts have been pleaded and canvassed, an amendment which puts a different label on the plaintiff's cause of action, or presents the facts in a different light or basis may be allowed; it is however quite a different matter when the proposed amendment raises a cause of action which did not exist at the time that the writ bringing the plaintiffs' claim before the court was originally filed: see Tottenham Local Board of Health v. Lea Conservancy Board (1886) 2 T.L.R. 410; and see also Eshelby v. Federated European Bank Ltd (1932) 1 K.B. 423 (C.A.) affirming the lower court at (1932) 1 K.B. 254. See also the observation in the White Book (1982) in the commentary on O 20 r 5, (20/5 - 8/2):

> "The rule as to the effect of an amendment is the reason why a a plaintiff may not amend his writ by adding a cause of action which has accrued to him since the issue (of his writ)."

A similar comment appears in the 1976 White Book, see comment on Order 20 R. 5. (20/5-3) Effect of Amendment. As Swift J. said in the Eshelby case (supra) at page 262:

> "...... I cannot see how, without the consent of the parties, the Court can so amend a writ as completely to change the cause of action so as to bring in a cause of action which was non-existent at the time the writ was originally issued."

In the result, neither the amendment made to the statement of claim nor the Order made on it granting specific performance can be supported, and the judgment must be reversed in that respect.

Though it is not necessary to decide the point, having regard to what has just been said, but in as much as it was argued, the parties may find it useful to remember that in deciding whether in any event the option was properly exercised, much will depend on a finding as to whether it was not only exercised in accordance with its terms, i.e. three months before the termination of the agreement, but also whether at the time of its exercise the contractual tenancy was still existing. There appears to be a good deal of authority to which we were referred to the effect that an option to purchase would not "carry over" and become one of the terms of any statutory tenancy which followed on a holding over by the tenant: See 4th Edition Halsbury, Vol 27: paragraph 109: Nature of option to purchase; and see Woodall v. Clifton (1905) 2 Ch. 257; Rider v. Ford (1923) 1 Ch. 541, (1923) All E. R. 562; Longmuir v. Kew (1960) 3 All E.R. 26, (1960) 1 W.L.R. 862; and Re: Button's lease: Inman v. Button (1964) Ch. 263, (1963) 3 All E.R. 708.

Turning now to the question was the contractual tenancy properly determined? The notice to quit was challenged on two grounds:

(1) that it was bad at common law; and

(2) that it was bad under section 31 of the Rent Restriction Act.

For present purposes it is sufficient to refer to Cheshire's Modern Law of Real Property, 11th Edition pp. 451 - 453 for discussion of the determination of tenancies. In general, in order to terminate a periodic tenancy a notice to quit must (save in the case of a yearly tenancy) provide for a notice period equal in length to the period of the tenancy, e.g. a month's notice for a monthly tenancy; and it must also provide that the terminal date of the notice should coincide with the date on which the current periodic tenancy would normally end, e.g. a monthly tenancy commencing on the 1st of the month should have to terminate it a notice ending on the last day of the month. See for example Queen's Club Garden Estates Ltd v. Bignell (1924) 1 K.B. 117, (a Saturday to Saturday weekly tenancy must be determined by a weeks notice that expires on the Friday at midnight, and a notice that expires on the Monday is invalid). And see Lemon v. Lardeur (1946) K.B. 613; (1946) 2 All E.R. 329, in which the Queen's Club Garden Estates case was approved, and the headnote tersely observes:

> "In the case of every periodic tenancy, including monthly and weekly tenancies, a notice to quit must expire at the end of a current period of the tenancy."

That case further observes that there is an onus on the landlord to prove that the notice expired on the correct date: this is usually done by proving what was the commencement date of the tenancy.

However, a long established series of cases show that if the notice to quit expires on the anniversary day of the tenancy, instead of the day before (which would have been the end of the current period of the tenancy), the notice to quit will still be regarded as a good notice: See Sidebotham v. Holland (1895) 1 Q.B. 378 (C.A.); Newman v. Slade (1926) 2 K.B. 328; Crate v. Miller (1947) K.B. 946; (1947) 2 All E.R.

45; <u>Bathavon Rural District Council v. Carlile</u> (1958) 1 Q.B. 461 (C.A.). The reason for this exception has altered over the passage of time; in the Sidebotham case the leading judgment of Lindley L.J. approved by Lord Halsbury, Lord Lindley observed:

> "...... it is well settled that a notice (to quit) ought to expire on the last day of the current year. But although a half-year's notice to quit on the 18th would be correct, it does not follow that a notice to quit on the 19th, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of opinion that it is not ....The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

In the same case, A.L. Smith, L.J. who was somewhat doubtful observed:

> "It cannot be denied that the law upon notices to quit is highly techinical; but the technicalities are too deeply rooted in our law to be now got rid of ....I would point out that the plaintiff (landlord) has only himself to blame for the difficulties he is in this case. Had he added the words which are ordinarily inserted in a notice to quit, 'or at the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice' and which are inserted to avoid such a point as that now taken, all would have been in order;........"

In <u>Newman v. Slade</u> (supra) the Divisional Court followed the <u>Sidebotham case</u>, but Salter J. observed:

> "Applying what Lindley L.J. called the usual rule of disregarding the day on which the notice is given and including the day for which it is given, it is plain that the recipient of the notice has seven days' notice, <u>but of course it is essential that he should have the whole of the day for which notice is given.</u>"

That observation is perhaps slightly out of keeping with the rule of Cutting v. Derby (1776) 96 E.R. 520; (1775-1802) All E. R. 520, to the effect that a tenant is entitled to remain in possession of the demised premises until midnight of the last day of the term. It is also perhaps slightly inconsistent with Lord Lindley's observation that the notice to quit on the anniversary day should be regarded or could be regarded as taking effect on the first moment of that day. But it is good common sense that if the tenant is told in the notice to leave on what is the anniversary day rather than, than the last day of the current period, he should have the whole of that day until midnight.

However, in Bathavon Rural District Council v. Carlile (1958) 1 Q.B. 461 (C.A.) giving the judgment of the Court and following the Sidebotham case, and noting Crate v. Miller, Hodson L.J. observed:

> "The next matter to consider is whether a notice expressed to end on the day following the expiration of the period can be good. The answer is 'Yes' and is to be found in Sidebotham v. Holland and in a later decision of the Court of Appeal in Crate v. Miller ...."

After citing the passage referred to earlier from the judgment of Lindley L.J., Hodson L.J. continued:

> ".... it seems clear that the true explanation of this principle is not de mimimis non curat lex, but that the court construes a notice given for the anniversary as a notice expiring at the first moment of the anniversary.

However, observing that the notice in question contained the words "by noon" (of the anniversary day), he said:

> "The council argued upon these authorities that if notice expiring on Monday is good, it could not be rendered bad by the addition of the words 'by noon'. The answer is that while 'Monday' without more can be construed (as the authorities show) as meaning the first moment of the day (the preceding midnight), 'by noon on Monday' cannot be so construed .... the words 'by upon on Monday are expressed to mark the expiration of the notice itself and there is no room for a licence to remain on the premises after the termination of the tenancy."

In effect, according to Hodson L.J. where the notice is given to expire on the anniversary day simpliciter, it can be construed as a notice to quit at the first moment of that day, seconds after midnight of the last day of the current period, coupled with a licence to use the whole of that day, but the mention of a specific time prevents that interpretation, and shows that the notice is clearly for the wrong day! And that by some hours! While confirming the Sidebotham case, it does appear that the Bathavon case illustrates how technical the law with regard to notices to quit can be.

The parties however may depart from the rules indicated above, and make their own arrangements with respect to notice: See Allison v. Scargall (1920) 3 K.B. 443 per Salter J. at 449:

> "I know of nothing which prevents parties, in entering into an agreement for a tenancy from year to year, from stipulating that it should be determinable by a notice to quit shorter than the usual six months' notice; or that the notices to quit to be given by the landlord and the tenant respectively should be of unequal length; or that the tenancy should be determinable by the one party only by notice to quit and by the other party either by notice to quit or in some other way."

In Dagger v. Shepherd (1946) K.B. 215; (1946) 1 All E.R. 133 (C.A.) Evershed J. delivering the judgment of the Court, conveniently sums up the effect of most of the cases to which we were referred on the aspect of how the courts approach notices to quit. He said at page 220:

> "It is well established that a notice to quit, being a "unilateral act" in exercise of a contractual right to put an end to an existing relation of landlord and tenant, must conform strictly to the legal requirements of the contract. Accordingly, 'although no particular form need be followed, there must be plain unambiguous words claiming to determine the existing tenancy at a certain time' (see per Lord Coleridge C.J. in Gardner v. Ingram (1889) 61 L.T. 729, 730), quoted with approval by Atkin L.J. in P. Phipps & Co. (Northampton and Towcester Breweries) Ltd v. Rogers We refer also to the language of the present Master of the Rolls (Lord Greene) in the most recently reported case in regard to notices to quit to which our attention has been directed Hankey v. Clavering (1942) 2 K.B. 326 C.A. at 329."

In that passage, Lord Greene had observed:

> "Notices of this kind are documents of a technical nature, technical because they are not consensual documents, but, if they are in proper form, they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They must on their face and on a fair and reasonable construction do what the lease provides they are to do.
> It is perfectly true that in construing such a document, as in construing all documents, the court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that, where a document is clear and specific, but inaccurate on some matter such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip."

Evershed J. after citing Lord Green (above) continued:

> "There is a further general principle to be applied. The court must assume that the parties to the contract of tenancy are aware of its terms, particularly of the provisions relative to termination: see for example per Atkin L.J. in Phipps & Co. v. Rogers (supra).
>
> Bearing these general principles in mind, the question for our determination is solely one of interpretation. What upon its fair and reasonable construction does the document of December 20, 1944 mean? Is the tenant left by its terms in any doubt as to its intended effect? (emphasis supplied)

In the case now before us, clause (vi) in the lease agreement had clearly provided that:

> "If either party wishes to terminate this Agreement at any time before the expiration of the said term, he or she shall give the other party not less than SIX (6) MONTHS notice thereof."

The parties had therefore clearly made their own arrangement for termination of the tenancy (and the option). It was permissible to do so, and the cases clearly establish that where they provide for notice to be given "at any time" they have in effect dispensed with the normal rule that the notice must expire at the end of the current period of the tenancy. See Land Settlement Association Ltd. v. Carr (1944) K.B. 657; (1944) 2 All E.R. 126 (C.A.) per Luxmoore L.J. at p. 668 (p. 132 All E.R.); W. Davis (Spitafields), Ltd. v. Huntley et al. (1947) 1 All E.R. 246 (Notice of 3 months held to run from date of service, though the notice itself had not named a date); H & G Simmonds v. Heywood (1948) 1 All E.R. 260.

In the result then the complaint that the notice to quit did not terminate on one of the regular quarter days, or on the last date of the current tenancy period fails: the parties had agreed otherwise.

It is now necessary to ask and answer the question posed by Evershed J. in Dagger v. Shepherd:

> "What upon its fair and reasonable construction did the notice to quit given here mean?
>
> Is the tenant left by its terms in any doubt as to its intended effect?

Giving these questions the best consideration I can, it seems to me that the tenant was left in no doubt as to the meaning of the notice to quit. It called for the tenant to quit the premises on the 1st June, 1982. It also used the alternative formula indicated as being wise by A.L. Smith L.J. in the Sidebotham case. The learned trial Judge found that the alternative formula used was unnecessary and had introduced an element of confusion. He found that the notice with this formula presented the tenant not only with the 1st of June, but also with an alternative date, the 30th June. With great respect I have been unable to agree. At the most it would have presented a choice between the 31st May, and the 1st June, 1982. On the interpretation put forward in the Sidebotham case, or for that matter its interpretation in the Bathavon Rural District Council case, there is no substantial difference between a notice that expires at midnight on the 31st May, and one that expires at the earliest moment of the 1st June, 1982. To quote Lindley L.J.

> "The validity of a notice to quit ought not to turn on the splitting of a straw."

It may of course be observed that if the notice to quit expired at the earliest moment of the 1st June, then strictly speaking an entry by the landlord on that very day ought not to be a trespass. The answer to this is in the observation made by Salter J. in Newman v. Slade that the tenant should be given the whole of the day for which the notice is given. Or looked at as in the Bathavon case, he had been given a licence to use that day the 1st June, and it could not

be revoked. There was therefore at least a technical Trespass, and if landlords chose to use self-help remedies instead of seeking the assistance of the courts, then they are answerable even if the trespass is "technical."

Thus far I am, as I understand it, in agreement with your Lordships: the notice to quit was good at common law, but the entry by the landlord on the 1st June, 1982, constituted at least a technical trespass; as the tenant had all that day to terminate the tenancy, and to quit the premises. The notice required the tenant to leave on the 1st June, not by the 1st June.

The attack on the basis of the Rent Restriction Act has however caused me more concern. The attack has two sections:

> "(a) it attacks the validity of the notice to quit; and
>
> (b) it asserts that the tenant was entitled to the protection of the Rent Act and could legitimately hold over, notwithstanding that the contractual tenancy had been ended."

As to (a), I would make a preliminary remark. Though the validity of the exercise of the option is not before us, in view of what has been said earlier with respect to the writ having been filed before the option was purportedly exercised, it seems fairly arguable that whether or not the Rent Act makes the notice invalid as regards the obtaining of possession, the notice may nevertheless be good to terminate the option to purchase, a collateral matter with which the Rent Act is not concerned: that is on the assumption that such an option does not carry over into any statutory tenancy that may arise, and I have already referred to cases which indicate this.

In a sense the arguments raised at (a) and (b) are complementary: both involve a consideration of the overall scope and application of the Jamaican Rent Act. There is this difference between them: if the argument at (a) is well founded, then the contractual tenancy will have continued despite the fact that a notice to quit which is valid at common law has been given. The argument at (b) however deals with the situation on the basis that the contractual tenancy has ended, and asserts that there has now arisen what is called a "statutory tenancy" and we are called on to consider what rights, if any, accrued to the tenant if it is held that such a tenancy arose.

At the risk of repeating some of what I said in an earlier case, Golden Star Manufacturing Co. Ltd v. Jamaica Frozen Foods Ltd. S.C. Civil Appeal 13/86 (31st October, 1986), it is useful to make some preliminary observations on the relationship between the common law as to landlord and tenant, and our Rent Restriction Act. The Act assumes the existence and continuance of the normal law relating to landlord and tenant. The relationship is one which in almost all cases arises in the first instance by virtue of a contract made between the parties. The agreement so made governs all aspects of the relationship, save where they have been altered by the Act. But even at its inception the Act may in some respects have affected the contractual agreement, for example it may be that the Standard Rent of the premises (and permitted increases if any) has already been determined by the Board set up under the Act, in which case the contractual rent fixed may not exceed the figure that has been determined to be appropriate to those premises. The Rent Act acts in rem: Carter v. S.U. Carburetter Coy. (1942) 2 K.B. 288; (1942) 2 All E.R. 228 (C.A.)

The Rent Act was designed to protect tenants against landlords. It has done so in two ways (a) by controlling the quantum of rent which may be lawfully charged; and (b) by protecting the tenant's occupancy of the premises. The second protection is a natural corollary of the first, otherwise a tenant who "took his landlord to the Rent Board", or asserted liability only for the standard rent as fixed, might find himself ejected for his temerity, and a new tenant who promised to be more complacent might be installed.

The Rent Act intervention as to the tenant's occupancy arises however only if and when the contractual tenancy has been determined, and it arises only where the tenant claims it, for if the tenant accepts the termination of his tenancy no question arises, he has gone. It is only where the tenant refuses to accept that his right of occupancy has been ended, i.e. where he purports to "hold over" that the protection of the Rent Act comes into play. Regrettably we have so far been unable to find a better term for the tenant's rights when he thus holds over than the words "statutory tenancy." In Keeves v. Dean & Nunn v. Pellegrini (1924) 1 K.B. 685, (a case that decided that such a tenant could not assign his rights, whatever they were), Bankes L.J. observed (at p. 690)

> "The person who so seeks to assign has come to be known as a 'statutory tenant', and I think it is a pity that that expression was ever introduced. It is really a misnomer, for he is not a tenant at all; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one, and as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies."

Scrutton L.J. however, in the same case observed: (at p. 694)

> "My lord has objected to his being called by that name, ('statutory tenant') on the ground that he is not a tenant at all. But it is a convenient expression ...... (and as to his rights) ..... I take it that he has a right against all the world to remain in possession until he is turned out by an order of the Court, and that he could maintain trespass against any person who entered the premises without his permission."

Both judges reached the same conclusion, that these rights, whatever they were called, were not assignable, and Lush J. observed at p. 697:

> "He has no estate in the premises, that has come to an end, and all that the statute has given him is a purely personal right to be free from disturbance by his landlord. It is a very valuable right, but it is personal to him."

Though both the English Rent Acts and our own local Rent Act refer to the "statutory tenant" as "tenant" the person holding over is not a common law tenant: in particular <u>it is not necessary to serve him with a notice to quit</u>. If it is sought to get him out, the landlord need only establish that one of the statutory reasons exist which make it lawful for a court to order his ejectment. Those reasons are set out at great length in section 25 of our Rent Act. If the tenant is unwilling to go and holds over, it will be remembered that section 27 of our Act makes it illegal to forcibly remove him, except under an order or judgment of a competent court for the recovery of possession. Before the Rent Act comes into play, the contractual tenancy must be shown to have been terminated by an appropriate notice to quit: appropriate as to the length, terminating on the proper day, given by the right person to the right person. But once

that has been done, if the tenant refuses to go it will become necessary to apply to the Court and to show that one or other of the statutory reasons exist.

Because we have got into the habit of referring to the "statutory tenant" as a "tenant" (and even the Act so refers to him) there has been a tendency to think that he must be served with a notice to quit. This is incorrect. If he is a statutory tenant it is because he has already been served with such a notice, and his contractual tenancy has been already determined. All that now remains is to serve him with the appropriate court process and get a possession order from a court, based on one of the statutory "causes" for which he can be ejected. A careful study of our Rent Act, section 25 (Restriction on the right of possession) will show that in none of these subsections is it required that the landlord should serve a notice to quit on the Statutory tenant. Section 26 does however provide for a mode of terminating the tenancy of public or commercial building, by a notice that must be at least 12 months in length. That section has introduced the possibility of a tenant giving a counter notice of his intention to hold over, and of applying to the Court for a "substituted date of termination", which may result in an extension not exceeding a further 12 months from the original date of termination. Section 26, as I understand it, is however an alternative mode of getting the tenant, or statutory tenant out. It does not prevent application under section 25, and many of the heads or causes for which the landlord may apply for an ejectment order to the court expressly apply to tenancies of public or commercial buildings: see for example sub-sections (e) (f) (h) and (k). It would not I think be correct to regard section 26 as having made section 25 no longer applicable to public or commercial tenancies, or to regard it as having limited section 25 to dwelling houses only.

It is in this context that we have to construe section 31 which deals with notices to quit. The relevant part of the section reads thus:

> "31. (1) No notice given by a landlord to quit any controlled premises shall be valid unless it states the reason for the requirement to quit."

As to what is or are "controlled premises" can be discovered by reference to section 3: Application of the Act. For present purposes it reads thus:

> "3. (1) This Act shall apply to .... all dwelling houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter and whether let furnished or unfurnished. ...."

The rest of the section contains provisions which remove certain types of premises from the control of the Act. None of them apply to the circumstances of this case.

In the result then we have a section which, even if it were limited to being regarded as something designed for the purposes of the Rent Act, is so wide - having regard to the width of "controlled premises" - as to apply to any tenancy save perhaps one dealing with agricultural land or farms etc. I must confess that though I am sympathetic to the views which seek to limit the scope and application of this section I can see no reason why it should not apply to the notice in this case. The Act applies to all (save excepted) dwelling houses, whether let furnished or unfurnished.

It may well be that the intention of the section as originally conceived was to provide that in all cases where an application is made for a possession order, the application should specify which of the many causes under section 25 were being invoked, so that a statutory tenant brought to court might know in advance what was the case that he had to meet. It

may also be that it was thought, incorrectly, that a statutory tenant had to be given a notice before court process was brought against him. This may be due to the fact that the most commonly used remedy claiming possession from tenants, viz section 85 of the Judicature (Resident Magistrates) Act requires proof of service of a notice to quit. That section designed originally for use against contractual tenants is now used against all tenants. Of course proving that the contractual tenancy has ended may involve proving a notice to quit. Be that as it may, we have a section of the widest application, and it applies here. What does it mean or require? It says that the notice must contain the reason for the requirement to quit. Interestingly enough the section does not require, as it might, that the notice should be in writing. But the notice given in this case was in writing. It is true that the evidence shows that the landlord here orally intimated to the tenant that he wanted to get back his house for himself and his family to reside in. But that has not been set out in the notice given here. All that the notice says is that the landlord requires possession of the premises held under the lease. Having held that the notice here was good at common law, one is sorely tempted to try and avoid the effect of section 31, but I have been unable to find a way to avoid it. There is no express reason given nor can I find one that is implied. I agree that the section does not require that the reason in the notice must be one that satisfies section 25, but no reason has been given express or implied and the notice is therefore under the section invalid. But invalid for what purpose or purposes? I have already indicated that though the notice may be invalid for the purpose of determining the tenancy it is arguable that it determined the option: it is not however necessary to decide that question having regard to what has already been said relating to the amendment that purported to claim speciifc performance.

The effect of section 31 must be that the notice is invalid for the purpose of determining the contractual tenancy. If that is so, then that tenancy continued until it would have expired by effluxion of time. There was therefore not merely a technical trespass by this landlord entering on the morning of the 1st June, instead of waiting till midnight, but a substantial trespass which continued till the tenant got the interlocutory injunction on the 10th June. Such a finding will not however affect the quantum of damages awarded by the trial judge, since they were awarded on that basis. It does however mean that the landlord would not be entitled to recover possession of the premises.

It is necessary however to say something about the alternative argument advanced by the tenant, to the effect that even had the tenancy been validly determined by the notice to quit, still the tenant, and its licensee the 2nd Plaintiff, Clover Brown, were entitled to the protection of the Act. This raises the difficult question as to what is the nature of the protection enjoyed by a Statutory tenant under the Jamaican Rent Act.

The answer to that question is to be found in section 28 of our Rent Act. The most important part of the section is in subsection (1) which reads:

> "28 (1) A tenant who, under the provisions of this Act, retains possession of any premises, shall, so long as he retains possession, observe and be entitled whether as against the landlord or otherwise, to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the original contract of tenancy: Provided that, notwithstanding anything in the contract of tenancy,

> "a landlord who obtains an order for the recovery of possession of premises or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant. ...." (emphasis supplied)

It is to be noticed that this section, save in one fundamentally important respect, is identical to what appears now as section 15 (1) of the English Rent Act, 1920 . That respect is that the English Act instead of premises, specifies "dwelling house". This difference though it does not alter the approach to the construction of the section, and the Act as a whole, does alter most materially what the Act applies to, or the nature of the premises in respect of which a statutory tenancy can exist. Section 3, already referred to, provides that this Act shall apply "to all dwelling houses and public or commercial buildings ... whether let furnished or unfurnished." In altering the subject matter of the statutory tenancy it may also alter the effect of any argument that derives from a consideration of the subject matter.

It will have been noticed that section 28 (1) speaks of a tenant who "retains possession". Subsection 28 (2) forbids the tenant who retains possession from asking for a premium from any person, other than the landlord, as the consideration for giving up the premises. (Section 24 as a corollary forbids the landlord from asking for a premium for the renewal or continuance of the tenancy). Section 28 (3) deals with the position of sub-tenants. Section 25 (1) (1) (restrictions of right to possession) had provided that one of the causes or reasons on which a Court could make an order for possession against a statutory tenant was that he had sub-let or parted with the possession of the whole or any part of the premises without the consent of the landlord or being authorised

to do so under the original tenancy agreement. Section 28 (3) deals with the position where the landlord had given his consent, or the subletting had been done under the provisions of the tenancy agreement. Read as a whole, the statutory tenancy may be enjoyed only by a tenant who retains possession of the premises. Subletting is forbidden: if done without consent, it provides a legitimate cause for getting a possession order, and if done by consent, the sub-tenant, not the original tenant will become the "statutory tenant" but on the terms of his sub-tenancy. Fairly construed, "retaining possession" is a fundamental requirement or qualification for the contractual tenant to become a "statutory tenant" when he holds over. But this applies "across the board" to all or any premises covered by section 3 of the Act.

I now turn to a consideration of the series of cases cited to us dealing with the nature of the statutory tenancy, in what premises it may exist, and who may be so protected. The case of Keeves v. Dean; Nunn v. Pellegrini (1924) 1 K.B. 685 (C.A.) has already been mentioned: It is authority for the proposition that the statutory tenancy is not assignable, because it depends on the tenant "retaining possession." An assignment would mean that he no longer retained possession, and neither he nor his assignee would be entitled to the protection afforded a "statutory tenant." The next case for consideration is Haskins v. Lewis (1931) 2 K.B. 1 (C.A.). In that case Scrutton L.J. opened his judgment by remarking on the difficulty of Rent Restriction cases and observing: (at p. 9)

> "The Acts have been passed without those framing them having any clear idea whether they were conferring property on the tenant or whether they were conferring a privilege of personal occupation, and the Courts have very slowly - and I do not think they have finished yet -- been trying to frame a consistent theory of what must happen."

Greer L.J. had doubts. He said at page 565:

> "It does not seem to me that mere non-residence justifies the Court in making an order for possession, inasmuch as it is not so provided in the Act. Moreover, a man may remain in possession in law, even if he is not physically upon the premises, if he occupying the premises by a licensee. ......"

He however accepted Haskins v. Lewis as binding and did not dissent from the result reached. Slesser L.J. agreed with Scrutton L.J. He said at page 569:

> "I therefore come to the conclusion that the restriction on the landlord's right to recover possession is confined to the case of persons who are tenants residing on the premises, meaning thereby not residing in the narrow sense, but tenants of whom it can properly be said that they are in actual occupation."

So far the Courts had been dealing with absentee tenants, but in Reidy v. Walker (1933) 2 K.B. 266 they had to deal with a tenant who was a limited liability company. The Divisional Court followed the previous line of cases. It was noted in the argument that many of the other sections in the Rent Acts envisaged a human being e.g. a landlord who wished to get possession for himself or members of his family to occupy. Acton J. though following the reasoning of the previous cases, expressed doubts. He said at page 270:

> "I should have thought that a company may be in possession and in occupation of premises, including a dwelling house, through the medium of some caretaker or other occupant to whom is entrusted the duty of living in and, it may be, taking care of some house to which the Acts apply."

However, he observed that the Court of Appeal had come to the conclusion that the protection afforded by the Act had no application save to a tenant who was in occupation and possession in a certain limited sense. Clearly a company could not be regarded as "residing in a house, or being in personal occupation of it as a home. Goddard J (as he then was) agreed:

> "The Court of Appeal lays down the proposition that before a person can become a statutory tenant his occupation must have an essentially domestic quality, and I read the case of Skinner v. Geary as showing that because a company cannot reside in the sense which is necessary for a statutory tenant its occupation can never acquire this domestic quality."

This extention was confirmed by the Court of Appeal in the case of Hiller v. United Dairies (London) Ltd. (1934) 1 K.B. 57 C.A. The company here were leaseholders of a shop and rooms above which were occupied by their manager. It was not clear what was the arrangement between the manager and the company. If he were a subtenant, the company, the tenant, would not be protected by the Act. If he were a licensee, then the company's position would be the same as in Reidy v. Walker. The company argued that though they could not occupy or reside personally in the sense indicated in Skinner v. Geary, they could do so through their agent; and that there was nothing in any of the Acts to show that limited companies were not entitled to protection.

The Court of Appeal (Lord Hewart C.J., Lord Wright and Slesser L.J.) did not accept the company's argument. Lord Wright said at page 61:

> "If the rights under the Acts which are given to the statutory tenant are, as this Court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted. It was naturally not suggested that the manager was a subtenant."

Pausing here, the draftsmen of the Acts having failed to indicate the nature and extent of the rights of a statutory tenant, the English Courts have considered the statutory qualification for such a tenant, i.e. that he "retains possession" of the premises, by reference to the nature of the subject matter of the possession, that is a dwelling house, and have ruled that the statutory tenant must be in "actual occupation" and using the premises as such, in order to qualify for protection under the Acts. Flowing logically from this a limited liability company can never so occupy a dwelling house, and therefore cannot be a statutory tenant thereof.

A limited liability company is not however without all rights: Carter v. S.U. Carburetter Co (1942) 2 K.B. 288; (1942) 2 All E.R. 228 (C.A.) shows that where a limited liability company is a contractual tenant, it is entitled to the benefit of having to pay only the standard or permitted rent which has been established in respect of the particular premises. The Rent Acts operate in rem.

Hiller v. United Dairies (London) Ltd. (supra) was further amplified by the Court of Appeal in the fairly recent case of S.L. Dando Ltd. v. Hitchcock et al (1954) 2 All E.R. 335 (C.A.) In that case a dwelling house had been let to a tenant, under an agreement which specifically provided that the tenant "or his present manager" is to reside on the premises. The landlord sold his interest to a limited liability company. That company sought a possession order against the tenant, on the ground that the tenant was not himself occupying the premises, but was allowing his manager, a licensee to do so. In this case then, the landlord was a limited liability company! What was at issue was whether a tenant could be said to be "retaining possession" through an agent or licensee. The Court

distinguished cases dealing with a tenant's deserted wife, and held that a tenant occupying through a licensee was not entitled to the statutory protection afforded by the Rent Acts. Denning L.J. remarked:

> "The only person protected under the Rent Restriction Acts is the tenant and he is only protected so long as it is his home."

Birkett L.J. remarked of Hiller's case at page 338:

> "As I understand them, that case and the limited company cases proceed on the footing that having regard to the doctrine that the protection of the Acts afford is a personal one, a limited company cannot come within it.

Lord Goddard C.J. agreeing, said at page 338:

> "The Rent Restriction Acts are intended and designed to protect tenants and tenants only.
>
> .... that means tenants who live in these houses. If a personal tenant does not live in the house, never intends to live in the house, and declares that his intention is never to live in the house, I can see no reason at all why his tenancy should be protected to enable him to keep in the house a manager or partner or anyone else whom it may be convenient to have there."

As the argument has developed before us, both sides have sought to rely on the Rent Act. Here the tenant, a limited liability company, took a lease which specifically provides:

> "The Lessor agrees to let the premises for the occupancy of Crampad International Marketing Company Limited, or its nominee." (See clause 3 of the lease Agreement.)

On the one hand the tenant, the company, has argued that the English cases which have been referred to do not apply to the Jamaican Rent Act, and that they are entitled to the protection of that Act, though they are a limited liability company, and though they are not in personal occupation, they are "retaining possession" through a nominee, the second Plaintiff Clover Brown.

On the other hand the landlord relies on these English cases as showing (i) that the protection of the Rent Acts extends only to tenants who personally reside in the dwelling house as their home; and (ii) that a limited liability company cannot be such a tenant, and is therefore not eligible for such protection, and they rely strongly on such passages as those of Lord Goddard C.J. and Birkett L.J. in S.L. Dando's case and of course the remarks by Scrutton L.J. in the earlier cases cited above.

As I understand your Lordship's judgments which I have had the privilege of reading in draft, they accept as applicable to a dwelling house in Jamaica the line of cases flowing from Keeves v. Dean, Haskins v. Lewis, Skinner v. Geary, Reidy v. Walker, and culminating in cases such as Hiller v. United Dairies and S.L. Dando v. Hitchcock. Unfortunately I feel unable to do so, at least to the extent that your Lordships have done.

Those cases were found on interpreting the phrase "a tenant who by virtue of the provisions of this Act retains possession of any dwelling house" and flowing from a consideration of the subject matter of the protection, "a dwelling house," the English Courts have been able to work out the principle "that the only person protected is the tenant, and he is only protected so long as it is his home."

Our own Rent Act in section 28 though obviously modeled on the English Act, uses the phrase "a tenant who, under the provisions of this Act, retains possession of any premises" and thereby, with eyes wide open, departs from the limits of "dwelling house" to an act which under section 3 (1) applies to all dwelling houses and public or commercial buildings, whether let furnished or unfurnished."

The draftsmen have not, either in England or in Jamaica, furnished in the respective acts any clear idea of what was being conferred upon the tenant, as Scrutton L.J. remarked in Haskins v. Lewis. But having regard to the width of application of the Jamaican Act, clearly it must be possible to have statutory tenants, or statutory tenancies in respect of public or commercial buildings, notwithstanding that section 26 has provided an alternative way, a short cut, enabling public or commercial tenancies to be terminated other than by proceedings under section 25.

Section 25, (restrictions on the right to possession) has to be read along with section 28, (conditions of statutory tenancy) for it is these two sections taken together which protect the tenant holding over. If one has statutory tenancies of public or commercial buildings, while possession by the tenant is clearly a necessary condition for securing the statutory protection, there can be no built in limitation of that possession to cases of possession of the premises as a home, nor can it be said that a limited liability company is incapable of possession of a public or commercial building, or of being a statutory tenant thereof. Once the gate has been opened in that way, then the English cases and the developments that have taken place therein lose much of their persuasive power. We are faced with the problem of interpreting our own act, which despite its debt to the English Acts, is a new and different statute.

We can, I think, borrow from the English cases the principle that to enjoy protection the tenant must be in possession of the premises, whatever these may be. Our Act clearly does not afford protection to tenants in cases of sub-letting: where they have done so without consent of the landlord, they have provided a justifiable head for getting a

a court order: see section 25 (1) (1); and where the tenants have sub-let with consent, it is the sub-tenants who are to be protected, and the tenants have lost their protection: see section 28 (3).

I am of the view that a similar situation would exist in cases of assignment: the tenant would cease to be entitled to protection as he would no longer be in possession, and his assignee would be entitled to no protection either as he had never been a tenant retaining possession. In short Keeves v. Dean (1924) 1 K.B. 685 should apply.

In the case of tenants who are in possession through a caretaker or nominee, (and a company is usually in such a position) I think that we will not be able to follow the English cases, based as they are on limitations derived from "dwelling houses." Any rules that we may develop as to the interpretation of section 28 have to be based on Rules applicable to possession generally in its ordinary legal significance, and the question at issue must be "Has the tenant parted with possession?" "What is the nature of the relation between the tenant and the person in actual occupation?"

I should add that in forming the view that the line of English cases relating to the nature of a statutory tenancy of a dwelling house do not assist us greatly in the present case, I have not overlooked the principle enunciated in Trimble v. Hill (1879) 5 App. Case 342 at 344, modified by Robins v. National Trust Co. (1927) A.C. 515, at 519, both of which cases were reviewed in the judgment of the Privy Council, delivered by Lord Diplock in the recent case of De Lasala v. De Lasala (1979) 3 W.L.R. 390 at page 397. I have however been mindful of the remarks contained in the judgment of Lord Macmillan in the Privy Council case of Commissioner of Stamps (Straits Settlement) v. Oei Tjong Swan (1933) A.C. 378 at page 389 as to the need

for first considering the terms of our own Rent Act before embarking on a textual comparison with that of the United Kingdom. Where the terms of our own Act follow closely those of a United Kingdom Statute, decisions made there may obviously be helpful: see for example Chogley v. Bains (1955) 1 W.L.R. 877 at 8834 (Lord Radcliffe). However in this case, for the reasons indicated earlier I have not been able to derive assistance from the English cases cited beyond the extent indicated above.

As to the judgment in respect of the counter claim, I have not been persuaded by the arguments advanced on behalf of the plaintiff/respondents, that no such damages should have been awarded, nor have I been persuaded by the Landlord/appellant that the awards should be increased.

In the result, I agree that the judgment in so far as it orders Specific Performance in favour of the tenant must be set aside. I would confirm the award of damages made for the trespass that took place when the landlord entered, and would leave untouched the award made to the landlord on the counter claim.

However, as I do not agree that the notice to quit was validly given having regard to section 31 of the Rent Act, it follows that the contractual tenancy continues to exist until the effluxion of time, (three years), and that the tenant being still there, in pursuance of having been restored by the interlocutory injunction, and paying rent at the figure fixed in the original lease agreement, must be regarded as a tenant from year to year, and may be given a fresh notice of six months, which need not expire on any of the established quarter days, but may be given at any time (as provided for in the original lease agreement). Thereafter, should the tenant refuse to quit,

and holds over, the landlord will (if he wishes to regain possession) have to take the necessary steps under section 25 of the Rent Act. He would be well advised in any fresh notice to the tenant to insert therein a reason or reasons for requiring the tenant to quit.

As to costs, this has been a difficult case: the landlord/appellant has won on the issue of specific performance, but, in my view, lost on the issue of the validity of the notice to quit under section 31 of the Rent Act, (though winning on the validity at common law). The landlord has lost on the issue of damages for trespass, but sustained his award on the issue of waste. The landlord has also lost, in my view, on the issue of whether the tenant, a limited liability company, can be a statutory tenant. The landlord has also in my view lost on his claim to recover possession of the premises. I would be inclined to the view that each party should bear its own costs.

CAMPBELL J.A.

The appellant is the owner of a dwelling house with appurtenancies thereto situate at No. 6 Marvic Close in the parish of Saint Andrew. On or about the 15th day of August, 1980 he leased these premises under a written lease agreement to the first respondent for a term of three years commencing on August 1, 1980. The first respondent entered into possession and occupation by and through the second respondent. It appears on the evidence that prior to the execution of this lease, the appellant had entered into negotiations with the first respondent for the sale to it of the premises. A draft contract of of sale was prepared by Mr. Codlin, Attorney-at-law who was acting for both parties. This document exhibit 5 was never signed or otherwise executed by the parties or either of them. The first respondent admitted in evidence that the appellant refused to sign the document as he claimed that it did not reflect his intention on the purchase consideration. He was insisting that it should be the equivalent of U.S $150,000.00 at an exchange rate of U.S. $1.00 to J$1.75.

The lease which was subsequently executed contained two provisions namely paragraph 5 relating to an option to purchase by the first respondent which purportedly incorporated exhibit 5, and paragraph 6 relating to the determination of the lease by either party. These paragraphs are as hereunder:

> "v. At any time during this agreement prior to three months before its termination, for the consideration of One Dollar (1.00) the receipt of which sum is hereby acknowledged the Lessor hereby grant (sic) to the Lessee the option to purchase the leased premises at a price or consideration, the exchange in One Hundred and Fifty Thousand Dollars (J$150,000.00) of the sum of Two Hundred and Sixty-two Thousand Dollars Fifty Cents (US$262,000.50)

> "and on the Lessee taking up this option the Lessee agrees to pay the amount of ten percent (10%) of the purchase price of the balance within thirty (30) days hereafter."
>
> vi. If either party wishes to terminate this Agreement at any time before the expiration of the said term he or she shall give the other party not less than Six Months (6) notice thereof."

On November 23, 1981 the appellant served a notice on the respondents pursuant to paragraph 6 of the lease. The notice was in these terms:

> "We hereby give you Notice to Quit and Deliver up possession of premises at 6 Marvic Close which you hold as tenant under the terms of a lease agreement dated 15th August, 1980 on the 1st day of June, 1982 next or at the end of the complete month of your tenancy which will expire next after the end of six months from the service upon you of this Notice.
>
> Dated the 23rd day of November, 1981."

On June 1, 1982 at about 9.30 a.m. the appellant in the absence of the second respondent, forcibly re-possessed himself of the premises and in the process, stacked the second respondent's personal belongings on a part of the premises outside the dwelling house. The respondents reacted quickly by issuing a writ on June 8, 1982. The claims endorsed on the Writ were solely for damages for trespass to land and trespass to goods.

In the Statement of Claim filed and delivered subsequently, the respondents after pleading the written lease agreement, pleaded the undermentioned matters relevant to paragraphs 5 and 6 of the aforesaid lease agreement namely:

"5. That before the said lease was terminated, the Defendant purportedly served a Notice on the Plaintiff in accordance with the terms of the said lease seeking to bring the lease to an end.

6. That the said Notice was defective, in that among other things it did not specify the exact period of its duration neither did it conform with the provisions of the Rent Restriction Act.

7. That on the 1st June, 1982 the said lease agreement was in force and the plaintiff his servant, agent or otherwise were entitled to the protection of the said lease agreement.

11. Further or in the alternative the Plaintiffs will say, if, which is not admitted, the said Notice aforesaid was valid and the term in the said lease was determined, the Plaintiffs held over and thereby became a tenant protected by the Rent Restriction Act under the said terms and conditions stipulated in the lease aforesaid. The Plaintiffs will further say that the entry by the Defendant upon the said premises as herein before described constitutes a breach of a statutory duty, and the plaintiffs fall within the category of persons whom the statute intends to protect.

12. That in the month of June 1982 the Plaintiff delivered a letter to the defendant together with a cheque for $15,000.00 pursuant to its right to exercise the option contained in the said lease and the Defendant tore up the cheque and stated that he wanted the premises."

The appellant by his Defence and Counterclaim having pleaded that the premises were leased as furnished premises, proceeded to answer the above paragraphs of the Statement of Claim. He pleaded that the notice referred to in paragraphs 5 & 6 of the Statement of Claim was properly given under paragraph 6 of the lease agreement and had been properly served by registered post on the first respondent as provided for in

paragraph 7 of the lease agreement in addition to being personally served on and acknowledged by the second respondent on November 23, 1981. He denied that the notice was in any way defective. Rather, he pleaded that the same was effective in law to terminate and did terminate the lease and that there were no provisions of the Rent Restriction Act which, being relevant, had not been complied with. As regards paragraph 7 of the Statement of Claim he pleaded that the lease agreement, pursuant to the notice served, was determined on 31st May, 1982. With regard to paragraph 11, he pleaded inter alia that the first respondent being a limited liability company was not protected in its tenancy and could not hold over under the Rent Restriction Act.

The appellant's defence to paragraph 12 of the Statement of Claim merits reproduction in full and is stated thus:

> "In answer to paragraph 12 of the Statement of Claim the Defendant admits that on the 10th June, 1982 he received a letter from the first Plaintiff's Attorney at law dated 9th June, 1982 together with a cheque for $15,000.00 in the purported exercise of an option which the first Plaintiff alleged it had and the Defendant tore the said cheque in the presence of a representative of the first Plaintiff and informed the said representative that the first Plaintiff had no option to exercise and that he was not selling his house. The Defendant subsequently returned the torn cheque unnegotiated to the first Plaintiff's Attorneys at law through the Defendant's Attorneys at law by letter dated 11th June, 1982 rejecting the said purported exercise of an alleged option. The Defendant denies that on the 9th of June, 1982 the Plaintiff had any option pursuant to the terms of the lease agreement or that any alleged option was properly exercised. The Defendant will rely on the Plaintiff's aforesaid conduct as evidence of the

> "mala fides of the Plaintiffs in the relationship between the Plaintiffs and the Defendant touching the said lease agreement and of the intention of the Plaintiffs to use their alleged possession after the due termination of the said agreement to ground a false claim to an option."

The appellant thereafter counterclaimed for possession based on the determination of the lease and damages for waste and expenses as specified in the counterclaim.

Hearing in the case commenced on September 26, 1983 and the respondents closed their case on November 7, 1983 on which date the appellant began his defence. At the close of the evidence for the appellant on March 13, 1984 the first respondent sought, and despite objection by the appellant, obtained an order amending the prayer in the Statement of Claim to include an "Order for Specific Performance of the contract created by the option in the lease." This amendment was thus granted nearly two years after the action which was solely in trespass had commenced.

On July 6, 1984 Vanderpump J., delivered a written judgment in which he gave damages in the sum of $500.00 to the first respondent as "nominal damage for infringement of legal right." In addition he granted it a decree of Specific Performance of "concluded contract of purchase." He awarded the second respondent damages in the sum of $5,000.00.

He awarded the appellant damages on his counterclaim against both respondents in the sum of $19,719.00 and additionally against the second respondent only, in the sum of $9,296.00.

Against the judgment for the respondents on their claim the appellant has appealed on many grounds which (without doing violence to the verbatim grounds) may be broadly summarised as under, namely:

"1. The learned judge erred in law in holding that the notice to quit served on the first respondent was invalid to determine the lease.

2. The learned judge erred in law in the exercise of his discretion in granting the amendment of the respondent's Statement of Claim and thereafter decreeing Specific Performance in favour of the first respondent because of the following reasons inter alia:

   (a) No claim for Specific Performance was endorsed on the writ, no claim in contract was endorsed thereon, nor was any such claim properly pleaded in the subsequent statement of claim;

   (b) the grant of the amendment was oppressive, unjust, took the appellant by surprise without affording him an opportunity of meeting this late claim and thus manifested an unjudicial exercise by the learned judge of his discretion.

   (c) The evidence adduced did not satisfy the criteria for a decree of Specific Performance because it did not establish a concluded contract of purchase, the option on which alone any such contract could be based was ambiguous and would in any case require rectification as a condition precedent to any decree and no such rectification was sought.

3. The learned judge erred in holding that the appellant was not entitled to exercise his right of re-entry having regard to his findings that the first respondent was in breach of covenants in the lease."

The two respondents each filed Respondent's Notice for variation of the judgment by the substitution for the judgment in favour of the appellant on his counterclaim a judgment dismissing the aforesaid counterclaim.

On the issue of the amendment to include the relief for Specific Performance, the learned judge while appreciating that a new cause of action was being introduced, considered this to be a mere irregularity which had been waived by the appellant.

He said this of the writ and of the course which he considered had been open to Mr. Daley:

> "It alleged trespass to land, trespass to goods and prayed an injunction. No breach of contract, that appeared later as section 12 of the Statement of Claim. This was clearly a new cause of action and was accordingly an irregularity. In his closing address Mr. Daley asked that it be dismissed .... what he should have done is to have made application to set aside the irregularity ..... He did not do that. He filed a defence which resulted in a waiver of the irregularity. He cannot now complain."

Before us, Mr. Daley complains that contrary to what is stated above by the learned judge, no claim in contract could even faintly be extracted from paragraph 12 of the Statement of Claim. There was no reference to the terms of the contract comprised in the option, to any breach thereof or to any remedy being sought. Further, inasmuch as the amendment sought had the effect of introducing a new cause of action which involved different defences, the appellant had been seriously prejudiced by the late stage at which the amendment was sought and granted. He was seriously prejudiced, because he was disabled from pleading defences peculiar to this claim which were open to him. Again he submitted, even if the amendment had been properly granted, the order for Specific Performance ought not to have been made because the option giving rise to the claim, contained a patent ambiguity regarding the purchase price and the learned judge disabled himself from correctly resolving this ambiguity by disallowing cross-examination of the first

respondent by the appellant in relation thereto.

Mr. Codlin for the respondents relied on section 48 (G) of the Judicature (Supreme Court) Act, section 259 of the Judicature (Civil Procedure Code) Law and Order 18 Rule 15 (2) of the United Kingdom Supreme Court practice (1970) as together authorizing and justifying the amendment and the subsequent order decreeing Specific Performance.

Section 48 (G) so far as is relevant states that:

> "The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant ....all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided. (emphasis mine)

Section 259 of the Judicature (Civil Procedure Code) Law states:

> "The Court or judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Order 18 Rule 15 (2) of the United Kingdom Supreme Court Practice (1970) states:

> "A Statement of Claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as or include or form part of facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement."

Mr. Codlin submits that there is no express provision in our Judicature (Civil Procedure Code) Law similar to Order 18 Rule 15 (2) but the latter provision can be invoked by virtue of section 686 of our abovementioned Judicature (Civil Procedure Code) Law which states that:

> "Where no other provision is expressly made by law or by Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England shall, so far as applicable, be followed."

The gist of Mr. Codlin's submission in reliance on Order 18 rule 15 (2) is capsuled in the question which he posed and the answer he gave. He asked the question "Isn't the exercise of the option two days after the writ was filed, and of which evidence was led by both sides and not objected to, at least part of the facts giving rise to the cause of action in the Writ? He answered "I submit it is."

In my view Mr. Codlin is palpably wrong in the answer he gave to the question which he posed. The purported exericse of the option after the writ was issued can never be part of the facts giving rise to the cause of action in the writ for the simple and obvious reason that the facts relative to the purported exercise of the option did not exist at the date of the writ. In my view learned counsel has misconstrued the principle enshrined in Order 18 Rule 15 (2).

This order envisages and provides for a situation where at the date of issue of the writ, a composite of facts exists which has been stated in the writ and can support not only the cause of action and/or relief stated in the writ but could also support some other cause of action and or relief not stated in the writ. In such a situation the Statement of Claim may properly include all such additional causes of action and reliefs which are founded on such composite of facts or parts thereof and the plaintiff is not obliged to amend the

indorsement on his writ in order to extend his claim. If the facts, which would support a cause of action not mentioned in the writ, are not stated in the writ, albeit in existence at the date thereof, the plaintiff may not, without amending the indorsement on his writ include such a cause of action in his Statement of Claim. If he does, this would amount to an irregularity and the cause of action so stated in the Statement of Claim could be struck out on application by the defendant unless leave to amend the endorsement is granted to the plaintiff or the defendant has waived his right to object to the irregularity. The application of Order 18 Rule 15 (2) is shown in Brickfield Properties Ltd v. Newton (1971) 3 A.E.R.328

The defendant therein in addition to his employment as superintending architect in connection with the building of a block of flats, had also been earlier employed to design the said building as part of a continuous employment.

The plaintiff issued a writ in the following form:

> "The Plaintiff's claim is for damages for negligence and breach of duty by the defendant as an architect employed by the Plaintiffs in connection with the building of six blocks of flats .... at Ruislip Road, Ealing." (emphasis mine)

In a subsequent Statement of Claim the plaintiff pleaded that:

> 5."It was an implied term of the defendant's said employment to render professional services that the defendant would design and superintend the erection of the buildings that they would be suitable for their purpose.
>
> ....
>
> 8. The Defendant was guilty of negligence and breach of his duty .... Particulars of negligence and/or breach of duty the Defendant so negligently designed the buildings and superintended their setting out and/or erection that the same were defective."

Sach L.J. posed the question whether the plaintiff was entitled to extend the claim in the Statement of Claim by virtue of RSC Order 18 rule 15 (2) and said this at p. 333:

> "It was contended for the plaintiff that the number of facts which would have to be proved to establish the cause of action stated in the writ coincided with so many facts which would have to be established to prove the claim that there was negligence in design that the plaintiff further claim fell within the terms of the sub-rule. I am, however, unable to accept that contention. In order to establish the 'design' claim, there would have to be proved additional facts which occurred before the superintending began. Without wishing to lay down any general formula as to how the sub-rule should be applied, it seems that in general it is meant to relate to cases in which some part of the facts necessary to establish the claim made in the writ would suffice to establish some other, perhaps narrower, cause of action. It has somewhat the same effect as the rule in criminal cases that one may include any count in an indictment that is supported by evidence disclosed in the depositions but none that requires the proof of additional facts. It is enough to say that on the facts of this particular case the plaintiff in my judgment, was not entitled as of right to add an additional cause of action in the statement of claim in respect of design. That addition was accordingly an irregularity."

In Brickfield Property Ltd v. Newton (supra) the court went on to consider how the jurisdiction of the court to cure a defect in a writ which amounted merely to an irregularity ought in practice to be exercised in favour of a plaintiff. The situation posited in this case is however completely different. The learned judge was not here dealing with a case disclosing a mere irregularity which the appellant could be taken to have waived, or which he the learned judge could cure by amendment under section 259 of the Judicature (Civil Procedure Code) Law in order that the salutary and beneficial

effects of section 48 (G) of the Judicature (Supreme Court) Act could be achieved.

The learned judge was dealing with a situation in which at the date of the writ no cause of action in relation to the option existed. The facts in relation to the purported exercise of the option as earlier stated, could not conceivably constitute a part of the facts on which the writ as issued was based because they were subsequent to the writ and totally unrelated to, and independent of the facts necessary to prove the claim in trespass. Thus Order 18 rule 15 (2) has no application. The learned judge was dealing not with a matter of practice and procedure but with a matter of substantive right namely the right of a person not to be subjected to a judgment except on a cause of action which was duly constituted at the date when his adversary invoked the jurisdiction of the court against him.

In my view, the learned judge had no jurisdiction to grant the amendment, the effect of which was to enable the first respondent without the express consent of the appellant to claim relief in respect of a cause of action which did not subsist at the date of issue of the writ. Despite the fact that an amendment relates back to the date of issue of the writ, the amendment in this case was futile, because it cannot achieve the objective of embracing therein a cause of action, which because of its non-existence at the relevant date, could not provide the basis for the issue of the writ. It was thus not a question of irregularity which could be waived by a defendant. It was a case in which his express consent to the adjudication of this cause of action was required to be unambiguously given.

The case of Eshelby v. Federated European Bank Ltd (1932) 1 K.B. 254 is in my view directly on point and disposes of the matter. In that case a contract provided for payments of a certain sum by instalments in October, 1930, January, April and July 1931 respectively. Default was made in the payment of the October instalment and a writ was issued in November 1930 to recover payment. The action came on for hearing before the Official Referee in March 1931 by which date the January instalment was due and also in default. The Official Referee gave leave to the plaintiff to amend his claim by adding the amount of the January instalment. He thereafter gave judgment for the plaintiff for the two amounts claimed. The appellant appealed inter alia on the ground that the Official Referee had no jurisdiction to allow the amendment of the Statement of Claim to include the claim which only arose after the date when the action was begun.

It was held that the amendment was not justified in as much as it added a new cause of action which did not exist at the date of issue of the writ.

At page 262 Swift J. said:

> "The Court is limited in giving its leave, to the powers which are conferred upon it by the Rules and by the Statutes under which those Rules are made, and I cannot see how without the consent of the parties the court can amend a writ as completely to change the cause of action so as to bring in a cause of action which was non-existent at the time when the writ was originally issued."

The appellant in this case objected to the amendment when the same was sought. Such objection foreclosed the matter. The learned judge therefore erred in granting the amendment. On this basis alone, and without more, the appellant would be entitled to have the learned judge's order granting the amendment and the further order decreeing Specific Performance set aside. Additionally on the merits of the case as revealed

on the record, the equitable relief of Specific Performance ought not to have been granted since there was no clear undisputed concluded contract in existence capable of being enforced. The option which the first respondent claimed to have exercised was ambiguous as to the purchase price. It mentioned two sums J$150,000 and U$262,000.05. There was evidence that exhibit 5 which the option clause in the lease purportedly incorporated, contained a figure representing the exchange rate between the Jamaican dollar and the U.S. dollar of $1.75 Ja. to $1.00 U.S. The application of this exchange rate to $150,000.00 would approximate the figure of $262,000 but not vice versa. Thus prima facie the juxtaposition of "J$" to the figure of "150,000" and "US$ to 262,000 was a mistake. The juxtaposition must be reversed in order for the option clause to have meaning. The first respondent's witness who prepared the lease which contained the option, admitted that there was a big mistake in the document.

A further reason why Specific Performance in the circumstance ought not to have been decreed, stemmed from the fact that the learned judge in construing the option clause as containing surplusage, failed to apply the proper rule of construction, namely that all words in a document must so far as is possible be given a meaning. Had the learned judge applied this principle, then having regard to the mention in exhibit 5 of $150,000.00 without the prefix "J" and an exchange rate between the Jamaican and the U.S. dollar, and the reproduction of the abovementioned two figures in the option clause, he inevitably would have concluded that the purchase price was fixed in U.S. dollars as the money of account with payment in Jamaican dollars at a stipulated rate of exchange. Since such an agreement would not be illegal, it could have been given effect and there would have/been no necessity for erroneously treating

the alternative figure of "262,000.05" as surplusage. On this construction of the option it could not be said to have been properly exercised. The exercise of the option involved the offer of 10% of the purchase price. This would be J$26,200.00. The evidence is that only J$15,000.00 was tendered. There was thus in any case no valid exercise of the option.

Mr. Daley next complained of the finding and conclusion of the learned judge that the notice determining the lease was invalid both at common law and by statute.

The learned judge's finding and conclusion on the validity of the notice at common law is stated thus:

> "The effect of mutual covenant 'VI' that the tenancy shall be terminable at any time by Notice of not less than 6 months is that such Notice may be given for any date, notwithstanding that the date is not an anniversary of the commencement of say a quarter or really two quarters, it is not tied to any period of the tenancy. So that an alternative is not necessary here. It confuses the issue and only serves to make it invalid. The term begins on 1st August, 1980. So that by the alternative it would be six months from the 24th November, 1981 plus one month of tenancy which would take first named Plaintiff to the end of June ..... Here the recipient of Exhibit 2 must be in a quandary. She is confronted with two dates - 1st June, 1982 or the 30th June, 1982, the latter by calculation, not difficult. Which is the right date? It is not certain, it does not claim to determine the tenancy at a certain time. The time is uncertain either 1st June or 30th June! so the notice cannot be valid to determine this lease. I so hold."

On the validity of the notice under the Rent Restriction Act the learned judge having recited section 31 which says:

> "No notice to quit given by the landlord to quit any controlled premises shall be valid unless it states the reason for the request."

concluded the issue thus:

> "Exhibit 2 does not have any reason on it so is not a valid notice if the Act applies to this dwelling house. There is no reason why the act should not apply and I accordingly hold that it does. The notice is therefore of no effect and the lease still alive on the 10th June and the option exercisable when Plaintiff sought to exercise and did exercise it."

Both Mr. Frankson and Mr. Codlin in supporting the learned judge's finding and conclusion on the invalidity of the Notice, independently of the Rent Restriction Act, structured their submission on what was required at Common Law for rendering a notice to quit valid. Further, they each submitted, as the learned judge had ruled, that even if the Notice to quit was valid as for 1st June, 1982, there was a trespass by the appellant in entering at 9.30 a.m. on that date instead of after midnight. They cited as authority for this latter proposition Cutting v. Derby (1775-1802) A.E.R. (Reprints) 520.

To the contrary Mr. Daley submitted that the cases dealing with the determination of a tenancy at Common Law are not germane to the determination of a lease under a specific covenant therein. Under such a covenant there may be no requirement that the termination date should coincide with the anniversary date of commencement of the tenancy. Where there is such a special provision for determination, the validity of the notice is established by showing that when construed in relation to the enabling provision the notice complies strictly with the aforesaid provision. I think Mr. Daley is correct in his submission. The learned judge having correctly found that the lease was determinable at any time, provided there was compliance with the "break clause," should have limited his consideration to the issue as to whether there was such compliance.

Hankey v. Clavering (1942) 2 All E.R. p. 311 to which the learned judge adverted and on which both sides rely, deals specifically with the construction of an option to determine a lease, as exists in this case. It lays down that where a precise date is mentioned in the lease as the date on which any notice in exercise of the option to determine, is to expire, then unless the notice is so worded as to determine the lease on that specified date it is invalid. In that case the "break clause" in the 21 year lease which was from December 25, 1934 was worded thus:

> "If the lessee shall desire to determine the present demise at the expiration of the first 3 years and either party at the expiration of the first 7 years or 14 of the said term, and shall give to the other party 6 calender months notice of such desire .... then immediately at the expiration of such 3, 7 or 14 years, as the case may be, the present demise and everything herein contained shall cease and be void."

The notice served to determine the lease at the end of the 7th year was expressed to determine the lease on December 21 instead of December 25 which was the date implied in the "break clause". It was thus incurably bad.

At p. 313 - 314 Lord Greene said:

> "Notices of this kind, given under powers in leases of this description, are documents of a technical nature, technical for this reason, that if they are in proper form they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They are not consensual documents; they are documents which must do the thing which the proviso in the lease says they are to do; they must on their face and on a fair and reasonable construction do what the lease says they are to do. It is perfectly true that in construing such a document, as in construing any other document, the court in case of ambiguity will lean in favour of reading the document in such a way as to give it validity as a document, but I dissent entirely from the proposition that, where a document is clear and specific on a particular matter, such as that of date, it is possible to ignore the accurate

> "reference to a date and substitute a different date because it appears that the date was put in by a slip. In the present case what the respondent purported to do by the notice on its face was to bring the lease to an end on December 21, and if he had said: I hereby by this notice give you six months notice to determine your lease on December 21, 1941, he would have been attempting to do something which he had no power to do."

The case of W. Davis (Spitalfields) Ltd v. Huntley and Others (1947) 1 All E.R. p. 246 is also relevant. In that case the lease provided for determination by 3 months notice to be given at any time. The three months notice given was in these terms:

> "We must give three months' notice to terminate the lease."

It specified no specific date on which possession was to be given up. It was however held that the notice was valid and the period of three months commenced to run from date of its receipt by the tenants.

In Land Settlement Association Ltd v. Carr (1944) 2 All E.R. p. 126 Luxmore L.J. in construing a "break clause" in a lease which provided that the agreement may be determined by either party, at any time, during the currency of the term giving to the other, three previous calendar months' notice to quit said at p. 132:

> "It seems to me that the phrase 'at any time' refers to the determination of the tenancy and not to the giving of the notice. The argument of Counsel for the appellant that the only valid notice that can on a true construction of the clause be given, is one which expires at the end of one of the periods created by the agreement seems to me to give no sensible meaning to the words 'at any time' for there is no need to give the parties power to give notice at any time, if in fact the only notice that can be effective is one which operates at the end of one of the periods created."

This excerpt which I respectfully adopt, completely disposes of the view inherent in the submissions of the respondents before us, that despite the existence of the words "at any time" in the "break clause" provision, the lease could only be effectivley determined at the end of a particular period created by the tenancy as for example by reference to the period for which rent is periodically paid.

The true principle is that the validity of notices to quit and deliver up possession under "break clause" provisions must be vindicated by their conformity with the aforesaid provisions. The principle enunciated in Hankey v. Clavering, W. Davis (Spitalfields) Ltd and Land Settlement Association Ltd (supra) while apposite and helpful, are however not wholly determinative of the issue raised in the present case because while the "break clause" provision in those cases provided for either a precise date on which the notice was to expire or a precise number of months notice to be given, in the present case the "break clause" provision merely provides for "not less than six (6) months notice." Thus the issue is whether the notice which in the present case, specifies therein a particular date which is more than six months from the date of service on which the lessee is to quit and deliver up possession is defective as pleaded in paragraph 6 of the Statement of Claim because it further provided for the lessee to quit and deliver up possession at the end of the complete month of its tenancy which will expire next after the end of six months from the service upon it of the notice.

The notice is not struck down by the principle in Hankey v. Clavering (supra) because the 1st June, 1982, having regard to the admitted service of the notice in November, 1981, complies with the "break clause" provision. The alternative date given to the lessee to quit and deliver up possession "en face" is incapable of being less than six months and in fact

expired on 31st May, 1982. Thus both dates pass muster under Hankey v. Clavering and accordingly the notice must be construed in a manner so as to give it validity as adumbrated in the aforesaid case. In my view a clear and specific date namely 1st June, 1982 was given in the notice on which date the first respondent was required to quit and deliver up possession of the premises. The alternative date mentioned was undoubtedly inserted "ex abundanti cautela", as in common law notices, to have effect only if the specific date first mentioned became invalid under the "break clause" provision due to the date when service was actually effected. Since this first mentioned date did not in the circumstances of this case become invalid, it became the operative date on which the lease was effectively determined. The notice is thus a valid notice determining the lease on 1st June, 1982.

Though Cutting v. Derby (supra) was a common law notice intended to determine the tenancy at the end of a term, while in this case the notice need only comply with the "break clause" provision in the lease and will be effective to determine the lease other than at the end of a term, no good reason exists why a lessee whose lease is by notice under a "break clause" provision limited to determine on a particular date should not be given the full final date of the notice to enjoy the benefit of his lease. The first respondent was in my view entitled to enjoy the demised premises until midnight on 1st June, 1982. It was dispossessed at about 9.30 a.m. on that date. There was thus a trespass albeit the notice was a valid notice under the lease.

With regard to the issue as to the invalidity of the notice to quit because of non compliance with section 31 of the Rent Restriction Act, Mr. Daley submitted that the learned judge was in error in holding that the notice was invalid on this ground. He submitted that firstly the tenancy being that of a

Limited company in relation to a dwelling house section 31 of the Act is irrelevant. This is so because the purpose of this section is to determine in point of time when the contractual tenancy ends and a statutory tenancy arises which the Act is designed to protect. Since however a Limited Company cannot be a statutory tenant of a dwelling house section 31 in the particular circumstances lacks operative effect. Secondly, if section 31 is relevant, a reason stipulated in the lease agreement for its determination is a sufficient reason for purposes of complying with Section 31. Thirdly the lease being one containing an option, Section 31 does not apply because the effect of making it applicable would be to render the option period uncertain as this would depend on when the court saw fit to determine the tenancy and order delivery of possession.

Mr. Frankson's submission to the contrary is that even if a notice complying with a "break clause" provision in a lease would otherwise be effective to determine the contractual agreement as between the lessor and the lessee, this will not be so where it is expressly provided that a tenancy created under the Rent Restriction Act cannot be validly determined by a notice to quit unless there is in addition, compliance with section 31 of the said Act. Further, compliance with section 31 requires that irrespective of the reason provided for in the lease, the reason given in the notice must additionally be one mentioned in section 25. This latter section details the various reasons on the basis of which alone a court may competently order delivery up of possession.

Mr. Frankson is not correct in submitting that the only reason which will render valid a notice under section 31 of the Rent Restriction Act is one which can be pigeon-holed in section 25. The act does not specify or otherwise restrict the scope of the reasons for which a notice to quit may be given. The reason may be that the house is being sold, is being given

in trust to a charity or for some other such laudable purpose or pursuant to a mutually agreed option to determine exercisable by either party. There would in any such case be a valid notice complying with section 31 so that the tenancy created by the lease would be effectively determined. Alternatively even if the Notice to quit was required to contain but did not contain a reason as specified in section 25, it would still be sufficient by virtue of its compliance with the terms of the lease, to determine the lease agreement and with it the option, whether or not a statutory tenancy eo instanti arises. See Weinbergs Weatherproofs Ltd v. Radcliffe Paper Mill Co. Ltd (1958) Ch. 437 and Castle Laundry (London) Ltd v. Read (1955) 1 Q.B. 586. In my opinion the learned judge erred when he found that the notice given did not state a reason therein. It stated that the Notice to Quit was given under the terms of the lease. This effectively brought in paragraph VI and thus incorporated this paragraph as the reason namely that the lessor was exercising the option to determine the lease which option was mutually agreed on. The respondents themselves in paragraph 5 of their Statement of Claim admitted that the Notice albeit allegedly defective, was given pursuant to the terms of the lease. The learned judge was equally in error in failing to find that even if in fact there was no reason or sufficient reason stated in the Notice to Quit, it was not invalid for all purposes and that it effectively determined the lease contract and with it the option. By reason of these errors the learned judge erroneously concluded that the lease was still alive "on the 10th June and the option exercisable when plaintiff sought to exercise and did exercise it." The notice not only complied with the provision in the lease under which it was given, but it further stated a reason which was sufficient for purposes of section 31 of the Rent Restriction Act. The lease was thus lawfully and effectively determined on 1st June, 1982 and the option died with the determination of the lease on that date.

The option was thus not available for exercise on the date thereafter when it was purportedly exercised.

Mr. Frankson in a further alternative submission stated that even if the Notice to Quit was effective to terminate the contractual tenancy, the first respondent was entitled to hold over as a statutory tenant under section 28 of the Rent Restriction Act and so long as it retained possession, it was entitled to the benefits of the covenants in the lease including the option. The issue at the outset is whether the first respondent was capable of being a statutory tenant under section 28 on the determination of its contractual tenancy.

In England it was held in Skinner v. Geary (1931) 2 K.B. 546 that the only person who could claim the privilege of being a statutory tenant under the relevant provision of the U.K. Rent Restriction Acts now section 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1970 was a tenant who having acquired the legal tenancy of a dwelling house remained in actual possession thereof after his contractual tenancy had ended.

In Haskins v. Lewis (1931) 2 K.B. p. 1 Romer L.J. speaking on the policy of the Rent Restriction Acts in England said this at p. 18:

> "It has frequently been pointed out in the Courts, and it has been pointed out once more by Scrutton L.J. in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling house from being turned out of his home. Where, therefore when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Acts which enables him to resist the claim of his landlord to possession." (emphasis mine.)

In Hiller v. United Dairies (London) Limited (1934) 1 K.B. 57 the headnote reads thus:

> "A Limited company were the leaseholders of a shop, with living rooms above in which their manager resided for the purposes of the business. On the expiration of the lease the landlord claimed possession. The company claimed that they were protected by the Rent Restrictions Acts, as being in occupation by their manager."
>
> Held: That they were not so protected.

Lord Wright dealing with the issue on the basis of the company being the contractual tenant said at p. 61:

> "As I understand the argument very ably put forward by Mr. Vaughan in the present case it is this, that as the defendants are a company, and therefore, incapable of physical possession, they ought to be placed in a position better than, and different from the position of one who is an individual and not a juristic person such as the defendant company. I cannot follow that argument at all. If the rights under the Acts which are given to the statutory tenant are, as this court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted."

In S.L. Dando Ltd. v. Hitchcock and Anor. (1954) 2 A.E.R. 335 the facts were as follows:

> "A Landlord let a dwelling house subject to the provisions of the Rent Restrictions Acts to a tenant under an agreement which provided that 'either the tenant or his present manager (A.P.) is to reside on the premises and not to part with the possession of any part thereof.' The tenant did not reside in the dwelling house but his manager A.P. resided there. A.P. subsequently became his partner. Following a notice to quit, the landlord brought an action to recover possession of the house."

Held: The Rent Restriction Acts afforded protection only to a tenant retaining possession of a house for personal occupation as his home (though including in appropriate cases occupation by his wife living apart from him) and not to one using it, even within the contemplation of the tenancy agreement, for residence by his agent, and the landlords were, therefore entitled to possession.

Denning L.J. at p. 336 said:

> "The tenant claims the protection of the Rent Restrictions Acts not because he is living there himself, but because Mr. Paynter is living there. Mr. Paynter himself is only a licensee and has no protection against the tenant but the tenant claims to be entitled to the protection of the Acts because, he says that occupation by Mr. Paynter is equivalent to occupation by himself, and for this purpose he relies on the clause in the agreement. In my opinion the principle on which this case should be decided was stated by Lord Wright in <u>Hiller v. United Dairies (London) Ltd</u> (1934) 1 K.B. 57 where he said at p. 61:
>
> 'If the rights under the Acts which are given to the statutory tenant are, as this court has held in several cases purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted.'
>
> If the tenant were enabled by the clause in this agreement to claim the protection of the Acts, it would mean that a limited company by a like clause could obtain protection and that would be contrary to the principle involved in Hiller's case. So also, if the tenant could by the clause obtain the benefit of the Acts in respect of this house, he might do so in a similar way for half a dozen houses, and he might be statutory tenant of half a dozen ... such consequences can never have been intended by Parliament, and I do not think the clause in the agreement can be admitted to have such an effect."

Section 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act (1970) (U.K.) provides so far as is material as follows:

"15. Conditions of Statutory Tenancy - A tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies shall so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice."

Section 28 of our Rent Restriction Act provides thus:

Conditions of Statutory Tenancy

"28. (1) A Tenant who, under the provisions of this Act, retains possession of any premises, shall, so long as he retains possession, observe and be entitled whether as against the landlord, or otherwise, to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the original contract of tenancy."

It will be seen that S. 15 of the U.K. legislation and S. 28 (1) of our Rent Restriction Act differ mainly as to the words "any premises" which are substituted in our Act for "any dwelling-house" in the U.K. legislation. The use of the words "any premises" was necessary in our legislation because our Act in addition to applying to dwelling houses to which alone the United Kingdom legislation applied, also applied to public and commercial buildings which in the United Kingdom are dealt with under the rubric of business premises in a separate piece of legislation namely the Landlord and Tenant Act 1954 Part II.

Part II of this Act applies to "any Tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant ..... for the purposes of a business". The term "business" has been given a very wide meaning by judicial decisions. It includes trade, profession, employment and activities carried on inter alia in shops, offices, factories, clubs, hospitals, surgeries, laboratories and schools which are all business premises. Business premises also include bare land. It seems clear that business premises as construed under the Landlord and Tenant Act (1954) (Part II) comprehends "public and commercial buildings" in our Rent Restriction Act.

The landlord and Tenant Act 1954 provides security of tenure to tenants of business premises by providing that a tenancy within Part II "shall not come to an end unless terminated in accordance with the provisions of this Part of this Act." These provisions provide for:

(a) Notice in statutory form not being less than six months nor more than twelve months being served by the landlord on the tenant.

(b) The tenant within two months of receiving the notice, serving written notice on the landlord stating that he is not willing to give up possession of the premises.

(c) The tenant not less than twonor more than four months of the receipt of the landlord's notice applying to the appropriate court for a new tenancy.

(d) The landlord opposing the grant of a a new tenancy and establishing his opposition on specified statutory grounds in the absence of which the court is bound to grant a new tenancy.

(e) The court in its discretion on failure of the landlord to establish his opposition, granting a new tenancy to take effect from the termination date of the existing tenancy which is the date on which the statutory notice is limited to expire.

These provisions of Part II of the above Act namely sections 23, 24, 25 and 26 with inconsequential modifications have been compressed in Section 26 of our Rent Restriction Act thereby establishing within its ambit an exclusive regime regulating the security of tenure of public and commercial buildings on lines substantially in pari materia with the Landlord and Tenant Act 1954 Part II. Our Act provides for a minimum of twelve months notice to be given by the Landlord to determine the contractual tenancy. It provides for the tenant notifying the Landlord at least three months before the expiry of the notice that he or it does not intend to give up the premises at the date of termination and for him or it additionally within the same prescribed period to apply to the Court for an order substituting a new date for termination of the contractual tenancy. The competent court is then empowered, if the Landlord establishes his case as is appropriate under Section 25 to make an order either confirming the Notice, or fixing a new date up to twelve months from the original termination date in the notice as the new termination date on the expiration of which notice the tenant purusant to the order must vacate the premises. Thus a tenant of a public and or commercial building under the scheme of section 26 of our Act, (as would similarly appear to be the case of a tenant of business premises in the United Kingdom under the Landlord and Tenant Act 1954 Part II) cannot ever become a statutory tenant because throughout his tenure and until he vacates the premises he is a contractual tenant by virtue of his original tenancy which is determined by the notice to quit which notice may be extended by the court under section 26. In the United Kingdom the tenant similarly remains throughout a contractual tenant by the grant to him of a new tenancy to take effect eo instanti with the determination of the immediately pre-existing contractual tenancy.

From this it follows in my opinion that the statutory tenancy of which Section 28 of our Act speaks, albeit using the expression "any premises" must be construed as statutory tenancy in relation to premises of the nature of dwelling houses. I find support for this opinion from the further fact that the expression "business statutory tenancy" used by Seller J. in Castle Laundry (London) Ltd v. Read (supra) has been described by Harman J. in Weinbergs Weather Proofs Ltd v. Radcliffe Paper Mill Ltd (supra) as being merely "a convenient phrase." Speaking of this expression he said this at p. 445:

> "This is a convenient phrase so long as one does not confuse it with the so-called statutory tenancy under the Rent Restrictions Acts, that, of course, being not a tenancy at all, whereas having regard to the language used in the Act of 1954, the term must be thought of as continuing by way of a statutory extension (see the observation of Denning L.J. in H.L. Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons Ltd where the following appears:
>
> 'In his Lordship's opinion the right view was that the common law tenancy subsisted with a statutory variation as to the mode of termination')."

Again in Scholl Mfg. Co. Ltd v. Clifton (Slim-Line) Ltd (1967) Ch. 41 Lord Diplock in dealing with a business tenancy under Part II of the Landlord and Tenant Act 1954 said this at p. 51:

> "The argument by Mr. Francis for the defendants ... depends upon drawing a distinction between a statutory tenancy and a contractual tenancy, a distinction such as is created by the Rent Acts dealing with dwelling-houses. In the present Act the draftsman knew better than to do this. There is no such dichotomy. There is but one tenancy of which the terms which would otherwise govern its coming to an end are modified by the Act. It is true that the tenancy may continue by virtue of the Act, after the period at which, apart from Part II of the Act it would have come to an end, but it is throughout one and the same tenancy."

In my view section 15 of the U.K. Act and Section 28 of our act are in "pari materia" notwithstanding the substitution in our Act of the words "any premises" for the words "any dwelling house" in the U.K. Act. The words "any premises" as earlier stated must be confined to premises in the nature of dwelling houses. Any reasonable interpretation by the English Courts of section 15 ought therefore to commend itself and be persuasive authority in interpreting Section 28 of our Act.

I am persuaded by the principle of construction of the United Kingdom Act. The policy of the said Act in my view coincides with the policy of our Act relative to tenancy of dwelling houses. This is to give security of tenure to tenants in physical occupation of dwelling houses as their domestic abode. The decisions in the cases earlier cited ending with S.L. Dando Ltd v. Hitchcock & Anor. (supra) commend themselves to me. I accordingly adopt the reasoning in those cases, and applying the principle to the case now in point, I hold that the first respondent by virtue of being a legal persona only i.e. an incorporated company, cannot be a statutory tenant. Further, that it does not become a statutory tenant by virtue of the fact that the second respondent is in occupation as its agent. The second respondent on the evidence is not a sub-tenant but only a licensee of the first respondent. Neither of the two respondents is therefore a statutory tenant, entitled to protection of the Rent Restriction Act as applied to statutory tenants.

In the circumstances the submission of Mr. Frankson that the option was alternatively capable of being exercised while the first respondent was a statutory tenant, merits no further consideration.

Mr. Daley complains that damages for trespass ought not to have been awarded against the appellant in favour of the first and second respondents. He submitted that in relation to

the second respondent she was neither a tenant nor a licensee of the appellant. She was merely a licensee of the first respondent. She could succeed in an action in trespass only on the hypothesis that the first respondent, on whose authority she was in occupation was itself lawfully entitled to possession on June 1, 1982 either pursuant to the lease agreement or under the Rent Restriction Act. But says Mr. Daley the first respondent was neither entitled to possession under the lease nor under the Rent Restriction Act. Further, and in any case, the appellant had lawfully exercised his right of re-entry and for this he was not liable in trespass.

The learned judge in dealing with this aspect of the matter said this at p. 119:

> "Entering as he did on an invalid notice on the 1st June, Defendant is liable in Trespass and I so hold."

The learned judge did not accept the appellant's contention that he lawfully re-entered and effected a forfeiture of the lease for waste and other breaches of covenant. He said this:

> "It is significant that on the night of this entry by defendant when the police came he did not mention this aspect of the matter (breaches of covenant) but told all and sundry that he had thrown out second-named Plaintiff as she had disobeyed his Notice to Quit! A perusal of Exhibit I by learned counsel seems to have led to the inclusion of this paragraph (paragraph 17) .... particulars follow as 17 (1) (a) to (s) and 17 (2) supra. This process of re-entry could not be exercised as a forfeiture of the lease without first giving second name plaintiff an opportunity of remedying this breach, none given her."

As to the right of re-entry Mr. Daley in his written submission stated that since the learned judge had found that on May 24, 1982 the first respondent's agent namely the second respondent had been notified of breaches of covenant including the fact that the appellant's prized furniture was missing and she had also been notified that the appellant would be taking possession on 1st June, he, the learned judge, should have found that the appellant had lawfully re-entered for breach of covenant independently of the notice to quit. I am not persuaded by this submission.

The reasoning of the learned judge as disclosed in the above extract from his judgment is faultless and there can be no doubt whatsoever that the sole and exclusive reason why the appellant took possession of 6 Marvic Close on June 1, 1982 was because in his view the lease had been lawfully determined by the Notice to Quit which had been given. Re-entry for breach of covenant had not entered the appellant's mind and his re-possession of the premises was not for this reason.

The learned judge's award of damage for trespass is based on his finding that the Notice to Quit was invalid. The notice to quit is however not invalid as earlier herein stated. However, the contractual tenancy had not yet expired under the valid notice when the appellant forcibly re-possessed himself of the premises. There was thus a trespass albeit not on the basis on which the learned judge awarded damages. However, since the learned judge had found that even if the notice was valid for 1st June, 1982 there would still have been a trespass, his award of damages ought not to be disturbed.

Mr. Daley in this appeal asks that the judgment in favour of the respondents be set aside and that judgment be entered in appellant's favour for:

(i) Possession of the premises

(ii) Damages pursuant to paragraphs 17 and 18 of the appellant's counterclaim, such damages to include damages disallowed by the learned judge,

(iii) mesne profits or double the net annual value of the premises at the rate of $190.000.00 a year from the 19th June, 1982 until possession is delivered up,

(iv) damages for trespass in respect of the fixtures, tools and furniture on the leased premises.

These reliefs are the same as were sought by the appellant in paragraph 20 (1) to (4) of his counterclaim. The respondents by respondent's notices on the other hand sought a variation of the judgment by the substitution of a judgment dismissing the appellant's counterclaim insofar as judgment had been given on the same. For the first respondent Mr. Frankson submitted that the judgment on the counterclaim was inconsistent with the learned judge's finding that the entry of the appellant on the premises was illegal and consequently his occupation thereof was illegal because the Notice to Quit was invalid. The option had additionally been properly exercised by the first respondent, thus the appellant had no right of occupation. The pith of Mr. Frankson's submission is that whatever the appellant expended on the premises to make good, breaches of covenant was voluntary and gratuitous expenditure not requested by the first respondent who was the owner of the premises by virtue of exercising the option. There is a fallacy in this argument. The fact that a lessor may have wrongfully dispossessed a lessee and so become liable in trespass does not disentitle him from damages for breaches of covenants by the lessee prior to the latter's wrongful eviction, and if the lessor while in occupation repairs the breaches of covenants by the erstwhile lessee there is no principle of law which would disentitle the

lessor from reimbursement of expenditure reasonably incurred. Again even assuming that the first respondent had lawfully exercised the option and thereby became the beneficial owner, the appellant does not thereby become a stranger to the property. He has a vital interest therein until the full purchase price is paid and if while in possession he incurs expenditure to arrest deterioration to the premises which expenditure should have been incurred by the prospective purchaser qua lessee, thereby perserving the property for ultimate delivery to the said purchaser, I cannot see how such expenditure could be considered as voluntary and gratuitous so disentitling the appellant from reimbursement.

For the second respondent, Mr. Codlin adopted the submission of Mr. Frankson. He further submitted that as there had been no notice served on the respondents to rectify the breaches of covenant prior to the landlord himself embarking on the expenditure it was as a consequence, irrecoverable. The short answer to this submission is that there was no stipulation for the giving of notice in the lease and such notices in any case relate to the exercise of the right of re-entry and forfeiture. No notice need be given by a lessor in possession, to a lessee who is no longer in possession to rectify breaches of covenants as a condition precedent to recovery by the lessor of damages for such breaches of covenants rectified by him. There is no merit in the Respondent's notices which are accordingly dismissed.

Reverting to the appellant's counter-claim the learned judge's judgment disclosed by inference that, had the first respondent failed in its claim to possession, the appellant would have been entitled to damages being mesne profits, in addition to damages as particularised under paragraph 18 (i) (ii) (iii) & (iv) of the Defence and Counterclaim, being compensation consequent on

his being deprived of possession under the interlocutory injunction.

The learned judge disclosed this much when he adverted to the appellant's claim for relief under paragraph 20 (1) to (4) of his counterclaim. He said this at page 126:

> "20. (1) Defendant cannot get possession as Plaintiff in possession as the purchaser pending completion of the sale.
>
> (2) Damages paragraph 17 breach of covenants $19,719
>
> Damages paragraph 18 (v) <u>Security Guards vs. Second-named Plaintiff</u> only 9,296
>
> $29,015
>
> (3) No mesne profits recoverable as counterclaim fails on 20.1. In any case on 22nd October, 1982 in the interlocutory proceedings my sister ordered that plaintiff continue to pay for use and occupation of the premises in the amount specified in the lease.
>
> (4) Not recoverable as Plaintiff is not a trespasser. Section 18 (1) - (iv) dealing with losses occasioned by his having to leave the premises on 19th June, 1982, not recoverable as Plaintiff succeeds in the action and was justified in seeking and obtaining Interlocutory Injunction."

The notice determining the lease is on my finding valid. It effectively determined the lease so giving the appellant an immediate right to possession because the first respondent did not become a statutory tenant. The option equally was not validly exercised and accordingly the first respondent was not entitled to continue in possession after June 1, 1982. In the light of these conclusions and consistent with the view of the learned judge, had his conclusion been the same as mine he would have viewed the grant of the interlocutory injunction in retrospect as having been unjustified and he would have awarded the appellant damages in addition to mesne profits arising from the grant of the said interlocutory injunction. These damages he has however

not qualified. It will therefore be open to the appellant to effect recovery of the same.

In conclusion and for the reasons herein given I would allow the appeal by the appellant against the judgment given against him in favour of the respondents in relation to specific performance. I would further allow the appellant's appeal against the dismissal of that part of his counterclaim relating to the order for possession and would accordingly vary the judgment on the counterclaim by adding to that judgment an order for possession of 6 Marvic Close within 30 days of the delivery of this judgment and for mesne profits to be assessed. I would in addition give judgment for the losses occasioned by the grant of the interlocutory injunction to be assessed.

The respondent's notices as earlier stated are dismissed with costs to the appellant.