JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 52/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	MICHAEL EVANS	PLAINTIFF/APPELLANT
AND	ROBERT YOUNG	DEFENDANT/RESPONDENT

Hugh Small, Q.C., instructed by Gresford Jones for the appellant

Dr. Lloyd Barnett and Patrick Foster, instructed by Clinton Hart & Co. for the respondent

October 13, 14 and December 18, 1998

RATTRAY, P.:

I have read in draft the judgment of Patterson, J.A. and agree with his reasoning and conclusion as well as the order proposed.

PATTERSON, J.A.:

On the 30th September, 1980, the respondent Robert Young granted the appellant, Michael Evans, a lease of premises known as "Fairview", Aguilar Road, Stony Hill in the parish of St. Andrew, registered at Volume 1053 Folio 764 of the Register Book of Titles, for a term of two years. Included in the lease agreement was the following clause ("clause 4(ii)"):

> "The Lessee shall have option to purchase the leased premises at any time during the continuance of the lease at the market value to be decided by an independent valuator at the time of the exercise of such option."

The appellant contended that by the said clause, 4(ii), he was granted an option by the lessor to purchase the said premises. Pursuant thereto, on or about the 19th May, 1981, the appellant lodged a caveat against the registration of any change in the proprietorship or any dealing with the said estate. On the 6th July, 1981, the appellant duly gave notice to exercise the option. The notice was contained in a letter from the appellant's attorney-at-law, which was admitted in evidence as exhibit 2(a), and it reads as follows:

> "
>
> 6th July 1981
>
> REGISTERED
>
> Dear Sir:
>
> re 'Fairview', Aguilar Road, St. Andrew
>
> I act for Mr. Michael Evans. He has shown me a copy of a Lease Agreement dated 30th September, 1980, between yourself and himself, and your attention is particularly drawn to paragraph 4(ii) which gives an option to purchase. I enclose a copy of valuation which has been done by one of the foremost reputable firms in Jamaica. This shows that the market value of the property currently is $75,000.00.
>
> My client hereby formally gives you notice that he is hereby exercising option to purchase the property in accordance with the terms of your agreement. He is ready willing and able to complete the purchase.

I also enclose a copy of a Contract for Sale which I would request that you sign and return to me, subject, of course, to any legal advice that you may wish to seek.

I look forward to hearing from you no later than 31st July, 1981.

Yours truly,

SONIA JONES

Mr. Robert M. Young,
P.O. Box 137,
Stony Hill

MAILED TO: Mr. Robert M. Young, 270 Palmdale Drive
PH 9, Scarborough,
Ontario, Canada.

c.c. Messrs. Donald Bernard & Co.,
Attorneys-at-Law
58 Laws Street, Kingston

Mr. Michael Evans
25 Tobago Avenue
New Kingston, Kingston 5

P.S. You should take advice from your Attorneys-at-Law as to whether it is necessary for you to obtain permission from the Bank of Jamaica."

The valuation report and the contract for sale mentioned in the letter, exhibit 2(a), were admitted in evidence as exhibit 2(b) and exhibit 2(c) respectively.

A subsequent formal notice, which is undated, was sent by the appellant to the respondent. It was admitted in evidence as exhibit 3 and it reads as follows:

"TO: Mr. Robert M. Young,
P.O. Box 137,
STONY HILL.

> I, MICHAEL EVANS, refer to the Lease Agreement between myself and ROBERT M. YOUNG, otherwise known as GREGG ROBINSON YOUNG, dated the 30th September, 1980 in relation to premises known as 'Fairview', Aguilar Road, Stony Hill.
>
> I make particular reference to paragraph 4(ii) which grants me an Option to purchase.
>
> I hereby formally exercise that Option and/or formally give Notice of the exercise of that Option.
>
> I hereby formally offer to pay the sum of Seventy-five thousand Dollars ($75,000.00) for the property being the market value assessed by Messrs. Allison, Pitter & Co. who are independent valuators.
>
> MICHAEL EVANS
>
> Copied to:
>
> Messrs. Donald Bernard & Co.,
> Attorneys-at-Law,
> 58 Laws Street,
> Kingston."

The respondent apparently took no steps whatsoever to complete the sale. The appellant, therefore, filed a writ of summons on the 9th May, 1983, seeking the following reliefs:

> "1. A declaration that the Defendant is bound by his Agreement dated 30th September, 1980 to sell premises known as 'Fairview', Aguilar Road, Stony Hill, in the parish of Saint Andrew, to the Plaintiff for a sum of Seventy-five Thousand Dollars ($75,000.00).
>
> 2. Specific Performance of the said Agreement.
>
> 3. Damages for breach of Contract in lieu or addition to Specific Performance.

4. Further or other relief.

AND THE PLAINTIFF CLAIMS COSTS."

The selling price of $75,000 was the "market value" of the premises which the appellant claimed he obtained by "acting in accordance with the said option agreement." It was contained in the valuation report, exhibit 2(b), done on April 19, 1981, by Allison, Pitter & Company, Chartered Surveyors, described by the appellant in the letter, exhibit 2(a), as "one of the five most reputable firms in Jamaica."

The respondent, in his defence, denied that clause 4(ii) "conferred on the plaintiff a valid and/or enforceable option to purchase the said premises", and while admitting that the letter, exhibit 2(a), purported to exercise the said option, "denied that the same could be or was thereby validly or legally exercised." There was a further or alternative defence couched in the following terms:

> "Further or alternatively, the alleged option was and is unenforceable and/or void for uncertainty in that it did not set out the necessary material terms of a valid option to purchase land and/or the arrangements for securing consensus between the Plaintiff and the Defendant and/or the machinery for carrying the alleged purchase into effect."

By way of counterclaim, the respondent sought the following reliefs:

> "(a)Possession of the said premises.
>
> (b) All necessary and consequential accounts, directions and enquiries.
>
> (c) Payment of such sum as may be due to the Defendant on the taking of such accounts.

(d) Further or other relief.

(e) Costs."

Marsh, J., who heard the case in the court below, found "that clause 4(ii) does not contain a validly exercisable option and defendant was entitled to refuse to complete the sale of the said premises, 'Fairview', Aguilar Road, Stony Hill in the parish of St. Andrew." He entered judgment for the respondent on the claim and counterclaim, and granted the reliefs prayed by the respondent in the counterclaim.

The learned trial judge, relying on the principles which were lucidly set out in the judgment of Templeman, L.J. in *Sudbrook Trading Estate Ltd. V. Eggleton and others* [1981] 3 All E.R. 105 (at 115), decided that the agreement in clause 4(ii), on the face of it, was incomplete for two reasons. Firstly, there was no agreement between the parties on the price of the premises which was to be the "market value" decided by an independent valuator, at the time of the exercise of the option, and secondly, there was "no consensus as to how the 'independent valuator' should be selected." The "machinery as to who should be or how the 'independent valuator' was to have been appointed" was lacking.

The established principles that Templeman, L.J. so accurately summarised in his judgment in the *Sudbrook* case (supra) were binding on the Court of Appeal in which those principles were established. But it is quite clear that Marsh, J. was not adverted to the fact that the *Sudbrook* case (supra) went on appeal to the

House of Lords, and the established principles were reviewed by their Lordships' House.

I will now examine that case which is reported as *Sudbrook Trading Estate Ltd. v. Eggleton and others* [1982] 3 All E.R. 1. The facts are not dissimilar to those in the instant case. Lease agreements, binding on the parties, each contained a clause which purported to confer on the lessees an option to purchase the freehold reversions from the lessors. The words on which the appeal turned were these:

> "That if the Lessees shall desire to purchase the reversion in fee simple in the premises hereby demised ...give to the Lessor notice in writing to that effect the Lessees shall be the purchasers of such revision as from the date of such notice at such price not being less than twelve thousand pounds as may be agreed upon by two Valuers one to be nominated by the Lessor and the other by the Lessees or in default of such agreement by an Umpire appointed by the said Valuers..."

The lessees sought to exercise the options, but the lessors contended that the option clauses were void for uncertainty and were unenforceable. The judge's decision at first instance, that the options were valid and exercisable, was reversed by the Court of Appeal. The Court of Appeal held that "where the agreement was on the face of it incomplete until something else had been done, whether by further agreement between the parties or by the decision of an arbitrator or valuer, there was no complete agreement which the Court could enforce." As I pointed out earlier on, it is that principle which found favour with

Marsh, J. But their Lordships' House overruled the decision of the Court of Appeal and allowed the lessees' appeal. The headnote reads as follows:

> "Held (Lord Russell dissenting) - The appeal would be allowed and the options would be ordered to be specifically performed for the following reasons--
>
> (1) Where the machinery by which the value of a property was to be ascertained was subsidiary and non-essential to the main part of an agreement for the sale and purchase of the property at a fair and reasonable price, the court could, if the machinery for ascertaining the value broke down, substitute other machinery to ascertain the price in order to ensure that the agreement was carried out. Since the contract between the parties provided that the price was to be determined by valuers, it necessarily followed that the contract was a contract for sale at a fair and reasonable price assessed by applying objective standards, and on the exercise of the option clauses a complete contract for the sale and purchase of the freehold reversion was constituted; it was unrealistic to treat the machinery provided by the option clauses for ascertaining the price as an essential term of the contract when it merely consisted of provision for the appointment of valuers and an umpire, none of whom was named or identified. The only reason the machinery had not been implemented was the lessors' own breach of contract in refusing to appoint their valuer. It followed that, since such machinery was not essential, there was no reason why the court should not substitute its own machinery...; *Agar v Macklew* (1825) 2 Sim & St 418 and *Vickers v Vickers* (1867) LR 4 Eq 529 overruled.
>
> (2) Where an agreement which would otherwise be unenforceable for want of certainty or finality in an essential stipulation had been partly performed so that the intervention of the court was necessary in aid of a grant that had already taken effect, the court would strain to supply the want of certainty even to the extent of providing a substitute

> machinery. It followed that, since the option was one term of the lease which had been in force for several years when the option under the contract was exercised, the resulting agreement was not entirely separate from the partly performed contract of lease...; *Gregory v. Mighell* (1811) 18 Ves 328, *Dinham v Bradford* (1869) LR 5 Ch App 519 and *Beer v Bowden* (1976) [1981] 1 All ER 1070 followed.
>
> (3) Where the valuation provisions related to a subsidiary part of a wider contract which was itself valid and enforceable, the court would take steps to prevent the wider contract being rendered unenforceable by a failure of the machinery for the subsidiary part. Since the mode of valuation provided for was not the very essence and substance of the contract, the court could accordingly substitute machinery to prevent the contract being rendered unenforceable, and in the circumstances the appropriate means to enforce the contract would be to order an inquiry into the fair value of the reversions..."

Lord Diplock, in his opinion, had this to say about the principles enunciated by Templeman, L.J. in the Court of Appeal (at p. 6):

> "What Templeman LJ refers to in his summary of the effect of the authorities as the one central proposition from which the three principles that he states all stem, viz until the price has been fixed by the method provided for in the contract 'there is no complete agreement to enforce' (see [1981] 3 All ER 105 at 115, [1981] 3 WLR 361 at 373), involves a fundamental fallacy. A contract is complete as a contract as soon as the parties have reached agreements as to what each of its essential terms is or can with certainty be ascertained, for it is an elementary principle of the English law of contract id certum est quod certum reddi potest. True it is that the agreement for the sale of land remains executory until transfer of title to the land and payment of the purchase price; but if this is the sense in which the agreement is said not to be complete it is only

> executory contracts that do require enforcement by the courts; and such enforcement may either take the form of requiring a party to perform his primary obligation to the other party under it (specific performance) or, if he has failed to perform a primary obligation, of requiring him to perform the secondary obligation, that arises only on such failure, to pay monetary compensation (damages) to the other party for the resulting loss that he has sustained."

Then further on (at page 7):

> "I do not accept as fit for survival in a civilised system of law any of the three principles extracted from the authorities that are summarised in the passage that I have quoted from the judgment of Templeman LJ.
>
> My Lords, I would have hesitated before overruling such a long and consistent line of authorities if I thought that people had arranged their affairs and dealt with their property on the basis that those authorities correctly stated what is the existing law; but when honest parties to a contract for the sale of land or an option to enter into such a contract have in the past inserted provisions for the ascertainment of the purchase price similar to the emphasised words included in the option clause in the instant case they must have intended to create legal rights to have those provisions acted on by both parties and not flouted by either party at his own sweet will, otherwise there is no point in inserting them at all. So, to overrule the old authorities will be to give effect to the intentions of those who have made use of such provisions in contracts that have been entered into before the decision of this House in the instant appeal."

It is not unusual for a lease agreement to contain a clause which confers on the lessee an option to purchase the lessor's interest in the demised premises. Such a clause usually states the purchase price decided on by the parties or the

machinery for fixing the purchase price. The nature of such an option (which I adopt as a true statement of the law) is stated in *Hill and Redman's Law of Landlord and Tenant* (issued 1989, at para. 735) in this fashion:

> "Such an option is collateral to, independent of, and not incident to the relation of landlord and tenant, and the option itself does not constitute a contract, but creates a right of property in the widest sense of that term."

If the stipulated conditions precedent to the exercise of the option are strictly observed, then the exercise of the option during the currency of the lease creates the relation of vendor and purchaser, and a binding contract is constituted. Lord Diplock in his opinion in the *Sudbrook* case (supra) expressed a similar opinion as to the nature of the option clause in a lease. This is what he said (at p. 5):

> "The option clause cannot be classified as a mere 'agreement to make an agreement'. There are not any terms left to be agreed between the parties. In modern terminology, it is to be classified as a unilateral or 'if' contract. Although it creates from the outset a right on the part of the lessees, which they will be entitled, but not bound, to exercise against the lessors at a future date, it does not give rise to any legal obligations on the part of either party unless and until the lessees give notice in writing to the lessors, within the stipulated period, of their desire to purchase the freehold reversions to the lease. The giving of such notice, however, converts the 'if' contract into a synallagmatic or bilateral contract, which creates mutual legal rights and obligations on the part of both lessors and lessees."

The respondent contended that in the instant case a valid and enforceable contract did not come into being. Dr. Barnett argued that the parties clearly

treated the independence of the valuator as important by expressly stating that qualification. He submitted that "the independence of the valuer is not a matter of machinery but of basic qualification. It is not a subsidiary provision but a fundamental requirement of the option."

I am of the opinion that clause 4(ii) conferred on the appellant a valid option to purchase the leased property. There is no doubt that the appellant, within the stipulated period, gave the respondent notice of the exercise of the option. The exercise of the option gave rise to a complete contract for the sale and purchase of the demised premises, and the creation of the relation of vendor and purchaser, between them. The essential terms of the agreement for sale crystallized. The fact that the parties did not state the purchase price in a fixed sum of money does not, in my view, invalidate the contract. The parties agreed on a machinery for fixing the purchase price. They agreed that the purchase price shall be "the market value to be decided by an independent valuator at the time of the exercise of the option."

I see no grave distinction between the machinery fixing the mode for ascertaining the purchase price in the instant case and that in the *Sudbrook* case (supra). I think the words of Lord Fraser in the *Sudbrook* case may be appropriately applied to the instant case. These are the words of his Lordship (at p. 10):

> "I think the defect lies in construing the provisions for the mode of ascertaining the value as an essential part of the agreement. That may have been perfectly true early in the nineteenth century, when the

> valuer's profession and the rules of valuation were less well established than they are now. But at the present day these provisions are only subsidiary to the main purpose of the agreement, which is for sale and purchase of the property at a fair or reasonable value. In the ordinary case parties do not make any substantial distinction between an agreement to sell at a fair value, without specifying the mode of ascertaining the value, and an agreement to sell at a value to be ascertained by valuers appointed in the way provided in these leases. The true distinction is between those cases where the mode of ascertaining the price is an essential term of the contract and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential: see *Fry on Specific Performance* (6th edn, 1921) paras 360, 364. The present case falls, in my opinion, into the latter category. Accordingly, when the option was exercised, there was constituted a complete contract for sale, and the clause should be construed as meaning that the price was to be a fair price. On the other hand, where an agreement is made to sell at a price to be fixed by a valuer who is named, or who, by reason of holding some office such as auditor of a company whose shares are to be valued, will have special knowledge relevant to the question of value, the prescribed mode may well be regarded as essential. Where, as here, the machinery consists of valuers and an umpire, none of whom is named or identified, it is in my opinion unrealistic to regard it as an essential term. If it breaks down there is no reason why the court should not substitute other machinery to carry out the main purpose of ascertaining the price in order that the agreement may be carried out."

It is quite clear that in the instant case, the machinery agreed on by the parties for fixing the purchase price must be regarded as subsidiary to the main contract and non-essential. On a true construction, the machinery calls on the parties to agree on an independent valuator who will fix the market price at the

time of the exercise of the option. The parties have agreed on the purchase price in their main contract as being the "market value" at the time of the exercise of the option. Nothing can be clearer than that. What has transpired in this case is that the appellant and the respondent have failed to agree on an independent valuator, that is to say, one that is mutually acceptable to them. That was their common intention when they agreed on clause 4(ii). I see no reason why the contract of sale cannot be enforced.

The appellant, prior to the exercise of the option, unilaterally obtained a valuation of the leased premises. That was done on April 19, 1981, almost three months before the exercise of the option. In my view, at the time of the exercise of the option, there was no valid decision by the parties on the "market value" of the premises. What the appellant did was not in conformity with the agreed machinery for fixing the purchase price of the premises. But as I said before, the machinery laid down for fixing the purchase price is subsidiary to the main contract and non-essential. The "independent valuator" was not named or identified. The common intention must have been that the purchase price was to be a fair value, at the time of the exercise of the option, fixed by a valuator of their choice. But the common intention of the parties was not acted on by them both.

Counsel for the appellant urged the court nevertheless to say that there was sufficient evidence coming from two valuators who testified, to satisfy the terms of the agreement made by the parties. I do not accept that to be so. The

appellant acted unilaterally, and whatever he did, in my opinion, is of no effect, and cannot fix the market value of the premises. How then should the court proceed? Undoubtedly, the machinery for fixing the purchase price was not put into train, but has laid dormant since 1981. It is not that it is ineffective; I am satisfied that it can be brought into action by the court's intervention. The doctrine laid down in the *Sudbrook* case is apposite.

In my judgment, I hold that there is a valid contract subsisting between the parties which binds the respondent to sell the premises in question to the appellant. The purchase price is to be decided on by an independent valuator to be agreed on by the parties. Failing such an agreement, each party shall be at liberty to submit to the Registrar of the Supreme Court a list of three valuators, and the Registrar shall decide on the valuator from such list or lists. The valuator is to be given specific instruction to fix the market value of the premises as on the 6th July, 1981, and report the same to the court, and such sum shall be the contractual purchase price. If for any reason he is unable so to do, then a report in that fashion should be made to the court. I realise that over the years, the physical condition of the house may have changed, and it may no longer be practical to assess a 1981 market value. In such an event, the appellant would be entitled to damages to be assessed in lieu of specific performance of the contract.

In conclusion, my order is:

> Appeal allowed, judgment of the court below is set aside, and judgment is entered for the plaintiff on the claim and on the counterclaim. It is hereby declared that the defendant is bound by his agreement of 30th

September, 1980, to sell the demised premises to the plaintiff, at the market value on 6th July, 1981. It is ordered that the contract for sale constituted by the exercise of the option be specifically performed and carried into execution in accordance with clause 4(ii) of the lease.

It is further ordered that the purchase price of the said premises shall be the market value as at 6th July, 1981, such amount to be fixed by a valuator agreed on by the parties, and if not so agreed, then by the Registrar of the Supreme Court from a panel consisting of three names of valuators to be submitted by each party, and the costs of such valuation shall be borne equally by the parties. The defendant shall have the carriage of sale, and shall be at liberty to prepare the proper conveyance within three weeks of the decision on the purchase price, failing which, the plaintiff shall be at liberty to prepare such conveyance (to be approved by the Registrar of the Supreme Court).

It is further ordered that the parties do execute the said conveyance, but if either party shall fail so to do, then the Registrar shall be at liberty to execute the same for and on behalf of the defaulting party.

The plaintiff shall have the costs of this appeal and the costs in the court below, such costs to be taxed if not agreed, and the plaintiff shall be at liberty to deduct the said costs when taxed or agreed from the amount of the purchase price when ascertained as above.

The parties shall be at liberty to apply to the Supreme Court.

HARRISON, J.A.:

I agree.