[2020] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**SNIVELY JUNIOR BARRETT**	**APPELLANT**
AND	**HERON DALE**	**1st RESPONDENT**
AND	**CHARLES GIBBS**	**2nd RESPONDENT**
AND	**PEARNEL CHARLES JR.**	**3RD RESPONDENT**
AND	**PATRECE CHARLES-FREEMAN**	**4TH RESPONDENT**

Canute Brown and Miss Zaieta Skyers instructed by Brown, Godfrey and Morgan for Snively Junior Barrett

Heron Dale and Miss Sasha-Lee Hutchinson instructed by HS Dale and Co for Heron Dale

Miss Tamiko Smith and Obiko Gordon instructed by Frater Ennis and Gordon for Pearnel Charles Jr and Dr Patrece Charles-Freeman

3, 4 February and 24 April 2020

MORRISON P

Introduction

[1] The subject matter of this appeal and cross-appeal is a property described as Lot 10, Knapdale in the parish of Saint Ann ('the property'). The appeals are concerned with,

on the one hand, a claim by the person in possession of the property to defeat the paper title of the registered owners on the basis of an alleged prior interest in the property; and, on the other hand, a competing claim by the registered owners for an order for recovery of possession from the person in possession.

[2] In a judgment given on 24 July 2015, Dunbar-Green J ('the judge') dismissed both claims, thereby leaving the respective proponents dissatisfied. This is therefore an appeal and a cross-appeal against the judge's judgment.

The background

[3] In order to make the various issues which arise intelligible, it is first necessary to state the history of the property.

[4] During his lifetime, the property was owned by the late Mr Peter Lawrence ('the deceased'). It was part of a larger parcel of land[1], which the deceased had sub-divided into 10 lots.

[5] By a memorandum of agreement signed on 27 March 2001 ('the lease agreement'), the deceased leased the property to Mr Snively Junior Barrett ('Mr Barrett').

[6] Mr Barrett is the appellant in the appeal and the respondent to the counter-notice of appeal.

[1] Registered at Volume 941 Folio 407 of the Register Book of Titles

[7] The term of the lease was one year, subject to renewal, at a monthly rental of $15,000.00. All notices under the agreement were required to be in writing. At the time of the lease agreement, the deceased was not yet in possession of a registered title to the property. However, clause 8(b) of the lease agreement ('the option clause') provided as follows:

> "The Landlord agrees to sell the rented premises to the Tenant for FOUR MILLION SIX HUNDRED THOUSAND DOLLARS ($4,600,000.00) as soon as the registered Certificate of Title for the individual lot is available and the Landlord shall give a written notice to exercise their option to enter into an agreement to purchase within FORTY-FIVE days."

[8] The deceased died on 25 July 2001, not quite four months into the term of the lease. As at that date, the registered certificate of title for the property was still not available and no steps had therefore been taken with regard to the option to purchase. And, when the lease expired on 26 March 2002, Mr Barrett did not signify his intention to renew it. However, Mr Barrett held over as a statutory tenant at the monthly rental of $15,000.00 and would in fact remain in possession for several years, up to and including the date of the trial.

[9] The deceased died leaving a will dated 26 May 1999. The named executors of his estate were Mr Charles Gibbs ('Mr Gibbs'), a businessman, and Mr Heron Dale ('Mr Dale'), an attorney-at-law. (Save where it is necessary to refer to them individually, I will refer to them t as the 'executors'). A Grant of Probate was made to the executors on 3 October

2003 and they were in due course registered on transmission as the proprietors of the larger parcel of land of which the property formed part.

[10] Mr Dale is the first respondent to the appeal.

[11] During the deceased's lifetime, Mr Barrett paid the monthly rent to one Mr Lenworth Lauther, who was the deceased's agent for that purpose. After a period of delay after the deceased died, Mr Lauther resumed collecting rent from Mr Barrett, now as agent of the executors. In this regard, a dispute as to the payment of the rent arose between Mr Barrett and Mr Lauther. This led to Mr Lauther filing action against Mr Barrett in the Resident Magistrates' Court for the parish of Saint Ann to recover arrears of rent. These proceedings were protracted, as the dispute continued over the amount due for outstanding rent and Mr Barrett's insistence that he should be given credit for various sums expended by him on the property over the years.

[12] Under the terms of his will, the deceased devised the property to his grand-nephew and grand-niece, Mr Pearnel Charles Jr and Dr Patrece Charles-Freeman ('the beneficiaries'). Mr Lauther died in December 2006 and, in early 2007, Mr Dale advised Mr Barrett that the beneficiaries were now the owners of the property and that he should deal with them. The beneficiaries would in due course be registered as proprietors of the property on 12 January 2009[2].

[2] See Certificate of Title of that date registered at Volume 1427 Folio 327.

[13] The beneficiaries are the second and third respondents to the appeal, and the appellants on the counter-notice of appeal.

[14] In February 2008, Mr Barrett met with Mr Charles, who advised him that $210,000.00 was outstanding for rent of the property. Mr Barrett gave Mr Charles $100,000.00 on the night of the meeting and paid him the balance within a week of that date.

[15] By notice dated 4 September 2009, attorneys-at-law acting on behalf of Dr Charles-Freeman gave Mr Barrett notice to quit and deliver up the premises on or before 30 September 2009. The stated reason for the notice was that "[t]he premises is [sic] in need of repairs and is [sic] required by the Landlady for her personal use and occupation".

[16] The notice to quit drew an immediate response from Mr Barrett's attorneys-at-law. In a letter to Mr Dale, dated 14 September 2009, they protested that Mr Barrett had "an equitable interest [in the property] pursuant to an agreement between himself and Mr Lawrence dated the 27th March 2007".

[17] In a claim form filed on 31 May 2011, Mr Barrett commenced action against the executors and the beneficiaries[3]. In his particulars of claim filed that same day, he averred, among other things, that the defendants had all "conspired with each other to deprive the Claimant of the benefit of the covenant granting the option to purchase the

[3] 2011 HCV 3619. It appears that the claim form as filed originally named only Mr Charles as the third defendant, but that Dr Charles-Freeman was later added as the fourth defendant.

land … and wrongfully cause [sic] or procured the transfer of the said land [to the beneficiaries]". On this basis, Mr Barrett claimed the following reliefs:

> "A declaration that the agreement dated the 27th March 2001 is a binding contract, creating an equitable interest in the said land
>
> And that the devise to [Mr Charles] of the demised premises, lapsed, adeemed or failed altogether entitling the legatees only to the purchase price agreed on between [Mr Barrett] and [the deceased].
>
> ….that the lands comprised in certificate of title at Volume 1427 Folio 327 be re-transferred to [the executors].
>
> …. specific performance of the Agreement and that he is entitled to exercise the option therein, Damages and Costs."

[18] In separate defences, Mr Dale and the beneficiaries specifically denied that they conspired to deprive Mr Barrett of the benefit of the option. It does not appear that Mr Gibbs filed a defence of his own.

[19] For their part, the beneficiaries also filed action against Mr Barrett[4]. They sought orders for recovery of possession of the property and mesne profits of $50,000.00 per month from 1 October 2009 to 31 December 2011, and continuing. The claim for recovery of possession was based on the facts that (a) the beneficiaries were the registered proprietors of the property, and (b) the option was not exercised during the deceased's lifetime. In relation to the claim for mesne profits, the beneficiaries relied on the assertion

[4] Fixed date claim form dated 17 February 2012 (2012 HCV 01006)

that they were informed and verily believed that Mr Barrett had breached the lease agreement, "by failing to pay rent as stipulated"[5]. The actions were consolidated.

The judge's findings

[20] The judge identified the issues in the consolidated action as being whether (i) the option to purchase was exercisable after the expiry of the lease; (ii) Mr Barrett was entitled to specific performance of the lease agreement; (iii) the beneficiaries had satisfied the requirements for an order for recovery of possession; and (iv) the beneficiaries are entitled to mesne profits and, if so, at what rate.

[21] In a finding that was determinative of the first and second issues, the judge held that Mr Barrett was not entitled to specific performance of the option to purchase, "because that option expired with the lease". Alternatively, the option was invalidated by the rule against perpetuities.[6] Further, that the rules relating to the indefeasibility of registered title issued under the provisions of the Registration of Titles Act ('the RTA') precluded any possibility of a re-transfer of the property to the executors in the circumstances of this case.[7]

[22] In relation to the third issue, the judge held that the beneficiaries had not met any of the evidential requirements for the grant of an order for recovery of possession under

[5] Affidavit of Pearnel Charles Jr. and Patrece Charles-Freeman in support of fixed date claim form, sworn to on 17 February 2012.
[6] Judgment, para. 41
[7] Judgment, para. 64

the Rent Restriction Act ('the RRA'). Nor was she satisfied that, in all the circumstances of the case, it was reasonable to make such an order.[8]

[23] And finally, as regards the fourth issue, the judge considered that (i) the beneficiaries' claim for mesne profits was misplaced since, as a statutory tenant, Mr Barrett's liability, if any, could only be for non-payment of rent; and (ii) in any event, the beneficiaries had failed to prove that Mr Barrett in fact owed any rent in respect of his tenancy of the property.

The grounds of appeal

[24] In his notice and grounds of appeal filed on 20 January 2016, Mr Barrett contends as follows:

> "a. The learned Judge in the Court below erred in law, in holding that the option that provided that the Grantor promised to give notice to the Grantee as soon as title for the land became available and that the Option should be exercised within forty five days of the receipt of that notice was not time bound and offended the Rule against Perpetuities.
>
> b. The learned Judge misdirected herself in law as to whether the Appellant had an equitable interest in the demised premises as to when a person, on taking a transmission as personal representative is vested with the estate of a deceased person. By failing to apply the provisions of Section 130 of the Registration of Titles Act she wrongly concluded that the date of the entry of the registration of the instrument of Transmission was the effective date of the vesting of the estate and not the date of death of the deceased.

[8] Judgment, paras 70-71

c. The learned Judge erred in law in holding that the Option to purchase the demised premises was terminated at the end of the term of the lease even though the Appellant could not exercise the option without the condition undertaken by the Grantor to give notice of the availability of title, being first fulfilled and that the Grantor died during the term.

d. The Learned Judge erred in law in her interpretation of the Registration of Titles Act and its application to the receipt of the trust property by the third and fourth Respondents, in circumstances where they were aware of the pre-existing rights of the Appellant, evidenced by their filing of a Claim exhibiting the Agreement granting the option to purchase the property and the evidence of the Appellant that the Third Respondent stated that the sale price had to be increased. The Learned Judge's failure to resolve this issue of fact led to her treatment of the Claimant's claim, *in personam*, as being untenable and defeated by the Title of the Third and Fourth Respondents."

[25] And, in their counter-notice of appeal filed on 17 February 2016, the beneficiaries challenge the judge's judgment on the following grounds:

"(a) That the Honourable Judge erred in failing to take into account the evidence of the 3rd Respondent in dismissing the Court action for recovery of possession.

(b) That the Honourable Judge erred in determining that the 4th Respondent's evidence was insufficient to establish that the claimants were ready, able or intended to effect repairs to the premises or to occupy it in all the circumstances presented to the Honourable Court.

(c) The Honourable Judge erred in finding that the hardship suffered by the Appellant outweighed the hardship suffered by the Respondents in the circumstances of the case.

(d) The Honourable Judge erred when she failed to take into account the admission of the Appellant of the numerous Resident Magistrate's proceedings against him by or on behalf of the 1st, 3rd and 4th Respondents in determining that the Appellant's hardships outweighed the 3rd and 4th Respondent's hardships.

(e) Further, the Honourable Judge erred when she failed to take into account the admission of the Appellant of the numerous Resident Magistrate's claims against [sic] by the 1st, 3rd and 4th Respondents in determining that the 4th Respondent failed to satisfy the evidential requirements for a grant of recovery of possession.

(f) The Honourable Judge erred when she failed to take into account the admission by the Appellant and the evidence of the 1st Respondent that the Appellant effected substantial unauthorized changes to the premises, in determining that the Appellant's hardships outweighed the Respondent's hardship.

(g) Furthermore the Honourable Judge erred when she failed to take into account the admission by the Appellant and the evidence of the 1st Respondent that the Appellant effected substantial unauthorized changes to the premises in determining that the 4th Respondent failed to satisfy the evidential burden for a grant of recovery for possession.

(h) The Honourable Judge erred when she failed to take into account the Appellant's admission that he has been in breach of a number of the terms of the Tenancy Agreement when she determined that the 4th Respondent failed to satisfy the evidential burden for a grant of recovery for possession.

(i) The Honourable Judge erred when she failed to take into account the 3rd and 4th Respondents' evidence that the Appellant had sublet the premises without their consent, knowledge or permission when she determined that the 4th Respondent failed to satisfy the

evidential burden for a grant of recovery for possession.

(j) That the Honourable Judge erred when she determined to include the question whether other accommodation was available for the 4th Respondent as a weighty consideration in all the circumstances of this case.

(k) That the Honourable Judge erred in failing to make an order for recovery of possession when this was one of the orders being sought in the Claim No. 01106 of 2012."

[26] Taken together, the notice and grounds of appeal and the counter-notice of appeal appear to me to give rise to the following questions:

1. Did the option to purchase survive the expiry of the lease?

2. Does the option to purchase offend against the rule against perpetuities?

3. Does section 130 of the RTA apply to this case?

4. Ought the judge to have ordered a re-transfer of the property from the beneficiaries/registered proprietors to the executors?

5. Were the beneficiaries entitled to an order for recovery of possession of the property from Mr Barrett?

Did the option to purchase survive the expiry of the lease?

Does the option to purchase offend the rule against perpetuities?

[27] As the answers to both these questions affect the enforceability of the option to purchase, it is convenient to take them together.

[28] For Mr Barrett, Mr Canute Brown challenged the judge's conclusions on these questions on the broad ground that she had misconstrued the lease agreement. The judge erred in not approaching the question of construction posed by this case on the basis of the well-known principle that "[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"[9].

[29] Properly interpreted, Mr Brown submitted, clause 8(b) of the lease agreement in fact amounted to an agreement by the deceased to sell the property to Mr Barrett, subject only to the certificate of title becoming available. In these circumstances, it conferred on Mr Barrett an equitable interest in the property, which ran with the land, and by which the executors were therefore bound. Accordingly, the option survived the expiration of the lease and the judge therefore misapplied the authorities treating with options and the rule against perpetuities.

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[9] Per Lord Hoffmann in **Investors Compensation Scheme v. West Bromwich Building Society** [1998] 1 All ER 98, 114

[30] As was to be expected, counsel for the executors and the beneficiaries submitted that the judge was correct in her conclusion that the option did not survive the expiration of the lease. The option was a term of the lease agreement and steps had to be taken during the term of the lease to exercise it. Referring specifically to clause 8(b), Mr Dale questioned whether the parties could have intended the purchase price of $4,600,000.00 "to hold indefinitely".

[31] The parties referred us to a number of authorities, most of which the judge also considered. I will mention some of them.

[32] In **Sherwood v Tucker**[10], a three-year lease agreement terminating 25 December 1917 gave the tenant an option to purchase the freehold for £700, "during the three years hereby provided for". In June 1917, the landlord and the tenant signed an indorsement to the agreement agreeing to the extension of the lease "for three years expiring December 25, 1920". By a second indorsement made in September 1920, the parties agreed to a further extension to December 25, 1923. On 17 September 1923, the tenant's solicitors gave notice that he wished to exercise the option; but the landlord's solicitors replied a few weeks later to say that the option had long since expired.

[33] The question for the court was therefore whether, by extending the term of the lease twice, the parties also intended to extend the period for exercise of the option. The trial judge's decision that they did so intend was reversed by a unanimous Court of

[10] [1924] 2 Ch 440

Appeal. Pollock MR pointed out[11] that, although contained in the same agreement as the lease, the option to purchase was "a separate and independent contract whereby a chance is given to the tenant, under the conditions imposed, to purchase the freehold of the premises which are demised to him". Against that background, Pollock MR considered[12] that the two indorsements extending the term of the lease could not be interpreted as having also extended the time for exercising the option:

> "It is quite clear that a landlord may be prepared to give to his tenant an option to purchase at a fixed price for a limited period of time. The circumstances of value may enable both parties to fix upon a sum which will stand good for a definite time. It is quite another to say that the same considerations apply where there is an extension and a renewed extension of the term."

[34] In **Longmuir v Kew**[13], an agreement for the lease of premises for a term of five years from 1 June 1939 gave the tenant an option to purchase the freehold "at any time at £675". Upon expiry of the lease in 1944, the tenant remained in possession for several years as a statutory tenant under the Rent Restriction Acts. By notice given on 6 June 1959, the tenant notified the landlord of his intention to exercise the option.

[35] After considering a number of authorities on the point, some of them conflicting, Cross J concluded[14] that "on the true construction of this agreement, the right given to the tenant to purchase the freehold was a right to purchase it at any time during the

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[11] At page 444
[12] At page 445. To the same effect, see Warrington LJ at pages 446-447.
[13] [1960] 3 All ER 26
[14] At page 30

currency of the agreement". Echoing the same point made by Pollock MR in **Sherwood v Tucker**, Cross J observed that –

> "It seems to me prima facie most unlikely, especially in these days of Rent Acts, that a landlord would agree in advance to a tenant having the right to purchase the reversion, at a price named in the agreement, throughout the quite uncertain period during which the tenant may continue to be his tenant by holding over."

[36] In arriving at his decision in **Longmuir v Kew**, Cross J distinguished the older case of **Rider v Ford**[15], in which an option to purchase the freehold contained in a lease, which was not expressed to be subject to any limitation in time, was inoperative and invalid as infringing the rule against perpetuities. I will have to come back to **Rider v Ford** when I come to consider whether the judge was correct to apply it as an alternative ground for her decision in this case.

[37] In the Canadian case of **Rafael v Crystal**[16], a lease for 28 months gave the tenant an option to purchase "to be exercised only during the term of the within lease". At the end of the 28 day term, the tenant held over as a monthly tenant, then sought to exercise the option. The Ontario Supreme Court held that the option did not survive the expiration of the term. As Gale CJ explained[17]:

> "It is reasonably clear that, if a tenant over-holds without any agreement as to whether or not an option such as this one here is to be carried forward, then it expires if it has not been

[15] [1923] All ER Rep 562
[16] [1966] 2 OR 733, 58 DLR (2d) 325
[17] At para. 21

> exercised prior to the end of the lease. That is so because ordinarily an option to purchase is not an incident of the relationship of landlord and tenant."

[38] However, Gale CJ also went on to observe[18] that "an option will still be available to a tenant after the termination of the lease if there have been set out appropriate words of agreement between the parties indicating that such is their intention". But, as to this, Gale LJ also went on to sound a note of caution as regards the possible operation of the rule against perpetuities by reference to the following passage from the text, Morris & Leach, Rule Against Perpetuities[19]:

> "(c) If an option to purchase the reversion is contained in a lease for less than twenty-one years, and after the expiration of the term the tenant remains in possession as tenant from year to year or as a statutory tenant, it is usually held as a matter of construction that the option is exercisable only during the fixed term and cannot be exercised after that term has expired. **Otherwise, it could be argued that every option to purchase the reversion is too remote, no matter how short the lease.**" (Emphasis mine)

[39] Mr Brown placed heavy reliance on what he described as the "helpful analysis" of the nature of an option by Hoffmann J (as he then was) in **Spiro v Glencrown Properties Ltd and Another**[20]:

> "The granting of the option imposes no obligation on the purchaser and an obligation on the vendor which is contingent on the exercise of the option. When the option is exercised,

[18] At para. 22
[19] 2nd edn, page 222
[20] [1991] 2 WLR 931, 935

> vendor and purchaser come under obligations to perform as if they had concluded an ordinary contract of sale."

[40] In **Annie Lopez v Dawkins Brown and another**[21], a decision of this court, it was held that, "… at common law an option to purchase is a species of privilege … the party seeking to rely on the option must comply strictly with the conditions stipulated for its exercise, failing which the option will lapse". In arriving at this conclusion, the court referred to the earlier decision at first instance of Patterson J (as he then was), in **Janet Robertson v Surbiton Property Developments Ltd**[22]. In that case, that learned judge treated it as "… well settled that 'an option for the renewal of a lease or for the purchase or re-purchase of property, must in all cases be exercised within the time limited for the purpose, otherwise it will lapse'"[23].

[41] And finally, as far as works of authority go, Miss Sasha-Lee Hutchinson, who appeared with Mr Dale, referred us to a passage from Halsbury's[24], in which the learned editors reiterate that an option to purchase contained in a lease is –

> "… collateral to, independent of, and not incident to, the relation of landlord and tenant. It is not, therefore, one of the terms which will be incorporated in the terms of a yearly tenancy created by the tenant holding over after the expiration of the original lease."

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[21] [2015] JMCA Civ 6, per Morrison JA at para. [52]
[22] (1982) 19 JLR 90, 94
[23] Patterson J was here quoting from Halsbury's Laws of England, Vol. 8, 3rd edn, para. 165
[24] 4th edn, Vol 27(1), para. 110

[42] These authorities, which all seem to point one way, suggest that the position is as follows:

1. Although usually contained in the same agreement as the lease, an option to purchase the reversion is a separate and independent contract from the lease; in other words, it is not an incident of the lease.

2. An option to purchase imposes no obligation on the purchaser unless and until it is exercised, but it does impose an obligation on the vendor, which is contingent on the exercise of the option.

3. As with any other option, an option to purchase contained in a lease of land must generally be exercised strictly in accordance with its terms.

4. The question whether an option to purchase contained in a lease can survive the original or extended term of the lease is a matter of construction of the document, applying the generally accepted rules of construction.

5. *Prima facie*, in the absence of any indication to the contrary in the document itself, read against the background of the surrounding circumstances, the right given to the tenant to

purchase the freehold will generally be a right exercisable at any time during the currency of the lease, subject to any time limits agreed by the parties.

6. Although it is always open to the parties to provide expressly, or by necessary implication, that an option to purchase is to be exercisable even after the term of the lease has expired, it may be necessary to consider whether an option to purchase which is not expressed to be subject to any limitation in time might not also be invalid as infringing the rule against perpetuities.

[43] In this case, having reviewed the authorities, the judge's answer to the first question was that, "[i]n the absence of a specific agreement to that effect, the option cannot survive the lease"[25]. In my view, this conclusion was plainly the correct one in the circumstances of this case. As has been seen, the certificate of title to the property was still not available when the deceased died. That remained the position by the time the lease expired on 26 March 2002, without having been renewed. There was nothing in the lease agreement to suggest that the parties intended that the option to purchase should survive the expiration of the term of the lease. In these circumstances, as it seems to me, the option ceased to be exercisable once the term expired. I find it inconceivable to suppose that the parties could have intended that the option to purchase at the price of

[25] Judgment, para. 29

$4,600,000.00 should have been exercisable at any time in the future, irrespective of how many years had elapsed by that time. I therefore consider that, upon the expiration of the lease, the property fell to be dealt with by the executors as part of the deceased's estate in accordance with the terms of his will.

[44] The second question speaks to the judge's additional basis for her decision, which was that the option to purchase was in any event void because it infringed the rule against perpetuities. Although in the light of my conclusion on the first question it is strictly speaking unnecessary to answer this question, I will for completeness consider it briefly.

[45] Put in its simplest form, the rule against perpetuities is that, in order for an interest in land to be good, it must vest, if at all, no later than 21 years after some life in being at the creation of the interest[26].

[46] In **Rider v Ford**, as has been seen, Russell J considered that an option to purchase the reversion which was not time-bound was invalid because it infringed the rule against perpetuities. To similar effect, the learned editors of Halsbury's[27] state that "… an option is bad for perpetuity, if unlimited in point of time, in so far as it creates an interest in land, although, in so far as it gives rise to a personal right and liability in contract, it may be enforceable …"

[47] On the basis of these authorities (in addition to the passage from the Canadian text which I have set out at paragraph [38] above), it therefore seems to me that the

[26] See Cheshire, The Modern Law of Real Property, 10th edn, page 238
[27] Halsbury's Laws of England, Vol. 80, para. 45

judge also was fully entitled to hold that if the option to purchase in this case was in fact open-ended in terms of the time for its exercise, as Mr Barrett contended, it would infringe the rule against perpetuities.

Does section 130 of the RTA apply to this case?

[48] In so far as is relevant, section 130 of the RTA provides as follows:

> "(1) When registered land or any registered lease, mortgage, or charge of or upon registered land shall have been acquired by transmission the person claiming to have acquired the same shall apply in writing to the Registrar to be registered as the proprietor thereof and shall furnish such evidence of his claim as the Registrar shall deem to be necessary. Upon such claim being proved to his satisfaction the Registrar shall enter a memorandum of the change of proprietorship accordingly upon the certificate of title for the said land, and also (unless he has dispensed with the production thereof) upon the duplicate of the said certificate. Upon such entry being made the person so entitled by transmission shall become the transferee of such land, lease, mortgage or charge, and be deemed to be the proprietor thereof, **and shall hold the same for the purposes for which it may be applicable by law and subject to any qualification under which the previous proprietor held the same**, but for the purpose of any dealings therewith under the provisions of this Act he shall be deemed to be the absolute proprietor thereof.
>
> (2) The title of every person becoming a transferee under this section shall, upon such entry being made, relate back to and be deemed to have arisen upon the happening of the event upon which such registered land, lease, mortgage or charge shall have been acquired by transmission as if there had been no interval of time between the happening of such event and such entry.
>
> (3) … "
>
> (Emphasis mine)

[49] In his written submissions filed on behalf of Mr Barrett, Mr Brown submitted that, when the executors were registered on transmission as the proprietors of the property, they took subject to Mr Barrett's equitable interest.

[50] The judge considered that this section had no relevance to the circumstances of this case, and so do I. The judge having found, correctly in my view, that the option to purchase expired with the lease, or, alternatively, was invalidated by the rule against perpetuities, the question of the executors taking the property "subject to any qualification under which the previous proprietor held the same", simply did not arise.

Ought the judge to have ordered a re-transfer of the property from the beneficiaries/registered proprietors to the executors?

[51] The answer to this question turns on the provisions of the RTA and the principle of indefeasibility of title which it enshrines. It is well known that the RTA proceeds on the basis that, generally speaking, a registered title cannot be set aside, "except in case of fraud"[28].

[52] It is no doubt with this rule in mind that, in his particulars of claim filed on 31 May 2011, Mr Barrett pleaded that the defendants had all "conspired with each other to deprive the Claimant of the benefit of the covenant granting the option to purchase the land … and wrongfully cause [sic] or procured the transfer of the said land [to the beneficiaries]". In this regard, Mr Barrett's principal point in the court below, as it was

[28] RTA, section 70; see also **Frazer v Walker** [1967] 1 AC 569 and **James Wyllie et al v David West et al** [2012] JMCA App 41

before us, was that the executors, especially Mr Dale, were or must have been aware of the circumstances in which he came to be in possession of the property, in particular the existence of the option to purchase.

[53] The judge took the view[29] that this was an insufficient platform from which to defeat the beneficiaries' registered title:

> "61. Even if, as [Mr Barrett] appears to have assumed, reasonably I might add, that as an Attorney-at-Law, [Mr Dale] should have or [sic] expected to have familiarized himself with the circumstances under which [Mr Barrett] had been in possession of the land, it would be a leap to conclude that [Mr Dale] had conspired to do something by deceit or dishonesty to transfer title to [the beneficiaries]. Such a conclusion … would be a sweeping, general allegation of fraud which could not possibly suffice to displace the registered title …
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> 62. I also agree with counsel for [Mr Dale] that in the circumstances of this case, where the devise was made before the option was given, the gift would have been adeemed only if the option had been exercised when it was open to [Mr Barrett] to do so."

[54] Both Mr Brown and Miss Skyers made submissions on this issue. Going first, Miss Skyers pointed to a number of items of evidence which, she submitted, made it clear that Mr Dale was fully aware of the option in Mr Barrett's favour. First, there was Mr Barrett's evidence[30] that, at his first meeting with Mr Dale in August 2002, he "told Mr. Dale of the Agreement that I had with Mr. Lawrence and that Mr. Lauther knew all about it".

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[29] Judgment, paras 61-62

[30] Supplemental witness statement of Snively Junior Barrett dated 2 June 2015, para. 7; see also notes of evidence, Record of Appeal, page 50

[55] Second, Miss Skyers pointed out that, in the lease agreement, the deceased had designated Mr Lauther as the person to whom Mr Barrett should make monthly rental payments in respect of the property, and that Mr Lauther himself actually witnessed the agreement. By letter dated 29 January 2003, writing on behalf of the executors, Mr Dale authorised Mr Lauther "to collect rental from the tenants who occupy the premises and [sic] Knapdale in the Parish of Saint Ann". Further, in 2005, Mr Dale instructed Mr Lauther to file action against Mr Barrett in the Resident Magistrate's Court in respect of arrears of rent and for recovery of possession.

[56] Based on these and other matters, Miss Skyers submitted that Mr Lauther was in fact Mr Dale's agent and that Mr Dale must have been aware of the fact that Mr Barrett had a subsisting option to purchase the property. In this regard, Miss Skyers referred us to the decision of the High Court of Australia in **Sargent v A.S.L. Developments Limited et al**[31], in which Mason J observed that –

> "As against a third party the law imputes to a principal knowledge gained by his agent in the course of, and which is material to, a transaction in which the agent is employed on behalf of the principal, under such circumstances that it is the duty of the agent to communicate to the principal."

[31] (1974) 131 CLR 634, 658

[57] For his part, Mr Dale denied any knowledge of the lease agreement. Indeed, in his evidence at the trial, Mr Dale stated[32] that it was after the commencement of the litigation in 2011 that he "saw a document purporting to be a Lease Agreement".

[58] On this state of the evidence, Miss Skyers submitted, the judge ought to have made a finding of fact as to whether or not Mr Dale was made aware of the existence of the lease agreement. Mr Brown added further submissions on other aspects of the conduct of the executors and the beneficiaries which ought to have attracted the judge's attention by way of specific findings. In these circumstances, he submitted, there was a sufficient basis for this court's intervention, notwithstanding the appellate court's traditional reluctance to disturb a trial judge's findings of fact[33].

[59] Both Miss Hutchinson for the executors and Miss Tamiko Smith for the beneficiaries submitted that there was no evidence to ground a finding of agency by the judge; nor was there any evidence to support the pleaded conspiracy to deprive Mr Barrett of the benefit of the option. In this regard, Miss Smith directed us to a section of Mr Barrett's evidence under cross-examination[34], where he appeared to accept that there was no conspiracy.

[60] It is true that the judge made no finding on the state or extent of Mr Dale's knowledge of the option. Perhaps, given the sharp conflict of evidence on the point, she

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[32] Notes of evidence, page 72

[33] The principle is, of course, well known; but Mr Brown referred us in particular to the decision of the Privy Council on appeal from this court in **Paymaster (Jamaica) Limited and another v Grace Kennedy Remittance Services Limited and another** [2017] UKPC 40, para. 29

[34] Notes of evidence, page 68

might have. But, at all events, it is clear from what the judge did say that her primary conclusion was that there was no evidence of a conspiracy between the executors and the beneficiaries sufficient to defeat the latter's certificate of title to the property. In this, I think that she was clearly correct. Even if, as Miss Skyers submitted, Mr Dale was aware of the option, what was required to defeat the beneficiaries' title was proof of fraud. The concept of fraud in this context, as Lord Wilberforce observed in the leading case of **Frazer v Walker**[35], "has been limited by judicial decision to actual fraud by the registered proprietor or his agent". So, irrespective of what the state of Mr Dale's knowledge might have been, there was absolutely no evidence of fraud committed by the beneficiaries or any agent acting on their behalf.

Were the beneficiaries entitled to an order for recovery of possession of the property from Mr Barrett?

[61] This question arises from the beneficiaries' counter-notice of appeal, in which they take issue with the judge's findings against them on the claim for recovery of possession.

[62] In concluding that the beneficiaries had failed to satisfy the statutory criteria, the judge said this[36]:

> "At the trial, [Dr Charles-Freeman] said she wished to take possession for her own use. That general statement was not evidence that she had been ready, able or intended to effect repairs to the premises or to occupy it as a residence. In any event, the Court has a duty not to grant the order if it has not been satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order than by refusing to grant it. The circumstances include the

[35] At page 580
[36] Judgment, para. 71

> question of whether other accommodation is available for [Dr Charles-Freeman]. No evidence was offered on these matters. For these reasons [Dr Charles-Freeman] has not satisfied the evidential requirements for a grant of recovery of possession."

[63] In their grounds of appeal, the beneficiaries contend strongly that the judge's conclusion was flawed for a number of reasons, mainly having to do with her failure to take into account matters such as Mr Barrett's admitted breaches of the lease agreement, including making unauthorised changes to the property and subletting without consent. In her submissions before us, Miss Smith also told us that, at the time of commencement of the action for recovery of possession, Mr Barrett was in arrears of rental of more than $750,000.00; and that, considering all that had happened between 2004 and 2011, including the numerous actions to recover rental arrears from Mr Barrett in the Resident Magistrate's Court, the balance of hardship was clearly in the beneficiaries' favour. On this basis, Miss Smith submitted that the judge ought not to have confined herself to the reasons set out in the notice to quit, but ought to have considered "the wider circumstances".

[64] In his submissions in opposition to the counter-notice, Mr Brown referred us to the fixed date claim form filed on behalf of the beneficiaries, their affidavit in support of it and the notice to quit. On this basis, he submitted that the beneficiaries had failed to prove the reasons for the notice and that the judge had correctly rejected the claim for recovery of possession.

[65] There is no dispute that the property is governed by the provisions of the RRA. It is therefore controlled premises for the purposes of the Act[37]. As is well known, section 25(1) restricts the right to possession of controlled premises by providing that no order or judgment for recovery of possession may be made with respect to such premises, save in the cases specified in section 25(1).

[66] As has been seen, the stated reason for the notice to quit given on behalf of the beneficiaries was that "[t]he premises is [sic] in need of repairs and is [sic] required by the Landlady for her personal use and occupation". This was clearly an invocation of the statutory reasons set out in section 25(1)(e)(i) and 25(1)(h), which are as follows:

> "(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 …
>
> (h) the premises, being a dwelling-house or a public or commercial building, are required for the purpose of being repaired, improved, or rebuilt; …"

[67] Section 25(1) goes on to provide that no order for possession may be made in any case "unless in addition … the court asked to make the order or give the judgment

[37] See RRA, section 3

considers it reasonable to make such order or give such judgment". Further, in relation to the reasons set out above, the court must also be satisfied that –

> "… having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it; and such circumstances are hereby declared to include-
>
> (i) when the application is on a ground specified in paragraph (e) or (f), the question of whether other accommodation is available for the landlord or the tenant;
>
> (ii) when the application is on a ground specified in paragraph (h), the question of whether other accommodation is available for the tenant."

[68] In this case, the court accordingly had to be satisfied that, in addition to the grounds themselves, it was (i) reasonable to make the order for recovery of possession; and that (ii) having regard to all the circumstances, less hardship would be caused by making the order than by refusing it, bearing in mind the availability of other accommodation for either Mr Barrett or the beneficiaries.

[69] The fixed date claim form filed on behalf of the beneficiaries on 17 February 2012 was silent as to the reason/s for which they required possession. However, in their joint affidavit in support of the fixed date claim form of the same date, the beneficiaries referred to the notice to quit dated 4 September 2009 and stated[38] that, as a result of Mr Barrett's continued possession of the property, "we are being deprived of the use and

[38] At para. 24

occupation of the said land which we lawfully and rightfully own". This statement was repeated in identical terms in the separate witness statements filed by each of the beneficiaries on 12 March 2013. In the same witness statements, the beneficiaries also stated that they were informed and verily believed that Mr Barrett had rented the property or part of it to tenants[39].

[70] That was the extent of the evidence given by the beneficiaries on the claim for recovery of possession.

[71] Two cases referred to by the judge affirm the necessity for a party claiming an order for recovery of possession, not only to state in the notice to quit a statutory reason to make such an order, but to prove it at trial. In the first, **Muriel Reid and Eustace Chisholm v Denise Johnson et al**[40], a decision of this court arising out of an action for recovery of possession of controlled premises, I referred to the necessity of "… **establishing by evidence** one of the statutory reasons"; and, in the second, **Betty's Café Ltd v Phillips Furnishing Stores Ltd**[41], a decision of the Court of Appeal of England and Wales, Lord Denning MR stated that "… the landlord must honestly and truthfully state his ground in his notice, and **he must establish it as existing at the time of the hearing**" (emphases mine).

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[39] See witness statements of Pearnel Charles Jr and Patrece Charles-Freeman sworn to on 12 March 2013, paras 14 and 15.
[40] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 135/2007, judgment delivered 3 April 2009, para. 25
[41] [1958] 1 All ER 607, 623

[72] On this basis, the judge concluded[42], in my view correctly, that "[t]he landlord must therefore prove that she had definite intention [sic] to act, consistent with the statutory reasons for requiring possession as stated in the notice to [quit]".

[73] The beneficiaries relied on the grounds that the property was in need of repairs and that it was also required "by the Landlady for her personal use and occupation". As has been seen, they proffered absolutely no evidence at trial in support of either ground. Indeed, I can only regard Miss Smith's brave suggestion that we might also want to consider other grounds for possession as an implicit acknowledgment of this reality. In my view therefore, given the long-established principles in this regard, the judge's conclusion that they had failed to satisfy "the evidential requirements for a grant of recovery of possession" is unassailable.

Conclusion and disposal of the appeal

[74] As will have become clear, I have come to the conclusion that both the appeal and the cross-appeal must fail. The judge considered all the relevant issues and, despite the energetic advocacy of all counsel who argued to the contrary, no basis has been shown to disturb the conclusions she reached in her wholly admirable judgment.

[75] I would therefore dismiss the appeal and the counter-notice of appeal. Subject to any contrary submissions which any of the parties may wish to make in written submissions filed within 21 days of the date of this order, I would also order that Mr Barrett should pay the costs of Mr Dale and the beneficiaries on the appeal, while the

[42] Judgment, para. 70

beneficiaries should pay Mr Barrett's costs on the cross-appeal. All such costs are to be taxed if not agreed.

F WILLIAMS JA

[76] I have read in draft the judgment of the learned President and agree with his reasoning and conclusions. There is nothing further that I could usefully add.

P WILLIAMS JA

[77] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

MORRISON P

ORDER

1. The appeal and counter-notice of appeal are dismissed.

2. Subject to any contrary submissions which any of the parties may wish to make in written submissions filed within 21 days of the date of this order, it is ordered that Mr Barrett should pay the costs of Mr Dale and the beneficiaries on the appeal, while the beneficiaries should pay Mr Barrett's costs on the cross-appeal. All such costs are to be taxed if not agreed.