Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. C.L. 2000 J - 016

BETWEEN	**JALTIQUE LIMITED**	**CLAIMANT**
AND	**LAURA WALKER (as Administrator of the Estate of RAPHAEL C.WALKER)**	**DEFENDANT**

Heard June 5, 6, 7 and 21, 2007 and January 30, 2008

Mrs. Georgia Gibson Henlin and Ms. Camille Wignall instructed by Nunes, Scholefield, DeLeon & Co. for the Claimant; Mr. David Batts instructed by Livingston Alexander and Levy for the Defendant

ANDERSON J.

This is an action brought by the Claimant, Jaltique Limited, a family-owned company engaged in the business of horticulture, ("Jaltique" or the "Claimant") against the Defendant Laura Walker (as Administrator of the Estate of Raphael C. Walker). The Claimant seeks, inter alia, a "declaration that the (Plaintiff) has validly exercised an Option to purchase all those parcels of land together comprising 14 acres and 20.3 perches more or less being the land partly comprised in Certificate of Title entered at Volume 963 Folio 645 and partly unregistered being part of Mount Friendship in the parish of St. Andrew as appears on Survey Department pre-checked plan bearing Examination Number 137887 prepared by V.D. Prendergast, Commissioned Land Surveyor". Secondly, the Claimant claims "specific performance of an Agreement for sale of the said parcels of land, the terms of which have been incorporated in Lease dated April 8, 1985, between the (Plaintiff) and the Defendant". The Claimant also claims, in the alternative, damages for breach of the "the said agreement" and "damages for fraudulent and/or negligent misrepresentation" in relation to the aforesaid agreement entered into between the Claimant and Raphael Walker on the 18th day of April 1985.

The Claimant's Case

The Claimant's case is largely set out in the Witness statement of Monica Cools-Lartique, the managing director of the Claimant. She averred that in or around July 1984 she

entered into discussions with Mr. Raphael Constantine Walker, ("Walker") now deceased, with a view to acquiring property at Mount Friendship in the Parish of St Andrew. The purpose of the intended acquisition was to secure land for carrying on the business of farming. She alleges that Walker advised her that the title to the "family owned land" was "not in order" but that he would be willing to enter into a lease agreement with an option to purchase. It is common ground that the property in question consisted of land which was partly registered under the Registration of Titles Act and land partly not so registered. The registered portion was in the name of a certain Mr. William Carpenter from whom Walker's father had allegedly purchased it early in the last century. It also appears from the evidence that I accept that Mrs. Gloria Clare Cumper, the daughter of Mr. William Carpenter, was the administratrix for her father's estate, which included the registered portion of land claimed by Walker and his family.

Ultimately, it was agreed that the Claimant would take a lease of the lands in question. The lease contained an option to purchase the lands in question, which option was granted in consideration of a separate payment of one hundred dollars ($100.00). According to Mrs. Cools-Lartique, the Claimant agreed to the proposal for a lease, on the basis that the lease would be for a minimum of ten (10) years. Walker had advised the Claimant, through Mrs. Cools-Lartique, that the subject property in question had been owned by his deceased grandfather, and that he, Walker, was one of the beneficiaries, all of whom had agreed to sign powers of attorney authorizing the transfer of the entire property, save and except for a part of the unregistered portion occupied by Walker's mother, and in which she was to retain a life interest.

It is common ground that a lease was eventually prepared and executed on the 18th of April, 1985. So far as is material, the lease provided that in return for a lease payment of two thousand four hundred dollars ($2,400.00) per annum payable at the rate of two hundred dollars ($200.00) monthly, the Claimant would lease "all that parcel of land together comprising 14 acres and 20.3 perches, more or less, being the land partly comprised in Certificate of Title entered at Volume 963 Folio 645 of the Register Book of Titles and partly unregistered, being part of Mount Friendship in the Parish of St.

Andrew.... SAVE AND EXCEPT that portion of land containing approximately two (2) acres more or less, on which the dwelling house presently occupied by Mrs. Elfreda Walker is situate and which forms part of the unregistered land .... Butting and bounded to the North on the Parochial Road from Mount Friendship to Belmore, to the South on the gully which passes through the unregistered portion of the land, and to the East of lands comprised in Certificate of Title registered at Volume 356 Folio 76". The lease included as an attachment, a draft agreement for sale in respect of the property, the subject of the lease.

By virtue of the provisions of section 5(3) of the said lease, the Claimant was granted an Option to Purchase the property, in consideration of the payment of one hundred dollars ($100.00). This section which is central to the issues to be determined herein is set out in full below.

> "That in consideration of the sum of **ONE HUNDRED DOLLARS** now paid by the tenant the landlord hereby gives the Tenant an Option to purchase the fee simple in possession of the premises (and in the event of the Option being exercised by the tenant the said One Hundred Dollars paid for same shall form part of and be deducted from the Purchase Money) subject to the Restrictive Covenants, Easements and Outgoings as to users endorsed in the Certificate if Title for the sum of $7,000.00 per acre the actual acreage to be determined by a commissioned Land Surveyor acceptable to both at the Tenant's sole expense. This option shall be exercised by the tenant up to ninety (90) days after the anniversary of the third year of the Lease or within ninety (90) days of notice served by the Landlord stating that a title registered in the name of the Landlord has been obtained, whichever is later. Notice in writing of the tenant's intention to exercise this Option shall be sent to the Landlord by prepaid registered letter post addressed to the Landlord's Attorneys-at-Law, Messrs. Myers, Fletcher & Gordon, Manton & Hart 21 East Street, Kingston, or handed to them at any time before the expiration of the option period and shall be sufficient evidence of the tenant's intention to exercise the Option. PROVIDED HOWEVER that such notice of intention shall be accompanied by a payment of a sum equivalent to twenty percent (20%) of the Purchase money and on the exercise of the Option and Payment of sum equivalent to 20% of the Purchase of money the premises shall be sold to the Tenant on the terms set out in the Third Schedule hereto."

The factual evidence in this matter is to be found in the witness statements of Mrs. Cools Lartique, for the Claimant, and Walker (the Defendant,) and his widow, Laura Walker representing his estate, as well as the various pieces of correspondence from and among

the attorneys at law who, at various times, represented the parties. There is considerable agreement on the facts of this case as given in the evidence. Walker, who has of course died in the interim, did produce a witness statement for the Defendant. Although the witness statement of Laura Walker does reveal that she may have had some limited knowledge of the history of the properties in question, it does not, in my view, provide a great deal of assistance as to the specific factual developments of this particular transaction. In addition as I observe below, there are serious issues of weight, if not admissibility, in relation to Mrs. Walker's evidence. There are some conflicts between the evidence of Mrs. Cools Lartique and that contained in the witness statement of Walker. I have to say at this point, that having observed the witnesses Cools Lartique and Laura Walker under cross examination, where there are conflicts between the evidence of the Walkers and that of Mrs. Cools Lartique, I believe, on a balance of probabilities that the latter is to be preferred.

The evidence led by the parties indicates that while the Lease with option to purchase was signed by the parties, the agreement for sale which was appended as an exhibit was never signed, save by the Claimant at the time it purported to exercise the option in 2000. It is also common ground that the Claimant did not exercise the option to purchase within "ninety days of the third anniversary of the lease". This would have required that there was an exercise on or before the 18th July 1988. Nor did it exercise the option "within ninety days of notice served by the landlord that a registered title in the name of the landlord had been obtained", for the compelling reason that the landlord never advised that a registered title in his name had been obtained. As Mrs. Cools-Lartique for the Claimant stated in her witness statement and is apparent from the section cited above, the option clause also provided as follows:

> Notice in writing of the tenant's intention to exercise the Option shall be sent to the Landlord by prepaid registered letter post addressed to the Landlord's Attorneys-at-Law, Messrs. Myers, Fletcher & Gordon, Manton & Hart 21 East Street, Kingston, or handed to them at any time before the expiration of the option period and shall be sufficient proof of the tenant's intention to exercise the Option. PROVIDED HOWEVER that such notice of intention shall be accompanied by a payment of a sum equivalent to twenty percent (20%) of the Purchase money and on the exercise of the Option and Payment of sum

equivalent to 20% of the Purchase of money the premises shall be sold to the Tenant on the terms set out in the Third Schedule hereto."

The option was not exercised within ninety days of the third anniversary of the lease, nor indeed the third anniversary of its renewal. The Defendant never did give notice to the Claimant of receipt of registered title in his name. The Claimant however, purported to exercise its option to purchase by notice to the Defendant by way of a letter dated January 26, 2000. The Defendant has not accepted that there has been a valid exercise of the option, and has failed and/or refused to execute the Agreement for Sale which was attached to the notice of exercise of option.

Mrs. Cools Lartique said in her evidence, and based upon the documentary evidence produced I accept as true, that during the period from the signing of the lease to January 1995, there were many demands made on the Claimant as to availability of the registered title with requests that such be provided. This was never done. From the letters which have been introduced into evidence, it seems that part of the difficulty may have been in the fact that the registered portion was landlocked and the only access was over the unregistered portion. This would not, it appears, have prevented the Defendant from transferring the registered portion of the land.

I shall below refer to some of the correspondence passing between the Claimant and various attorneys at law who represented the Defendant over the period. According to Mrs. Cools-Lartique, the Claimant wrote a letter to the Defendant dated January 16, 1995 which purported to exercise an option to extend the lease for a further five (5) years from April 18, 1995 to April 18, 2000. I accept the Claimant's evidence as given by its managing director and supported by the exhibited documents, that during this extended period of the lease, the claimant continued its demands on the landlord and his attorneys. By a letter from its attorneys dated January 12, 2000, the Claimant purported to serve *notice of its intention to exercise the option* granted pursuant to section 5(3) of the lease of April 18, 1985. Consistent with the section, the Claimant also sent a cheque representing 20% of the purchase price required under the terms of the agreement for the sale of the land, as well as the agreement for sale, in triplicate. The cheque was returned

by the Defendant's attorneys at law "on the basis that they no longer represented Mr. Walker". As a consequence of this, the Claimant's attorneys at law then sent the letter to Walker directly, and it was delivered both personally and by registered post enclosing the cheque for $19,775.00 being the agreed 20% of the purchase price. I accept the evidence of the Claimant's witness, that no response was ever received from Walker, nor was the agreement ever returned. This is in direct conflict with the evidence of Walker and Laura Walker that her husband had then returned the cheque. (I refer to this evidence again below). However, according to Mrs. Cools Lartique, subsequent to the purported exercise in the year 2000, when she spoke to him about the intention to exercise the option, "Walker got very upset". It was then, sometime in that year, that he advised her that the registered portion had been transferred to a third party. The Claimant continues in possession of the leased property on which it has effected major improvements to the infrastructure and other developments with the knowledge and encouragement of Walker. It is of note that there is no dispute that the Claimant carried out its obligations under the lease agreement while Walker exercised the rights of ownership. Indeed, in August 2000, Walker served on the Claimant, a summons for the recovery of possession of the said premises, which summons was adjourned sine die in October 2000.

Defendant's Case

According to Walker's witness statement, he confirmed many of the substantive averments in Mrs. Cools Lartique's evidence, including the fact of the lease extension in 1995. I am struck by evidence in Walker's witness statement that his new lawyer who succeeded Ms. Linda Mair at Myers Fletcher & Gordon, advised him that Mrs. Cumper, the heir of Mr. Carpenter, had sold the registered portion of the land to a third party. The statement is as interesting for what it does not say as for what it does. It does not say when he became aware of it, but given that he agreed to a five year extension in 1995, the Court is entitled to infer that he was not aware of this alienation at the time of the extension of that lease agreement. He also said that this development was "told to Mrs. Cools Lartique". This is inconsistent with the evidence of Mrs. Cools Lartique, adverted to above, which I accept as more credible on a balance of probabilities.

There are also other aspects of Walker's witness statement that I reject as not being credible. For example, he said he told Mrs. Cools Lartique that he was not the owner of the land; that an application for registered title would have to be made by the Administrator of his father's estate and he was not the administrator; that there was a problem obtaining registered title since the land was landlocked; that part of the property had been sold by Mrs. Cumper and that he had communicated all these facts to the Claimant and that, as a result, the Claimant had been aware that "the option could not be performed". It would seem to be odd in the extreme that the Claimant would have entered into the lease with option in April 1985, when she knew that the option "could not be performed". The only reasonable conclusion to be drawn must be that if the Claimant was made aware of these hindrances to the performance of the obligations, it would have been after the signing of the original agreement under which any rights would have arisen.

The Claimant's evidence was to the effect that at the time of the purported exercise of the option in January 2000, a cheque and a signed agreement for sale had been sent, first to the attorneys who had hitherto represented the Defendant, and on their returning it, it had been sent personally, and by registered mail to Walker. The Defendants' witness statement, (as well as that of Laura Walker), refers to the letter having been returned by Walker to Nunes Scholefield with a handwritten note saying that he could not complete the transaction at that time because of "circumstances beyond the writer's control". There is no independent objective evidence in support of the Defendant's assertion that this letter with the handwritten note ever was returned to the Claimant's attorneys at law. This evidence of the letter with the handwritten note is self-serving and incredulous. There is no other instance in the plethora of correspondence in relation to this case where the mode of communication was to hand-write a reply on a letter which had been received, and then send it back to the original author. I reject this as unlikely in the extreme.

The Claimant in its Statement of Claim averred that it repeatedly during the period of the lease notified the Defendant of its desire to exercise the option granted it in the lease with option to purchase. The Defendant in its defence says:

> that subsequent to the time the Claimants entered into the Lease Agreement, the Defendant became aware that it did not have good title as a portion of the land in dispute was unregistered land purchased by the Defendant's father, Mr. David Walker, deceased from his uncle and the other portion of the land was comprised in Certificate of Title registered at Volume 963 and Folio 645 of the Register Book of Titles in the name of William A. Carpenter, deceased, who sold that property to Mr. David Walker some time in the early 20th Century, and who had no title to either the registered land as all documents of title were destroyed by wind and water during the 1951 hurricane, or to the unregistered land. Further, the estate of William A. Carpenter was administered by his daughter, Gloria Cumper and at the time of entering the Lease Agreement the Defendant honestly believed that he could compel the transfer of the registered parcel of land from Gloria Cumper and obtain registered title for the unregistered parcel of land. Further the Defendant will say that it was during the term of the lease that the Defendant became aware that part of the leased premises was transferred by Gloria Cumper to a third party. (My emphasis)

It is, I think, necessary to make the following observations in relation to the words I have underlined in the passage above. There is not a scintilla of evidence that the Defendant only "became aware that he did not have good title to the registered portion of the land after the execution of the lease". On the contrary, it seems clear that the Defendant proceeded on the basis that, whatever the legal ownership in the respective parts of the property, the beneficial ownership was vested in him and his siblings. This would account for the fact that he was given a power of attorney to act on their behalf. Moreover, it is obvious on the face of the document, the lease with option to purchase, that the signatories proceeded on the basis that the beneficial interest resided in the Defendant and his siblings whom he could represent. Secondly, there is no basis for the averment that "at the time of entering into the lease agreement the Defendant honestly believed that he could compel the transfer of the registered parcel from Gloria Cumper". Indeed, in a letter of August 16, 1984 from Myers, Fletcher & Gordon to Walker, they had asked him to ascertain from Mrs. Cumper whether she "knows of the history of the property and would be ready to execute the relevant documents to pass title to your father's heirs". By September 10, 1984, Mrs. Cumper expressed herself, in a letter to the attorneys, as being "willing to sign the relevant documents to effect transfer of this land to the heirs of David Walker provided that proof is obtained that those who are applying for the title are the only heirs".

The averment in question certainly does not appear from Walker's witness statement, while Laura Walker's witness statement in which it is found, is to the effect that the papers relevant to the property had all been destroyed in the hurricane of 1951. There is no indication as to how she knew of this fact, if indeed it was a fact. The Court is justified in asking: At what point in time after the 1951 hurricane did Walker become aware of the "problems" of which he allegedly advised Mrs. Cools Lartique? It seems to me that the fact of his "becoming aware of the fact that he did not have good title until after the execution of the lease in April 1985" is inconsistent with him believing that he could "compel the transfer of the registered parcel from Gloria Cumper". He could only have been "confident of compelling Mrs. Cumper to transfer" the said land if he believed that he was at least the beneficial, if not the legal, owner.

As noted above, the Defendant's pleadings say that all the papers in relation to the title and/or transfer of the two pieces of property were destroyed by wind or water in the hurricane of 1951. However, this fact was not mentioned in the witness statement provided by the Defendant in 2004. It is only contained in the witness statement of Laura Walker without any basis for establishing that she had any personal knowledge of such fact. So that it seems to me that the evidential basis of the pleading is very slight. What is even more confusing is the letter from Walker's attorneys at law, Myers, Fletcher & Gordon, to him dated November 20, 1986 and signed by Lynda Mair, which contains the only other reference to title deeds for any land. That letter which was in pursuance of the efforts to bring land under the Registration of Titles Act, asked that Walker supply certain information including "*the year on which the fire gutted your parents' house and destroyed the Title Deeds to the land*". It seems an irresistible inference for this court to draw, that the information previously communicated to the attorneys by Walker, was of a destruction of the "title deeds" by a fire which gutted his parents' home. To be fair to the Defendant, I should acknowledge the letter from Walker to his attorneys, Myers, Fletcher dated December 12, 1986 in which he denied that the title deeds were destroyed by fire but did say it was by "wind and water" during the 1951 hurricane.

The final comment with respect to this part of the defence is that neither Walker's nor Mrs. Laura Walker's witness statement says when the Defendant became aware of the sale by Mrs. Cumper of the land in question. Was it after the renewal in 1995 or before? Mr. Batts suggested that it must have been after the renewal in January 1995. Indeed, this court in considering the value to be attributed to the Walker witness statement (and indeed, to that of Laura Walker), may properly come to the view that its value is negligible. The Walker statement contains matters which are clearly hearsay or at best unsubstantiated allegations. Thus, for example, Walker says that "Research showed that my father had purchased the property from two different people. The registered portion was purchased around 1914. The unregistered portion was previously purchased (that must be, before 1914) from his uncle. He had no titles for any of them". If there were "no titles for any of them", then one must wonder what had been destroyed in the hurricane of 1951 or in the fire at the Defendant's parents' home. The Court is not told who did the "research". There is no indication that Mr. Walker was even born by 1914, let alone that he would have had personal knowledge of the alleged transactions.

In looking further at the evidence of Walker, in support of the Defendant's case, it is noticed that he said that just before the expiry of the first 10 year lease, his then lawyer, Ms. Lynda Mair advised him that she would be leaving Myers, Fletcher and Gordon, and that another attorney would be assigned to handle his matter. The witness statement said that some time after taking over the representation, the "new lawyer" informed me that Mrs. Cumper, the daughter and heir of the original owner of the property had sold the registered portion of the land to a Mr. Basil Ferguson who also owned other lands in the area. Regrettably, the Court is not given any assistance in ascertaining when this information first became available. What is ascertainable from the documents agreed between the parties is that Walker's then attorneys at law, Myers, Fletcher & Gordon, wrote to the Claimant's attorneys, Nunes Scholefield, in a letter dated August 12, 1995, several months after the exercise of the option to renew for a further five (5) years, confirming that they were "proceeding to secure registered title". This letter was also some four (4) months after they had been advised in a letter of April 19, 1995 that the property had been transferred by Mrs. Cumper.

The letter of April 19, 1995 from Myers, Fletcher & Gordon to Keith Brooks in which it acknowledges that it is aware that the property with the registered title had been transferred by Mrs. Cumper, is also instructive in that it refers to "our last correspondence with you of November 23, 1988". This November 1988 letter of MFG to Mr. Keith Brooks referred to Mrs. Cumper's letter of September 1984, four years earlier, and enclosed a copy of that letter, while requesting that a transfer be provided from Mrs. Cumper. There seems no evidence to suggest that in the four (4) years which elapsed between the offer by Mrs. Cumper and the essay at securing a transfer by Mrs. Cumper through Mr. Brooks, any effort had been made to advance the resolution of the Defendant's obligation to get title in his name. Mr. Batts suggested in his submissions that if there had been negligence, (and he was not suggesting that there had been), in pursuing the title for the property, that negligence was not that of the Defendant, but maybe that of his attorneys. It may not be pure pedantry to observe that the obligation which I have found was undertaken was the obligation of the Defendant. He cannot pass it on to his attorneys. But in any event, there would have been nothing to have prevented him from joining the attorneys as ancillary defendants if he felt that they had been negligent in representing his interests.

There are a couple of pieces of correspondence which are important in helping the court to come to an appropriate understanding the transaction into which the parties entered as well as their approach to ensuring that their obligations under the agreement were carried out.

One such piece of correspondence is a letter from Myers, Fletcher to the Jamaica Agricultural Development Foundation dated March 29, 1988. This letter makes it clear that as early as that date, the Claimant, through his attorneys, recognized the critical importance of treating the registered and unregistered portions of the land together, because the only ingress and egress to the registered portion was through the unregistered part. This letter as well as those dated 23rd November 1988 [page 41 of Bundle 1] –from Mr. Walker's attorneys requesting the instrument of transfer as a matter of urgency, and

from Keith Brooks to Myers, Fletcher & Gordon dated 17th June 1988 (Pages 37, 38 and 39 Bundle#1), demonstrate that the Defendant and his attorneys were endeavouring to obtain registered title from as early as 1988. It is instructive that in Mr. Brooks' letter suggesting a course of action with respect to the application for the title, he said: "I am of the view that my client will not be disposed to lodge any caveat against your said application". This was particularly important because in the same letter Mr. Brooks adverted to the reluctance of his client, Mrs. Cumper, signing a transfer in respect of the registered portion in the absence of the duplicate certificate and the uncertainties and undetermined nature of the boundaries. It seems an irresistible inference to be drawn from this correspondence that there was an appreciation of the need for some urgency in addressing the problem.

As far as the evidence of Laura Walker is concerned, her witness statement claims that she had been married to Raphael Walker for more than twenty eight (28) years at the time of his death in 2004. Even if she had been married for thirty (30) years, she would only have married him in 1974, twenty three (23) years after the alleged destruction of the "documents of title" by wind and water in the 1951 hurricane. Again, the Court is given no basis upon which Mrs. Walker could have made this statement. Indeed, if I may say so with respect, almost the entire witness statement of Mrs. Walker may be summed up in her own words at paragraph 18 of her witness statement where she says the following: "Based on my recollection and review of the file, it is clear to me that the Defendant actively took steps to procure a good title to the leased premises". Even if there has been no application to reject Mrs. Walker's evidence as hearsay, which clearly much of it is, the Court still has a duty to consider whether any weight should be attached to it.

The Issue of Representations

The Claimant in its pleadings also averred that certain representations were made to it by Walker. In particular the pleadings claimed that there were representations that the Claimant was capable of conveying the legal interest in the premises when he knew or ought to have known that the said interest was already transferred to a third party. The Defendant does not admit the Claimant's assertion that there were repeated assurances by

the Defendant's attorneys at law that the Defendant was in the process of securing registered title. It is however undisputed that the Defendant failed to secure registered title for the entire property. Further, the Defendant's defence also denies the efficacy of the purported exercise of the option by the Claimant.

Counsel for the Defendant, denied that any representations had been made to the Claimant. In particular, it was said that that the Defendant made no promise to apply for a registered title during the currency of the lease. Further, that, in any event, he was precluded from executing an agreement for sale by virtue of Special Condition 3 of the Agreement attached to the Third Schedule of the Lease which provided that the Agreement for Sale was "subject to the landlord obtaining title in his name for the property sold hereunder as to which condition time shall not be of the essence."...

Summary of Claimant's Submissions

It was the submission of the Claimant's attorneys at law that the proper interpretation of paragraph 5(3) of the lease with option to purchase (set out above) is that it contained alternative "options". The first alternative is in the nature of a classic option to purchase and places the obligation on the Claimant to give notice to the Defendant on the effluxion of time. The second is not in the nature of an Option to Purchase but in the nature of a binding obligation on the landlord to take steps to obtain a title registered in his name and thereafter serve notice on the tenant. It is said that the tenant has provided valuable consideration for the performance of this obligation and entered into an executory contract with the landlord as set out and duly signed by the parties in Schedule III of the lease. These are contracts in which more remains to be done by either party to the contract (in addition to the payment of money) such as delivery of goods, rental of equipment, or provision of additional services. It is only after the performance of this obligation by the landlord that the tenant would have been obliged to exercise an Option to Purchase in the Classic sense. As it has happened the tenant exercised the Option prior to the landlord performing his obligation

It was submitted that the Claimant has provided valuable consideration for the performance of obligations as stipulated in Clause 5(3) of the lease and the Court should intervene to compel the Landlord to carry out his obligation. This is because the Defendant has been unreasonable and otherwise dilatory in failing to perform his obligations. The Claimant therefore contends that different considerations must of necessity apply to the alternatives presented by Clause 5(3) and that it is second alternative that falls for construction since it is not in dispute that the first alternative was never exercised and that the Claimant is relying on the landlord's obligation to obtain title under the second limb.

Summary of Defendant's Submissions

In his closing submissions Mr. Batts, for the Defendant, asked what, on the pleadings, were the issues to be decided. He submitted that the Claimant has failed to prove the case pleaded. He pointed out that the Claimants were seeking a Declaration that the Claimant has validly exercised its option. It was submitted that whether or not the Claimant had validly exercised his option was a strict simple matter of construction. Paragraph 5.3 of the Lease with Option to Purchase into which the parties had entered gave the Claimant a right to exercise an option to purchase the properties within the alternative time frames set out in the said paragraph. No notice had been given by the landlord in respect of registration and the lessee had not renewed the lease within the 90 day period after the third anniversary of the lease even in relation to the renewal between years ten (10) and fifteen (15), that is the second period of the lease.

The second relief sought was specific performance of the agreement for sale. He submitted that as the matter of law there was no enforceable agreement for sale. What one had was a lease with option to renew and also with option to purchase. It was his submission that since no option had been exercised in relation to the option to purchase the agreement for the sale of land did not take effect. The third relief sought, he pointed out was damages for breach of an agreement for sale. Again, as indicated above, it was his view that this does not arise since no agreement of sale came into being. The fourth issue, he posited, was that the Claimant sought damages for fraudulent or innocent misrepresentation. With respect to the latter it was his submission that the common law

gave no remedy in respect of innocent misrepresentation. In the U.K. that position had been changed by the introduction of the Misrepresentation Act in 1967. However, Jamaica had no similar legislation. To some extent that proposition had been alleviated by the authority **Esso Petroleum vs Mardon [1976] 2 All ER 5** which introduced the concept of negligent misrepresentation. However, even this concept only applied where:-

1. One party had specific knowledge,
2. That party knew that the other party was relying on it and
3. That party gives negligent advice upon which the other party relied.

It was his submission that this was not the case here. According to Defendant's counsel, the only issue which remained on the evidence and on the pleadings, was whether there was any fraudulent misrepresentation on the part of the Defendant in relation to which the Claimant would have been entitled to succeed. Again it was his submission that the Claimant had failed to establish fraudulent misrepresentation. The elements of which are

1. a representation of fact,
2. proof that the fact is not true and
3. either the misrepresentation was made knowing it to be false or with reckless disregard as to whether or not it was true.

Derry v Peek [1889] All ER 1, sets out the tests of this tort.

According to Mr. Batts the evidence which had been led before the court, fell short of establishing that there had been any fraudulent misrepresentation. In fact he said there was no evidence given by the Claimant that the Defendant Walker, now deceased had made any "representation" of fact to the Defendant Jaltique on which the Defendant had relied. In summarizing the position, Mr. Batts suggested that the Defendant never said, and could not have intended to have said, that "I have a registered title and I have legal title and can transfer land to you". What he said was, "I expect to get title," and it can be inferred that he was saying that he would do his best to secure the title. This therefore was a promise of future intent. The question therefore is, whether at the time of making that statement he did have the intention which it is alleged he had. Mr. Batts' view was that there was nothing to suggest that when the defendant said he would do his best to obtain title that he did not intend to do so.

Reasoning

I believe that while the Claimant has set out its case on the basis of its right to certain declarations and a request that the Court exercise its Equitable Jurisdiction in order to do justice as between the litigants, and the Defendant has expertly set out what I agree are **some** of the issues raised in the pleadings and on the evidence, many of the submissions miss the mark and essence of what needs to be decided herein.

According to Defendant's counsel, the only issues are fraudulent misrepresentation and whether the option to buy was properly exercised. There was no "representation" within what that term is intended to cover and hence no "misrepresentation", whether negligent or fraudulent. The Defendant's counsel seems to proceed on the basis that he can take "unassailable refuge" in the proposition that, at best, the Defendant's assurances about securing (registered) title in his own name were *statements of intention as to the future and cannot be representations for the purposes of this action*. He submitted that on the evidence, far from establishing fraudulent misrepresentation, there was in fact no misrepresentation and that Walker honestly tried to carry out his bargain. He said Walker was impeded by what appears to be professional disagreements between Mr. Keith Brooks who acted for Mrs. Cumper and Myers Fletcher who were acting for Mr. Walker as to how to obtain title in Walker's name and that this delayed the matter. He asserts that this had nothing to do with Walker and does not provide any evidence of misrepresentation. I beg to differ and would make but two observations. Firstly, the fact is that the Claimant had no relationship with, professional or otherwise, or control over Mr. Brooks or Myers, Fletcher. It had no control over Walker's efforts or lack thereof, to secure the title. Secondly, it can hardly be pleaded that although a litigant failed to carry out his obligations under an agreement, the fact that he "used his best efforts" is an exculpatory factor in determining whether there has been a breach.

In relation to his submissions, Defendant's counsel also purports to rely on the Jamaican Court of Appeal case **Madden v Elliot, SCCA 81/91 decision delivered 31st May, 1993 per Rowe P**. It was held that there was no liability for fraudulent misrepresentation – the

question was whether the Defendant when he promised to sell the land, honestly believed the facts stated. It is submitted that the facts of that case are more extreme than ours because there is no evidence that Mr. Walker said, "I must get title" – he never gave the sort of assurance as the Defendant in Madden gave. He referred also to Patterson, JA's analysis at pages 42 to 44 of the judgment where the learned judge discussed the tort of deceit and the necessity for "intention to deceive". In his view, Walker did intend to try and get title.

In so far as the passage referred to by Mr. Batts is concerned, I think it is unexceptional for there is no doubt that where there is an allegation of deceit, the fact that at the time of making the representation a person honestly believed it to be true and there was no intention to deceive, it does not give rise to actionable deceit. However, the part of his Lordship's judgement which I find more particularly instructive in the context of the analysis of the instant case, is that where he delivers himself of the following.

> "On the face of the statement which the appellant said the Respondent made, it would appear that the respondent was then, on each occasion, making a promise with the intention of fulfilling it, namely, that he would sell the appellant the house at 8 Gwendon Park Avenue, and unless it can be shown that he did not actually and honestly believe he could sell the house, or that no such intention existed in his mind, it cannot be said that he is guilty of a fraudulent misrepresentation of an existing fact, but neither the intention nor the belief of the respondent is capable of positive proof. Such conditions of mind may be determined only by considering what he said or did, or both what he said and did, and thereafter by applying the test of the reasonable man in similar circumstances. *His words and behaviour must be examined in the light of the reasonable man, so one must look to discover what direct evidence there is in this regard and what inferences can be drawn*". (My emphasis)

For my part, I believe that the place to start the discussion is with the invitation which Mr. Batts made to the court in his submission to arrive at the following conclusion based upon the evidence:

> "The Defendant never said and could not have intended to have said that "I have a registered title and I have legal title and can transfer land to you". What he said was, "I expect to get title," and it can be inferred that he was saying that he would do his best to secure the title. This therefore was a promise of future intent. The question therefore is, whether at the time of making that statement he did have the intention which it is alleged he had. .....There was nothing to suggest that when the defendant said he would do his best to obtain title that he did not intend to do so".

I do believe that within the above statement lay the more fundamental questions with which this court must grapple in order to properly decide this case. Firstly, the question of what inference should the court draw, not from what counsel suggests that Defendant **must have meant** from what counsel says he said, but from what the court finds from the evidence is a more reasonable inference that he did say. There is no evidence in any witness statement or other any document, that the Defendant said at any time of entry into the lease in April, 1985, "I expect to get title". Secondly, what is the character of what the court finds, on a balance of probabilities, was what the Defendant did, in fact, say? I think that it must be clear by now, as I have stated above, that as general proposition, where there are conflicts between the evidence for the Defendant and that of the Claimant, I accept the Claimant's as being, on a balance of probabilities, more credible. On the contrary, I find that there is sufficient evidence to hold that the Defendant made representations to the effect:-

a) that he had beneficial ownership in the subject property along with his siblings, **AND**
b) that he was authorized to alienate that beneficial interest.

I also hold that these representations were made by way of inducing the Claimant to enter into the lease with option to purchase agreement.

Despite the submissions of Defendant's counsel to the contrary, at the very least, I would be prepared to hold, on the said authority of **Esso Petroleum v Mardon** cited above, that here there was, at least, negligent misrepresentation. The Defendant knew the purposes for which the Claimant required the lease with the option and I also accept that he knew that the Claimant was relying on his representation when it decided to enter into the agreement. Indeed, the Defendant's averment that the Claimant knew the option "could not be performed", can only be a repudiation of the premise on which **HE** had entered into the lease, that he had a *right* to do so. If I am correct in so holding, then the damages flowing from the negligent misrepresentation would include the sums admittedly paid by the Claimant to the Fergusons for the registered land. I am also of the view that the Defendant gave an implied warranty of authority to deal with the said property in any

way including transferring it, and that the belated assertion that he could not have had authority to alienate it is evidence of a breach of that warranty.

In this regard, I believe that a recent case in Hong Kong which had to consider the modern approach to the question of what is a representation or warranty provides instructive analysis which can assist me in examining this matter further. I refer to the case **Ko Ching Chung v Fulltin Investment Limited**, **Civil Action No: 4857 of 2004**, a case from the Hong Kong District Court, Special Administrative Division, which contained an extensive examination of the judgments in the Esso Petroleum case cited above. In her judgment handed down on June 29, 2006 the learned judge, Her Honour, H.C. Wong, had this to say.

"The issues in this case are:

> (1) Did Mr. Lau of the Defendant make the two representations to Mr. Ko before the signing of the provisional tenancy agreement?
>
> (2) If the two representations were made, did they become a term or condition of the provisional tenancy agreement, or were they misrepresentations".

I believe that in the case at Bar, there are the same issues to be canvassed and answered. In answering those questions she cited considerable sections of the judgments of their lordships in the Esso Petroleum case. The learned judge started with her analysis with the following cite from Chitty on Contract which I approve and adopt.

According to the authors of Chitty on Contract 29th ed. volume 1, page 203, para. 2 – 161:

> "Other statements which induce persons to enter into contracts have some effect in law, but exactly what that effect is often turns on whether they are "mere representations" or have contractual force. The distinction between these categories turns on the test of contractual intention. In cases concerning the effect of such statements, the test of intention generally determines the contents of a contract, the existence of which is not in doubt. But where the inducing statement for some reason cannot take effect as a term of the main contract it may, nevertheless, amount to a collateral contract; and whether it has this effect again depends on the test of contractual intention."

The authors further stated:

> "It follows that an oral statement made in the course of negotiations will not take effect as collateral contract where the terms of the main contract show that the parties did not intend the statement to have such effect. This was, for example, the position where the main contract contained an "entire agreement" clause: this showed that statements made in the course of negotiations were to "have no contractual force."

In considering the question of whether a representation or warranty had been made she continued:

In the English Court of Appeal Case of ***Esso Petroleum v. Mardon*** **[1976] 1 Q.B. page 801**, Lord Denning M.R held at page 820:

> "A professional man may give advice under a contract for reward; or without a contract, in pursuance of a voluntary assumption of responsibility, gratuitously without reward. In either case he is under one and the same duty to use reasonable care: see ***Cassidy v. Ministry of Health*** **[1951] 2 K.B. 343, 359-360**. In the one case it is by reason of a term implied by law. In the other, it is by reason of a duty imposed by law. For a breach of that duty he is liable in damages: and those damages should be, and are, the same, whether he is sued in contract or in tort."

At page 824 of the same report Lord Ormrod went on to consider the difference between representation and warranty. He cited at 824 a dicta of Lord Denning M.R. in ***Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.*** **[1965] 1 W.L.R. 623, 627**:

> *' "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty."* (Emphasis mine)
>
> On the other hand there are dicta, particularly in the speeches in ***Heilbut, Symons & Co. v. Buckleton [1913] A.C. 30***, which suggest a more restrictive or conservative approach: for example, Viscount Haldane L.C. said, at p. 37:
>
> "It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it ..." .....

At p.825F, Lord Ormrod continued:-

> "A variety of tests have been suggested to determine the intention of the parties. For example, it is said that to constitute a warranty a representation must be of fact and not of opinion; or a statement about existing facts as opposed to future facts such as a forecast. To quote

again, in ***De Lassalle v. Guildford*** **[1901] 2 K.B. 215, 221,** A. L. Smith M.R. said:

"In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment."

But he went too far in speaking of the "decisive test" which was strongly disapproved of by Lord Moulton in the *Heilbut, Symons* case [1913] A.C. 30, 50.

In my judgment, these tests are no more than applied common sense. A representation of fact is much more likely to be intended to have contractual effect than a statement of opinion; so it is much easier to infer that in the former case it was so intended, and more difficult in the latter."

Chitty on Contract Volume 1 Chap. 6 at paragraph 6–010 page 434 has this to say:

"It is suggested that the fundamental principle which underlies the cases is not so much that the statements as to the future, or statements of opinion, cannot be misrepresentations; but rather that statements are not to be treated as representations where, having regard to all the circumstances, it is unreasonable of the representee to rely on the representor's statements rather than on his own judgment. In general this seems to be the reason why statements as to the future and statements of opinion have been held not to ground relief; in dealing with statements of this nature it has usually been felt that the representee ought not to have relied on the representor. It has been recognised that sometimes a statement which was on its face a statement of fact was really only one of opinion because it was apparent that the maker had no real knowledge or was simply passing on information for what it was worth. On the other hand there are circumstances in which it is perfectly reasonable for the representee to rely on the representor's statements even where those statements are matters of opinion, or statements as to the future, and where this is the case, it is thought that the statement should be treated as representation in the relevant sense." (Emphases mine)

I wholeheartedly agree with the analysis of the learned judge and accept that for the purposes of the claim in this case, the cite from Chitty is the correct approach to dealing with the law as it relates to what statements ought to be treated as a representation or warranty, rather than a mere statement of opinion or "future intent".

Defendant's counsel has also submitted to the court that since Defendant was saying, "I expect to get title", it must be inferred that he was saying that he "would use his best endeavours" to do so. Counsel suggests that, at the time of making the statement from which he has invited the court to draw an inference as to what was meant, this was a "promise of future intent" and "there is nothing to suggest that he did not intend to do so". Given the evidence of what I hold were less than "best efforts" made, and lack of diligence shown by the Defendant to secure legal title, as revealed by the correspondence, I would have little difficulty in holding that, on a balance of probabilities it is a reasonable inference to draw that at the time of making the statement, he had no such intention.

Further, it seems to me that the Defendant, having entered into a lease with option to purchase exercisable within specified time limits, and being seized with the knowledge, which I find that he had, (See Mrs. Cumper's 1984 letter expressing her willingness to transfer the property to the lawful beneficiaries of David Walker, deceased) that the name on the registered title was not his, he did precious little to prevent alienation of the property by Mrs. Cumper. Why did he not lodge a caveat over all the years, when according to the evidence the property, was not transferred until sometime in the early 1990s? It is true, as Defendant's counsel has submitted, that a party to a contract has no duty in law to "embark on expensive litigation in order to comply with contractual duties". Counsel submitted that "to the extent it may be suggested that Mr. Walker could have sued Mrs. Cumper we rely on **Wroth v Tyler [1973] 1 All ER 897** and **Hargreaves v Lynch [1969] 1 WLR 215**" exemplifying the principle that a "party to a contract is not obliged to do more than is reasonable to perform a contract and is not duty bound to embark on litigation or appeals". I agree with counsel's submission in this regard. However, I would hold that it would have been no more than reasonable to have entered a caveat against the registered title, given the knowledge that it was in the name of another. This would have prevented alienation, or at the very least, have made it more difficult. The difficulty then was not one as to not being able to obtain a title as argued by Counsel for the Defendant in terms of impossibility. It is more a situation that the Defendant had

not even used his best endeavours as he had impliedly warranted he would, to enable him to carry out his obligations, and I so hold.

I will leave aside for the moment the question whether the Claimant could get specific performance of the Agreement for Sale which is attached as an appendix to the lease in respect of either the registered or the unregistered portion of the land or in relation to both to consider the issue of the option. The only comment that I would make with respect that submission here is that in light of the maxim that "Equity does nothing in vain", it would seem that an order for specific performance, being an equitable remedy, would be precluded, at any rate in relation to the registered portion, since the Claimant does in fact already have title to that part of the property. The question is: How then would effect be given to such an order and against whom would it be enforced?

It is nevertheless necessary for me to deal with the issue of what, if anything should be made of the option and the purported exercise thereof. Mr. Batts has argued with some force that what we have here was a lease with an option to purchase and since the option to purchase was never, in his view, validly exercised, the agreement for sale which is the Third Schedule to the lease agreement, certainly never took effect. Further, it was submitted that the Jamaican Court of Appeal decision **Dennis Woodbine v Ebanks SCCA 147/2000 delivered on 20th December 2004** (per Harrison J. A. as he then was) was that an "option to purchase must be strictly complied with", a proposition with which it is impossible to disagree. The option herein was not exercised within the terms of the first leg, and the condition precedent for the exercise under the second leg never was fulfilled. It needs to be borne in mind that in Woodbine, the learned judge agreed with the judge at first instance that what was being considered in that case was not, in fact, an option. Moreover, as he also made clear, where an option is properly granted, the grantor cannot retract the grant from the grantee until the expiration of the time granted therein. Thus, if I grant an option to X, in consideration of the payment of $100.00, that X will have a right to purchase my property for one million dollars "providing he notifies me of his intention to purchase before the fifteenth day of the month next succeeding the grant of the option", I would not be able to sell to Y before the expiration of that time frame.

Indeed, if I attempted to sell in breach of the terms of the option, X would be able to enjoin such an effort.

Mr. Batts also submitted that, in any event, "an option to purchase is not a contract". In support of this proposition, he cited **Spiro v Glencrown Properties Ltd. & Anor. [1991] 1 All E.R. 600**, a case in which it was held that "an option to purchase exercised by a purchaser is not a contract, and the fact that there is an option does not mean there is contract". I am not at all certain that this case provides the support claimed by the Defendant. Indeed, the headnote reads:

"Although the grant of an option to purchase was a 'contract for the sale of an interest in land', for the purposes of section 2 of the 1989 Act, and had to be in writing incorporating all he terms of the contract and signed by both parties, a notice by the purchaser exercising the option was not a contract which was required to comply with section 2..... An option to purchase was not strictly speaking an irrevocable offer or a conditional contract since, although it resembled each of them in certain ways, it did not have all the incidents of the standard form of either". It does not appear to me here that the Claimant is advancing a case that the option here was, indeed, a contract and that its breach provides the cause of action which it is pursuing. Rather, as I have suggested above, it seems to me that the lease with option to purchase contains an *implied warranty* of authority to alienate, a breach of which warranty which is actionable, as well as a representation which I find, induced the Claimant to enter into the contract.

It is obvious that the Claimant gave valuable consideration for the option which was exercisable in the alternative time spans given in paragraph 5.3. It is also clear that the Claimant was *entitled to exercise the option* at the later of the two periods. The only party who assumed any obligation with respect to the alternative period was the Defendant. The agreement did not set any time limit on the carrying out of this obligation. The question may well be asked: Absent the issue of alienation by the third party/registered owner, if for fifteen or twenty years the Defendant sat on his hands and did nothing, would the Claimant have, *ipso facto,* surrendered the contractual right given it in the lease with option to purchase? Would it not have been open to the Claimant, (absent the action

of Mrs. Cumper), to serve a notice making time of the essence for getting the registered title, and upon failure by the Defendant to comply with such notice within a reasonable time, to seek the assistance of the court to force the Defendant to act so as to allow for the exercise of the option under the second limb? Could the Defendant then be heard to say? "I have not got title in my name and so the right for which you have paid, no longer exists, merely because I failed to fulfill my obligation to you under the terms of the lease agreement. It was difficult but I tried my best". It seems to me that in such circumstances the court would intervene to compel the Defendant to perform the obligations he has undertaken, and **Woodbine**, cited above, is not inconsistent with this proposition.

It is trite law that where no time limit is set for the performance of an obligation under the terms of a contract, the law implies a "reasonable time". In this case, the right given under the terms of the lease with option to purchase was manifestly exercisable within the later of the alternative periods set out in paragraph 5.3. No time limit was set for the Defendant to provide the trigger for the notice of intention to exercise under the second leg. I am prepared to hold that the effect of the provision in the section 5.3 of the lease with option to purchase was to give a warranty that the Defendant would do what was necessary for the Defendant to do in order to allow the Claimant to exercise the choice for which it had given valuable consideration. Since no time had been given for this, the court may imply a reasonable time. It would seem that the period of fifteen years from the signing of the lease to the time of the purported exercise of the option was considerably more than a "reasonable time".

In the Australian case of **LOUINDER v. LEIS [1982] HCA 28; (1982) 149 CLR 509** the action was concerned with a contract for the sale of real property. As far as time for completion was concerned, it was not of the essence. There was a failure of purchaser to tender transfer to purchaser by the specified date. The question was whether the vendor was thereby entitled to give notice to complete, or whether the vendor may give notice when purchaser was in breach though not guilty of unreasonable delay. It was held that default in compliance with a covenant which fixes a time for performance of that covenant, when time is not of the essence, entitles the innocent party to make time of the

essence and fix a reasonable time for performance of that covenant. If such a notice is not complied with, the party who gave the notice may rescind or sue for damages. In the instant case, it seems to me that the terms of paragraph 5.3 would have entitled the Claimant to have given notice in 2000 to produce registered title in fulfillment of what I have held to be a warranty that that would have been done, and in a reasonable time, no specific time limit having been set on the operation of the second limb of the option.

In this regard, I have found useful dicta in the unreported case of **Michael Evans (Appellant) v Robert Young (Respondent, SCCA # 52/97** cited by the Claimant's attorneys at law. This was a case in the Jamaican Court of Appeal and one of the judges was Patterson J.A. who gave the leading judgment in **Madden v Elliot**, cited by Mr. Batts above. In **Evans v Young**, the respondent lessor granted a lease to the appellant lessee with a clause in the following terms:

> 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 the option "

Having obtained a valuation from an "independent valuator", the lessee purported to exercise the option. The respondent did nothing and the appellant sued to enforce the option. At first instance, Marsh J. found that the clause in question did not "contain a validly exercisable option and the defendant was entitled to refuse to complete the sale of the said premises". In the course of his judgment, Patterson J.A. referred to the case of **Sudbrook Trading Estate Ltd. v Eggleton and Others, [1982] 3 All ER 1**, which was the House of Lords decision, reference to which had not been made before the first instance judge who only had the benefit of the Court of Appeal decision, later reversed by their lordships' house.

In **Sudbrook**, it was held by their lordships, (Lord Russell dissenting) that:

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 the

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 was constituted;

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 Migell [1811] 18 Ves 328; Dinham v Bradford [1869] L.R. Ch App 519** and **Beer v Bowden [1981] 1 All ER 1070** followed.

Harrison J.A. also adverted to the judgment of Lord Diplock who had the following to say:

> What Templeman L.J. 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 agreement 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 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 require enforcement by the courts, and such enforcement may either take the form of requesting 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 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.

Patterson J.A., in discussing the nature of options in lease with option to purchase, also cited, with approval, Hill and Redman's Law of Landlord and Tenant (1989 at para 735) as follows;

> "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 the term*". (I have highlighted this phrase in light of my reference below to proprietary estoppel).

His lordship then continued:

> 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:
>
> *'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 the 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 lessor at a future date, it does not give rise to any legal obligation on the part of either party unless the lessees give notice in writing to the lessor, 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 lessor and lessees'.* My emphasis)

I agree with, and adopt the reasoning of the learned judge of appeal, Patterson, J.A. and in particular the passage cited from the judgment of Lord Diplock in the Sudbrook case. (See the italicized and underlined passage in the preceding paragraph hereto). I also believe that this case, **Evans v Young**, is instructive in seeking to determine how the instant case ought to be decided. It is clear that the only obligation left to be performed was that of the lessor, Defendant, (to give notice of the fact that he had secured registered title). It will be apparent from the foregoing analysis that the Defendant had, in my view, *represented* that he would provide the notice of the title in his name, the trigger to the exercise of the option under the second limb. This should have been done and, in the absence of a stated time limit, within a "reasonable time" of the execution of the lease.

Before finally making what I think would be appropriate rulings and orders, there is one other issue to which I should like to make reference. This is the issue of equitable estoppel in its twin arms of promissory and proprietary estoppel and whether either has any application to, or implications for, the instant set of facts.

Under English law, promissory and proprietary estoppel are both species of equitable estoppel. Whilst the requirement of inducement and detrimental reliance is broadly the

same for both, one important distinction (which has been reiterated in recent case law) is that promissory estoppel cannot generate an independent cause of action since it is concerned primarily with preventing a contracting party from resiling from his representations or promises if the other party has acted in reliance on them: **Combe v Combe [1951] 2 K.B. 215 at 224; Baird Textile Holdings Ltd v Marks & Spencer Plc [2001] EWCA Civ 274** and **White v Riverside Housing Association Ltd [2005] EWCA Civ 1385**. By contrast, proprietary estoppel may be used not only as a "shield" in defence of an action by the legal owner but also as a "sword" capable of grounding a distinct and separate cause of action in equity. In this sense, the estoppel is capable of creating rights in property on behalf of the claimant who has successfully asserted an equity based on assurance and detrimental reliance.

In that regard, I refer to and draw upon an article, **"The Many Views of Promissory Estoppel"** by Adam Kramer, lecturer in law at the University of Durham, and published in **Student Law Review 2002, Volume 37 at page 17**.

Kramer suggests that:

> "..... the various forms of estoppel are like the tort of negligence – they are legal responses to statements, agreements or promises yet do not arise from the binding nature of promises (which is dealt with by the law of contract and governed by a requirement of consideration); they arise, rather, from different moral principles".

He does acknowledge further that:

> "English law does not yet recognise a wide (sword and shield) estoppel doctrine in which promises are remedied by an award of damages measuring the detrimental reliance, but such a doctrine is much easier to justify than a wide doctrine in which expectation damages are awarded (as in many Australian and US cases) or performance is ordered (as in proprietary estoppel cases)....."

But, he continues:

> "On the other hand, the wider principles behind tort law could justify a wide doctrine of promissory estoppel giving rise to detrimental reliance damages. Just as it is an actionable wrong in many situations to cause someone to detrimentally rely upon one's statement where that statement is carelessly given (**Hedley Byrne v Heller [1964] AC 465** applying the tort of negligence), one could argue

that it is equally wrong to cause someone to detrimentally rely upon one's promise and then not perform it".

It is to be conceded that this is not yet the law in England and Wales although, as will be seen from the citations below, courts in the United States and Australia have developed a more robust theory of promissory estoppel. In those jurisdictions, promissory estoppel is a full-blown, wide-ranging way of enforcing promises that operates alongside the law of contract – it can create new rights amongst those with no existing contract, and does not operate merely as a form of waiver, the underlying principle upon which estoppel is based. That this is not the law in England and Wales was reiterated in the case of **Baird Textile Holdings Limited v Marks and Spencers plc, [2001] EWCA Civ. 274**. There, the Court of Appeal held, per the learned Vice Chancellor, Sir Andrew Morritt, that "a common law or promissory estoppel cannot create a cause of action". (**Combe v Combe [1951] 2 KB 215**)

In an Australian case, **Waltons Stores *v Maher* (1988) 164 CLR 387** in which case the judges concentrated upon the unconscionability of the circumstances as a way of justifying enforcement of the promise, the following quotation is found (See the judgment of Mason CJ and Wilson J).

> The (foregoing review of the) doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. Humphreys Estate suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party. Humphreys Estate referred in terms to an assumption that the plaintiff would not exercise an existing legal right or liberty, the right or liberty to withdraw from the negotiations, but as a matter of substance such an assumption is indistinguishable from an assumption that a binding contract would eventuate.

The approach of United States jurisprudence to this issue provides for the direct enforcement of promises made without consideration by means of promissory estoppel. The Restatement on Contracts 2d, 90 states:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Notwithstanding the continuing persistence of the traditional view of this principle of law in England and the unwillingness to embrace a more assertive view of the promissory estoppel, it ought not to be supposed that a claimant may not be assisted the concept. Kramer in his article cited above states:

> Promissory estoppel can be used, in effect, to reduce the obligations already owed by the promisee to the promisor, but not to increase the obligations owed by the promisor to the promisee or to create new ones. It cannot, therefore, be used to create a new cause of action. This does not mean that the promisor must always be the claimant, as opposed to the defendant, only that the estoppel will not provide a cause of action and will only help a party to prove their case under a different cause of action (such as breach of contract).

This view of the applicability of the principle is also reflected in the judgments handed down in the case of **Waltons Stores** cited above. There, an Australian court looking at the approach of their English counterparts had this to say.

> There has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future. Promissory estoppel, it has been said, is a defensive equity (**Hughes v. Metropolitan Railway Co. (1877) 2 App Cas 439, at p 448; Combe v. Combe (1951) 2 KB 215, at pp 219-220**) and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword: **Perpetual Trustee Co. Ltd. v. Pacific Coal Co. Pty. Ltd. (1953) 55 SR(NSW) 495, at pp 508, 518-519** (reversed on appeal on other grounds, **[1954] HCA 37; (1954) 91 CLR 486; (1955) 93 CLR 479); Gray v. Lang (1955) 56 SR(NSW) 7, at p 13; N.S.W. Rutile Mining Co. Pty. Ltd. v. Eagle Metal and Industrial Products Pty. Ltd. (1959) 60 SR(NSW) 495, at pp 503, 510, 517**. High Trees itself was an instance of the defensive use of promissory estoppel. **But this does not mean that a plaintiff cannot rely on an estoppel. Even according to traditional orthodoxy, a plaintiff may rely on an estoppel if he has an independent cause of action, where in the words of**

Denning L.J. in Combe v. Combe, at p 220, the estoppel "may be part of a cause of action, but not a cause of action in itself". (Emphasis mine)

Indeed, as Kramer in his article (cited above) noted:

> The fact that promissory estoppel is primarily a doctrine of waiver – a shield and not a sword – makes the analogy with other forms of estoppel a little stronger: you still can't sue for estoppel (like you can sue for contractual breach or tort), *you can only use it to prove your case*. (My emphasis)

In the instant case, it seems to me that, based upon the facts of this case as I have found them, they would provide an excellent basis for the adoption of the more robust Australian and United States position. However, being bound by authority, I am unable to say that I can apply it here. Nevertheless, I do accept that "a plaintiff may rely on an estoppel if he has an independent cause of action, where, in the words of Denning L.J. in **Combe v Combe**, at page 220, the estoppel 'may be part of a cause of action, but not a cause of action in itself'". The cause of action here may properly be defined as breach of contract or at least an action for breach of warranty of authority, and it seems to me that the clear evidence of detrimental reliance by the Claimant, evidence of expenditure on the property and indeed, expenditure in purchasing the registered part of the land from the Fergusons, reinforces the view that the Claimant ought to succeed on the basis that there has been a breach of a specific contractual obligation; to wit, that the Defendant would put himself in a position, within a reasonable time, to advise the Claimant that he was in possession of the registered title, so that the Claimant could exercise its option given under the terms of the lease.

The second limb of equitable estoppel to which I should like to make reference is "proprietary estoppel". Again, I cite the Kramer where the author delivers himself of the following.

> There is a second doctrine of equitable estoppel that is called 'proprietary estoppel'. Proprietary estoppel applies to cases in which a party with rights to property leads another to believe either that the other party has rights to that property (often labelled 'acquiescence'), or will be granted some in future. This doctrine is *not* merely an equitable doctrine of waiver, as the *Combe v Combe* 'shield not sword' limitation does not apply to proprietary estoppel. It is also

fairly clear that detrimental reliance, rather than merely reliance, is required on the part of the party gaining the rights.
The remedy in such cases is whatever is required to do equity (fairness) between the parties. This will often amount to an award by the court of the full proprietary right that was promised. Thus, in *Pascoe v Turner* [1979] 1 WLR 431 a man told a former cohabitee woman that the house they had lived in was hers, and she later spent some money on repairs and improvements to the property. The man had led the woman to believe that she had a fee simple – effectively ownership – in the property, she had detrimentally relied on this, and so the court awarded her the fee simple. Spending £230 ensured that the woman got full title to a house.

It has also been said that the equitable principle known as "proprietary estoppel," is to the effect that, when A to the knowledge of B acts to his detriment in relation to his own land in the expectation, encouraged by B, of acquiring a right over B's land, such expectation arising from what B has said or done, the *court will order B to grant that right to A on such terms as may be just*, (my emphasis) is confined to rights and interests created in and over the land, and, perhaps, other forms of property of another.
Similarly, in **Crabb v Arun District Council [1976] Ch 179; 19753 All E.R. 865**, Lord Denning, M.R. had the following to say in relation to the principle of proprietary estoppel:

When Mr. Millett, Q.C., for Mr. Crabb said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. *But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action.* (My emphasis) We had occasion to consider it a month ago in **Moorgate Mercantile v. Twitchings (since reported in 1975 3 W.L.R. 286)** where I said that the effect of estoppel on the true owner may be that

"his own title to the property, be it land or goods, had been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct -what he has led the other to believe - even though he never intended it."

The new rights and interests, so created by estoppel, in or over land, will be protected by the Courts and in this way give rise to a cause of action. This was pointed out in **Spencer Bower and Turner** on **Estoppel by Representation, Second Edition (1966)** at pages 279 to 282.

The basis of this proprietary estoppel - as indeed of promissory estoppel - is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising an equity". If I may expand that, Lord Cairns said: "It is the first principle upon which all Courts of Equity proceed", that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties, see **Hughes v. Metropolitan Railway (1877) 2 A.C. at page 448**. What then are the dealings which will preclude him from insisting on his strict legal rights? -If he makes a binding contract that he will not insist on the strict legal position, a Court of Equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights - then, even though that promise may be unenforceable in point of law for want of consideration or want of writing - then, if he makes the premise knowing or intending that the other will act upon it, and he does act upon it, then again a Court of Equity will not allow him to go back on that promise, see **Central London Property Trust v. High Trees House (1947) K.B. 130: Richards (Charles) v. Oppenhaim (1950) K.B. 616, 623**. Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights - knowing or intending that the other will act on that belief - and he does so act, that again will raise an equity in favour of the other: and it is for a Court of Equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In **Ramsden v. Dyson (1866) L.R. 1 H.L**. at page 170 Lord Kingsdown spoke of a verbal agreement "or what amounts to the same thing, an expectation, created or encouraged." In **Birmingham & District Land Co. v. The London & North Western Railway (1888) 40 Ch. D**. at page 277, Lord Justice Cotton said that

".... what passed did not make a new agreement but what took place .... raised an equity against him."

And it was the Privy Council who said that

".... the Court must look at the circumstances in each case to decide in what way the equity can be satisfied"

giving instances, see **Plimmer v. City of Wellington Corporation (1884) 9 A.C.** at pages 713-4.

Recent cases afford illustrations of the principle. In **Inwards v. Baker (1965) 2 Q.B. 29**, it was held that, despite the legal title being in the plaintiffs, the son had an equity to remain in the bungalow "as long as he desired to use it as his home." Mr. Justice Danckwerts said (at page 38):

"Equity protects him so that an injustice may not be perpetrated."

In **E.H. Ives Investment Ltd. v. High (1967) 2 Q.B. 379**, it was held that Mr. High and his successors had an equity which could only be satisfied by allowing him to have a right of access over the yard, "so long as the block of flats has its foundations on his land." In **Siew Soon Hah v. Wang Tong Hong (1973) A.C. 837**, the Privy Council held that there was an "equity or equitable estoppel protecting the defendant in his occupation for 30 years".

In light of the foregoing dicta which I approve and adopt, it seems clear that the Claimant can call in aid here the principle of proprietary estoppel in support of its action, as there has been a detrimental reliance upon the representation of the Defendant within a contractual context involving real property. I am prepared to hold that in these circumstances, the Claimant is entitled to redress and that that redress may be on such terms as a Court of Equity considers just and appropriate in all the circumstances. At the end of the day, it would seem repugnant to all the principles of equity which have over centuries been developed to counter the harsher effects of the Common Law, that it is the innocent Claimant who should be left without a remedy in circumstances where a party (the Defendant in this case) had undertaken a contractual obligation to another party, (an obligation peculiarly within his power to perform, that is the obligation to do what was necessary to put the Claimant in a position to exercise the option granted in the contract), and the Defendant fails to deliver on that obligation in circumstances which give no basis for a claim of frustration of the enterprise,.

I accordingly hold that the Claimant has established a cause of action in contract and that there has been a breach of the contract. In particular I hold that the Claimant has relied upon representations made by the Defendant, at least negligently, knowing that it would be relied upon and which induced the Claimant to enter into the contract. The representations are those articulated in the Claimant's Amended Statement of Claim at paragraph 13 thereof. I am also prepared to hold that there has been a breach of the implied warranty of authority that the Defendant had the right to alienate the properties in question. I am satisfied that the Claimant is greatly assisted in its case by the established principles of proprietary estoppel and that the manifest detrimental reliance of the Claimant upon the representation of the Defendant. I accept that this entitles the Claimant

to an interest in the real property owned by the Defendant and I accordingly give judgment for the Claimant.

As far as the nature of the redress to which the Claimant is entitled is concerned, I hold that the Claimant is entitled to damages in respect of the registered part of the property purchased from the Fergusons. The extent of the damages will be the difference between the sums paid to the Fergusons and the sums that would have been paid to the Defendant under the terms of the original lease with options to purchase. I also order that the Claimant now has an equitable interest in the unregistered parcel and that the Defendant, at her cost, will do what is necessary to invest the Claimant with legal title within a reasonable time. If this sounds like an order for specific performance of the aspect of the contract dealing with the unregistered portion of the land, it really is a short hand way of saying that the Defendant must, within a reasonable time, provide the opportunity for the Claimant to exercise the option which it has under the contract. After all, Equity regards as done, that which ought to have been done.

It will be recalled that one of the concerns with the Claimant's initial acquisition was the fact that the only ingress or egress to the registered land was over the unregistered portion. In those circumstances, the Claimant may, if it so prefers, immediately purchase the outstanding portion of land at the agreed price and proceed to register it along with the previously purchased portion.

I award costs to the Claimant, to be taxed if not agreed.

I invite counsel on both sides to try to prepare an appropriate order to give effect to these rulings.