NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 147/2000

BEFORE: **THE HON MR JUSTICE HARRISON, P. (Ag.)**
THE HON MR JUSTICE BINGHAM J.A.
THE HON MR JUSTICE PANTON, J.A.

BETWEEN:	**DENNIS WOODBINE**	**PLAINTIFF/APPELLANT**
AND	**JOHN EBANKS**	**DEFENDANTRESPONDENT**

H. Haughton-Gayle for appellant instructed by Joseph Jarrett of Joseph Jarrett and Company

Garth McBean & Courtney Bailey for respondent instructed by DunnCox

May 7, 8 & 9, 2003 and December 20, 2004

HARRISON, J.A:

This is an appeal from the judgment of Smith, J as he then was, on November 23, 2000, dismissing the action of the appellant for specific performance of an agreement for the sale of premises at 42 Hagley Park Road, Saint Andrew, registered at Volume 1051 Folio 702 of the Register Book of Titles owned by the respondent. The appellant, as lessee, of the said premises, claims to be entitled having exercised an option to purchase, arising under the said lease.

The relevant facts are that the parties executed a lease agreement, exhibit 2, for the lease of premises 42 Hagley Park Road, in 1987, for a period of

five years. The building on the land in 1987 consisted of a "warehouse office building with 3 bathrooms." The respondent as lessor, was represented by one Maurice A. Jackson, who signed on his behalf under a power of attorney. The lease document, exhibit 2, contained a clause headed "Option to purchase" and reads:

> "The lessor hereby agrees to offer the lessee the first right of purchase of the leased premises on the following understanding as part of this agreement.
>
> 1. The lessor agrees to a purchase price of $670,000.00 with 15%-20% deposit by the lessee within twelve (12) months, the owner to hold mortgage on premises details to be finalized on signing of Sale Agreement.
>
> 2. If the lessor obtains an offer for purchase from a third disinterested person he shall offer the lessee the right to purchase on no less favourable terms and conditions than was offered by the disinterested party and the lessee has the option to refuse the offer giving the lessor the will to dispose of the property without any obligation or recourse to the lessee."

The agreed monthly rental of the said premises was $2,500.00. The appellant in evidence in chief before Smith, J said:

> "The range of rental prices for other premises I inspected in approximate size as 42 Hagley Park Road was $7-$15,000 per month but in immaculate condition so that one could start business right away."

The appellant took possession of the said premises operated a business and paid the agreed rental.

The lessor's covenant in the said lease permitted construction and repair to the said premises at the appellant's expense. Clause 4 reads:

> "4. To allow the Lessee to construct or modify any existing construction at his own expense, including the erection of fences, gates or any other such convenience he may require from time to time, provided that such construction or modification does not damage the foundation or create any serious structural damage or effects, and provided that the lessee will repair the building to its original state and condition as and when he received possession under the terms of this lease agreement. Should the lessee erect a fencing around the perimeter of the leased premises and does not eventually complete a sale agreement the question of reimbursement of costs will be decided on the termination of this lease and when the lessee is ready to vacate the premises provided that such values will take into consideration the depreciated costs of such fencing."
>
> (Emphasis added)

The appellant did effect repairs to the said premises and commenced operating his business of a garage.

The lease agreement, exhibit 2, the original, tendered in evidence by the appellant, indicates on page 1, that:

(a) the instrument was "... executed ... on the 1st day of May 1987."

(b) "... lease shall be ... five (5) years commencing on the 1st day of May 1987 ...expiring on the 30th day of April 1992 ...".

and on the final page:

(c) the parties "... set their hands and seal this 20th (twentieth) day of May, 1987."

However, wherever the word "May" appears on page 1 of the said document, exhibit 2, it is handwritten above the word "April" which is crossed out "April" was typewritten, as is the remainder of the specific date. On the final page the typewritten word "April" is also crossed out and the word "May" appears in handwriting above it, with the words and figures "20th" and "twentieth" in handwriting.

The appellant said, in cross-examination:

> "... lease was in May. Not true that I signed lease on 25th April, 1987, ... I signed the lease when it was presented to me on 20th May 1987".

In further cross-examination, the appellant, at page 30 of the record said:

> "This is a photocopy of the lease. I see my signature and also my wife's but it is irregular. Photo-copy received as exhibit 13 photo-copy of lease dated 20th April, 1987.
>
> I see date 20/4/87 at bottom of photocopy lease. The date is above all the signatures exhibit 2 (original lease) shown witness. The date on lease was originally 20th April, 1987. April is struck out and May inserted over April and initialled by Mr Jackson. The photocopy lease has initials of Mr Jackson to the left of the date.
>
> Don't agree that the word April was struck out after lease was signed by the parties."

The respondent's witness Maurice Jackson, in examination-in-chief, at page 53 of the record, said:

> "As agent for Mr Ebanks I signed a lease agreement in respect of premises with Mr Woodbine on 10/4/87. Exhibit 2 shown to witness (lease agreement). This is the lease agreement. Recognize my signature. There

seems to be a change on the last page – a change from April to May, 1987, and also on the first page. I sent copy of agreement signed to Mr Ebanks.

Document shown witness. This is a copy of agreement which I sent to Mr Ebanks and which I signed. Copy received in evidence as exhibit 2A.

There is a difference between last pages of exhibit 2A and exhibit 2. The first difference is that in exhibit 2A there is no deletion of month of April 1987 – it is unchanged. Whereas in exhibit 2 it is changed. In exhibit 2A there is an initial to left side of paper close to the word 20th written in and in bracket. There is no signature under the word 'April' in exhibit 2A. In exhibit there is a signature that looks like mine under the word April which is deleted and changed to May."

and in cross-examination, at page 55 said:

"I initial the 1st page of exhibit 2. My initials appear

on it at least 4 times on the 1st page of exhibit 2. These initials appear to be mine. In paragraph 1 at bottom of 2nd to last line there is a signature which looks like mine. That's the most I can say. Under the clause terms in the left hand margin there are two writings. One looks like my initial.

In line 2 (terms) immediately under date "30th April" in handwriting there are three signatures. Two of them look like my initials.

At bottom there is writing which looks like my initials. I think they are mine because this looks like the original document I drew up.

If document is amended from typewritten to handwriting the parties would initial the amendments.

(Witness asked to look at page 4). I see on this page "May" written in words and this is at top of type written word "April". Immediately below this is a signature which looks like mine. My proper signature

> follows this at the usual place. The signatures that are on the document and the initials appear to be mine. (Page option clause)."
>
> "As far as I recall, the agreement was executed during the month of April with a view to the tenant occupying from May onwards ...".

All the documents, exhibit 2 (the original lease agreement tendered by the appellant), exhibit 2A (copy thereof retained and tendered by the respondent's agent Jackson) and exhibit 13 (copy thereof sent to the respondent by Jackson after signing) bear the date, in paragraphs 1 and 4 "1st May 1987". The word "May" in each case is in writing above the typewritten "April" which is struck out and initialled.

Both exhibits 2A and 13, in the final paragraph on page 4, it reads:

> "In witness whereof the parties have hereto set their hands and seals this 20th (Twentieth) day of April, 1987".

Both paragraphs are unaltered, "20th" and ("Twentieth") are in writing. On the contrary in the final paragraph on page 4 of exhibit 2, the typescript "April" is crossed out and the word "May" written above, with one initial below.

On that state of the evidence, Smith, J having found that there was no proper exercise of an option because of the non-payment of a deposit, observed:

> "In light of the above conclusion it is not necessary for me to attempt to resolve the knotty issue as to whether the lease was signed by the parties on the 20th April, 1987 (as the defendant contends) or on the 20th May, 1987 (as the plaintiff contends). Suffice it to say that the preponderance of evidence favours the defendant's contention." (Emphasis added)

Smith, J was, in effect, accepting that on a balance of probability, the respondent's contention that the lease document exhibit 2, was signed on the 20th day of April 1987, out-weighed any other contention.

By letter dated the 20th day of April 1988 (exhibit 5) and 17th day of May 1988, (exhibit 6), the appellant sought to exercise an "option to purchase" the said property. Both exhibits 5 and 6 were written to the respondent's witness Maurice Jackson, who acknowledged that he received the letter. Jackson refused to accede to the appellant's request that he prepare an Agreement for Sale of the said property.

In June 1988, the appellant met with the respondent, at the latter's home in the United States of America. The appellant, in-examination-in-chief, said:

> "I asked him to give me his reassurance in writing and he prepared a reassurance statement, his wife I think typed it and he and I signed it, it was witnessed by his wife and dated June 14, 1988."

This statement, exhibit 7, reads:

> "Sales Agreement
>
> I, John C. Ebanks hereby agree to sell property located at 42 Hagley Park Road, Kingston 10, Jamaica to Mr Dennis A Woodbine for the sum of JA$670,000.00 with an initial deposit of 15% down at the earliest convenient (sic) to Mr Woodbine plus a 5% down at the time of closing.
>
> The seller is offering to carry (hold) the mortgage at 19% for a term of 15 years.
>
> An agreement will be initiated with the buyer's bank to have the monthly mortgage payment deposited to the seller's bank account. Provision of seller's

> account number and name of bank to which the deposit will be made will be arranged at time of closing.
>
> (Sgd) John C. Ebanks — (Sgd) Dennis A Woodbine
> Seller — Buyer
> Date 6/14/88 — Date 6/14/88
>
> Margarita Ebanks
> Witness."

Later, the under-mentioned was added to the said statement:

> "I Dennis A. Woodbine sworn to the following and states that this is a true copy taken from the original of the sales agreement signed to by John C Ebanks and Dennis A Woodbine on June 14, 1988 in the presence of Margarita Ebanks, wife of John C Ebanks, describing all that parcel of land situated at 42 Hagley Park Road and as described in the Register Book as Volume #1051 and Folio #702.
>
> This Sales Agreement is legally binding between both parties.
> Sworn to by (Sgd) Dennis Woodbine
> In the presence of (Sgd) Vincent E Chin
> Justice of the Peace"

The appellant contended that he did not make any deposit because the respondent failed to provide him, as purchaser, with:

> "a sales agreement ... so that I could make initial down payment."

The respondent terminated the services of Jackson as his agent on January 31, 1989.

By letter dated June 24, 1989, exhibit 11, the respondent offered to sell to the appellant the said premises for $1,400,000.00.

It reads:

"P.O. Box 462
Kingston 6
Jamaica W.I.
24/6/89

Mr Dennis Woodbine
42 Hagley Park Road
Kingston 10

Confirming our meeting today when we agreed that I am willing to sell #42 Hagley Park Road, Kingston 10, and you agreed to buy the said premises for a sum of one point four million Dollars ($1,400,000.00) in as is condition.

This offer is good until the tenth of July 1989, after which this offer will expire and I will ..... to offer this property for sale to the public.

Hoping to hear from you soon.
Sincerely yours
(Sgd) John C Ebanks."

The appellant denied that he had agreed to the above terms of purchase.

He replied by letter dated July 7, 1989 (exhibit 12). It read:

"Dear Mr Ebanks:

Re: Your letter dated June 24, 1989, proposing to sell to me 42 Hagley Park Road at a new price $1,400,000.00 Volume 1051 of Folio #702

The new proposed offer contained in your letter dated June 24, 1989 to sell me the abovementioned premises for $1,400,000.00 is in breach of our original agreements previously signed to.

You have now confirmed my beliefs that you apparently not have any intention to honour two previous agreements which we both had signed to. I

> am still waiting to buy for the price previously agreed on.
>
> Subsequently, I am of the belief therefore that I will have to take legal action to protect my rights and the monies I have invested in the premises. See you in court Mr Ebanks. (Note I will take all legal action to block any sale).
>
> Please note that the roof is still leaking, and I continue to suffer damages due to water damaging my auto parts stocks. Also note that I have not been able to verify the lodgment made to your bank account for the months of May and June. Kindly send me a letter permitting me to get clarification of the lodgments I had made to your account.
> I remain
> (Sgd) Dennis A Woodbine."

By writ of summons dated March 12, 1993, the appellant sought, inter alia, specific performance of the contract to sell to the appellant the said premises. Smith, J. on November 23, 2000, dismissed the appellant's action and ordered inter alia, that the appellant vacate the premises on January 30, 2001, resulting in this appeal.

The grounds of appeal as filed, read:

> "(i) The learned trial judge erred in law in holding that clauses 1 and 2 of paragraph 4 of the lease instrument, dated May 20, 1987 between the plaintiff and the defendant's agent, amounted to the first right of pre-emption only and not an option to purchase, and consequently ruled that the option granted to the plaintiff by the vendor was not exercised by the plaintiff and thereby refused the plaintiff's application for Specific Performance of the contract.
>
> (ii) The learned judge erred in not taking into account the position of the appellant whereby he relied on the said option to purchase clause, which he

> exercised and the repair clause in the lease agreement and consequently expended large sums of money on the said premises in building perimeter walls, infrastructure and general refurbishing of the premises, which was handed over to the appellant in a dilapidated state and therefore erred by not making the order for a valuation to be done to determine the value of the plaintiff's input in the subject premises which enhance the value of the premises. Without this order of valuation and the payment by the defendant to the plaintiff the money value of the plaintiff's impute, the defendant would obtain a windfall greater than the original value of the premises."

Mr Haughton-Gayle argued that an option to purchase was contained in the lease agreement, exhibit 2, the appellant exercised the option and thereby completed the contract. Sufficient material existed to constitute the existence of the terms of the contract, despite the appellant's erroneous thinking that an agreement had to be drawn up, details finalized, and a deposit not paid. Furthermore, although by the terms of the lease agreement, exhibit 2, it could be argued that the appellant had no authority to incur expenses on behalf of the respondent, the court should be mindful of the principles of equity.

An option to purchase, contained in a lease, is an offer to the lessee that he has the right to call for the sale of the land to him in accordance with certain specified conditions and exercisable within a stated time. The lessor has a corresponding obligation during the said period not to revoke the offer, nor deal with the land in any way inconsistent with the right of the lessee to exercise the option. An acceptance of the offer by the exercise of the option within the said

period by the lessee, creates a binding contract of sale. (See ***Beesley v Hallwood Estate Ltd.*** [1960] 1 WLR 549; 2 All ER 314 at 321).

A right of pre-emption or of first refusal over land is a contractual offer from the owner of the land that in the event that he decides to sell the land he will first offer it to the other contracting party in preference to any third party buyer. No obligation arises on the part of the owner to sell if he does not wish to sell, nor is the other party bound to accept when the offer is made (Halsbury's Laws of England 4th Edition, Volume 42, paragraph 26).

One needs to construe the terms of the particular contract in order to determine whether what was created was an option to purchase or a right of pre-emption. The words of the agreement should be given their ordinary meaning unless the terms of the contract are in a particular context or the subject matter compels another meaning to be adopted: (***Mackay v Wilson*** (1947) 47 S.R. (N.S.W.) 315).

In ***Brown v Gould*** [1972] Ch. 53; [1971] 2 All ER 1505, Megarry, J, as he then was, illustrated the differences between an option to purchase and a right of pre-emption, which differences can serve as aids in identifying the clause in question. At page 1509, he said:

> "Under an option, only one step is normally needed to constitute a contract, namely, the exercise of the option. Under a right of pre-emption, two steps will usually be necessary, the making of the offer in accordance with the right of pre-emption, and the acceptance of that offer."

A clause, on the face of it, may appear to be a right of first refusal, but is in fact an option to purchase, viewing all the terms of its provisions. The Australian High Court by a majority so found in ***Woodroffe v Box*** (1954) 28 A.L.J 90. The decision turned on the interpretation of a clause in a contract under seal, between M the owner of certain property and W, the lessee. The clause inter alia, read:

> "... in consideration of the sum of One hundred pounds paid by [W.] to [M] the receipt whereof is hereby acknowledged the parties hereto mutually covenant and agree in manner following:
>
> 1. [M] hereby covenants that his executors will upon the death of the survivor of [M.] and his wife ... give to [W.] or his executors or administrators or at his or their requests to him or them conjointly with [W.'s son] the right of first refusal to purchase the ... premises for Thirteen thousand pounds ...
>
> 2. In the event of the purchaser or his executors or administrators either solely or in conjunction with [[W.'s son] purchasing the ... premises pursuant to the said right of first refusal then the sale shall be for cash and the said sum of One hundred pounds the consideration for this agreement shall be credited on account of the purchase money but should no purchase be made in accordance with the terms of this agreement then the said sum of One hundred pounds shall become the absolute property of [M.]."

Morris, C.J., the trial judge at first instance, held that the term "right of first refusal" gave no more than a right to the lessee, in priority to all others, to refuse the offer of sale. In the event that the executors decide to sell they must first offer the property for £13,000 to W in preference to all others. The clause imposed no obligation on the owner to make the offer.

On appeal, the majority, Fullagar and Kitto, JJ. (Webb, J. dissenting), while accepting that the phrase "... give ... the right of first refusal ..." conferred a pre-emptive right, held that the phrase had no technical meaning, and in the context, the executors were required to perform a particular act on the occurrence of a specific event and therefore the *prima facie* meaning was displaced. The majority allowed the appeal, holding that an option to purchase was conferred.

Their Honours, at page 92, said:

> "It seems clear that a mere promise to give the first refusal should be taken *prima facie* as conferring no more than a pre-emptive right. If I promise to give you the first refusal of my property: I am making *prima facie* only a negative promise: I am saying: "I will not sell my property unless and until I have offered it to you and you have refused it." But the whole of the burden of justifying this interpretation rests, of course, upon the word "first". "I give you the refusal of my property" can mean nothing but "I offer my property to you." So, if the words used are "first option," the whole argument for the view that no more than a preference is given, rests on the word "first". There may be found, in any particular case, a context, or surrounding circumstances, such as to outweigh the *prima facie* significance of the word "first" and compel the conclusion that a true option is intended to be given. ... Where the promise is to give the right of "first refusal" on a fixed date or on the occurrence of a specified event (whether, as in the ***Manchester Canal Case,*** [(1900) 2 Ch.352; (1901) 2 Ch. 37] an event which may or may not happen, or, as in the present case, an event which must happen sooner or later), there is evident ground for the word "first" its full *prima facie* significance. For it is difficult to suppose that the parties intended that the promisor was not to be bound to do anything on the fixed date or on the occurrence of the specified event.

> And it may be said that there is no great difficulty in regarding the words as meaning that an offer will be made on the date or on the occurrence of the event, and that no other offer will be made to anybody else in the meantime – in other words, in treating the promisor as saying: "On that date, or on the happening of that event, I will make you an offer, and it will be the first offer, because I will not make any offer to anybody until that date or the happening of that event."

and at page 93, said:

> "... we find that clause 1 purports to give a right immediately upon the occurrence of the second of two specified events, both of which are bound to occur sooner or later. It seems clearly to be intended that something definite is to be done at fixed point of time. This tends against the view that merely negative promise is being made. No operative promise is made at all until the second event has occurred."

and continuing said:

> "... we are of opinion that the appellant's view of the effect of the agreement is the correct view. We would agree with the learned Chief Justice in thinking that *prima facie* a "right of first refusal" means a right of pre-emption. But we would not regard the expression as bearing any very strong or clear *prima facie* meaning. It is easy to miss the true intent by holding too much emphasis on the word "first."

Webb, J. (dissenting), in agreeing with Morris, C.J., at page 91, said:

> "No doubt it would be immaterial that the right was designated by the agreement as "a right of first refusal" if by the terms of the agreement it was made in substance an option of purchase. But before it can be held to be something other than what it is expressed to be the terms of the agreement must be such as to leave open no other reasonable conclusion. As pointed out by Davidson, J., in ***Mackay v Wilson***

> (1947) (47 S.R. (N.S.W.) 315 at p. 325) the words of the agreement should be given their ordinary meaning, unless the context or the subject matter compels another meaning to be adopted. Nothing in the subject matter of this agreement compels another meaning to be adopted. Nor do I see anything in the context which has that effect. ... the expression "upon the death of the survivor" does not necessarily fix a point of time, as distinct from a period of time: "upon" may mean either "immediately after" or "thereafter," depending on the subject matter or the context pointing definitely to one meaning or the other. There is in my opinion no such subject matter or context here. The word "upon" is equivocal apart from subject matter or context and it requires something more than an equivocal term to convert what ordinarily is a right of pre-emption into what would be in effect an option of purchase."

It is my opinion that the reasoning of Webb, J., is not without great worth in the circumstances of that case and is to be preferred.

In the instant case although the relevant clause in the lease is captioned "Option to purchase" one should examine the terms of the clause in order to determine its true nature. The sentence immediately following the said caption reads thus:

> "The Lessor hereby agrees to offer the Lessee the first right of purchase of the Leased Premises on the following understanding as part of this agreement."

This is the operative phrase by which the paragraphs following are governed. Clearly this opening phrase is *prima facie* a right of first refusal or a pre-emptive agreement and not an option to purchase. The use of the word "first" is indicative of a primary right preceding others. In order to displace this *prima facie* meaning one has to examine the two paragraphs following to see whether

or not a contrary meaning emerges from the "following understanding". Paragraph 1 reads:

> "1. The Lessor agrees to a purchase price of $670,000.00 with 15% - 20% deposit by the Lessee within twelve (12) months, the owner to hold mortgage on premises, details to be finalized on signing of Sales Agreement."

This paragraph merely recites the proposed terms of the "first right of purchase", namely the purchase price and deposit proposed, the period for payment, the mortgagee and omitting any other details "... to be finalized on signing of Sales Agreement". Nowhere in this paragraph is any reference to the grant of an option to purchase, nor any phrase to give rise to any such construction. No mention is made of any giving of a notice to indicate the exercise of an option to purchase, as is usual in such cases, nor a date within which such option may be exercised.

There is therefore nothing in paragraph 1 to attract the view, that the lessor was obliged to make an offer of purchase. Nor was there any conferment of "... a right immediately upon the occurrence of:

> ... specified events", nor "... something definite to be done at that fixed point in time,"

which circumstance caused the majority in ***Woodroffe v Box*** (supra) or which could cause this Court to hold that an option to purchase was granted.

If there was any doubt as to the import of paragraph 1 being a right of first refusal or a pre-emption clause or an ambiguity arising therein, it is my view

that the terms of paragraph 2 demonstrate beyond doubt that the clause confers a right of first refusal and not an option to purchase.

By paragraph 2, the lessor is obliged to offer to the lessee the right to purchase whenever an offer of purchase is made to him by a ... "third disinterested person." An obligation of this nature is in accordance with the right of first refusal which prohibits a grantor from disposing of property, if he chooses to sell, without first affording to grantee the opportunity of purchasing it. Furthermore, a reference to a future offer of purchase is a feature of a right of first refusal. An immediate offer of purchase is necessary for an option of purchase to arise.

In the circumstances, I do not agree with counsel for the appellant that the learned trial judge erred in finding that the clause properly interpreted should read:

> "should the Lessor (defendant) wish to sell the said property he will first offer to do so to the plaintiff."

No option to purchase was granted. The appellant had the right of first refusal, as evidenced in the said clause.

Counsel for the appellant argued further that the learned trial judge misdirected himself in law and on the facts in holding that, if there was an option to purchase, the option was not properly exercised.

Smith, J. at page 8 of the supplemental record said:

> "If I am right that the plaintiff was not granted an option to purchase, then this issue is only of academic interest."

He went on to find that the attempt by the appellant to exercise the option verbally was not a proper exercise and the non-payment of the deposit at the time of such exercise was additionally in breach of the agreement.

Assuming, for the sake of argument that the clause in question was an option to purchase, which in my view it was not, I agree with Smith, J. that it was not properly exercised. In ***Hare v Nicoll*** [1966] 2 Q.B. 130, in describing the nature of the option, at page 141, Willmer, L.J. said:

> "It is well established that an option for the purchase or re-purchase of property must in all cases be exercised strictly within the time limited for the purpose. The reason for this, as I understand it, is that an option is a species of privilege for the benefit of the party on whom it is conferred. This being so, it is for that party to comply strictly with the conditions stipulated for the exercise of the option."

Although in that case, the property concerned was the shares in a company, a usually speculative entity, the statement is of general application to the exercise of an option to purchase. The general principle in relation to land is stated in Halsbury's Laws of England, 3rd Edition Volume 8 page 165:

> "An option for the renewal of a lease or for the purchase or re-purchase of property must in all cases be exercised strictly within the time limit for the purpose, otherwise it will lapse ..."

Contrary to the established form in the drafting of an option clause, in the instant case, no stipulation of the manner of exercise of the option was included. Notice in writing within a stated period and which should be brought to the attention of the grantor of the option, is a usual feature. That was absent in the

instant case. If notification is deemed to be effective by the fact of posting or by reliance on statutory provisions, it is usually so stipulated (***Holwell Securities Ltd v Hughes*** [1974] 1 W.L.R. 155).

Because of its very nature, it seems to me that the purported verbal exercise of the option to purchase, would not be an adequate exercise, especially if the parties had not so specifically agreed. This is both because the option agreement requires proof that it has been strictly exercised, and it is an agreement respecting real property, ever mindful of the Statute of Frauds.

In the instant case the appellant on page 8 said:

> "I tried to exercise my option to purchase after 8 months in possession. I verbally asked Mr Jackson to prepare a Sales Agreement and furnish me with documents such as title for premises, water bill, and taxes. He did not do so."

Smith, J found:

> "This clearly is not a proper exercise of an option."

In the circumstances of this case the learned trial judge was correct by his finding that:

> "... the preponderance of evidence favours the defendant's (respondent's) contention ..."

that the lease agreement was signed on April 20, 1987. Smith, J was thereby stating as a finding of fact, that on a balance of probability, the said agreement was signed by the parties on April 20, 1987. I am clearly of the view, on the totality of the evidence, and in particular, in view of the nature of exhibits 2 and 2A that that finding is correct.

Accordingly, the purported "exercise of the option" by exhibit 5, the letter dated April 20, 1988 would have been out of time. In any event, the respondent's agent Jackson denied receiving the said letter. The final date for its "exercise" would have been April 19, 1988. Indeed, the further attempt to "exercise the option" by exhibit 6, letter dated May 17, 1988, was even moreso out of time.

The significance of the attempted "exercise of the option", by the appellant on the respective dates of April 20, 1988, and then on May 17, 1988, in view of the disparity between exhibits 2 and 2A, was obviously not lost on the learned trial judge. There was no valid exercise of any "option".

The appellant, in purported enforcement of the "option" relied on an agreement signed between the parties on June 14, 1988. The statement of claim, in paragraph 5 reads:

> "On June 14, 1988, the plaintiff met with the defendant in Florida where a contract was prepared and signed by both these parties, reconfirming that the plaintiff had agreed to purchase and the defendant consented to sell 42 Hagley Park Road, Kingston 10, registered at Volume 1051 Folio 702 of the Register Book in the Office of Titles (of which defendant is the registered proprietor) for Six Hundred and Seventy Thousand Dollars ($670,000.00) on terms that the plaintiff would deposit 15% of the purchase price together with a further 5% at closing on the understanding that the balance of the purchase money would be secured by a mortgage from plaintiff to defendant of a period of 15 years at 19% per annum."

The "Sales Agreement" in paragraph 1 exhibit 7, reads:

> "Sales Agreement
>
> I, John C. Ebanks hereby agree to sell property located at 42 Hagley Park Road, Kingston 10, Jamaica, to Mr Dennis A. Woodbine for the sum of JA$670,000.00 with an initial deposit of 15% down at the earliest convenience to Mr Woodbine plus a 5% down at the time of closing. ..."

Exhibit 7, drafted at its commencement in affidavit form, "I John C. Ebanks ...," contains in essence the basic terms of the "option" clause, in the lease agreement, exhibit 2. I agree with Smith, J for the reason stated below, that it is not enforceable as an agreement for sale. Although, before us, counsel for the appellant advances no argument as to its enforcement independent of the "option", we considered its effect.

A document will be construed as a sufficient agreement for sale, and enforceable if it contains all the material elements agreed between the parties and is intended to be contractually binding between them. That will be ascertainable as a matter of construction from the terms of the document and the conduct of the parties.

By letter dated August 23, 1988, exhibit 14, the respondent requested the payment of the deposit by the appellant by August 31, 1988. The respondent contended, that the latter request was in pursuance of a verbal understanding between them. The appellant denied this. The said letter made time of the essence of the contract. No deposit was paid. Although eight days notice would ordinarily be too short a period to make time of the essence of a contract,

the appellant gave his reason for non-payment of the said deposit. In cross-examination, in reference to the letter dated August 23, 1988, exhibit 14, he said:

> "Having seen all these now say it is possible that this document was presented to me and I did reply to it asking for the Sales Agreement.
>
> By consent copy letter received in evidence as exhibit 14 (letter dated 23/8/88) I did not pay any deposit by the 31st August, because Mr Ebanks was nowhere around neither was there any Sales Agreement presented to me for me to pay deposit on."

and on page 36:

> "On 30/8/88 I did not copy report to Mr Jackson because there was no Sales Agreement and the required documents I did not receive."

On this evidence, the appellant demonstrated that the document, exhibit 7, was not intended to be a legally binding agreement, the parties were evidently contemplating that a subsequent formal contract would have to be entered into. Exhibit 7, properly construed, was therefore an agreement "subject to contract. " An agreement "subject to contract" or which contemplates the subsequent preparation of a formal document creates no legally binding contract. (***Winn v Bull*** (1877) Ch. 29; ***Lloyd v Newell*** (1895) 2 Ch. 744). In the earlier case of ***Rossiter v Miller*** [1874-80] All E.R. Rep. 465, their Lordships in the House of Lords, held that if on a consideration of the correspondence between parties to a contract for the sale of land, all the material essential for the completeness of a contract, namely premises, parties, price, conditions and stipulations, are found,

there is a completed and enforceable contract despite the fact that the parties have stipulated that there shall afterwards be a formal contract prepared. Lord Blackburn at page 475 said:

> "... the mere fact that the parties have expressly stipulated that there shall be a formal agreement prepared afterwards embodying the terms, which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence, and determining whether the parties have really come to a final agreement or not ..."

The document, exhibit 7, was not a sufficient memorandum creating a binding contract. It contained no completion date, no carriage of sale stipulation, no amount as mortgage, no obligation for costs, nor any conditions of sale. In any event, the essential payment of the deposit by the appellant was never made either:

(a) "within twelve (12) months" of the signing of exhibit 2."

(b) "... at the earliest convenient (sic) to Mr Woodbine"

(c) nor by the 31st August 1988.

Up to the date of trial no deposit was paid nor tendered by the appellant. The learned trial judge was correct. There is no merit in ground 1.

On the second day of argument, on completion of ground 1, Mr Haughton-Gayle, counsel for the appellant, sought leave to file "supplementary" grounds of appeal on the question of compensation to appellant in respect of his expenditure on the property. He sought an adjournment to do so. We refused the application.

At the outset of the hearing of this appeal on May 7, 2003, the said counsel had sought an adjournment of the hearing on the ground that he had:

> "... not completed his research on the question of whether option to purchase had been properly exercised and on the issue in respect of the counter-claim."

He stated further that he:

> "... came into the matter in April 2003 and the exhibits were not in my possession."

Mr McBean for the respondent opposed the application stating that he supplied to the appellant's counsel all the exhibits on May 2, 2003, having had the request therefor on May 1, 2003. Mr McBean advised the Court that he had had three applications before this Court to dismiss the appeal for want of prosecution, prompting the appellant to respond. Notice of appeal was filed on December 22, 2000. The first application to dismiss was filed in April 2002, eliciting an application by the appellant for extension of time on the ground that the notes of evidence were not available. Counsel for the respondent subsequently obtained the said notes. The second application to dismiss the appeal for want of prosecution was made on November 4, 2002. The appellant's reason for the tardiness was the inability to obtain the judge's reasons for judgment. Mr McBean, counsel for the respondent, supplied the said reasons. On April 11, 2003, a third application to dismiss was made. It was not proceeded with on the assurance that the hearing would be commenced on May

7, 2003. Mr Haughton-Gayle, counsel for the appellant had appeared on April 11, 2003, and agreed to the hearing date of May 7, 2003.

On his contention that he could present arguments "for a half day" only, this Court granted the appellant's counsel an adjournment until 12:00 noon on May 7, 2003.

In view of the above, when on May 8, 2003, on the completion of Mr Haughton-Gayle's submissions on ground 1, of this appeal, he again sought a further adjournment, the pattern of continuing delay by the appellant since his appeal was first filed on December 22, 2000, was evident to this Court. We refused his application and invited him to proceed. The court recessed at 11:30 a.m. and resumed at 12:00 noon.

With reference to ground 2, Mr Haughton-Gayle referred to page 21 of the record which reads:

> "... the total costs of repairs $50,000.00 additional repairs excess $1million ... mini-plaza 7 to 8 shops."

He also referred to the judgment of Smith, J. He then submitted:

> "This is a reasonable position for giving the appellant an opportunity to put before the Court merits in respect of ground 2."

and sought an adjournment until the following day.

In response to a question from this Court counsel admitted that it could be said that the appellant had no authority to incur expenditure, but commented that this Court will be mindful of the law of equity despite the terms of the lease.

This Court again invited counsel for the appellant to proceed with his submission on ground 2. He declined to do so, stating that he was not yet ready to proceed because he had not yet done his research on ground 2. The Court then ruled that counsel had advanced what arguments he had in a cursory manner, on ground 2, and treated counsel's submissions in respect of the grounds of appeal as at an end.

The essence of the complaint of the appellant in ground 2 is, that the learned trial judge erred in not ordering that the respondent compensate the appellant for the appellant's expenditure as tenant in effecting improvements to the said property.

Clause 4 of the lessor's covenants included in the lease with introductory words reads:

"The lessor hereby covenants ...

> 4. To allow the Lessee to construct or modify any existing construction at his own expense, including the erection of fences, gates or any other such convenience he may require from time to time, provided that such construction or modification does not damage foundation or create any serious structural damage or defects and provided the Lessee will repair the building to its original state and condition as and when he received possession under the terms of this Lease Agreement. Should the Lessee erect a fencing around the perimeter of the leased premises and does not eventually complete a sale agreement the question of reimbursement of costs will be decided on the termination of this lease and when the Lessee is ready to vacate the premises provided that such values will take into consideration the depreciated costs of such fencing."
>
> (Emphasis added)

The evidence of the appellant was that he started effecting repairs to the property soon after he took possession, as tenant. He repaired the building, paved the outside area, replaced the toilets and did other plumbing work, and built a wall around the premises with two swing gates. He testified that the total cost of repairs was "between $50,000 to $120,000.00."

Smith, J. found:

> "It is not in dispute that the plaintiff erected such a fence, however there is no evidence of the costs of the fence and of any depreciation thereof. Regrettably there is no evidential basis for the court to consider the question of a set-off."

The evidence does disclose the estimated cost of expenditure incurred by the appellant although the cost of the perimeter fence is not particularized. Neither is there any evidence of the "... depreciated costs of such fencing." In refusing the item of claim by the appellant, it is my view that Smith, J. was in error.

The evidence of the appellant of "$50,000.00 to $120,000.00" for total repairs, must be viewed in light of the fact that he would give figures more favourable to himself. I would therefore take the lower figure of $50,000.00, mindful of the fact that other items of repairs are probably included, to represent a reasonable sum for repayment as the cost of erecting the perimeter fence. Consequently, the appellant is entitled to a set-off in respect of the said amount expended.

The unchallenged evidence is that the appellant, as lessee, has paid to the respondent no rental for the premises since March 1990. The rental then was

$3,306.00 per month with a provision in the lease that the respondent had the right to annual increases of 15%. Smith, J. found that the appellant owed to the respondent for rental and mesne profits, sums of $98,088.00 and $951,227.34 respectively. There is no reason to disturb his computation and finding.

It cannot be ignored that the appellant was not disadvantaged in all this. He gained considerable benefit from the collection of monthly rental from several tenants in the said premises, now described as a "mini plaza". Ground 2, therefore, also fails.

In all the circumstances, the appeal ought to be dismissed and the order of the court below, affirmed.

The order should read:

Judgment for the respondent on both the claim and counterclaim. Provided that the appellant is entitled to be paid as set-off the sum of $50,000.00 with interest at 6% from April 1, 1992 to November 23, 2000;

1. The appellant to vacate and deliver up possession of premises located at 42 Hagley Park Road, Kingston 10, in the parish of St Andrew within 6 weeks from November 23, 2000.

2. Damages payable by the appellant are assessed as follows:

(a) Rental arrears - $98,088.00 from April 1 1990 to March 31, 1992

(b) Mesne profits - $951,227.34 from April 1, 1992 to November 20, 2000, with interest at 6% on $98,088.00 from April 1, 1990 to November 23, 2000.

Costs to the respondent to be taxed or agreed.

BINGHAM, J.A.

Having read in draft the judgment prepared in this matter by Harrison, J.A., I wish to state that I am fully in agreement with the reasoning and conclusions arrived at by the learned judge and the order as proposed by him. I have nothing to add save and except in relation to the conduct of Counsel, Mr Haughton Gayle, who represented the appellant. What took place on his part can only be properly described as a tactical manoeuvre bordering on time wasting, in seeking to obtain an adjournment after the hearing of the appeal had commenced on the grounds that he had not properly prepared himself to argue the appeal. This coming from experienced Counsel certainly does not redound to his credit and is to be deprecated.

PANTON, J.A.

In my opinion, this appeal is devoid of merit. The appeal is dismissed and the order of the court is as set out in the judgment of Harrison, J.A. I agree with the reasons that have been expressed by my learned brother, Harrison, J.A.

and have nothing to add except in relation to the conduct of the attorney-at-law for the appellant. During the hearing of the appeal, Mr Haughton Gayle sought, it appeared, to hold the Court to ransom in refusing to proceed with his arguments in respect of one of the grounds of appeal. He pleaded unpreparedness.

Considering all the circumstances, I formed the view that his stance was a mere ploy to force the Court to grant him an unwarranted adjournment. The Court cannot, and will not, yield to such tactics. We expect cooperation, not procrastination, in our efforts to dispense justice.