DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 OF 1997

BETWEEN:

EQUIPMENT RENTAL AND SERVICES LIMITED
Appellant

and

TEXACO [WEST INDIES] LIMITED
Respondent

Consolidated Suits No. 304 of 1993
No. 345 of 1993

Before:

The Hon. Mr. C.M.Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal

Appearances
Mr. D. Knight Q.C. and Mr. E. de Freitas for the Appellants
Mr. F. Solomon S.C., Mr. R Armour, and Mr. A Astaphan for the Respondents

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1998: September 16; 17
October 26.

JUDGMENT

BYRON C.J. [Ag.]

This is an appeal against the judgment of Einfeld J. delivered 18th April 1997. The ruling was given preliminary to the trial with the consent of counsel for all parties in two consolidated civil suits on agreed facts and issues submitted to the learned trial judge for determination. There were a plethora of matters in controversy but in essence their resolution revolved around the disposal of the preliminary legal issues submitted to the learned trial judge. This shortened the proceedings to one day, and an oral judgment with reasons which were recorded was delivered on the following day. A full trial was thought likely to have lasted three weeks. It was in our opinion a useful method of dealing with these proceedings.

The agreed facts

Daniel Green was the Registered Proprietor, [W4 folio 22] of about 300 acres of land. By a lease dated 20th January, 1968, registered as an incumbrance under the Title by Registration Act, he leased about one and half acres of the land to the respondent for a period of 25 years with effect from 1st August, 1967 with an option to renew. The respondent had an Aliens Landholding licence to hold the 25 year lease of the land .

By letter dated 5th May, 1992 the respondent exercised the option for renewal of the lease for a further period of twenty five [25] years commencing 1st August, 1992, but did not obtain an Alien's Landholding Licence for that further period of 25 years. The lease expired on 31st July, 1992.

On the 15th day of August, 1992, Daniel Green entered into a written contract with the appellant for sale of 66,575 sq.ft. of land then currently occupied by the respondent. The balance of the agreed price of E.C.$665,750 was paid on the 16th September, 1992. At the time of the agreement for sale, there was no notification on the Certificate of Title that the respondent had exercised the option to renew.

On the 29th September, 1992, the respondent presented a Caveat to be entered on the title of Daniel Green supported by allegations of its exercise of the option to renew the lease. This caveat was noted on the title in June 1993.

As a result of the Caveat, the appellant was not able to obtain a certificate of title notwithstanding that Daniel Greene had executed a memorandum of transfer in the statutory form and on 27th November, 1992 it was noted on the title.

The issues

The main issues decided by the trial judge resolved themselves in to two questions:

1. whether on the agreed facts the respondent was entitled by equitable relief to obtain the lease pursuant to the exercise of the option to renew, and

2. whether that right to the lease was affected by the fact that at the time the first lease expired the respondent had no aliens landholding licence.

The judge's rationale

The judge considered that an option to renew once registered as part of the lease must be regarded as indefeasible although it might only confer equitable interests. He rejected the contention that the failure of the respondent to place a caveat on the title to protect its interest when it exercised the option was the decisive factor in determining whether its claim could now be defeated. He reasoned that, a prudent purchaser conducting reasonable searches would have seen the lease with the option to renew and requisitioned what the situation was in regard to the option. He concluded that the exercise of the option created a prima facie entitlement in the respondent to the delivery of the lease and its due execution for the period for which it was renewed. He answered the Aliens Landholding Licence question by affirming the principle that there is no provision for a lacuna of ownership of land and once the vendor has received the consideration for sale he has no further interest in the land.

The Order

Consequently he ruled, that prima facie the respondent is entitled to the delivery of a new lease, duly executed by the appellant, and that nothing in the Aliens Land Holding Act 1992 invalidated or otherwise impinged on the respondent's entitlement to the delivery of the said lease. He ordered that all questions of costs be reserved.

At the hearing the appellant had obtained leave to amend its pleadings to allege that the respondent had waived or abandoned its rights to the lease. The trial judge had reserved his ruling on that issue. That ruling is no longer necessary because we have received formal notice that the appellant will not be pursuing the claim for waiver and abandonment.

The Appeal

The appellant challenged the ruling on the Aliens Landholding licence. We can dispose of this challenge quickly. The abundance of

authority makes it unnecessary to revisit this argument in detail. The law is well settled. The Aliens Landholding Licence legislation does not affect the contractual and other relationships between vendor and purchaser and lessor and lessee. The rights, powers and privileges to forfeit land held by the unlicenced alien vests in the State, and not in the individual citizen. Any such land or interest in land, including a 25 year lease, is merely liable to forfeiture. The forfeiture is not automatic nor is it mandatory. In effect this means that the unlicenced alien can hold the land or interest in the land subject to the right of the State to initiate steps to forfeit it . See the Privy Council decision of Young v Bess [1995] 46. W.I.R. 165 applied by this Court in Village Cay Marina v Acland and Others British Virgin Islands Civil Appeal No. 8 of 1995. The ruling of the learned Trial Judge on this issue accords with binding authority.

The appellant has challenged the ruling of the learned Trial Judge that The respondent had an interest in the land which had priority to the appellant as a purchaser for value. His contentions could be fairly grouped and dealt with under four main points.

1. In Dominica the statutory definition of land under the Title by Registration Act does not include equitable interests, Consequently the respondent had no interest that could be recognised under the Act, and could gain no priority over the appellant.
2. In Dominica the option to renew is not protected by registration as is the lease itself.
3. In Dominica the option to renew is not a registrable interest, therefore it is not indefeasible and cannot gain priority against a registered proprietor whose title is protected by the doctrine of indefeasibility.
4. Even if the option to renew runs with the land the exercise of the option does not as it causes a new lease to spring up and the new lease requires registration.

The Authority of Mercantile.

Mercantile Credits Limited v The Shell Company of Australia

(1975-1976) 136 C.L.R. 326 is a decision of the High Court of Australia on appeal from the Supreme Court of South Australia a jurisdiction which applies the Torrens System on which the Title by Registration Act on Dominica is based.

Shell was a lessee under a lease which contained covenants giving the right to renew for three successive periods each of five years. After the first extension, which was duly registered, another became registered as the proprietor of the land subject to the memorandum of lease, and the appellant became registered as mortgagee. Shell gave notice of a further extension and the registered proprietor executed a memorandum in registrable form but it was not registered. The mortgagee did not consent to the extension. There was a default on the mortgage and the mortgagee gave notice of its intention to sell. The appeal affirmed the decision that the lessee was entitled to registration of the extension of its lease and the mortgagee's right to sell was subsequent to the lessee's right of renewal so that the mortgagee was not at liberty to sell the land free from the leasehold interest.

I have concluded that the Mercantile case is very similar to this one. In both cases the relevant interests were the equitable interests that arose in favour of a lessee who had exercised an option to renew and failed to register it. The three members of the High Court of Australia, and the learned trial Judge in this case were satisfied that the registration of the lease with such a clause constituted an interest which ran with the land which was indefeasible, and the interests resulting from the exercise of the option were not dependent on the registration of the extension of the new lease.

Counsel for the appellant contended that the case should be distinguished because its rationale was based on or aided by statutory provisions which did not exist in Dominica. In particular he referred to the fact that under the South Australia Act land was very widely defined to include equitable estates and interests; under section 56 of the South Australia Act gives priority to registered interests over subsequent instruments affecting the same land; section 67 of the South Australia Act provided the lease to contain covenant. I will consider these submissions when dealing with the position under our law.

1. Does "Land" include "equitable interests in land."

The appellant's position was based to a considerable extent on the argument that the Torrens system as introduced to Dominica by the Title by Registration Act developed a new type of title which passes on registration subject to incumbrances but not to any equitable interests. He contrasted the wide definition of land in the South Australia legislation with the definition under the Dominica Act and argued that we should conclude that equitable interests were unknown to and, therefore, non existent in dealings under the Title by Registration Act. The effect being that when the respondent exercised its option to renew the lease the contractual rights that arose were not equitable interests in the land which could affect the estate to be acquired by a subsequent purchaser for value.

The definition of land

The definition of land in the Title by Registration Act is

> "Land includes all the fixtures and buildings thereon, and everything growing on the soil (unless otherwise specified), with the exception of any wooden houses belonging to others on the land, which are accustomed to be moved from place to place, and any wooden houses the property of lessees, and, in towns or villages, with the exception of such movable wooden houses as are the property of the residents therein, and not of the owner of the soil."

Counsel argued that this definition excluded equitable and other interests in land from being part of land. I could not agree. In my view this is clearly not a comprehensive definition. The legislature was dealing with a particular issue, that of chattel houses, and making it clear that movable houses were excluded from the concept of fixtures on the land.

The more complete statutory definition of land which would govern the Title by Registration Act is to be found in the Interpretation and General Clauses Act section 3[1]

> "For the purposes of this Act and any other Act or subsidiary legislation or statutory document whether made before or after the commencement of this Act, the following words and expressions shall be construed in

> accordance with the provisions of this section unless there is something in the context inconsistent with such construction or a different construction is expressly provided:
> "Land" includes buildings and other structures, land covered water, and any estate, interest, easement, servitude or right in or over land."

This broader definition of land including any interest in land, must include equitable interests in accordance with all established general principles. The contrary position was considered unarguable even a century ago. See Lord Macnaghten in Williams v Papworth (1900) A.C. 563 at 568 who said Ait could not of course be disputed that the expression "interest in land" unless there was something to restrict the meaning, must include equitable as well as legal interests."

This particular contention by the appellant has already received specific judicial rejection in the leading case of Lehrer v Gordon (1964) 7W.I.R. 247, a decision of the British Caribbean Court of Appeal from Antigua which has been followed and applied consistently. In Antigua the Title by Registration Act Cap 99[L.I.] in force at the time was in almost identical terms to the Act currently in force in Dominica. Archer P. had to deal with the argument and disposed of it quite decisively. He said

> "Although the argument was not fully developed and counsel did not go to the length of saying that the Title by Registration Act [L.I.] contemplated full ownership of land and did not recognise ownership in equity, I suspect that this is the conclusion to which the argument led and that what counsel intended to convey was that even after the signing of the agreement, there being no registration of the agreement under Cap 99[L.I.] the defendant appellant had nothing more than a contractual right and acquired no equitable estate in the land But the Title by Registration Act [L.I.] makes no such radical change in the law as the abolition of equitable estates in land and the defendant-appellant acquired more than a mere contractual right when the agreement was signed."

I conclude like Archer P. that the Title by Registration Act did not make such a radical change in the law of Dominica as the abolition of equitable interests in land brought under the Act. The respondent=s interest in the land, namely the right to have a new lease as a result of the exercise of the option to renew was an equitable interest that could be enforced against the proprietor of land held under the Act.

Priorities

The fallacious premise that equitable interests were unenforceable under the act affected the appellant=s propositions as to priority. It is true, that the Dominica Act provides that incumbrances rank in order of the date on which they were presented for registration, and makes no provision for the ranking of equitable interests.

This does not mean, as Counsel for the appellant argued, that the equitable interest has no standing at all. It means that general equitable principles should be applied. Simply stated, where the legal estate is outstanding the priority of equitable interests is *prima facie* governed by the rule *qui prior est tempore, potior est jure* [he who is first has the strongest right]. In this case the respondent exercised its option to renew, before the appellant agreed to purchase the land. The respondent should therefore have the stronger right. Neither the respondent nor the appellant had registered interests. Daniel Green had received full consideration for his land, and has no beneficial interest in the land. The real competing interests are equitable and the basic principle of first in time should prevail.

2. The Option to Renew is Part of the Lease

In Dominica Section 59 of the Title by Registration Act Cap 56:50 provides for the notation of a memorandum of lease as an incumbrance on the certificate of title

> "In order that all the rights granted, which to any important extent affect the land, may appear upon the certificate of title..."

The statutory form did not include provision for covenants. Counsel for the appellant has submitted that we should attach sufficient importance to that circumstance to find that it supports the conclusion that the covenants to a lease are not registrable interests.

It was his contention that the position in the Mercantile case was distinguishable because the conclusions to which the court

reached on this issue resulted from specific statutory provisions which made the covenants of a lease part of the lease and registrable.

The Dominican Act does not define lease. The meaning which should therefore be ascribed to the term should be the usual meaning consistent with the context of the Act. A lease operates as a conveyance or demise of the interest in land created by the relationship of landlord and tenant. Formal words are unnecessary once the instrument shows the parties intend that one should divest himself and the other come into possession for a determinate time either immediately or in the future. The term of the lease is clearly affected by rights to renew the lease. Any such right is an integral part of the demise.

4th Halsburys Laws of England volume 27 para 108 explains that property comprised in the lease includes easements, exceptions and reservations, the term of the lease , the reservation of the rent and the tenants and landlords covenants and conditions, and these would commonly include provision for the renewal of the lease.

The legal status of the option to renew is explained in the same volume of Halsbury at paragraph 113

> "Option for future lease. A lease which creates a tenancy for a term of years may confer on the tenant an option to take a lease for a further time. Such an option constitutes an offer which the landlord is contractually precluded from withdrawing so long as the option remains exercisable, and it may be possible to exercise the option by conduct. The option may be so phrased that the tenant is entitled to a fresh lease containing all the terms, including the option to renew, contained in his original lease, in which case the lease is perpetually renewable. Unlike an option to purchase, an option to renew is never affected by the rule against perpetuities, even though the new lease is not to be in terms similar to those of the original one. An option to renew runs with the land and with the reversion, and so both the landlords and tenants successors in title are bound. It is and interest in land capable of assignment, and on the tenants bankruptcy the option vests in his trustee in bankruptcy. ..."

I cannot agree with counsel that the omission to include a provision in the legislation specifically authorising the inclusion of an option to renew in a lease to be registered as an incumbrance evinces a legislative

intention to change the meaning of lease in such a drastic and far reaching manner.

I conclude that the option to renew was a part of the lease which was noted on the register and became an indefeasible interest, protected to the same extent as the lease, itself, by registration.

3. Indefeasibility

The rationale of indefeasibility of the option to renew and the caveats to a prudent purchaser of the reversion in such cases was well put in the Mercantile case by STEPHEN J. at 352 and his view is applicable to the law of Dominica.

> "To confer indefeasibility upon rights of renewal contained in registered leases does violence neither to the general scheme of the Act nor to the objects which it seeks to attain. The existence of such rights of renewal will be apparent upon any inspection of the register and those who deal in the land may thus learn of the extent to which the reversion is thereby contingently affected. What will be registered, and protected by that registration, is a right conferred by covenant which touches and concerns the land and runs with the land - Weg Motors Ltd. v Hales [68], affirmed on appeal - [69]; it is an incident of the lease creating an interest in the land forming a part of the lessees interest in that land. To accord it the protection afforded by registration is thus in no way inconsistent with the tenor of the legislation and gives rise to no anomalies. New Zealand courts have, over the years, had occasion to consider the matter here in issue as it has arisen under their own Torrens system legislation with the consequences discussed in the judgments of the other members of this Court. It is satisfying to note that the decision in this case will accord with the pattern of New Zealand decisions."

4. The exercise of the option

It is the option to renew which is indefeasible, not its exercise. The legal effect of the exercise of the option is that it requires a new lease to come into effect. Such new lease would become indefeasible on registration. The rights accrued under the exercise of that option are contractual and equitable giving the lessee a right to enforce the delivery of a new lease. This distinction is explained by Archer P in the case of Lehrer v Gordon when in his judgment he considered the case of Gonsalves v Fernandez (1961) 4 W.I.R. 55 another case from Antigua

under the Title by Registration Act. His consideration of this case is relevant because the extravagant arguments made in that case based on the definition of indefeasibility of registered title were echoed before us. The court ruled in that case that the doctrine of indefeasibility of title had no application to the proceedings which were for the enforcement of a contract between the parties. He explained that there was an important distinction between making a claim for declarations of rights flowing from a contract and orders in effect decreeing specific performance on the one hand, and a claim for rectification of the register on the ground that the person registered as proprietor is not the true owner of the land on the other. The doctrine of indefeasibility only affects the latter. In both cases the court gave effect to equitable interests held by someone other that the registered proprietor. At page 258 Archer P. said:

> "The difference between Gonsalves v Fernandez and this case is merely that in the former case the retention of his beneficial interest by one party was the subject of agreement between the parties whereas in this case the acquisition of the ownership in equity was by operation of law."

In this case the trial judge made an order which in effect was for the specific performance of the rights arising under the exercise of the option to renew.

The Party to be bound by the Exercise of the option

Council submitted that the appellant could not be held liable to execute and deliver the lease to the respondent. He relied on Section 6[2] of the Act which prescribed

Section 6.

> "[2] Dealings with lands brought under the operation of this Act, which are not in accordance with the provisions of this Act, shall operate as contracts only, and shall not confer any right in respect to the land, except the right of enforcing the contract as against the parties , and persons claiming otherwise than as purchasers or mortgagees for value under the parties."

It seems to me that this section does not deal with rights or interests in the land. The Act does not prescribe what interests in land

may be registered. It requires the registration of dealings with land brought under the Act. There is nothing in the section which defines or limits the interests that may exist in land. The Statute itself explains a dealing with the land in these terms:

> "A dealing with land is any act in regard thereto which requires an application to the registrar of Titles to have the act completed and made available for registration..."

Section 6 recognised the right to enforce contractual rights. The rights of the parties were that the respondent was entitled to a new 25 year lease and the appellant was entitled to the ownership of the land subject to the respondent's lease. Counsel for the appellant contended that the respondent's contractual right was against Daniel Green and not against the appellant, therefore the order to deliver a new lease should have been made against Daniel Green and not against the appellant. The premise of that contention may be technically correct. But the holder of the reversion under a lease is bound by its contractual terms. It is an agreed fact that Daniel Green had already received full consideration for the land and executed the memorandum of transfer to the appellant in the statutory form.

This constitutes a dealing with the land requiring registration, which must take effect subject to the lease. Daniel Green having unequivocally relinquished his beneficial interest to the appellant, the order for the appellant to deliver the new lease is an effective employment of the power to resolve the real issue between the parties. In effect the order of court is a simple and effective method of paving the way for the removal of the caveat, the registration of the appellant's title and the notation of the respondent’s lease on the title.

I would therefore dismiss the appeal and affirm the order of the court below subject to the minor variation required to reflect the appellant's withdrawal of the issues of waiver and abandonment.

On the issue of costs, I do not have enough information of the events before the trial court to make a final order and we accordingly affirm the order reserving those costs.

I award the costs of the appeal to the respondent.

C.M. DENNIS BYRON
Chief Justice [Ag.]

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT REDHEAD
Justice of Appeal