ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2006/0025

JACQUELINE HAVENER

Claimant

And

MAX FERNENDEZ
JILL FERNANDEZ

Defendants

Appearances:

Mr. Dane Hamilton Snr for the Claimant
Mrs. Neleen Rogers-Murdoch for the Defendants

.....
2007: January 15th
April 30th
.....

JUDGMENT

[1] Blenman J, This is a claim for possession of property together with mesne profits. There is also a counterclaim for specific performance of an agreement together with requests for several declarations.

Claimant's Claim

[2] Mrs. Jacqueline Havener (Mrs. Havener) is the registered proprietor of lands and premises situate at Dian Bay, Long Bay in the Parish of St. Phillip, in the island of Antigua and registered in the Land Registry as Registration Section: St. Phillip North: Block 25 3290A; Parcel 116; 60 and 82 (the property). Mrs. Havener alleges that on or about the 1st day of April 2003, she rented the property to Mr. Max Fernandez (Mr. Fernandez) and Mrs. Jill Fernandez (Mrs. Fernandez) for a term of one (1) year that is to say, from 15th April, 2003 to 15th April, 2004, at a rent of US$1,000 payable monthly in advance. The lease contained two option clauses one for its renewal and the other for the purchase of the property. The lease having expired on April 15th 2004, Mr. and Mrs. Fernandez have failed to exercise the option to rent the property for a further term of one (1) year granted by clause 4 of the lease within the time stipulated. Mrs. Havener complains that since the

expiration of the lease Mr. and Mrs. Fernandez have remained in occupation of the property as trespassers, having refused a request by her (Mrs. Havener) for possession of the property, the request was contained in a letter dated April 14th 2004 from Mrs. Havener's solicitors. The property comprise three parcels of land together with an upscale dwelling house and a guest house situate on Parcel 60; the same fronting Dian Bay with rental value which Mrs. Havener she says is in excess of US$5,000 monthly to which she (Mrs. Havener) says is entitled to claim as mesne profits from April 16th 2004 until delivery of possession of the premises. Mrs. Havener also claims costs and interest.

Defendant's Defence and Counterclaim

[3] Mr. and Mrs. Fernandez admit that the lease expired on April 16th 2004 and that they have failed to exercise the option to renew it for a further one (1) year term granted by clause 4 of the said lease. However, Mr. and Mrs. Fernandez state, that by clause 5 of the said Lease, Mrs. Havener gave to them an option to purchase the property, in the event that she (Mrs. Havener) puts up the property for sale, at any time during the term granted by the lease, subject to Mrs. Havener having the right to offer the property for sale to members of her (Mrs. Havener) immediate family, prior to them (Mr. and Mrs. Fernandez) option to purchase becoming exercisable. Mr. and Mrs. Fernandez further state that the said clause of the lease read as follows:

> "In consideration of the sum of one dollar the lessor hereby grants unto the lessee the first Option to lease the Demised Premises at the expiration of the term herein stated for a further one year term at a rental to be negotiated. In order to exercise this option the lessee shall inform the lessor in writing of their intention to exercise the same no less than two months prior to the end of the term hereby created."
>
> The lessor hereby grants unto the lessee an option to purchase the demised premises should the Lessor put the same up for sale at any time during the term hereby created SUBJECT to the lessor having the right to offer the demised premises for sale to members of the lessor's immediate family prior to the lessee's option to purchase becoming exercisable. The lessee shall have a period of 90 days from the date that they are notified by the lessor in writing of her intent to sell the demised premises in which to exercise the option to purchase herein granted and accept by written agreement the terms and conditions of sale. Should the lessee fail to execute a written sale and purchase agreement within the aforesaid

> period of 90 days the option to purchase shall be null and void and no longer binding on the lessor."

[4] Mr. and Mrs. Fernandez allege that prior to signing the lease on 1st April, 2003, the parties had discussed both the terms of the lease and the option to purchase the property in or around January, 2003.Mr and Mrs. Fernandez state that Mrs. Havener, in January, 2003, had placed a For Sale sign on the property, at which time they had indicated their desire to purchase the property. They further state that, Mrs. Havener, in January, 2003 during the discussions agreed to sell them the property for US$500,000 and further agreed to give them six months to purchase the property. Mr. and Mrs. Fernandez further allege that at the time of the discussions, Mrs. Havener proposed a rental of US$2,000 per month, but in fact agreed to a rent of US$1,000 per month in view of the fact that Mr. and Mrs. Fernandez were to purchase the property. In confirmation of the agreement to purchase the property, Mr. and Mrs. Fernandez contend that, on 5th January 2003, they paid Mrs. Havener the sum of US$1,000 which was forwarded to her by Federal Express, on her instructions. They further contend that by a hand written faxed letter, received from Mrs. Havener on 14th January 2003, she confirmed the terms of the discussions regarding the option and further confirmed that the purchase price of the property was US$500,000 and that the purchase price would be good for an initial period of six months.

[5] They contend that by typed letter, signed by Mrs. Havener and received by fax on the said 14th January, 2003, Mrs. Havener further confirmed to them their discussions regarding the lease agreement. The lease was to commence on 2nd April, 2003 at the rent of US$1,000 per month with the right given to Mr. and Mrs. Fernandez, if Mrs. Havener determined to sell, to purchase within 90 days of her decision to sell. Next, Mr. and Mrs. Fernandez contend that in or around February, 2003, Mrs. Havener met them in the presence of her brother Gregory Gordon and a third party and indicated that she wished to give her family an opportunity to purchase the property and requested them to consider a 12 month lease in lieu of a six month, lease in order to give her family the right of first preference. Mrs. Havener also proposed including in the lease the option for them to purchase the property. Mr. and Mrs. Fernandez state that, in good faith, and based on these discussions they entered into the agreement with her for the lease to commence on 15rh April, 2003 for a

twelve month period. The lease contained an option to purchase but no price was included therein; as it was understood by the parties that the purchase price would remain at the US$500,000 as had been previously agreed. Mr. and Mrs. Fernandez state, further, that by letter dated 15th January, 2004, Mrs. Havener wrote to them indicating that she had decided to sell the property and that the selling price would be US$1.2 million. Mr. and Mrs. Fernandez state that on 22nd January, 2004 Mrs. Havener having given notice of her intention to sell, consistent with the previous agreements and the terms of the option contained in her (Mrs. Havener) faxed letter of January 14th 2003, Mrs. Fernandez by letter from their solicitor exercised the option to purchase the said property at the price of US$500.000, 00

[6] They next contend that upon receipt of the notice of their intention to exercise the option to purchase the property Mrs. Havener wrote a letter of January 14th 2004, advising that the property had been taken off the market as she (Mrs. Havener) was no longer desirous of selling the property. They state that they wrote to Mrs. Havener and indicated their intention to purchase the property at the agreed price of US$500, having exercised the option contained in the lease in accordance with the terms of the agreement but that Mrs. Havener has failed and/or refused to complete the transaction according to the agreement between the parties. They state that instead, on 14th April, 2004 Mrs. Havener, through her solicitors, wrote to them referring to the lease agreement and advising that the lease will expire on 15th April, 2004 and requesting them to quit and deliver up possession of the premises. In response to Mrs. Havener's letter, on 29th April they caused a response to be written to Mrs. Havener's solicitors advising of the option to purchase and the existing agreement between Mrs. Havener and themselves. They further state that in or around October 2004, Mrs. Havener, through the agency of her brother Gregory Gordon instructed, her attorneys to make a proposal for settlement to them which proposal they rejected by letter dated 24th November, 2004 and invited Mrs. Havener to make a further proposal that would be more acceptable but have had no further word from Mrs. Havener until the commence rent of the present proceedings.

[7] Mr. and Mrs. Fernandez admit that since the expiration of the lease they have remained on the premises and that they have refused Mrs. Havener's request for possession but deny that they are trespassers on the premises. Further, they state by letters dated 29th April, 2004 and 21st June, 2004 and 9th November 2004 respectively, they have repeatedly indicated to Mrs. Havener that they are ready to purchase the property at the agreed sum of US$500,000 and that the sum of US$1,000 per month has been placed in escrow in respect of the occupation of the premises. They deny that the Mrs. Havener is entitled to possession of the premises or that they are trespassing on the premises and further deny that Mrs. Havener is entitled to possession of the premises of indeed to any of the reliefs claimed. Accordingly, they allege that Mrs. Havener's notice in January, 2004 that she was offering the premises for sale to them for the sum of US$1.2M was a notice in breach of the option agreement that had been concluded between the parties. They further allege that when Mrs. Havener gave notice to them, through her attorney, by letter dated February 24th 2004, that she had decided to take the premises off the market and was no longer desirous of selling, the same was in further breach of the said agreement.

[8] Mr. and Mrs. Fernandez allege that the notice to quit which Mrs. Havener issued to them by letter dated 14th April, 2004 is in breach of their agreement and is null void and of no effect since prior to the issue of the said notice they had duly given notice that they were ready to exercise the option pursuant to the terms of the January, 2003 agreement. They have altered their position based on the agreement between the parties a matter of which Mrs. Havener has had notice. They further state that they have attempted to resolve this matter by amicable means but Mrs. Havener has failed since November, 2004 to address the matter.

[9] In the premises Mr. and Mrs. Fernandez seek against Mrs. Havener the following reliefs:

(1) A declaration that the option agreement between Mrs. Havener and Mr. and Mrs. Fernandez made in January, 2003, is a binding agreement giving Mr. and Mrs. Fernandez the right to exercise the option to purchase the premises upon notice that Mrs. Havener wish to sell the same within three months of the Mrs. Havener giving such notice.

(2) A declaration that the Mrs. Havener's notice in January, 2004 that she was desirous of selling the premises gave the Mr. and Mrs. Fernandez the right to exercise the option pursuant to the terms that had been agreed in January, 2003.

(3) A declaration that Mrs. Havener's attempt to increase the purchase price to US$1.2M contrary to the terms of the agreement of January, 2003 was in breach of the agreement.

(4) A declaration that Mr. and Mrs. Fernandez's notice of January 14th 2004 that they were exercising the option pursuant to the terms of the January 2003 agreement is binding on Mrs. Havener.

(5) A declaration that Mrs. Havener's letter of January 24th 2004 indicating that she was no longer desirous of selling the property, and the notice to quit given to Mr. and Mrs. Fernandez in April, 2004 is null and void and of no effect.

(6) Specific performance of the agreement of January, 2003 for the sale of the property to Mr. and Mrs. Fernandez for the sum of US$500,000.

(7) An order that Mrs. Havener do provide security for the costs to the Fernandez.

Issues

[10] The issues to be determined by the Court are as follows:

(a) Whether there an Agreement between Mrs. Havener and Mr. and Mrs. Fernandez for the sale of the property;

(b) If so, whether Mrs. Havener has breached the agreement;

(c) Alternatively, whether Mrs. Havener is entitled to recover possession of the property together with mesne profit.

(d) Alternatively, whether Mr. and Mrs. Fernandez are entitled to the reliefs that they seek.

Evidence

[11] Mrs. Havener testified on her own behalf and called Mr. Gregory Gordon (Mr. Gordon) and Mr. Thomas Kenney (Mr. Kenney) in support of her claim. In relation to the Fernandez' counterclaim, they both testified on their own behalf. Mrs. Havener and Mr. and Mrs.

Fernandez agreed on a bundle of documents that was placed before the Court and to which the Court has had regard.

Claimant's Evidence
Mrs. Havener's Evidence

[12] In her witness statement Mrs. Havener stated that:

> "In January 2003, I had a "For Sale" sign placed on the wall of my property on Dian Point with the purpose of selling a portion of the property. Upon seeing it, Jill Fernandez gave a check for $2688.00EC (about US$1,000) to Linda Sawka as she was managing the property following my mother's death. The stated purpose of the check was so that the sign would be taken down and the Fernandez' would be the first ones to negotiate the terms and conditions of any possible sale of all or part of the property. The check was deposited on January 16th 2003, but there was no written or stated offer to buy or sell, no discussion of price or terms of payment, no indication of the amount of land involved, or which of the houses might be included. Based on what appeared to be a good faith offer, I subsequently spoke with Jill and Max several times on the phone. During these conversations, they requested that they be allowed to rent while they investigated whether they could come up with enough purchase money to make an offer on what might be available. But again, there was still no firm figure on either a purchase price or an amount of property to be conveyed. I agreed to their request that they rent for a period of one year, but indicated that six months from the beginning of the lease a final decision would be made as to the intent for the property and I felt that by then, I would have a firm understanding of my final feelings on the matter, as well as a decision on how I would handle the various, separate land parcels as well as both houses.
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> On or around January 14th 2003, I sent Max Fernandez a fax indicating that the selling price for the house would be US$500,000 net which meant to me, to be after all my expenses both in Antigua and the United States. I intended for this fax to be a point for further discussion upon my arrival in Antigua, where we could then discuss all of the terms and conditions as well as what property might be included. It was my feeling at that time that only a complete, written, signed document would be final. The fax was incomplete on many issues, but most specifically what portion of land was to be included. At this time, I envisioned including only a portion of parcel #60 on which the main house is situated. My mother had kept the land in three separate parcels: #82, #60 and #59 and had intended to use them all separately. Parcel 59 had already been separated into #116 and #117.
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> Without specifying the actual land parcels, I knew I wanted that amount of money "free and clear" above my total price, which would therefore have

to include taxes and settlement costs. I wrote, that when I arrived on the island, we would meet and draw up a contract after finalizing the terms and conditions of the sale. Final conditions would include an actual dollar amount as well as the portion of land that might be reasonably included along with the house. At that point, I was not sure how I would handle the different parcels, but I did know that I wanted to deed some to my brother, Gregory Gordon, some to my daughter, Laura Hunsicker, and I was unsure if wanted to keep a piece to build on in the future, as there is a great deal of emotion attached to the property for me. Parcel #116 was what I could give to my brother, parcel #82 could be saved for my daughter with access across parcel #60, and parcel #60 which consists of 1.25 acres could be easily divided into two pieces with separate houses on each parcel. Gregory and I were very aware that our recently departed mother had put her heart and soul into living on, and improving, the property. I did a lot of soul searching, had many conversations with family members, and ultimately decided that I did not want to sell any of the property at that time. In view of my family's interests, I needed more time to make a serious decision about how the entire estate should be handled. Many but not all of these feelings were conveyed to the Fernandez' at the time.

I arrived in Antigua on Saturday, February 1st 2003, a day after my brother, with whom I was staying. On that same day, I called the Fernandez to inform them that the offer to sell had been withdrawn because of the desire to keep the property in the family. At that time we agreed that they could come the following morning to my brother's house for further discussion. We spent an hour or more in the meeting and the Fernandez' acknowledged that they understood that I was withdrawing the offer for the house, due to my family's wishes. This was less than two weeks after I had sent them the original fax. They expressed great disappointment, but requested that they still be allowed to rent after the tenants who were in residence vacated. Their phrase was that they "had fallen in love with this place". It should be noted that my brother Gregory was part of the conversation that took place at his house and can confirm what was said. Dr Tom Kenney, who was in the same room, can make similar confirmation.

In view of their disappointment and their statements that they would take good care of the property, I allowed them to rent the house for US$1,000 per month, a price that I agreed to, even though it was well below market value and represented only a partial compensation for my out-of-pocket expenses in regards to the property. The rental agreement was signed approximately two months later after we had worked out all the terms and conditions. In the lease I allowed them to have the right of first refusal if I did decide to sell, but at no point did we discuss what future prices might be or which of the parcels of land might be included in the event of a sale, since family members at that time were expressing interest in different

parcels. A lease was drawn up by Nick Fuller and signed in April for occupancy to begin on April 15th 2003. It should be noted that a dollar figure relating to the option for the purchase of the property was not put in the lease at this time, because in my mind it had not yet been determined.

Everything at that time seemed to be very friendly even though the Fernandez expressed regret that they would not be able to purchase the house. In fact, a few days before leaving the island, Tom Kenney and I even had dinner at Max and Jill's nearby home on Dian Point. At this time, they repeatedly stated that they understood that I wanted to keep portions of the property in the family and that, if the family wanted the whole property, it was clearly understood that the Fernandez would not be able to purchase the house or any part of the property at that time. It should be noted that one of the discussions at the dinner was the possibility that, during their rental year, the Fernandez might wish to put a fence around the pool (since they had a 2 year old child) and erect a wall on the porch near the master bedroom. I agreed with the proviso that any modification would have to be removed at the end of the lease in 2004. After the initial lease was signed, an addendum regarding the fencing and the wall was added as part of the on-going rental talks. In all these discussions and in the legal rental documents, no sales contract was ever drawn up and there was never any discussion of what the final terms would be (i.e final price for any, all or part of the land that might be sold). It was agreed however, that the property was to be returned at the end of the lease in the same condition as when they took occupancy.

The next check which went into my Antigua bank account was deposited on April 17th for EC$5376 (about US$2,000) for the first and last month's rent. On May 23rd, I received a check for the period May 15th to May 31st. Thereafter rent was due and payable on the 1st day of every month and it was agreed that the original check from January 16, 2003 would be used as the tenants' security deposit. This was confirmed by a letter dated March 26, 2003 sent to me by Nick Fuller, who was handling the continuing rental negotiations for me in Antigua. The remaining year's checks were FedEx to me, but they never arrived on the due dates. The Fernandez ceased paying rent after the initial year and has been in unlawful occupancy on my property since then. I am seeking remedy for this unlawful occupancy and for the resulting damages.

After several months and discussions with my family it was decided that my financial and medical situation dictated that I sell the land included in the lease for fair and appropriate price as stated in my letter dating January 15th 2004. Soon after, within a couple of days, I hand delivered a map of all of the parcels that I intended to include in my offer.

My perception now is that the Fernandez does not wish to leave, pay rent or purchase the property at the offered price, seeing as though they have

> failed to keep appointments or keep in contact with the people representing me. It is also my feeling that the letter from Nelleen Rogers-Murdoch, (the Fernandez' Attorney) dated June 21, 2004, clearly states the problem at hand. On page 2, paragraph 4, of said letter she refers to the fact that the purchase price was "understood" by all parties, when in fact it seems to me as though it was "misunderstood". An actual dollar amount wasn't included in the lease because I hadn't settled on a dollar figure, but I still wanted to give them the opportunity to buy all or a portion of the property in the event that I offered any or all of it for sale, presuming they were still interested. When the time came, I was of the opinion that only a written agreement which would state the final asking price as well as the property to be included could be fair to both parties."

[13] During cross examination by Learned Counsel Mrs. Neleen Rogers-Murdoch, Mrs. Havener maintained that at the beginning she had asked for a security deposit in the sum of US$1,000 she maintained that at no time did she request Mr. and Mrs. Fernandez to pay her any monies so as to confirm their interest in purchasing the property. She maintained that the security deposit that she requested from them was to enable her to give the tenants notice to vacate. Mrs. Havener admitted that during their initial discussions she had discussed the sum of US$500,000 net but that they had not completed their negotiations since she was unsure for example, as to what the taxes on the property were. Mrs. Havener also said that she had not decided what portion of the property she was willing to convey since the property consists of 3 parcels of land with buildings thereon. They are three substantial properties. She was adamant that she had no discussion with either Mr. or Mrs. Fernandez in relation to the payment of a 5% deposit on the purchase price; neither did she tell them that her family was not interested in purchasing the property. She agreed that while she had initially discussed with Mr. and Mrs. Fernandez the sale of the property she subsequently had discussion with her brother and thereafter had a change of heart. She said that as a consequence, when she arrived in Antigua and Barbuda in February 2003 she called Mr. and Mrs. Fernandez to withdraw the offer and told them that she would not be selling the property. She later said that she withdrew the idea that she would sell the property since they were still in negotiations. Further, she convened a meeting at her brother's house and reinforced the fact that she was withdrawing the offer. She then "agreed to rent the house to somebody and they agreed to be the somebody". She denied ever telling Mr. and Mrs. Fernandez at the meeting that was held at her brother's house that "she was throwing herself at their mercy"

Mrs. Havener admitted that Mr. and Mrs. Fernandez were disappointed over the fact that she had withdrawn the offer; however in her view it did not matter whether they had agreed or disagreed since they had no signed contract. She further admitted that when she finally offered them to sell the property at a price of US$M1.2 they refused her offer. She said that she did indicate, at a later stage, to Mr. and Mrs. Fernandez her willingness to reduce the sale price by US$250,000 which proposal Mr. and Mrs. Fernandez refused.

Mr. Gordon's Evidence

[14] In his witness statement Mr. Gordon stated that:

> "My sister, Jacqueline Havener contacted me in early January and requested that I be present at a meeting that she was going to have with Max and Jill Fernandez. It was to take place in Antigua in February 2003. The purpose of this meeting was to discuss possibly selling a portion of her property in Antigua which the Fernandez' were interested in.
>
> I arrived in Antigua on Friday, January 30, 2003 and my sister arrived on February 01, 2003. Upon arrival, she phoned the Fernandez; in my presence, to let them know that the offer to sell was being withdrawn due to the interest of myself and her daughter, Laura Hunsicker, to keep the property in the family. The Fernandez' requested a meeting and one was set for the following morning at my home. My sister Jacqueline, her associate Tom Kenney, Marilyn Cornelius and I were present at this meeting. It should be noted that Marilyn Cornelius also had an interest in the house because she has spent approximately 20 years taking care of the property for my mother, Ruth Livingston, prior to her passing.
>
> The discussions at this meeting, and the statements made by both parties, gave me the impression that although there had been several prior conversations, the final terms and conditions as well as what property might have been included, had never been completely determined or resolved. It was repeatedly made clear to the Fernandez' that the offer to sell had been withdrawn, because of the interest by family members of the possibility of keeping the house and surrounding property in the family. My sister and I were, at this time, in agreement that it was never our intention to let all of the property be sold out of the family, and I made it clear, that in the future, if she no longer wished to be involved, that I might take over the responsibility of maintaining some of the property for the family, since not only myself, but also her daughter had vested interest. It was also established that family members would have first option to buy if the property was ever to be offered for sale at a future date.

> Before the meeting was over Mr. and Mrs. Fernandez expressed a continued interest in renting the house for a period of one year, and we discussed drawing up a lease at a latter date. They left my house that day seemingly disappointed that at this time they would not be able to purchase my sister's home, but feelings were still amicable."

[15] Learned Counsel Mrs. Rogers-Murdoch cross examined Mr. Gordon and he maintained that during the meeting that his sister had convened at his house in February 2003 and at which Mrs. Havener, Mr. and Mrs. Fernandez were present and that he was also present. He recalled Mrs. Havener saying that she no longer wished to continue the negotiations. He said that it was not true that at that meeting Mrs. Havener requested Mr. and Mrs. Fernandez to assist her with a problem that she had encountered in relation to the sale of the property. He recalled his sister saying that she felt badly about withdrawing the offer or ending negotiations because they seemed to have wanted to purchase the property; but at no time did his sister say that she felt badly because they had already paid US$1,000. Neither, said Mr. Gordon, did he recall Mr. Fernandez telling his sister that it was impossible for her to withdraw the offer.

Mr. Kenney's Evidence

[16] In his witness statement Mr. Kenney stated that:

> "During the first weeks of February, 2003, I was in Antigua and witnessed two meetings between Max and Jill Fernandez and Jacqueline Havener. My memory of those meetings includes the following aspects:
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> "When we first arrived on the island, Mrs. Havener called the Fernandez to inform them that the offer to sell had been withdrawn. They asked to come to where we were staying to discuss what else could be done.
>
> At the initial meeting, Mrs. Havener explained that the withdrawal had been at the urging of her brother, who owns the adjacent property (the Gordon House) and her daughter, who will be her heir. The decision had been made to keep the property in their family for the foreseeable future. Further, any future offer to sell would include the right of first refusal on the part of her family.
>
> At the meeting, the Fernandez indicated that they wished to rent anyway and it was decided that Mrs. Havener would do so for a period of one year. In the rental lease, the right of second refusal (i.e after the family)

> would be granted to the Fernandez. There was no discussion of what the price might be for any possible sale at the end of the rental term. A properly worded lease, in accord with Antiguan law, was to be drawn up and singed by both parties.
>
> The second meeting was dinner at the Fernandez' house on the hill. It was a typically pleasant evening, although they still expressed their disappointment at not being able to buy. They still wished to rent the house however.
>
> Whichever parcel or parcels of property were to be included in a final sale were never specified, and it was clear to me at this time that Jacqueline Havener was still undecided as to what she would be willing to include in any further negotiations."

[17] During cross examination by Mrs. Rogers-Murdoch, Mr. Kenney stated that he was present at the two meetings held between Mrs. Havener, Mr. and Mrs. Fernandez. At the first meeting, held at Gordon's house, Mrs. Havener explained the withdrawal of the offer to negotiate the sale. Mr. Kenney insisted that during the meeting he did not hear Mr. Fernandez say that the withdrawal was improper. He recalled that Mrs. Havener told Mr. and Mrs. Fernandez that should she decide to sell the property in the future her family should be entitled to first refusal. He said that he did not hear Jill or Max tell Mrs. Havener that she could not withdraw the offer.

Defendants' Evidence

[18] Mr. and Mrs. Fernandez provided witness statements which were very similar, with no disrespect intending and for the sole purpose of convenience; I propose to refer only to the witness statement of Mr. Fernandez as the evidence in chief of both of them. I, however, would refer to the evidence of both Mr. and Mrs. Fernandez as adduced in cross examination and re-examination.

Mr. Fernandez' Evidence

[19] Due to the nature of this matter, I am of the view that it is important to quote extensively from Mr. Fernandez' witness statement.

In his witness statement Mr. Fernandez stated that:

"Later that evening when I arrived home, we decided to call Mrs. Havener who owned the property that same evening. We called her and told her that we were interested in purchasing the property. She confirmed to us on the telephone that the property was for sale, and that the price was US$500,000. She also offered to finance the purchase for us if we wanted.

After that first conversation, we had several conversations regarding the sale of the property and during each of those conversations; we proceeded on the basis of the US$500,000 purchase price. After a while, it became clear to us that Mrs. Havener was consulting with her brother Gregory Gordon on the matter. After several discussions with Mrs. Havener, and because we rally wanted to purchase the property, we agreed that we would move into it and rent the property until we purchased it. During our discussion regarding the rental, Mrs. Havener proposed a rent of US$2,000 per month. She eventually agreed on the amount of US$1,000 per month since we would be purchasing the property.

In order to ensure that we would be guaranteed the sale, my wife asked Mrs. Havener to take down the for sale sign since we had agreed to purchase it, and the price had been agreed at US$500,000. Mrs. Havener told us that she would take down the sign if we sent her a payment immediately in consideration of her taking down the sign, and as an indication of our commitment to the purchase. At her request we sent her a deposit of US$1,000 by Federal Express. This cheque was sent on 5th January, 2003 and was posted to her at an address in Maryland, USA which she provided and she then had the "for sale" sign removed from the property.

After we had sent the US$1,000, we again spoke with Mrs. Havener and she told us that she would be visiting Antigua in a few weeks, and asked us to make when she visited, an additional payment of 5% deposit on the purchase price of US$500,000. She also asked us to tell anyone who asked in the meantime, that we had bought the property so that it would stop further enquires.

We had several conversations with Mrs. Havener after the initial conversation and based on our discussions on 13th January, she sent us a fax type written in which she outlined the terms of the lease agreement. She confirmed in the fax that the proposed lease was to be for one year to start on April 2nd 2003 or when the current tenants vacated, whichever was earlier. The rent was US$1,000 per month and we were to deposit the first and last month's rent along with a security deposit of US$1,000 into her account at a local bank.

The fax also confirmed the agreement to sell us the property if she decided to sell it during the year we were renting and that we would have 90 days to accept or refuse the offer of sale.

After we received the fax, we spoke with her on the phone about the terms of the agreement to purchase which we already had with her. In response to our telephone call and our discussions, she sent by fax to us on 14th January, 2003 a hand written note in which she confirmed that the price of the property would be US$500,000 net (after taxes and settlement cost), and that the price would hold for an initial period of six months.

Based on our agreement with Mrs. Havener, we put our house on the market. This we sold within a few months, as we anticipated moving into the Havener's property which was two houses down from where we were living, by the end of April 2003.

Mrs. Havener visited Antigua a few weeks after our agreement. She invited us to the house of Gregory Gordon, her brother, whose property is on the other side of her property. My wife and I went to Gregory Gordon's house and met with Mrs. Havener, her partner who we knew as Tom and Gregory Gordon. Mrs. Havener told us that she had a problem that she wanted our help with. The problem was that her brother Gregory Gordon had told her that she should offer the property to the family first, before she sold it to a stranger. She said she felt badly about the situation, because she already had our money. This has a reference to the deposit of US$1,000 that we had already paid.

I asked Mrs. Havener if she realized that we already had an agreement for sale, and told her that we had made arrangements for the deposit of 5% that she had requested and that we were working on the loan to finalize the transaction. I reminded her that the agreement was in her handwriting regarding the sale and the terms, together with the price. She told us she knew this and this was why she was throwing herself to our mercy. She was very distressed when she spoke to us.

She told us that if we agreed to give her family the first option, she would give them until the end of 2003 to come up with the money failing which we would purchase the property on the terms and conditions of the written agreement we already had.

We were very disappointed about this, but we felt sympathy for Mrs. Havener particularly because she seemed genuinely distressed about her family problems. After my wife and I thought about it and discussed it, we decided that since we were in the process of signing with the purchaser of our house, we would move into the Havener's house as we would have no where else to go. We therefore agreed to Mrs. Havener's proposal to give her family first option to purchase the property at the agreed sum of

US$500,000. We also agreed that we would pay the sum of US$1,000 per month in rent up to the end of 2003 while we occupied the property.

Mrs. Havener called us the next day and thanked us for understanding and helping her out of a difficult family situation, and she invited us to have dinner with her to show her appreciation for what we had done.

We did not accept the dinner invitation, but invited Mrs. Havener to our home for a drink. She thanked us again in the presence of her companion Tom and both she and Tom had dinner with us. She expressed gratitude at what we had agreed to do and told us that her brother wanted the property because he felt that if she sold it, he would not benefit from the proceeds. She assumed us that no other member of her family was interested in the property nor would any of them be willing to pay US$500,000 for what she termed a "run down" property in Antigua. She said she was confident that come December, the house would be ours. She also made several other statements regarding her family relationship particularly between her mother and her brother, and told us that as we were good and kind people, she was sure her mother would prefer us to have the property over her brother.

When we went to Mr. Fuller's office he showed us a lease which did not contain a reference about our option to purchase. After some discussion, Mr. Fuller called Mrs. Havener while we were in the office and had a discussion with her. He subsequently gave us the lease to sign with the clause regarding the option reworded to that which is at present in the lease. After I read the clause, I felt comfortable signing the lease although the clause gave us a period of ninety days from the date we were notified of Mrs. Havener's desire to sell to exercise our option and since the clause also said that within this time, we were to accept by written agreement, the terms and conditions of sale. At the time we signed, we understood these words to refer to the terms and conditions of sale which we already had with Mrs. Havener that the purchase price would be US$500,000. We did not concern ourselves with the change from six months to three months as we had already determined to exercise the option once she gave us notice.

When we signed the lease, we paid the sum of US$2,000. This sum represented as per the terms of the lease, the first month's rent and the security deposit that we were required to pay by the lease agreement. This sum was paid into Mrs. Havener's account at the Antigua Commercial Bank on the 14th April 2003.

At the time we signed the lease, there was not writing at the end of the same. We were advised that the lease was sent to Mrs. Havener by courier for her signature. A copy of the lease was subsequently given to us after we had already moved into the property, and we noted that Mrs.

Havener had written on the bottom that the security deposit and the first and last month rent had been paid. We did not initial the notation, since we had paid the US$2,000 for the first month's rent and the security deposit. The lease also did not contain a requirement for us to pay the last month's rent.

We have lived in the Havener house from April 2003 to January 2004, paying the rent and making small improvements to the property as we went along. In January 2004 we received a letter dated 15th January 2004 from Mrs. Havener advertising that she had made a decision with her family to offer the property for sale to us for US$1.2M, and advising us that we had 90 days within which to effect the purchase.

Immediately upon receipt of the letter we contacted Mrs. Havener about the matter and advised her that there must be some mistake since we had an option for US$500,000. Mrs. Havener told us that she had been told by a real estate agent that Dian Bay Hotel which had been unused for several years would soon reopen and that as a result, the value of the property would be more. She also told us that since she had a prior agreement with us that she would be prepared to take US$200,000 off the offered price of US$1.2M. I told her this was still more than two times the agreed price. She then invited us to come over to her brother's house to discuss it further. We decided not to go and we contacted Nick Fuller instead in his office.

When we went to see Mr. Fuller, he telephoned her in our presence. After his conversation with her, we were advised that Mrs. Havener would take the property off the market and that we should seek legal representation. We then determined, based on the conversation to consult another attorney.

Our attorney wrote to Mrs. Havener on 24th January 2004 indicating that the offer of sale at US$1.2M was rejected and that we were prepared to complete the purchase at the agreed US$500,000. Mrs. Havener responded to our letter by a letter from her attorney indicating that she had withdrawn the offer of 15th January, 2004 as she was no longer interested in selling the property.

On 14 April, 2004 we received a letter from Mrs. Havener's attorney advising us that our lease had ended on 15th April 2004 and that since we had not exercised the option to renew the lease, we were required to vacate the premises as the tenancy had come to an end.

Since April, 2004 we, through our attorney communicated with Mr. Christian, Mr. Havener's then attorney with a view to an amicable settlement of this matter as we wished to avoid litigation. We advised that the rental would be placed in escrow until the matter is resolved.

> Mrs. Havener made us an offer, through her brother Gregory Gordon we understand, in or around October 2004 to settle the matter. We gave our attorneys instructions for a letter to be written requesting clarification of the offer and also for further negotiations. This letter was written, but we were advised that our attorneys have received no reply to our attorney's last letter in November, 2004.
>
> In January 2006 we became aware that Mrs. Havener had once again changed attorneys. We received correspondence from Mr. Dane Hamilton requiring us to vacate the premises and referring to us as squatters. Mrs. Havener subsequently commenced this action against us.
>
> We have lived in the house and paid the rent in escrow as we notified Mrs. Havener's then attorney Mr. Christian. We have maintained and upkept the house during this time. We have installed a new water pump, new iron gate, door, windows and also obtained new appliances, lighting and furniture. We have changed the wiring and the plumbing to the premises and at a considerable cost; we have upgraded the small abandoned pool to usable condition.
>
> We have replaced the roof that has required attention and we have patched the same many times. We have also had the government's water supply connected to the premises at considerable cost to us and we have also had the cable television lines installed.
>
> We have no other home to go to as we sold our house in anticipation of owning this property. We are therefore asking the Court to insist that Mrs. Havener honour the agreement which she made with us as we remain committed to the purchase of the property on the agreed terms and conditions."

[20] Mr. Max Fernandez during the amplification of his witness statement corrected the statement he had made in his witness statement and now said that the first sum of US$1000 that he had paid to Mrs. Havener's agent was in relation to the rental of the property and not as he had originally said that it was paid to have Mrs. Havener take down the for sale sign that was on the property.

[21] During cross examination by Learned Counsel Mr. Dane Hamilton Snr, Mr. Fernandez maintained that the thrust of his case is that there was an agreement for the sale of the Livingston property. "He was paying out US$500,000 to purchase the property." Even though Mr. Fernandez maintained that there exists a signed document with Mrs. Havener

which evidences their agreement he was forced to admit that the said document stated that the parties were required to have yet another document drafted and agreed to in relation to the proposed sale. Mr. Fernandez next stated that he paid Mrs. Havener the security deposit to "lock in the price and take down the sign." Also, Mr. Fernandez conceded that the documentary evidence did not mention a 5% deposit on the purchase price he was aware that the usual deposit on the purchase price of land in Antigua and Barbuda is 10%. He was also forced to admit that when Mrs. Havener returned to Antigua and Barbuda on 1st February "there was no agreement made". The completed agreement was not made, neither had the separate document been completed. He however, said that he interpreted the faxed note as an agreement to sell him the property for US$500,000 and while he did not sign the document he had paid the money that is US$1,000 equivalent in EC as a deposit on the property.

[22] Mr. Fernandez conceded that Mrs. Havener never entered into a "full agreement" with him as was contemplated by the offer. Later, he admitted that the lease that he had signed and which contained the option to purchase made no reference to the purchase price but he explained that Mr. Fuller, the lawyer who did the transaction had told him this was not necessary since there was already a written document. Mr. Fernandez said that in the type written note, Mrs. Havener gave him 90 days within which to purchase the property but that he did not do so in the 90 days period. Later, he said that they had agreed that they had 3 months to come with the price and the price would have been held for 6 (six) months. He resiled from his position and said that the better explanation was that they had 90 days within which to complete the purchase of the property at the price of US$500,000. He was adamant that as early as January 14, he understood that he had a right of first refusal for 90 days. In his view they had 90 days "to come with US$499,000."

[23] He denied ever telling Mr. Fuller that he had paid a security deposit in relation to the lease of the property and admitted that Mrs. Havener's written note indicates that the moneys are to be paid in relation to the first and last month rent; this he agreed seemed to be consistent with Mr. Fuller's enquiry about the rental deposit. However, Mr. Fernandez

maintained that he had paid US$1,000 towards the purchase of the property and not as a security deposit towards the lease of the property.

Mrs. Fernandez' Evidence

[24] Mrs. Fernandez, during cross examination by Mr. Hamilton Snr. said that in February 2003, she learnt that Mrs. Havener was in Antigua so she (Mrs. Fernandez) telephoned Mrs. Havener. When she telephoned Mrs. Havener she did not tell Mrs. Havener that she had the 5% deposit and that she was ready to complete the agreement. At that time, she had not consulted a lawyer. Mrs. Fernandez, however, stated that she understood from Mrs. Havener that when Mrs. Havener would have visited Antigua in the month of February 2003 that she would have drawn up a separate legal document which document would have reflected US$500,000 as the purchase price for the property and at that time Mrs. Havener "was going to tell them when to pay the deposit." She admitted that she had never faxed Mrs. Havener to tell her that she had accepted the offer to purchase the property for US$500,000. However, she did telephone Mrs. Havener and knew that Mrs. Havener was saying "that we needed to enter into a proper contract to purchase the place." She later stated, however, that when she received the handwritten fax she accepted it as an agreement to sell the property and this she did by giving Ms Sawka on behalf of Mrs. Havener, US$1,000. as deposit. Mrs. Fernandez further stated that she had accepted the lease agreement as well and that her acceptance of the lease was premised on the fact that she had required some time "to raise the purchase price". Mrs. Havener had given them 90 days and an additional 3 months in order "to raise the purchase price." Mrs. Havener had offered them to purchase the property for US$500,000 and Mrs. Havener had agreed "to hold" that price for 6 months. Mrs. Fernandez denied that on the 1st February 2003, Mrs. Havener told her that she was withdrawing the offer rather it was at the meeting of the 2nd February that Mrs. Havener had a change of heart and on that latter occasion Mrs. Havener had told her and her husband that she (Mrs. Havener) had felt very badly about this and that they were advised by Mrs. Havener that they could have stayed in the premises for one year while giving her (Mrs. Havener) some time to make up her mind. Like her husband, Mrs. Fernandez admitted that the lease did not state the

purchase price for the property but that this was so because Mr. Fuller had told him that that was necessary since the purchase price was stated in the handwritten fax.

Closing Submissions

[25] At the close of the evidence, the Court directed the parties to submit written closing arguments within 7 days in accordance with Part 39.3 CPR 2000. Counsel appearing on behalf of Mr. and Mrs. Fernandez has failed to take advantage of this opportunity.

Claimant's Submissions

[26] Learned Counsel Mr. Hamilton Snr. in his written closing submissions, on the factual matters stated that on the evidence it is clear that there were negotiations between Mrs. Havener and Mr. and Mrs. Fernandez as to the possible sale of part or all of the property; there was no written or stated offer to buy or sell, no discussions of the price, no terms of payment, and the amount land involved. Mr. Hamilton Snr. said that during the discussions Mr. and Mrs. Fernandez requested that they be allowed to rent the property while they investigated whether they could come up with the purchase money, this Mr. Hamilton submitted is borne out by Mrs. Havener by sending both the handwritten note and the typed note and the fact that in the hand written note there is no reference to what was being sold for US$500,000. Both notes at their highest could only at best constitute an offer either to sell or to rent; both of which were conditioned on acceptance and the drawing up of proper agreements. Mr. Hamilton Snr. said that Mrs. Havener agreed that on January 14th 2003, she sent the handwritten note and the typed note. Significantly, neither Mr. nor Mrs. Fernandez adduced any evidence which unequivocally points to an acceptance of the offer between January 14th and February 1st 2003. Mrs. Havener stated that when she wrote Mr. and Mrs. Fernandez she told them that when she arrived on the island, the parties would meet and draw up a contract after finalizing the terms and conditions of sale. In her mind, she did not know how much of the property (three parcels 2.40 acres) she wished to dispose of and what part she wanted to give to immediate family members. No party stated that further communication took place between January 14th and January 31st 2003 (with exception of Max who said she requested payment of an additional 5% of the purchase price)

[27] The next state in the events occurred on February 1st 2003 when Mrs. Havener arrived in Antigua; she made a telephone call to Mr. and Mrs. Fernandez informing them that the offer to sell was withdrawn (not agreement to sell) because of a desire to keep the property in the family. A meeting was arranged for the following day at her brother's (Mr. Gordon's) home and at that meeting she confirmed her previous communicated decision to Mr. and Mrs. Fernandez. All of the witnesses agreed that both Mr. Gordon and Mr. Kenney (a friend of Mrs. Havener) were present. Both of the witnesses (Mr. Gordon and Mr. Kenney) support Mrs. Havener's account. She states that Mr. and Mrs. Fernandez expressed their disappointment but requested that they be allowed to rent after the tenants who were in the property had vacated and she agreed to allow them to rent the house for US$1,000, which was well below market value.

[28] A lease was drawn up 2 months later by Mr. Nick Fuller, an Attorney and it contained the option to purchase clause without any dollar figure. The lease is dated April 1st 2003. The evidence is that it was sent to Mrs. Havener for signature and that she indicated on it in writing that the security deposit and the first and last month's rent have been paid. On January 15th 2004, Mrs. Havener offered to sell the property to them. In cross examination Mrs. Havener maintained that they were to rent the property initially whilst she gave them six months to purchase the property at that price; the US$1,000 paid to Linda Sawka was paid as a security deposit on the proposed lease; Mr. Havener was clear that there was no discussion for the payment by Mr. and Mrs. Fernandez of 5% of the purchase price. She denied that she threw herself at their mercy at the meeting on February 2nd 2003; nor did Mr. Fernandez indicate to her that her attempt to withdraw the offer was not proper; or that she could not withdraw the offer as he had already paid her US$1,000 Mr. Hamilton Snr. submitted that implicit in this line of question are the following:

(a) It was communicated to Mr. and Mrs. Fernandez that Mrs. Havener was withdrawing the offer she had made (as testified to by Gordon and Kenney)

(b) Allegedly an acceptance of her offer is premised on the payment made by him of US$1,000.

Further, it was put to Mrs. Havener that their disappointment was because they had to give up a right they had to purchase the property because of her family. The question naturally

arises is that assuming they had this right did they in fact give it up by agreeing with the withdrawal. If Mr. and Mrs. Fernandez did not agree what steps did they take to enforce the alleged agreement? asked Mr. Hamilton Snr.

[29] Mr. Hamilton Snr. examined Mr. Fernandez' evidence and Counsel said that Mr. Fernandez stated that he had made a telephone call to Mrs. Havener and she confirmed that the property was for sale and that the price was US$500,000; that there were several conversations by telephone and they agreed that they would move into the property, renting it until he purchased it. Mr. Fernandez stated that Mrs. Havener agreed to take down the sign (For Sale) if he sent her US$1,000 by Federal Express, which cheque was sent to her by post to her address in Maryland. Mr. Fernandez resiled from this latter part of his story after Mrs. Havener gave evidence that the alleged cheque was a rent cheque negotiated by her on January 5th 2004. In this respect, the Court may wish to pay attention to the line of questioning of Mrs. Havener directed to establishing that that money was paid to take down the sign. Is that earnest money paid to show the seriousness of the negotiations? Can it ever be said to be a part of the consideration for the sale? Mr. and Mrs. Fernandez' pleaded case is that "in confirmation of the agreement to purchase the property they on 5th January 2003, paid to Mrs. Havener the sum of US$1,000 which was forwarded to her by Federal Express on her instructions." The pleading remained unamended and the change came after Mrs. Havener's cross examination. Having sent the US$1,000; in another conversation with Mrs. Havener, the latter requested an additional payment of 5% deposit on the purchase price of US$500,000. This was to be paid when she visited Antigua. Thereafter, Mr. Fernandez speaks to the lease (as did his wife Mrs. Fernandez). However, they speak only to the type written fax for the proposed lease, to start on 2nd April 2003, when the current tenants vacated. There is agreement as to the deposit and the rent payments to be deposited into her account at a local bank. This type written fax was sent on January 13th 2003. Thereafter, Mr. Fernandez spoke to her about the terms of the agreement to purchase, which he, already had with her and, on January 14th 2003 she sent a hand written fax note in which she confirmed the price of the property as being US$500,000 net.

[30] According to them, when Mrs. Havener arrived in Antigua in February, 2003 there was a meeting at Mr. Gordon's house at which Mr. Kenney was present as was Mr. Gordon. Mrs. Havener solicited their help as she had a problem in that she ought to offer the property to her family first and she felt badly as she already had their deposit of US$1,000. Mr. Fernandez spoke to her; about the agreement they had in relation to the sale about arrangements being made for the deposit of 5% and a loan to finalize the transaction. She threw herself at their mercy. She told them that if they agreed to give her family the first option she will give them until the end of 2003 to come up with the money failing which they could purchase the property on the terms and conditions of the written agreement they already had. Mr. Hamilton Snr. submitted that this begs the question which written agreement? The hand written note is conditioned on the execution of a document stating the price and holding that price open for six months. It is instructive that in neither Mr. nor Mrs. Fernandez' evidence is it mentioned that they accepted Mrs. Havener's proposal.

[31] Mr. Hamilton stated that the next significant piece of evidence is that concerning the signing of the lease in Mr. Fuller's office. They were concerned that the lease did not contain a reference about an option to purchase. This is surprising since as at page 70 of the Trial Bundle there is a fax page sent by Mr. Fuller to Mrs. Havener which touched and concerned the option. The date of the fax is February 24t, 2003. The following page contains a reply. After discussions with Mr. Fuller, he (Mr. Fuller) called Mrs. Havener and thereafter he gave them a lease with a clause regarding the option reworded. Mr. and Mrs. Fernandez read the clause and felt satisfied that this option was within the time which they were given to accept, by written agreement, the terms and conditions of the sale. The lease was signed but their understanding was that the purchase price would have been US$500,000, although they sought no confirmation of this from Mrs. Havener. They paid the sum of US$2,000 which was for the security deposit and one month's rent; they admitted living in the house from April 2003 to the present. They further indicated that on January 15th 2004 Mrs. Havener offered to sell them the property for US$1.2M which was rejected on the ground that they were prepared to purchase the same for US$500,000

[32] Next Mr. Hamilton Snr. referred the Court to Section 37(2) of the Registration of Land Act Cap 371 Laws of Antigua and Barbuda which provides as follows:

> "Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorized:
>
> > "Provided that such an action shall not be prevented by reason only of the absence of writing, where an intended purchaser who has performed or is willing to perform his part of a contract.
> >
> > (i) has in part performance of the contract taken possession of the property or any part thereof; or being already in possession, continues in possession in part performance of the contract and has done some other act which is exclusively referable to and in furtherance of the contract"

Section 37(2) above is a statutory re-enactment of its predecessor the Statute of Frauds 1677 Section 2. A plethora of cases have established that a note or memorandum of it is sufficient if it contains identification of the parties; the description of the subject matter, the nature of the consideration and any term deemed material by the parties. In the event of an absence of writing, it is necessary for Mr. and Mrs. Fernandez to show that in part performance of the contract they have taken possession of the property or being already in possession, they continue in possession in part performance and have done some other act which is exclusively referable to or in furtherance of the contract.

[33] On the facts of the case at bar, the fax handwritten note is not, Mr. Hamilton Snr. submitted, a sufficient note as there is no description of the subject matter that is being sold. It is equivocal as it is predicated on the drawing of a separate document showing purchase price. Mr. and Mrs. Fernandez' possession of the property is that of tenant by virtue of a lease and such possession cannot amount to an act of part performance. Counsel referred he Court to Maddison v Alderson [1883] 3 APP. Cas 467; Miller v Sharp [1899] 1 CH. 682. Mr. Hamilton Snr. further said that Mr. Fernandez contend that a 5% deposit was payable, this would have been a material term and it is not included: Hawkins v Price [1947] 1 AER 689. In any event, the deposit was never paid and the

payment of US$1,000 cannot be regarded as unequivocal and referable to the contract of sale as Mr. and Mrs. Fernandez pleaded case is that money was paid to remove the sign, whilst Mrs. Havener contends that it was referable to the deposit in respect of the lease: Kingswood Estate Co. Ltd. v Anderson [1962] 3 AER 593 at page 604.

[34] Mr. Hamilton further submitted that the better view on the facts of this case is that the parties were negotiating. Mrs. Havener indicated a price at which she would be willing to sell. This at best was an offer. There is no evidence that it was accepted, thus transforming the negotiations into an agreement. In fact there is no consideration given by Mr. and Mrs. Fernandez. The US$1,000 was referable to taking down the sign and bringing home the seriousness of their desire to purchase. Indeed, the parties could not have been ad idem as to the terms of the agreement, because as far as Mrs. Havener was concerned that sum was paid as a deposit (security) on the lease, whereas they are contending it was paid with reference to the purchase agreement. It is in this context Nicholas Fuller's letter March 26th 2003 must be viewed and interpreted and in so far as is material it reads as follows:

> "Re: Lease to Fernandez"
>
> "Max Fernandez visited my office this morning to discuss the lease. He seems ready to sign although he has a few questions which he asks me to put to you.
>
> "To whom is the monthly rent to be paid? Mr. Fernandez tells me that he has already paid the security deposit. He cannot remember whether it was agreed that the next payment on signing the lease would be just the first month's rent or the first and last month's rent. Which is it?..."

Mr. Hamilton Snr. submitted that this is clearly referable to the parties' previous negotiations as to leasing the property as evidenced by the type written fax note of January 14th 2003 and Mr. and Mrs. Fernandez' payment to Linda Sawka of the EC equivalent of US$1,000.

[35] Mr. Hamilton Snr. said that Mrs. Havener's evidence was that on arrival in Antigua on February 1st 2003 she withdrew the offer to sell. It is clear from the cross examination of Mrs. Havener that she communicated the withdrawal of that offer to sell to Mr. and Mrs.

Fernandez. Mr. Hamilton Snr. submitted that the Court should accept Mrs. Havener and her witnesses' version of what transpired at Mr. Gordon's house on February 1st 2003. It would have been impossible for Mr. Fernandez to conclude that he had an agreement which was evidenced by the payment of US$1,000 and indeed prior to giving his evidence he never so concluded, as his pleadings quite clearly showed a payment allegedly made as earnest to take down the sign. He had yet to come up with the 5% which he claimed she required as additional payment (deposit). When cross examined, both himself and his wife said they did not have the 5% nor did they consult a lawyer. Both offered the excuse that Mrs. Havener said she was going to draw up a separate legal document which can only take the matter in 'to subject to formal contract'. Further, any inference drawn from Mr. Nicholas Fuller's letter above would put paid to the suggestion that the US$1,000 was paid to lock in the price: Timms v Moreland Street Property Co. Ltd [1957] 3 AER 265. In the case at bar, it is admitted the EC equivalent of US$1,000 was paid to Linda Sawka, there is no exhibited cheque which makes reference to the hand written note. Assuming the existence of the cheque and putting together with the note (handwritten) how could the two vary a lease that was not yet in existence and still had to be negotiated and agreed upon? asked Mr. Hamilton Snr.

[36] Mr. Hamilton Snr. stated that it seems that what emerged from the meeting of February 1st 2003 was a decision to lease the property to Mr. and Mrs. Fernandez along the lines of the previously discussed terms as set out in the type written fax of January 14th 2003. Mr. Hamilton was of the view that it therefore remains to be determined whether in the context of the handwritten note the statement: "We will do a separate document stating that the price will be US$500,000 net (after any and all taxes and settlement costs). This price will be held for an initial six months period as we discussed" attracts the legal principles relating to "subject contract". Mr. Hamilton posited that what is implicit in that statement is that there is no contract, an offer maybe and an undertaking to hold that offer open for six months but it is still premised on the preparation of a formal document. In other words – I will by documentation give you six months to accept this offer to pay at US$500,000 net. Until the document is prepared and signed there is no agreement. Equally, there is no agreement as you have not accepted any offer [this is in addition section 37(2) argument].

Therefore, Mrs. Havener could not have thrown herself at Mr. and Mrs. Fernandez' mercy. They had not yet determined what the alleged 5% deposit was; neither had they started consulting an attorney or started discussions with a bank. The evidence establishes that this declaration of intention or offer was withdrawn on February 1st 2003. This brings us to a consideration of the lease of 1st April, 2003: Tiverton Estates Ltd v Wearwell Ltd [1974] 1 AER 209, 214 – 218.

[37] Next, Mr. Hamilton Snr. advocated that an option to purchase granted in a lease is treated in law as a separate agreement between the parties collateral to the lease. It is binding only between the parties. The law is that there must be certainty in the mechanism at which the price would be arrived at. He referred the Court to Smith v Morgan [1971] 2 AER 1500 in which the option provided "…at any later date should the Vendor wish to sell the same the first option of purchasing the said land edged and hatched blue as aforesaid shall be given to the Purchaser at a figure to be agreed upon PROVIDED THAT any such offer for sale shall only remain open for a period of 3 months from the date on which the said offer for sale is made by the Vendor." The Court held that the agreement on the price was no part of the offer. There was an obligation imposed on the Vendor alone to make an offer for sale at a price at which the vendor was willing to sell. That the words "*a figure to be agreed upon*" related to the ultimate contract of purchase. Mr. Hamilton Snr. stated that, it is clear that in the case at bar there is no price defined in the context of the offer, nor is a mechanism set out in the option clause by which such price could be ascertained. If the Court is of the view that this option is nonetheless valid, then it is submitted that the Smith v Morgan construction must be applied to the option. In that event, Mrs. Havener independently of any other legal arguments, acted properly and within her right in making an offer to sell at a price of US$1.2M to be embodied in a written agreement setting out the terms and conditions of sale.

[38] Mr. Hamilton Snr. next said that as he understood it, the case advanced by Mr. and Mrs. Fernandez was to the effect that there was already an agreement on the purchase price. He reiterated that there was no binding agreement between the parties. Mr. and Mrs. Fernandez' evidence was to the effect that Mrs. Havener told them that if they gave her

family a chance, that they will have an opportunity to purchase the property in the event of a failure by the family to purchase it, on the same terms and conditions of the written agreement. This story cannot hold for the following reasons: (a) The Claimant withdrew her invitation to treat or offer on the 1st February, 2003. (b) There was no contract or agreement Tiverton Estates Ltd v Wearwell Ltd. (c) There was always during the negotiations over the phone, a consideration of them leasing the property. Max Fernandez himself in cross examination testified to the separateness of the purchasing and the leasing. (d) The executed lease (1st April, 2003) as varied by the addendum of the 9th April, 2003 contains the expressed terms of the parties agreement as to lease and option to purchase. (e) Mr. and Mrs. Fernandez' payment of US$1,000 to Linda Sawka on behalf of Mrs. Havener, on the evidence was clearly referable to the security deposit in respect of the lease, as can seen from Mr. Nicholas Fuller's letter of March 26th 2003. (F) Both Mr. and Mrs. Fernandez' evidence is that they were dissatisfied with the option as drafted and that they made representation through Mr. Fuller to Mrs. Havener. The option was reworded to its present form and there is no independent evidence that they objected, in fact they signed signifying their agreement. Clearly, if on April 1st 2003 there were of the view that agreement was already had on the price at which the option would be exercised, it is highly curious that they never insisted that the price be clearly stated in the option. (g) The lease was wholly in writing and it eventually reflected the type written fax as to leasing the property which Mrs. Havener had earlier sent to Mr. and Mrs. Fernandez, what is changed is the right of first refusal to a right to offer the premises for sale to members of the lessor's family. It expresses the essential bargain of the parties. It is an established rule of law that parole evidence cannot be admitted to add, to vary or contradict a deed or other written instrument. It cannot be admitted to prove that some particular term which had been verbally agreed upon had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties: Jacob v Batavia and General Plantation Trust [1924] 1 Ch. 287 at 295

[39] Mr. Hamilton Snr. argued that it flows from the above that when Mr. and Mrs. Fernandez by letter dated 22nd January, 2004 rejected Mrs. Havener's offer to sell the property for US$1.2M and offered to pay instead US$500,000 that was in fact a counter offer and not

the acceptance of the offer made, therefore, Mrs. Havener acted well within her rights to reject the same on February 24th 2004 and to take the property off the market: Hyde v Wrench [1840] Beav. 334. In that case the Defendant offered to sell a farm for £1,000. The offeree replied offering to buy for £950 when the counter offer was rejected, purported to accept the Defendant's original offer to sell for £1,000 It was held that there was no contract as the offeree had, by making a counteroffer of £950, rejected and so terminated the original offer. In the circumstances there should be judgment for Mrs. Havener.

Possession

[40] Mr. Hamilton finally submitted that the lease also contained an option to renew which Mr. and Mrs. Fernandez did not exercise. Mrs. Havener gave them notice to quit on April 15, 2005; Mr. Hamilton argued that Mr. and Mrs. Fernandez have been in occupation of the property since April 15th 2004 and they have last paid rent in January 2004. (The consideration included payment of $100. per day paid to the maid Crissy). In her re-examination, Mrs. Havener stated that she could realize a rent of US$3,000 to US$3,500. Counsel therefore submitted that Mrs. Havener is entitled to mense profit calculated at the rate of $3,500 per month as from the 16th April, 2004 to the date of judgment plus 2 months rent from February 15th to April 14th 2004 together with interest on that amount at a rate of 5% up to the date of judgment.

Court Analyses and Findings

[41] This is a matter that has called for the careful assessment of the witnesses who testified and a very detail review of the evidence. I have also reviewed the evidence adduced in this matter in its entirety. It seems to me that the resolution of the claim and counterclaim to a large extent would be determined by the Court's assessment of the evidence adduced and the perusal of the exhibits tendered in the matter. In this regard, it was very useful to have been able to assess the credibility of the witnesses as they testified both in chief and more importantly during the cross examination that sought to test their earlier evidence. Also, I was able to determine the reliability of the various witnesses' evidence. I must state right away that, generally, Mrs. Havener struck me as a more forthright and honest witness than Mr. and Mrs. Fernandez. In fact, Mr. and Mrs. Fernandez did not cut a very

favourable picture during cross examination and to a large extent their evidence in chief failed to withstand vigorous cross examination. With respect, I am far from persuaded as to their truthfulness. In contradistinction, Mr. Gordon and Mr. Sweeney struck me as very candid and honest witnesses. I am of the view that their evidence is reliable. Therefore, I accept the evidence adduced on behalf of Mrs. Havener where ever there is a conflict with that adduced on behalf of Mr. and Mrs. Fernandez.

[42] Be that as it may, the following represents my findings of fact:
Mr. Havener owns quite a substantial property situate at Dian Point Long Bay in St Phillips; In fact there are 3 parcels of land together with a hotel and a dwellinghouse. There were several discussions between herself and Mr. and Mrs. Fernandez by telephone, both in relation to the possible lease of her property and the eventual sale of the property (this would include the (three) 3 parcels of land at a cost of US$500,000 net. The telephone discussions were initially held in January 2003. Mr. and Mrs. Fernandez paid Ms. Linda Sawka US$1,000 a security deposit on the proposed lease. It seems to me that, on January 14th 2003 Mrs. Havener by way of faxed handwritten letter offered to sell Mr. and Mrs. Fernandez property at a price of US$500,000 net which price was to be held for a period of 6 months. The nature of the property was not stated in the faxed letter. There was another fax and it seems to me that the fax also addressed a lease. Neither of the two faxes clearly referred to any specific property. In this regard, I agree with Mr. Hamilton that the faxed handwritten letter does not state to which property the US$500,000 refers. I must hasten to say that the faxed letter is very vague; it appears that the parties were at the stage of negotiations both in relation to the sale of the property and the possible lease in the property. I am fortified in my view since the faxed letter indicated that a written agreement was to be executed eventually.

[43] However, no agreement was reached by the parties, at that stage. I also accept that Mr. and Mrs. Fernandez had not committed to purchasing the property for US$500,000. as they would have me believe. I am convinced that at that stage they were trying to determine how to source that sum of money. I also accept that Mrs. Havener on 1st February 2003 arrived in Antigua and Barbuda and telephoned Mr. and Mrs. Fernandez

and told them that she was no longer willing to sell the property and that the following day she convened a meeting at her brother's Mr. Gordon's home (at which Mr. Gordon was present). By this time, Mr. and Mrs. Fernandez had not accepted the offer to purchase the property even though they were clearly interested in purchasing the property (which they had discussed with Mrs. Havener). At the convened meeting, Mrs. Havener in the presence of her brother (Mr. Gordon) and Mr. Sweeney confirmed her previous withdrawal of the offer to Mr. and Mrs. Fernandez, the latter who though disappointed agreed to nevertheless rent the property for US$1,000 and a lease to this effect was drawn up. They also agreed that should Mrs. Havener desire to sell the property they would be given the option to purchase, however, the right of first refusal was to have been given to her family.

[44] The lease dated 1st April 2003 was drawn up by Mr. Nick Fuller and sent to Mrs. Havener for her signature to be annexed, which she did. Mrs. Havener also indicated on the lease that the first and last month's rent have been paid. The lease of the 1st April 2003 contained an option to purchase the property but did not state the purchase price. I am not at all persuaded, based on the evidence adduced by Mr. and Mrs. Fernandez that the parties agreed that the option to purchase the property, if exercised by Mr. and Mrs. Fernandez pursuant to the lease, would be at a sale price of US$500,000. There is no credible evidence before me on which I could properly conclude that this is indeed the case. I accept Mrs. Havener's evidence that the parties had not agreed on the purchase price of the property on the date of the execution of the lease. It seems to me that the parties to the lease deliberately omitted the sale price in the option clause, surely if they had reached agreement that the option was to be exercised at a sale price of US$500,000 as Mr. and Mrs. Fernandez ask the Court to believe, in my view it would have been the easiest thing to have that price included in the option clause. In my respectful view, I do not for one moment accept that Mrs. Havener at the time of the execution of the lease agreed or intended that the sale price of the property was to have been US$500,000. It is clear to me that the price was not stated in the lease since Mrs. Havener wanted to allow herself the opportunity to determine the sale price at some future time. I therefore hold that at the time of the execution of the lease, there was no identifiable offer to sell the property for a specific price since Mrs. Havener had already withdrawn her initial offer.

[45] Having found the above stated facts, I propose now to address the legal arguments advanced by Learned Counsel Mr. Hamilton Snr. For the most part, I accept the submissions advanced by Learned Counsel Mr. Hamilton Snr. In my respectful view Mr. and Mrs. Fernandez cannot rely on section 37 of the Registered Land Act in so far as I have already found that there was no agreement reached between them and Mrs. Havener for the sale of her property. I state that in any event, in the circumstances of the case I am not even prepared to go so far and say that there was an offer by Mrs. Havener to sell Mr. and Mrs. Fernandez the property since the terms of the offer were not crystallized. The manner of payment; the time of payment, whether a deposit was required these are all matters that are material to any offer and they were all required to be addressed. It seems to me that it would be more accurate to refer to the proposal as "an invitation to treat". Even if I am wrong, and there was an offer as stated earlier I have no doubt that Mrs. Havener withdrew the offer on the 1st February 2003, or at latest on the 2nd February 2003 before it was accepted. I do not believe that the US$1,000 was paid towards the purchase price. I have no doubt that it was paid as a deposit on the lease of the property.

Option to Purchase

[46] This brings me now to consider the lease that the parties entered into and more specifically the option to purchase. I accept the view advocated by Learned Counsel Mr. Hamilton that an option to purchase granted in a lease is treated in law as, a separate agreement between the parties, collateral to the lease. I also agree that it is well settled that there must be certainty in the mechanism at which the price would be arrived at and this is not the position in the case at Bar. Equally, I am persuaded that the principles stated in Smith v Morgan ibid are applicable in the instant matter. By way of reminder, in that case the option provided that:

> 'At any later date should the Vendor wish to sell the same the first option of purchasing the said hand edged and hatched blue as aforesaid shall be given to the Purchases at a figure to be agreed upon Provided that any such offer for sale shall only remain open for a period of 3 months from the date on which the said offer for sale is made by the Vendor."

In those circumstances the Court held that the agreement on the price was no part of the offer. There was an obligation imposed on the Vendor only to make an offer for sale at a

price at which the vendor was in fact willing to sell. That the words "*a figure to be agreed upon*" related to the ultimate contract price. Applying those principles to the case at bar, I accept the position urged by Mr. Hamilton Snr. that option clause in the lease enabled Mrs. Havener to offer the property for sale at a price that she determined. I agree that Mrs. Havener was well within her right to offer Mr. and Mrs. Fernandez the property at a sale price of US$1.2M to be embodied in a written agreement which would have set out the terms and conditions of sale. She was not obliged to offer Mr. and Mrs. Fernandez to sell the property for US$500,000.

Counter Offer

[47] In my view, when on the 15th January 2004 Mrs. Havener offered to sell Mr. and Mrs. Fernandez to purchase her property at a price of $1.2M and they rejected her offer and indicated their willingness to purchase the property at a price US$500.000 this was a counter offer and, it is was rejected by Mrs. Havener. I have not doubt that these state of events effectively brought to an end Mrs. Havener's offer and there was thereafter no agreement between the parties. See Hyde v Wrench ibid in which it was held that there was no contract as the offeree had by making a counter offer rejected and terminated the original offer. By way of emphasis, I have no doubt that there was no agreement between the parties which is capable of being enforced.

Notice to Quit

[48] There is no dispute that, on 15th April 2004 Mrs. Havener caused a notice to quit to be served on Mr. and Mrs. Fernandez requiring them to vacate and deliver possession of her property; they have failed to heed her request. In addition, they have not paid her rent for their continued occupation of the property; neither have they exercised the option to renew the lease. In fact, Mr. and Mrs. Fernandez admitted that they are still occupying the property. I am satisfied that they ought to have vacated the property and have no legal right to continue to occupy Mrs. Havener's property.

Mesne Profit

[49] This brings me now to address the issue of Mesne Profit.

I am of the respectful view that from the 15th April 2004 when Mrs. Havener served notice on Mr. and Mrs. Fernandez to vacate the property they were obliged to comply with her request. In so far as they have failed and/or neglected to vacate the property since 16th April 2005, they are in so doing in occupation of the property without a claim or right. I therefore have no doubt as stated by Mr. Hamilton that Mrs. Havener is entitled to mense profits from 16th April 2004 until they deliver vacant possession of the property to her. Havener. I however, do not agree with Mr. Hamilton when he argued that Mrs. Havener should be awarded mesne profit at the rate of $3,500 per month, based on her self serving evidence, that the property could attract this sum as a monthly rental, which evidence though uncontroverted I do not accept. The justice of this matter requires that Mrs. Havener be awarded mesne profits at a monthly rate of US$1,000 (which is the present rental value) from the date of 16th April 2004 to the date of judgment. I will award Mrs. Havener interest at the rate of 5% on judgment from the date of filing the claim namely the 19th January 2006 to the date of judgment.

Claim and Counterclaim

[50] In view of the foregoing and for the above reasons, I hold that Mrs. Havener has succeeded in establishing her claim against Mr. and Mrs. Fernandez while Mr. and Mrs. Fernandez have failed to meet the threshold required of them to establish that there was an agreement between themselves and Mrs. Havener for the sale of the property. It is therefore unnecessary for me to decide the third issue that is whether Mrs. Havener is in breach of the agreement she had with Mr. and Mrs. Fernandez. Accordingly Mr. and Mrs. Fernandez are not entitled to any of the reliefs sought in their counterclaim.

[51] In view of the premises I give judgment for Mrs. Jacqueline Havener against Mr. and Mrs. Fernandez on her claim. I also dismiss Mr. and Mrs. Fernandez counterclaim against Mrs. Havener.

[52] The usual rule is that costs follow the event. The Court normally awards the successful party its costs. See Part 64.6 CPR 2000. There is no reason to depart from this rule.

Accordingly, Mrs. Jacqueline Havener is to have prescribed costs on her claim, the value of which I accept is US$500,000.00, unless otherwise agreed.

Conclusion

[53] It is hereby ordered as follows:

(a) Mr. Max Fernandez and Mrs. Jill Fernandez do deliver up vacant possession of the property situate at Long Bay in the Parish of St Phillip, Antigua and Barbuda and Registered as Parcels 116; 60 and 82 of Block 25 3290A Registration Section: St Phillips North to Mrs. Jacqueline Havener.

(b) Mr. and Mrs. Fernandez are ordered to pay Mrs. Jacqueline Havener Mesne Profits in the sum of US$1,000 monthly with effect from the 16th day of April 2004 until the date of delivery of possession of the property together with interest at a rate of 5% from the date of filing of the claim namely 18th January 2006 to the date of judgment.

(d) Mr. and Mrs. Fernandez are to pay Mrs. Havener prescribed costs unless otherwise agreed for these purposes the claim is valued at US$500,000.00

[54] The Court gratefully acknowledges the assistance of all counsel.

Louise Esther Blenman
Resident High Court Judge