JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 88/2001

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUTICE PANTON, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (Ag.)

BETWEEN:	**BASIL KENNETH CAHUSAC (executor of the estate DORIS CAHUSAC- DELISSER)**	**APPELLANT**
AND:	**C. BRAXTON MONCURE**	**RESPONDENT**

Carol Davis for the Appellant

Dennis Morrison Q.C., and Paula Blake-Powell instructed by Dunn Cox for the Respondent

May 27, 28, 29, 30, 31, July 3, 2002
December 20, 2004 and February 01, 2005

DOWNER, J.A.

Introduction

Was Basil Cahusac the appellant, who is the executor of his mother's estate, at Mullion Cove in Westmoreland, entitled to recover possession from C. Braxton Moncure the respondent? McCalla J. decided he was not so entitled, because the respondent Moncure had exercised an option to renew the lease, and that the provisions of the Rent Restriction Act (the "Act") did not assist the appellant Cahusac. The purpose of this appeal is to determine whether the learned trial judge in the Court below came to a correct decision on these issues.

The lease –

(i) Was the option to renew the lease exercised?

(ii) Did the respondent Mr. Moncure breach the terms of the lease

The transaction between Mrs. Doris Cahusac-Delisser the lessor and the respondent Mr. Moncure the lessee is at the heart of this dispute. Mr. Moncure the respondent is a registered investment advisor connected with Ross and Moncure Inc. and International Advisory Group Inc. He became the lessee of Mullion Cove on 1st June 1982. The house is now used as part of a small hotel complex and the initial issue to be decided is whether the respondent Mr. Moncure exercised the option to renew the lease. It is to be noted that during Mrs. Cahusac-Delliser's lifetime the house was used as a guest house.

Grounds 2, 3, 5 and 6 of the Notice and Grounds of Appeal at page 2 of the Record summarises the Appellant complaint on this issue. However, there is a prior complaint by the appellant in ground 4 which reads at page 2 of the Record:

> "4. That the learned trial judge erred in finding that the Defendant was not in breach of the lease by doing additions to the building and/or buildings on the leased premises without the consent of the Appellant."

It is therefore appropriate to begin by addressing this ground. The relevant clause 2 (g) of the lease reads as follows at 194 of the Record:

> "2. The Lessee HEREBY COVENANTS with the Lessor as follows:-
>
> . . .

> (g) Not to make or permit to be made any additions to the building or buildings on the Leased Premises without the written consent of the Lessor."

The learned trial judge found that complaint relating to the construction of cement step, a wooden sundeck adjoining the pool, the amalgamation of garage space were not within the intendment of clause 2(g) of the lease. Equally, the erection of temporary sundeck, the addition of air-conditioning units, the remodeling of the kitchen and the construction of a cement walkway were also not within the contemplation of clause 2(g) of the lease. Here is how the learned judge treated the matter at page 48 of the Record:

> "Given the purpose for which Mullion Cove was being used at the time the defendant entered into the lease and the condition it was in, it is not surprising that the lease did not prohibit alterations or improvements, replacements and repairs.
>
> I must therefore consider the meaning of the word "additions" in the context of the words used in the lease."

Then at page 50 of the Record the learned judge conclude thus:

> "In my judgment the evidence supports the contention that what the defendant did on the premises were improvements, repairs and replacements which were not prohibited by the lease and in any event I hold that acceptance of the new term in 1987 constituted either a waiver of those breaches or an acceptance that they were not breaches."

This was sound reasoning and the learned judge relied on some authorities to support her stance and I will now examine them.

At page 42 of the Record the learned judge below cited on three cases for assistance in construing clause 2(g) of the lease. All three cases were concerned with the interpretation of section 13(2) of the (U.K.) Settled Land Act 1890 which reads in part:

> "... making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let"

See **In re Leveson-Gwer's Settled Estate** [1905] 2 Ch. 95. There is sufficient similarity in the wording of the statute and clause2(g) of the lease for the citations to be helpful.

In **Clarke's Settlement** [1902] 2 Ch. 327 at 330; Buckley J. said:

> "But an "addition to buildings" within this section does not, I think, include the addition of land to a house, or furniture to a house. The "addition" here means structural addition in some sense of the word."

In re Blagrave's Settled Estates [1903] 1 Ch. 560 at 562-563 Collins M.R. said:

> "For my own part I have great difficulty in differing from Buckley J.'s view which was based, not merely upon his own opinion, but upon an earlier decision of Chitty J. **In re Gaskell's Settled Estates** [1894] 1 Ch. 485, where, although the words "structural addition" are not used, the learned judge seems to have considered that an addition to a building must be, in its terms, something in the nature of a structural addition."

Then Cozens-Hardy L.J. said at p 564:

> "Sect. 13, sub-s.ii., certainly does not mean making any additional building on an estate, but it is an addition to, or alteration in, existing buildings.

> However that may be, I think it is impossible to escape from the cogency of the reasoning of Buckley J. in the case of **In re Clarke's Settlement** [1902] 2 Ch.327."

In the light of the above reasons and citations, ground 4 of the Grounds of Appeal has not been successful. The learned judge also had an alternative formulation to dispose of ground 4 which to reiterate at page 50, she said:

> "... and in any event I hold that acceptance of the new term in 1987 constituted either a waiver of those breaches or an acceptance that they were not breaches."

Earlier at page 43 of the Record the learned judge accepted the authorities cited by Mr. Morrison QC. For the respondent Mr. Moncure. They were **Bass Holdings Ltd v Morton Music Ltd.** [1987] 2 All ER 1001 and **Thomas Hughes v Metropolitan Railway Company** [1887] 2 A.C. 439. In this context the material part of Clause 4(b) of the lease is pertinent. It reads at page 198 of the Record:

> "(b) If the Lessee shall be desirous of leasing the Leased Premises for a further term of five years from the expiration of the term hereby granted and shall not less than three months prior to the expiration of the term give to the Lessor notice in writing of such desire and if the Lessee shall have paid the rent hereby reserved and shall have performed and observed the several covenants and stipulations herein contained and on the Lessee's part to be performed and observed up to the expiration of the term then the Lessor will let and the Lessee will take the Leased Premises for a further term of Five years commencing from the day immediately following the expiration of the term hereby granted at the clear yearly rental calculated in accordance with the provisions of the Second Schedule hereto payable by

> equal monthly payments but otherwise on the same terms and conditions in all respects as are contained in this Lease including this Clause for renewal..."

The appellant in its Statement of Claim at page 9 of the Record admitted that the lease was renewed in 1987, thus:

> "4. On 20th February 1987 the Defendant duly served on the Plaintiff notice in writing renewing the said lease in accordance with the option to renew at clause 4 (b) of the lease between the parties aforesaid."

In this context the headnote in **Bass** summarises the ratio of the case. It reads at page 1001:

> "Held – The renewal option contained in cl 9 of the lease was to be interpreted according to the well-established principles relating to the interpretation of a condition precedent to the exercise by a tenant of an option in a lease that at the specified date he should have performed and observed all the covenants in the lease, since although cl 9 contained some unusual features the condition precedent contained therein was drafted in the well-established conventional form. Accordingly, cl 9 did not require that the tenants should never have committed any breaches whatsoever of any covenant prior to exercising the option but instead merely required that there be no subsisting breaches at the date when the option was exercised. It followed that the tenants were not prevented from exercising the option by past breaches of covenant which had become spent prior to exercising the option, and it was irrelevant whether the past breaches were of positive or negative covenant. The option had therefore been validly exercised, and the appeal would be allowed."

The point being made that even if there were breaches (which was not admitted) they were waived when the option to exercise was accepted.

Additionally, it was admitted in evidence at page 102 of the Record that Mrs. Cahusac-DeLisser spent more than one vacation at Mullion Cove after her husband died. However the case of **Perry v Davis and others** 3 CB (NS) 749 established the principle that "mere standing by and seeing the lessee making alterations which are in breach of his covenant does not operate as a waiver on the part of the lessor."

On the factual basis **Hughes v Metropolition Railway Company** (supra) was also relied on for the principle that if there were indeed breaches it would be unconscionable to rely on them to refuse renewal of the option. On the foregoing analysis ground 4 has not been successful.

It is now appropriate to deal with grounds 2, 3, 5 and 6 together they read as follows at page 2 of the Record:

> "2. That the Learned Trial Judge erred in law and in fact in finding that the memorandum dated 1st December 1991 was received by the Appellant, as this finding was against the weight of the evidence.
>
> 3. That the Learned Trial Judge erred in law and in fact in finding that the memorandum dated 1st December 1991 was notice given to the Landlord pursuant to clause 4 (b) of the lease between the Appellant and the Respondent.
>
> . . .
>
> 5. That the Learned Trial Judge erred in finding that the lease between the Appellant and the Respondent was not duly terminated on 30th May, 1992.
>
> 6. The Learned Trial Judge erred in finding that the Appellant validly exercised the option to

> renew the lease between the Appellant and the Respondent."

The gist of ground 6 is a complaint that the Appellant did not receive the notice to exercise the option. Here is how the learned judge treated the issue at page 19 of the Record:

> "On the 20th February 1987 the defendant duly served on the plaintiff notice in writing renewing the lease in accordance with the option to renew at clause 4 (b).
>
> The plaintiff pleads that thereafter the defendant failed to renew the lease in accordance with the option to renew and consequently the lease terminated on 30th May 1992."

With respect to the provision in the lease regarding notice clause 4 (g) reads at page 201 of the Record:

> "(g) Any notice or other communication hereunder shall be sufficiently made given and served upon the Lessor and the Lessee if delivered or sent by registered post addressed to the Lessor at
>
> or at such other address of which she may from time to time notify the Lessee in writing for this purpose or addressed to the Lessee at
>
> or at such other address of which he may from time to time notify the Lessor in writing for this purpose and every such notice or communication if posted pre-paid as aforesaid shall be deemed to have been given and served on the third day following the posting thereof in any Post Office in the United States of America and if delivered shall be deemed to have been given and served immediately on such delivery."

The learned judge at page 23 of the Record stated:

> "She also testified that letter dated November 21, 1987 (page 69 of Exhibit 1) was never delivered to Mrs. DeLisser at Evans Avenue and was not in accordance with Mr. Moncure's previous pattern of letters. That letter states inter alia:
>
> > ". . . Referring again to yours of the 21 June . . . It is true as you say that I have only leased Mullion Cove, but when the present term of our lease expires in 1992, you may take this as notice that I wish to renew and extend for a further term of five years, the third of nine such renewals called for under the lease."

I think it is useful to set out the letter in full. It reads at page 264 of the Record:

> "20th November 1987
>
> Dear Doris,
>
> Winsome tells us that you have not been well, which I am sorry to hear and hope that it is now all past. We understood you will be spending time with Basil and wonder if the two of you would like to look in on us at Mullion Cove over Christmas.
>
> Referring again to yours of 21 June, let me emphasize that the improvements to the kitchen and staff areas were undertaken to bring things up to the standard of the Tourist Board and JAVA: separate sinks for the washing of pans from actual food preparation and more agreeable circumstances for the staff etc.
>
> It is true as you say, that I have only leased Mullion Cove, but when this present term of our lease expire in 1992 you may take this as notice that I wish to renew and extend for a further term of five years, the third of nine such renewals called for under the lease.

> As to purchase, as I have said my offer is US$100,000 and I would hope we can talk about this and move forward at working something out. Wishing you a happy holiday with Basil.
>
> Yours truly."

Even if this letter was received it was merely an indication of what the respondent Mr. Moncure proposed to do. There was a letter of 30th May, 1988 seeking to amend the lease but the proposal was rejected by the appellant.

The next correspondence dated 29th May 1991 at page 281 of the Record contains the following passage:

> "If Edward Ashenheim thinks it best when Basil comes to Bluefields I will then serve legal notice of my intention to renew the lease for the next five year period. As you know, this is my right under the remaining forty years of the lease agreement."

This is not evidence that there was compliance with the clause of 4(g) of the lease. Moreover there is a post card in evidence dated December 1991 from the respondent Mr. Moncure to 4 Evans Avenue the then residence of Mrs. Cahusac-DeLisser. Be it noted there were a number of letters in the Record addressed by the respondent Mr. Moncure to Mrs. Cahusac-DeLisser at 4 Evans Avenue.

The learned judge continued thus at pages 25-26 of the Record:

> "By letter dated 4th June 1992, making reference to the above letter as well as to a letter dated 29th May 1991 Edward Ashenheim sought to confirm the renewal of the lease.

> On 17th September 1992, Miss Sonia Jones, attorney-at-law, responded that the lease was in fact terminated o the 30th May 1992 and requested Mr. Moncure to take immediate steps to relinquish possession of the premises."

It is important to set out the correspondence dated 1992. In so far as the letter dated 29th May 1991 is concerned the relevant passage has advertently been cited. Here is the correspondence. At page 286 of the Record it reads:

> "Contents of Letter dated 4th June. 1992 from Milholland, Ashenheim & Stone to Doris Cahusac DeLisser
>
> re
>
> MONCURE/MULLION COVE
>
> - - - -- - - - - - - - - - - - - -
>
> . . .
>
> NOTE: to SONIA
>
> It was Edith Thompson who refused to accept the letter, not Mrs. DeLisser."

Then at page 287 of the Record:

> "This is the copy letter referred to above from Milholland, Ashenheim & Stone to Mrs. Cahusac DeLisser
>
> ---
>
> We refer to the renewal of the Lease of "Mullion Cove" being all those parcels of land contained and described in Certificates of Title registered at Volume 651 Folio 25 and Volume 913 Folio 75 of the Register Book of Titles effected by letters dated May 29th, 1991, and December 1, 1991, and confirm that for the renewed period from 1.6..92 to 31.5.97 the yearly rental will be such amount calculated in accordance with the provisions of the Second Schedule of the Lease dated 3rd March, 1983. Such rent will be payable by equal monthly payments and save for

> such rental the renewed Lease shall be on the same terms and conditions in all respects as are contained in the Lease, including the caluse (sic) for renewal.
>
> NOTE: to S. J.: Betty Thompson is asking you please to peruse the paragraph after the Renewal Clause and advise her how it affects the case."

Then at page 288 of the Record the following appears:

> "June 4, 1992
>
> Mrs. Doris Cahusac-DeLisser
> 4 Evans Avenue
> Kington 8
>
> Dear Mrs. Cahusac-DeLisser:
>
> Enclosed is duplicate of a letter addressed to you and dated June 3, 1992 re C. Braxton Moncure – Mullion Cove, which our bearer attempted to deliver to you at approximately 1:30 pm. On Thursday, June 4, 1992, which you refused to accept.
>
> Yours faithfully
>
> Per: Edward Ashenheim"

Since there was no compliance with the notice provisions of the lease in Clause 4(g) of the lease it is difficult to support the learned judge's finding above and it seems that their being no proper notice not less than three months before expiry of thee lease. There could have been no proper exercise of the option. So considered grounds 5 and 6 of the Notice and Grounds of Appeal has been successful.

An issue of law was whether the notice to renew the option ought to be govern within a reasonable time. It must be stressed that the words to be construed in Clause 4(b) of the lease at page 198 of the Record were:

> ". . . shall not less than three months prior to the expiration of the term give to the Lessor notice in writing of such desire ..."

In such circumstances any notice given less than three months before the date of renewal would be ineffective. See **Biondi v Kirklington & Piccadilly Estates, Ltd.** [1947] 2 All ER 59 where the ratio at page 60 is applicable to this case states:

> "Close inspection of the clause leads me to one clear conclusion, that is to say, that no long interval of time was contemplated between the making of the request and the granting of the further lease."

There must be also an earlier cut off period before the notice can be served. I would think a period of two months before the stated three month period would be in compliance with clause 4 (b) of the lease but a notice before such a period would not be within the intendment of clause 4 (b).

In this context the following notice which was relied on by the respondent Mr. Moncure must be examined. It reads:

"1 December 1991

TO: Mrs. Doris Cahusac-Delisser
C/o The Manager – Please forward

FROM: C. Braxton Moncure

RE: Renewal of the Lease on "Mullion Cove"

> As we were unable to meet with your son Basil this past summer, this serves as notice that we are hereby renewing the lease on the property known as "Mullion Cove" from 1 June 1992 until 1 June 1997. Enclosed is check # 1117, which finalizes arrangements pertaining to this existing lease before our new five-year period begins.
>
> C. Braxton Moncure."

There is no evidence that anyone forwarded this Notice to Mrs. Cahusac-DeLisser. Even if this had been forwarded and received by Mrs. Cahusac-DeLisser it is arguable that it was forwarded too early.

On this analysis the appellant Cahusac has proved his case in accordance with the averments in the Statement of Claim at pages 5 and 6 of the Record which reads:

> "4. On 20th February 1987 the Defendant duly served on the Plaintiff notice in writing renewing the said lease in accordance with the option to renew at clause 4(b) of the lease between the parties aforesaid.
>
> 5. Thereafter the Defendant failed to renew the said lease in accordance with the option to renew at clause 4 (b) of the lease aforesaid, and the said lease thereby terminated on 30th May, 1992."

Here is how the learned judge addressed this issue at page 34 of the Record:

> "He wrote and took letter dated 1st December 1991 which dealt with the exercise of the option to renew, addressed to Mrs. DeLisser "c/o the Manager" to the National Capital Bank in Washington D.C., the bank where he pays the rent. The additional sum of three hundred and seventeen dollars and forty six cents ($317.46) referred to in the postcard at page 88 of

> Exhibit one was included in the rental cheque which he had enclosed in that letter."

Further on page 48 of the Record she made the crucial finding in this case which stated that:

> "I accept that Mr. Moncure did deliver the document dated 1st December 1991 to the bank and that on a balance of probabilities it was received by Mrs. DeLisser. I accept this evidence that he had previously communicated with her by that route."

The order in the Court below which stated that "Judgment be entered for the Defendant against the Plaintiff and costs to the Defendant to be agreed or taxed" must have been depended on the above finding of fact. This finding cannot be supported.

With respect to the very careful approach of the learned judge there is no evidence from the Bank that the notice was dispatched by them to Mrs. Cahusac-DeLisser by registered post or delivered personally to her so as to be sufficient with the intendment of clause 4(b) of the lease. The fact that the Bank credited Mrs. Cahusac-DeLisser's account with the rental which accompanied the notice is no proof that the notice was sent. Moreover, even if there were one or two instances where correspondence by this method was delivered to the Mrs. Cahusac-DeLisser, this was no proof that this notice was delivered.

The status at common law of the lessee Mr. Moncure at 30th May, 1992

The letter dated 17th September 1992 at pages 290-291 of the Record from Ms. Sonia Jones the former attorney-at-law for the appellant Cahusac correctly stated the position of the lease thus: "The lease expired on 30th May 1992." The letter continues, "you are accordingly formally requested to take immediate steps to relinquish possession."

A further letter from Ms. Carol Davis, the Attorney-at-law for the appellant Cahusac dated February 17, 1997, at page 298 of the Record reads in part:

> "As you are aware, the lease on the property was terminated on 30th May 1992, which termination was confirmed by letter dated 17th September 1992 by Mrs. DeLisser's then Attorney-at-Law, Miss Sonia Jones.
>
> Notice to Quit dated 20th May 1996 was duly served on you, and to date you have not vacated the premises."

At common law Mr. Moncure was a tenant at sufferance as from 30th May 1992 and as a consequence the following Notice to Quit was served on him. At page 217 of the Record the material part reads:

> "I, the undersigned, as Attorney-at-law for and on behalf of **DORIS CAHUSAC DeLisser,** your landlord and registered proprietor of all that parcel of land known as Blue Fields Pen situate in the parish of Westmoreland and being the land contained and described in Certificate of Title registered at Volume 651 Folio 25 of the Register Book of Titles, AND all those parcels of land situate at Bluefields in the Parish of Westmoreland, being the remainder of the land

contained and described in Certificate of Title registered at Volume 913 Folio 75 of the Register Book of Titles, (both parcels of land aforesaid hereinafter referred to as the said premises) HEREBY GIVE YOU NOTICE TO QUIT the said premises occupied by you for reasons as follows:

1. The said premises are required by the landlord for occupation as a residence for herself.

2. The said premises are required by the landlord for use by her for business and/or trade.

3. The said premises are required by the landlord for a combination of the purposes at (1) and (2) above.

4. The said premises are required by the landlord as a residence for '(persons)' wholly dependent upon her.

CONSEQUENTLY, I REQUIRE YOU TO QUIT AND DELIVER UP TO ME or to whomsoever I may appoint possession of the above mentioned premises which you presently hold from the landlord on the 1st day of May 1996 or at the end of the next complete month of your tenancy which will expire after the end of one (1) calendar month from the service upon you of this **NOTICE TO QUIT** and that before giving up possession you do pay all rentals due and owing by you to the 1st day of May 1996 as aforesaid.

TAKE FURTHER NOTICE that if you do not comply with the above mentioned provision, an ACTION will be commenced against you according to law.

DATED THE 20TH DAY OF MARCH 1996

PER CAROL DAVIS
ATTORNEY-AT-LAW FOR THE LANDLORD"

Mr. Moncure is still in occupation of Mullion Cove and in his Amended Defence on paragraph 7 pleads thus at pages 13-14 of the Record:

> "7. In reply to paragraph 6 of the Statement of Claim, the Defendant admits receiving the notice to quit referred to therein but states that the said notice was invalid or ineffective since the Plaintiff had no right to terminate the lease and make no admission, in any event as to the truth or reasonableness of the grounds indicated in the notice for purposes of the Rent Restriction Act."

It is worth notice in passing that while the respondent sought the services of Attorneys-at-law for drafting the lease, the original appellant Mrs. Doris Cahusac-DeLisser had the lease read to her before she signed. It does not appear that she sought an opinion of Counsel whether it was possible for the estate to be excluded from the provisions of the Act.

The position under the Rent Restriction Act

Ground 8 of the Notice and Grounds of Appeal reads at page 2 of the Record:

> "8. The learned trial judge erred in finding that there was greater hardships to the Respondent in not giving possession of the leased premises to the Appellant."

It was the respondent Moncure who introduced the Rent Restriction Act in paragraph 7 of his Amended Defence thus at page 13 of the Record:

> "7 In reply to paragraph 6 of the Statement of Claim, the Defendant admits receiving the notice to quit referred to therein but states that the said notice was invalid or ineffective since the plaintiff had no right to terminate the lease and make no admission, in any event as to the truth or reasonableness of the

> grounds indicated in the notice for purposes of the Rent Restriction Act."

It is convenient to state at this point that in addition to being executor of her mother's estate Basil Cahusac is of the three beneficiaries of the estate. The other two are his sister Mrs. Dorothy Thompson who gave evidence in the Court below and his handicapped brother David Cahusac.

Section 3 of the Rent Restriction Act (the "Act") reads:

> "3.-(1) This Act shall apply, subject to the provisions of section 8 to all land which is building land at the commencement of this Act or becomes building land thereafter, and to all dwelling-houses and public or commercial buildings whether in existence or let at the commencement of this Act or erected or let thereafter and whether let furnished or unfurnished."

Then section 3 (2) reads:

> "All building land, dwelling-house or public or commercial buildings to which this Act for the time being applies are hereafter referred as "controlled principles."

Mr. Moncure was now a statutory tenant pursuant to section 25(1) of the Act. Then there are restrictions to the right of possession by the Landlord stipulation in section 25 of the Act with regard to controlled premises and the relevant provision are stated thus:

> "25.-(1) Subject to section 26, no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom, shall, whether in respect of a notice to quit given or proceedings commenced before or after the commencement of this Act, be made or given unless-
> . . .

(b) some other obligation of the tenancy (whether express or implied and whether under the contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act has been broken or not performed and, in the case of the non-performance of any such obligation by the tenant, the tenant has been in default for at least thirty days; or

...

(d) the tenant has given notice to quit, and, in consequence of that notice, the landlord has contracted to sell or let the dwelling-house or has taken any other steps as a result of which he would, in the opinion of the court, be seriously prejudiced if he could not obtain possession; or

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

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

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

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

and unless in addition, in any such case as aforesaid, the court asked to make the order or give the judgment considers it reasonable to make such order or give such judgment:

. . ."

Then there follows the following provision:

"Provided that an order or judgment shall not be made or given on any ground specified in paragraph (e), (f) or (h) unless the court is also 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."

Further before the Court makes such an order the following procedural steps should be required pursuant to section 25(2):

> "(2) A court asked to make such an order or give such a judgment -
>
> (a) shall require the Secretary of a Board to furnish the court with a certificate setting out such information as the Board possesses in relation to the premises in respect of which the application is made;
>
> (b) may –
>
> (i) adjourn the application from time to time;
>
> (ii) stay or suspend execution of the order or judgment, or postpone the date of possession for such period as it thinks fit, and from time to time grant further stays or suspensions of execution and further postponements of the date of possession
>
> (c) shall, if it makes the order or gives the judgment, state in writing the grounds on which it does so.

> (3) Any adjournment, stay, suspension or postponement under paragraph (b) of subsection (2) may be subject to such conditions, if any, as the court thinks fit, and, if those conditions are complied with and the order has been made or the judgment given, the court may discharge or rescind the order or judgment."

With respect to this initial issue, it is appropriate to find that as the option to renew the lease was not exercised, then Mr. Moncure is a tenant at will and he has been in default for 30 days subsequent to 30th May 1992, pursuant to 25(1)(b) of the Act and the appellant is entitled to recover possession within a reasonable time thereafter.

However, pursuant to clause 25 (1) (e) of the Act the Notice to Quit having been served, the lessor Mr. Cahusac proposes to resume running the house as a guest house and develop the property and the adjoining lands. He will be seriously prejudiced if possession cannot be obtained.

Here is how the learned judge treated this aspect of the matter at pages 50-51 of the Record:

> "I consider this aspect of the case against the background of Mrs. DeLisser having served notice to quit in 1996, thereafter commencing proceedings for recovery of possession and her death in 1997 subsequent thereto. The landlord now being (executor) of the estate, any reason given for recovery of possession must be examined in that light. It appears that Mr. Cahusac's testimony as to future plans for Mullion Cove was given on the basis that he was the landlord. In the course of his evidence he testified, "I am going to run it as a family business." He also wishes to have the property back as it is full of memories for him. He made reference

> to Mrs. Thompson, his co-executor, being in a nursing home and that his ailing brother David would benefit from income to be derived from the use of the property. In my view the reasons for requiring possession as set out in the notice to quit have not met the statutory requirements.
>
> Mr. Moncure has testified that he ahs over a period of time, spent over US$150,000,00 for repairs and improvements to the property. It is now part of an integrated facility and he is in receipt of certain concessions because of its present classification by tourism officials and if the order requested were to be granted it would adversely affect his position.
>
> I find that the burden of proof in relation to hardship has not been satisfied by the landlord on whom that burden rests. Pursuant to the proviso to section 25(1) of the Rent Restriction Act, having regard to all the circumstances of this case, I am satisfied that less hardship would be caused by granting the order than by refusing to grant it.
>
> On the evidence presented it would not be reasonable to grant the order for recovery of possession.
>
> I find that the Plaintiff has not established his case on a balance of probabilities and accordingly, I refuse to grant the reliefs sought."

Firstly, in this passage the learned judge gave no recognition that Mr. Moncure was a tenant at sufferance when the Notice to Quit was served on him. It is important to state the position of a tenant at sufferance and then examine the impact of the Act on such a tenant. Megarry and Wade **The Law of Real Property** 2nd edition at page 45 describes this tenancy thus:

> "A tenancy at sufferance arise where a tenancy has terminated but the tenant "holds over" (i.e. remains

> in possession) without the landlord's assent or dissent."

The validity of the Notice to Quit in the light off 25(1)(b)(d) and (e) of the Act which deals with recovery of controlled premises. Section 26 deals with termination of tenancy and section 28 thereafter deal with Moncure's position as a statutory tenant.

A statutory tenant is defined thus in section 28 of the Act:

> "28. –(1) A tenant who, under the provisions of this Act, retains possession of any premises, shall, so long as he retains possession, observe and be entitled whether as against the landlord or otherwise, to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the original contract of tenancy:
>
> Provided that, notwithstanding anything in the contract of tenancy, a landlord who obtains an order for the recovery of possession of premises or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant."

Before addressing these issues it is necessary to deal with the definition of "public or commercial building" as defined in section 2(1) of the Act.

It reads:

> "public or commercial building" means a building, or a part of a building separately let, or a room separately let, which at the material date was or is used mainly for the public service or for business, trade or professional purposes, and includes land occupied therewith under the tenancy but does not include a building, part

> of a building or room when let with agricultural land;"

There is no dispute that Mullion Cove was used as a guest house before the lease to the respondent Mr. Moncure. Further the evidence is that it is now part of a complex with at least two other properties owned by the respondent Mr. Moncure that qualifies under the Resort Cottages (Incentives) Act.

Section 26 of the Act makes provision for notice of termination and therefore it is necessary to determine whether the Notice to Quit served on the respondent Mr. Moncure dated 20th March 1996 and served on 4th April, 1996 was in compliance with the Act. The notice therefore should be for one year before expiry of the lease which would be 30th May 1993 since the lease expired 30th May 1992. The notice therefore did not comply with section 26(1)(2) which reads:

> "26.-(1) Subject to the provisions of this section, the landlord of any public or commercial building may terminate the tenancy by notice in writing given to the tenant specifying the date at which the tenancy is to come to an end (hereinafter referred to as "the date of termination").
>
> "(2) A notice under subsection (1) shall not have effect for the purposes of this Act unless it is given –
>
> (a) not less than twelve months before the date of termination specified therein; and
>
> (b) in the case of premises leased to the tenant for a fixed term of years, not more than twelve months before the date of expiration of the lease."

Since the notice was not in compliance with section 26 of the Act then reliance must be placed on section 25 which to reiterate reads in part:

> "(1) . . .no order or judgment for the recovery of possession of any controlled premises... in proceedings commenced. . . after commencement of this Act, be made or given unless-
>
> . . .
>
> (b) some other obligation of the tenancy (whether express or implied and whether under the contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act has been broken or not performed and, in the case of the non-performance of any such obligation by the tenant, the tenant has been in default for at least thirty days..."

This provision suggests that since the lessee Mr. Moncure did not exercise his option proceedings could be commenced within 30 days of expiry to recovery possession. This provision recognizes that a tenant at sufferance at common law is also a statutory tenant in controlled premises, has to yield to the lessor's demands as he holds over for a short period before proceedings for recovery may be commenced.

However, the alternative which the appellant relied on is section 25(1)(e) of the Act is cited again for ease of reference. It reads:

> "25.-(1) Subject to section 26, no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom, shall, whether in respect of a notice to quit given or proceedings commenced before or after the commencement of this Act, be made or given unless –

...

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

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

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

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

The important proviso come into play reads:

> "Provided that an order or judgment shall not be made or given on any ground specified in paragraph (e), (f) or (h) unless the court is also 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:.."

The learned judge decided against the lessor as was stated earlier. Basil Cahusac is the executor and one of the three beneficiaries of the estate. The reasons certainly met statutory requirement. Further there is evidence that the property extends on the other side of the road and he has given evidence that he plans to develop that part of the property also. It should be added that Mr.

Cahusac the appellant has considerable experience in the tourist industry and he is the Group director for entertainment in the Sandals Hotel Group.

Here is how the learned judge summarized the respondent Mr. Moncure's evidence on this aspect of the matter at 51 of the Record:

> "Mr. Moncure has testified that he has over a period of time, spent over US$150,000.00 for repairs and improvements to the property. It is now part of an integrated facility and he is in receipt of certain concessions because of its present classification by tourism officials and if the order requested were to be granted it would adversely affect his position."

The crucial finding on the same page is as follows:

> "I find that the burden of proof in relation to hardship has not been satisfied by the landlord on whom that burden rests. Pursuant to the proviso to section 25 (1) of the Rent Restriction Act, having regard to all the circumstances of this case, I am not satisfied that less hardship would be caused by granting the order than by refusing to grant it."

It must be recalled that the learned judge found that the option was properly exercised. She therefore examined the proviso to section 25 of the Act against that background. On the other hand I had found that the option was not exercised and that Mr. Moncure was a tenant at sufferance in controlled premises.

The above analysis dispose of the Respondent's Notice which reads at page 1A of the Record:

> "The Learned Trial Judge was entitled to conclude from the course of dealing between the parties during the four year period 1992 – 1996 when rent was paid and accepted and other outgoings such as taxes and

> insurance paid by the Respondent in accordance with the terms of the renewed lease, that Mrs. DeLisser's conduct was explicable only on the footing that she had received the notice of 1st December, 1991 and accepted that the lease had thereby been validly renewed."

The desire to recover possession for the family and run the resort cottage for the benefit of the family are strong grounds to urge before a Court. This is in contrast to a professional financer who is also a man of business. He can easily lease another property although not at the bargain basement rates which he has been paying for the property in issue. It is true that Mr. Moncure has spent a tidy sum to improve the property so as to comply with the provisions of the Resort Cottages (Incentives) Act and other regulations imposed by the Government for the tourist industry. Improvements were permitted under the lease agreement and the failure to exercise the option to renew meant that the improvements would accrue to the landlord.

Gordon Langford, a chartered surveyor, gave the following evidence at page 82 of the Record:

> "This property is marketed along with 5 other properties in area to upscale Americans. On the pages entitled rate-sheet there is a column for Mullion Cove giving rentals for the high medium and low season. The rental is related to the number of adults staying on the property and it can accommodate 12 adults and ranges from a low season for 2 people of minimum of $4,000.00US per week to 12 people in the high season of $11,400.00US per week. There are some additions for children and premiums.
>
> Q. How large is the house?

> Ans. 6 double bedrooms and a couple of rooms that could be used for children, basically 6 double bedrooms.
>
> One does not normally advertise at a price, rents higher than you can achieve or lower than you can get. These are short-term resort rentals 2 or 3 weeks."

The other two beneficiaries of the estate are Mr. Cahusac's sister who is now in a nursing home and a handicapped brother. The increased rental now available on the market would be to great advantage for the family. The learned judge found that the "reason for requiring possession as set out in the notice have not met the statutory requirements" and did not give sufficient weight to the hardship the family would suffer from the failure to recover possession. The onus of proof is on the landlord who institutes proceedings for recovery of possession (see **Quinlan v Philip** (1965) 9 W.L.R.) To my mind the appellant has satisfied the onus of proof before the learned judge below.

On the other hand this is how the learned judge treated the respondent Mr. Moncure who was a tenant at sufferance in controlled premises at page 51 of the Record:

> "Mr. Moncure has testified that he has over a period of time, spent over US$150,000.00 for repairs and improvements to the property. It is now part of an integrated facility and he is in receipt of certain concessions because of its present classification by tourism officials and if the order requested were to be granted it would adversely affect his position.
>
> I find that the burden of proof in relation to hardship has not been satisfied by the landlord on whom that burden rests. Pursuant to the proviso to

> section 25 (1) of the Rent Restriction Act, having regard to all the circumstances of this case, I am not satisfied that less hardship would be caused by granting the order than by refusing to grant it.
>
> On the evidence presented it would not be reasonable to grant the order for recovery of possession.
>
> I find that the Plaintiff has not established his case on a balance of probabilities and accordingly, I refuse to grant the reliefs sought."

Once it was found in the Court below that the option had been correctly exercised then the reasons I have stated support the appellant's stance. When Mr. Moncure is obliged to rely on the provisions of the statute because of failure to exercise the option the reasons are far less convincing. It ought to be relatively easy for respondent Mr. Moncure to acquire another property in place of the estate in issue. On the evidence the Cahusac family are not in a position to acquire another estate to bring the income necessary for their upkeep. It is in the light of these factors I think the learned judge exercised her discretion wrongly and I would then order conditionally that the appellant Cahusac recovers the estate. I do so because the proviso to section 25 (1) (e) requires the Court to 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."

Before this is done there must be a reference to the Secretary of the Board pursuant to section 25 (2) of the Act and section 25(4) of the Act comes into play. Section 25 (4) reads:

> "(4) A certificate of the Assessment Officer or the Secretary of a Board, purporting to be signed by him as such, and furnished to the court in accordance with a requirement under paragraph (a) of subsection (2) shall be admissible as *prima facie* evidence of the matters stated therein:
>
> Provided that any of the parties to the Proceeding may require the Assessment Officer or the Secretary to attend and give evidence to the court."

So there are two other hurdles for the appellant. Before a final order is made, the Court is obliged to make the following enquiry as determined by section 25(2) of the Act and I quote:

> "(2) A court asked to make such an order or give such a judgment –
>
> (a) shall require the Secretary of a Board to furnish the court with a certificate setting out such information as the Board possesses in relation to the premises in respect of which the application is made;
>
> (b) may –
>
> (i) adjourn the application from time to time;
>
> (ii) stay or suspend execution of the order or judgment, or postpone the date of possession for such period as it thinks fit, and from time to time grant further stays or suspensions of execution and

> further postponements of the date of possession;
>
> (c) shall, if it makes the order or gives the judgment, state in writing the grounds on which it does so."

So having regard to the above provision I would order that the matter be remitted to the Supreme Court for the Registrar to require the Secretary of the Board to furnish the Court with the information stipulated by section 25(2) of the Act so as to enable the Supreme Court to comply with section 25(1) (e) of the Act.

May I say I agree with the reasons of my learned brother Clarke J. (Ag.) except for his analysis of the provisions of the Rent Restriction Act. He did consider all the relevant provisions. In fairness to my learned brother and the learned judge in the Court below, these sections of the Act were not cited by counsel. Nor was any examination made as to whether the estate was exempted from the provisions of the Act. These are aspects of the case of which judicial notice must be taken. See section 21 of the Interpretation Act. Section 8(1) of the Act reads:

> "8.-(1) The Minister may by order declare any class of premises specified in such order to be exempted premises"

So the reader of the Act is alerted to the subsidiary legislation. I am sure if counsel on either side had been aware of the significance of the subsidiary legislation, it would have been brought to the attention of the Court.

So the order of this Court ought to be. Appeal allowed in part. Order of the court below set aside. Matter remitted to the Supreme Court for (1) compliance with section 25(2) and (4) of the Act and (2) to ascertain whether the property is exempt from the Act pursuant to either:

(a) The Rent Restriction (Public Commercial Building Exemption Order 1983 dated 5th April 1983, or

(b) The Rent Restriction (Exempted Premises) Order 1983 which applies to resort cottages approved by the Minister.

The Registrar of the Supreme Court should act forthwith with respect to the referral, as this judgment involves important property rights. There has been a long delay in handing down this decision which is regretted. Having regard to the reasoning and result of this appeal I think there should be no order as to costs at this stage.

PANTON, J.A.

I have read the reasons for judgment written by my learned brothers, Downer, J.A. and Clarke, J.A. (Ag.), the latter now regrettably deceased. I agree that the option was not properly exercised, and, like Downer, J.A., I am of the view that the matter should be remitted to the Supreme Court for it to be ascertained whether the property is exempt from the Rent Restriction Act.

CLARKE, J.A. (Ag.): [Dissenting]

The issues which arise on this appeal are clear. The first issue is this: Did the respondent, as McCalla J found, validly exercise an option to renew for a third term the lease of premises known as "Mullion Cove" situate at Bluefields in the parish of Westmoreland by delivering to the late Mrs. Doris Delisser's bank in Washington D.C. U.S.A. a memorandum dated December 1, 1991 written by him?

Mullion Cove was leased to the respondent by Mrs. Delisser for a term of five years commencing on June 1, 1982 with an option to renew exercisable on no more than nine occasions. It has been common ground that the option to renew for a second five year term commencing on June 1, 1987 was duly exercised by the respondent. Although the notice of renewal for the exercise of that option had been duly served, a copy of the notice, be it noted, was delivered to Mrs. Delisser at her address at 4 Evans Avenue, Kingston 8.

The appellant, however, challenges McCalla , J's finding in the court below that on a balance of probabilities the letter dated December 1, 1991 was received by Mrs. Delisser and that the lease was thereby renewed for a third term. The appellant contends that there has been no proof that the letter was received by Mrs. Delisser; that in any case, the

letter did not constitute a proper notice of renewal; and that after the first renewal, no notice was given to, or received by Mrs. Delisser.

The letter in question reads as follows:

> "1 December, 1991
>
> To: Mrs. Doris Cahusac Delisser
> C/o The Manager –please forward
>
> From: C. Braxton Moncure
> **Re: Renewal of the lease on Mullion Cove**
>
> As we were unable to meet with your son Basil this past summer, this serves as a notice that we are hereby renewing the lease on the property known as "Mullion Cove" from 1 June 1992 until 1 June, 1997. Enclosed is check #1117, which finalizes arrangements pertaining to this existing lease before our new five year period begins.
>
> Signed: _____
> C. Braxton Moncure
>
> Date: 1 December, 1991

It is plain as plain as can be that the letter was in fact a notice of renewal of the lease. The question of crucial importance, however, concerns whether the respondent proved at trial that the notice of renewal was given to Mrs. Delisser in accordance with the terms of the lease. Clause 4 (b) of the lease provides:

> "If the Lesee shall be desirous of leasing the leased premises for a further term of five years from the expiration of the term hereby granted and shall not less than three months prior to the expiration of the term give to the Lessor notice in writing of such desire and if the lessee shall have and shall have paid the rent hereby

> reserved and shall have performed and observed the several covenants and stipulations herein contained and on the lessee's part to be performed and observed up to the expiration of the term then the Lessor will let and the Lessee will take the leased premises for a further term of five years... PROVIDED that this option to renew cannot be exercised more than nine occasions ..." (Emphasis supplied")

Clause 4 (g) incomplete by reason of the omission of the addresses for service in the first instance of the parties to the lease, provides:

> "Any notice or other communication hereunder shall be sufficiently made given and served upon the Lessor and the Lessee if delivered or sent by registered post addressed to the Lessor at
>
> or at such address of which she may from time to time notify the lessee, in writing for this purpose or addressed to the lessee at or at such other address of which he may from time to time notify the lessor in writing for this purpose and every such notice or communication if posted pre-paid as aforesaid shall be deemed to have been given and served on the third day following the posting thereof in any Post Office in the United States of America and if delivered shall be deemed to have been given and served immediately on such delivery."

Mr. Morrison Q.C. submitted that clause 4 (g) provides no assistance in determining the issue under consideration. The introductory words of the clause, "Any notice... hereunder shall be sufficiently made given and served", characterise it as a deeming provision merely. Even if the clause had been fully completed by the inclusion of respective addresses for service upon the lessor and upon the lessee, it does not purport to

provide an exclusive or mandatory method of service. There is also no evidence that the lessor ever notified the lessee of an alternative address "for this purpose", that is, for service. Such notification would not be affected by reason of the course of dealing by the lessor with the lessee from a particular address, namely, 4 Evans Avenue, Kingston 8, albeit that the lessee was at all material times aware of that address. All that was required was that the notice should have come to the lessor's attention. As the clause did not prescribe any particular method affecting service of notices, the lessee was free to serve his notice by any method that would be effective in bringing it to the attention of the lessor. The issue, therefore, is, Mr. Morrison argues, whether as a matter of probability the notice of December 1, 1991 did come to the attention of the lessor, Mrs. Delisser. On this basis Mr. Morrison compendiously submitted that the learned judge's finding ought not to be disturbed, inferred, as it was, from particular primary facts proved from the evidence.

In seeking further support for the finding of the learned judge, Mr. Morrison relied on the following respondent's notice:

> "The learned trial judge was entitled to conclude from the course of dealing between the parties during the four year period 1992-1996 when rent was paid and accepted and other outgoings such as taxes and insurance paid by the Respondent in accordance with the terms of the renewed lease, that Mrs. Delisser's conduct was explicable only on the footing that she had received the notice of 1st December, 1991 and

> accepted that the lease had thereby been validly renewed."

Both Mr. Morrison and Ms.Davis correctly submitted that options are in the nature of privileges and accordingly grantees have the correlative obligation to ensure that the preconditions for their exercise are strictly complied with. For Mr. Morrison, while clause 4(b) of the lease is applicable clause 4 (g) thereof gives no assistance. The only precondition for the exercise of the option was for the notice of December 1, 1991 to have come to Mrs. Delisser's attention. Ms. Davis on the other hand submitted that clause 4 (g) as well as clause 4(b) stipulates the preconditions for the exercise of the option to renew the lease.

With that submission of Ms.Davis I entirely agree. For the option to be exercisable clause 4(b) requires among other things that the lessee give notice in writing to the lessor of his desire to renew the lease. How is notice to be given to the lessor? The instrument of lease itself provides the answer in clause 4(g). This is no less so merely because that clause omits the addresses for service in the first instance. It provides for delivery of notices by registered post addressed to one party by the other at any alternative address notified in writing by the party on whom the notices are to be served. The clause also stipulates for personal service or delivery of notices.

Clause 4(g) is therefore not only applicable but it provides exclusive methods for giving notice. In my opinion the clear intention of the parties

to the lease as to how notices are to be given can best be expressed by the maxim "**expressio unius personae vel rei, est exclusio alterius**". What clause 4(g) says is that notices are to be given to either the lessor or the lessee by delivery by registered post to the respective addresses notified in writing by one party to the other or by personal service or delivery. The extent of the deeming provision of the clause is this: Notices are deemed to have been given or served (the terms are interchangeable) by the former method on the third day following any such posting in any Post Office in the U.S.A. or, by the latter method, immediately on delivery.

The lessee on whom the onus lay to prove that the notice had been given within the meaning of clauses 4(b) and 4(g) did not employ either method. There had been copious exchange of letters between the lessor and the lessee. In that correspondence there is no question that the respondent lessee had been duly notified of the lessor's address as being 4 Evans Avenue, Acadia, Kingston 8. In the result the notice of December 1, 1991 was neither posted nor delivered to the lessor in the manner intended by the parties to the lease. In fact, as Ms.Davis pointed out, other than the evidence accepted by the leaned judge that it was delivered to the Manager of the lessor's bank in the U.S.A. and that the lessee had previously communicated with the lessor by that route, there is no evidence as to what then happened to it. There is no evidence for instance, that it was posted or delivered to anyone.

In my judgment, therefore, the deduction by the learned judge that on a balance of probabilities the notice was received by Mrs. Delisser is unavailing. Ineffectual, too, is the argument advanced before us that the learned judge was entitled to conclude that Mrs. Delisser's conduct (as specified in the respondent's notice) was explicable only on the footing that she had received the notice of December 1, 1991 and accepted that the lease had thereby been validly renewed. Her conduct in accepting rent and permitting the payment of outgoings such as taxes and insurance by the respondent during the period 1992 to 1996 would not satisfy the exclusive ways by which the parties intended that notices should be given under clauses 4(b) and 4 (g). Such conduct could, arguably, be evidence of waiver or estoppel. But, as Ms.Davis points out, neither waiver nor estoppel has been argued on behalf of, or relied upon by the appellant on this aspect of the appeal.

For the foregoing reasons, I am of the view that the respondent failed to give the lessor the required notice of renewal and accordingly, the learned trial judge erred in finding that the respondent validly exercised the option to renew the lease for a third term, that is to say, the period June 1, 1992 to June 1, 1997.

I now come to the second and third issues. They were correctly formulated by Mr. Morrison thus:

> "**Second Issue:** Was the respondent in breach of the covenant of the lease prohibiting the

making of 'additions to the buildings on the leased premises without the written comment of the Lessor'. (Clause 2(g).

Third Issue – Even if the respondent was in breach of clause 2(g) did Mrs. Delisser by permitting the renewal of the lease in 1987, either waive the breach(es) or acknowledge thereby that they were spent; alternatively, did Mrs. Delisser's conduct in acquiescing in the work carried out by the respondent amount to a waiver which made it unconscionable for her to rely upon any such breach(es)."

The question of additions

Ms.Davis submitted that in any event the respondent would not be entitled to renew because he breached his covenant not to make additions to the building or buildings on the leased premises without the permission of the lessor. She urged the court to say that the learned trial judge erred in finding that the works carried out by the respondent including the construction of a sundeck or retaining wall and a water tank during the second term of lease were not additions within the meaning of clause 2(g) of the lease. These works she submitted were structures and should be construed as additional buildings.

Mr. Morrison submitted that none of the works done on the property since 1982 amounted to "additions" within the meaning of clause 2(g). On the plain language of that clause and taking into account the definition of the word ," building", what the clause prohibits is additions to existing buildings. So, for example, in the case of the water tank built by

the respondent, the clause was not breached for there was no water tank there before. He further submitted that in the context of the lease and the circumstances of the case the word, "additions", refers to structural additions in the sense that there must have been some increase in the area of the building(s) (which was not the case here) and not merely the improvement of the building by the provision of additional amenities. He cited in support, ***In Re Clarke's Settlement*** [1902] 2 CH. 327; ***In Re Blagrave's Settled Estates*** [1903] 1 Ch.D 560; and in ***Re Leveson-Gower's Settled Estate*** [1905] 2 Ch.D.95.

I agree with those submissions of Mr. Morrison as they are supported by authority and by the correct approach taken by McCalla, J, in resolving the issue in the light of the evidence.

Here is how she determined the issue:

> "It now falls to be determined whether the defendant breached clause 2(g) of the lease by the work he has done on the leased premises.
>
> It is agreed on both sides that floodwater had done damage to Mullion Cove in 1979. I accept the evidence of Mr. Moncure that when he leased the premises it was generally in a run-down condition.
>
> Given the purpose for which Mullion Cove was being used at the time the defendant entered into the lease and the condition it was in, it is not surprising that the lease did not prohibit alterations or improvements, replacements and repairs.

> I must therefore consider the meaning of the word 'additions' in the context of the words used in the lease.
>
> ...
>
> The evidence shows that Mr. Moncure had sought a waiver of clause 2(g) in order to build additional rooms facing the waterfront. He had also sought and obtained permission to build a tennis court at Mullion Cove. I accept his evidence since that when he built the sundeck prior to his wedding he did so with that covenant in mind and that it is a free-standing structure with steps not connected to the house. I believe his testimony that he showed Mrs. Delisser the sundeck, air conditioning units and work he had done to the garage. It does not appear that Mrs. Delisser considered the work to be anything other than improvements.
>
> ...
>
> I have examined the evidence and considered each item pleaded as constituting a breach. I am of the opinion that the lease prohibited structural additions and that the work carried out by the defendant was not in breach of clause 2 (g).
>
> ...
>
> In my judgment the evidence supports the contention that what the defendant did on the premises were improvements, repairs and replacements which were not prohibited by the lease..." see pages 48,49 and 50 of the Record.

Equally, the learned judge's treatment and findings on the alternative issue of waiver and acquiescence cannot be faulted.

Waiver

Ms. Davis submitted that waiver would not be applicable for a breach subsequent to 1987. There was no evidence that Mrs. Delisser visited the property at all in that period. Further merely standing by and seeing additions, she submitted, would not be a waiver of a breach of covenant.

As Mr. Morrison pointed out, Basil Cahusac had in response to a suggestion in cross-examination stated that it "could be possible" that, save for a concrete walkway, all of the items described in his evidence as additions were completed prior to February 20,1987: (see page 94 of the Record). And indeed this accords with the respondent's evidence at pages 117-124 of the Record. I therefore agree that in those circumstances the learned judge was correct in holding "that acceptance of the new term in 1987 constituted either a waiver of those breaches or an acceptance that they were not breaches": (see page 50 of the Record). Further, as the learned judge pointed out, in the letter dated September 11, 1992 from Mrs. Delisser's then attorney-at-law seeking to recover possession, there was no mention made of any breaches by the respondent (see page 93). In fact, the question of additions was raised for the first time on behalf of the appellant by Ms. Davis' letter dated July 11, 1997 (page 93). So, up to 1992, even if there had been breaches of clause 2(g), they had been spent.

Acquiescence

The evidence showed that Mrs.Delisser had vacationed at the premises and had from time to time been shown by the respondent the improvements. Notwithstanding Ms.Davis' submission to the contrary, I agree with Mr. Morrison that on the evidence the learned judge was justified in finding that any breaches by the respondent had been acquiesced or waived by her, and that it would be unconscionable to permit the appellant to rely on them: see ***Hughes v Metropolitan Railway Company*** [1877] 2 A.C. 439, 448.

The Final issue

The final issue raised on this appeal is this: On the basis that the lease had not been validly renewed by the memorandum of December 1, 1991, did the plaintiff/appellant establish that he was entitled to possession within the provisions of the Rent Restriction Act?

Although for the reasons already given herein, the option to renew the lease for the period 1992 to 1997 had not been validly exercised by the respondent, it must be understood that the appellant would not automatically be entitled to an order for possession. This is so because the premises were at all material times "controlled" premises to which the Rent Restriction Act applied.

I must therefore consider whether the learned judge erred in concluding that it would not be reasonable to grant the order for

possession. Section 25 of the Act makes it abundantly clear that no judgment for recovery of possession can be made or given unless for any of the specified grounds in subsection (1) thereof:

> "and unless in addition, in any such case as [set out in section 25(1)(a) to (f)] the court asked to make the order or give the judgment considers it reasonable to make such order or give such judgment..."

Notice to quit and deliver up possession of the premises had been served upon the respondent by Mrs. Delisser in 1996. The grounds given for the landlord requiring possession, were consistent with section 25(1)(e) of the Act. They were set out in the notice and repeated in the amended Statement of Claim as follows:

> "(1) The said premises are required by the landlord for occupation as a residence for herself.
>
> (2) The said premises are required by the landlord for use by her for business and/or trade;
>
> (3) The said premises are required by the landlord for a combination of the purposes at (1) and (2) above;
>
> (4) The said premises are required by the landlord as a residence for persons wholly dependent on her."

The Act further provides in the proviso to section 25(1) that in those circumstances falling within section 25 (1) (e):

> "...an order or judgment shall not be made unless the Court is also 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..."

An order for possession could not therefore be made unless (a) the landlord established one of the grounds specified in section 25(1); (b) the court considered it reasonable to make the order and (c) the court was satisfied that less hardship would be caused by granting the order than by refusing it. Having regard to the wording of the proviso to the subsection the onus of showing that less hardship would be caused by granting the order than refusing it is upon the landlord/appellant: see ***Quinlan v Phillip*** [1965] 9 W.I.R. 269.

I am prepared to hold that for the purposes of section 25, Basil Cahusac, his sister Edith Cahusac Thompson, as executors of their mother's (Mrs. Delisser's) estate became by operation of law the landlord and were not required to give fresh notice to the respondent after their mother's death in 1997. The question of hardship, considered by the learned judge, remained, nevertheless, of the first importance. Basil Cahusac gave evidence of future plans for Mullion Cove on the basis that he was landlord. An accurate summary of his evidence on this aspect of the case is given by the learned judge at pages 51 of the Record:

> "In the course of his evidence he testified, 'I am going to run it as a family business'. He also wishes to have the property back as it is full of memories for him. He made reference to Mrs.

> Thompson his co-executor, being in a nursing home and that his ailing brother, David, would benefit from income to be derived from the use of the property".

Moncure, on the other hand, gave evidence as to what he had done to bring the house on the property back to international standards of hospitality. What he said was essentially this: He had made Mullion Cove, by dint of planning and expenditure by him to the tune of some US$150,000.00 on improvements and repairs, part of an integrated tourist facility which included other properties in the same locale with amenities such as a tennis court. Mullion Cove had become a vital part of a hotel resort which benefitted from meaningful concessions for the importing of hotel supplies.

Contrasting the potential hardships, therefore, that would be caused by an order for possession, I agree with the learned judge that the landlord on whom the burden lay did not show that less hardship would be caused by granting the order than by refusing to grant it. In all the circumstances, therefore, I agree with her that on the evidence presented it would not be reasonable to grant the order for recovery of possession.

I would accordingly dismiss the appeal.

ORDER

DOWNER, J.A.:

By a majority; Downer, Panton JJA [Clarke JA (Ag.)] dissenting:

Appeal allowed in part. Order of the Court below set aside. Matter remitted to the Supreme Court:

(1) for compliance with section 25(2) and (4) of the Rent Restriction Act.

(2) to ascertain whether the property is exempt from the Act pursuant to section 8(1)

(3) No order as to costs.