

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV2007-00485

BETWEEN

DISHA MOORJANI
Formerly DISHA RAMCHANDANI
(EXECUTOR OF THE ESTATE OF RAJRANI MURLIDHAR KIRPALANI)
Claimant

And

DEEPAK KIRPALANI
First Defendant
KIRPALANI'S HOLDINGS LIMITED (IN RECEIVERSHIP)
Second Defendant
REPUBLIC BANK LIMITED
Third Defendant
LENNOX KOYLASS (RECEIVER)
Fourth Defendant

Appearances:

Mr. Seenath Jairam S.C. leading Mr. Farees Hosein instructed by Miss Adelle Rahamut for the Claimant.

Mr. Ernest Koylass S.C. leading Mr. Dave Cowie instructed by Mr. Sanjay Badrie-Maharaj for the First and Second Defendants.

Dated the 28th September, 2009

Before the Honourable Madame Justice Rajnauth-Lee

JUDGMENT

INTRODUCTION

1. The Claimant claims as executor of the estate of Rajrani Murlidhar Kirpalani (“Rani Kirpalani” or “Rani”) who died on the 6th March, 2000 a declaration that she is the owner of and entitled to possession of all and singular the premises known and assessed as No. 89C sometimes known as No. 89E Ascot Road, Goodwood Park, in the Island of Trinidad, comprising 990.7 square metres and more properly described in deed registered as No. 9377 of 1985. [Amended Claim Form filed the 12th February, 2007]. The property known as No. 89C Ascot Road, Goodwood Park will be referred to as “the said property” in this judgment. By Rani’s will, she devised the said property to the Claimant and her sister Renuka Koninger as beneficiaries.

2. Prior to the issue of the claim, on the 10th February, 2007, an injunction without notice was granted by Stollmeyer J. inter alia restraining the First Defendant whether by himself, his servants and/or agents or howsoever otherwise, from going onto and/or remaining on the said property, and/or from doing any act or thing inconsistent with the Claimant’s right to return to, enter on and occupy and enjoy the said property.

3. Before Stollmeyer J. the Claimant had alleged inter alia that on the 9th February, 2007 the First Defendant had caused security guards to enter the said property, changed the locks to the front gate thereby locking the Claimant’s housekeeper in the house on the said property. At the time, the Claimant alleged that she had gone out to dinner.

4. By Order dated the 27th April, 2007, the injunction was discharged and the First and Second Defendants gave undertakings in its place. It was by consent ordered that costs of the application be costs in the cause.

5. The First Defendant (“Deepak Kirpalani”) is the nephew of Ramchand Metharan Kirpalani, a well-known and very successful businessman who died suddenly on the 15th July, 1985 (“Ram Kirpalani” or “Ram”). Ram Kirpalani was the majority shareholder and Managing Director of Kirpalani’s Holdings Limited. By the will of Ram Kirpalani, Deepak Kirpalani was appointed executor. Deepak Kirpalani is the principal shareholder and a Director of the Second Defendant. On the 5th August, 1986 (shortly after the death of Ram Kirpalani), Kirpalani’s Holdings Limited was placed in receivership by Republic Bank Limited, the Third Defendant (“Republic Bank”).

6. Republic Bank was originally added as a defendant, being the holder of two (2) Deeds of Debenture both dated the 19th August, 1981 and registered as No. 21146 of 1986 and No. 4769 of 1987 and issued by Kirpalani’s Holdings Limited (“the said debentures”). The Ascot Road property was also subject to a charge by way of a legal mortgage dated the 23rd April, 1982 and registered as No. 12316 of 1982 and made by Kirpalani’s Holdings Limited in favour of Republic Finance Corporation Limited.

7. On the 8th May, 2007, with the consent of the parties, Republic Bank was relieved of its undertaking given on the 27th April, 2007 and gave the following undertaking in its stead:

“The Third Defendant hereby undertakes that its position is that all rights to possession conferred by two (2) debentures both dated the 19th August, 1981 and made between the Third Defendant and the Second Defendant are statute barred and that it does not propose or

intend to take any steps by way enforcement of such rights under the said Debentures.”

8. The parties have agreed that Republic Bank would not participate further in the matter. Subsequently, Republic Bank played no part in the proceedings. Further, Mr. Lennox Koylass (Receiver), the Fourth Defendant, appointed by Republic Bank pursuant to the said Debentures did not participate in the proceedings, he not having been served.

THE PLEADINGS

9. By her Statement of Case, the Claimant alleged inter alia that since about the year 1979 – 1981 or thereabouts, Rani Kirpalani entered into exclusive possession of the property now known and assessed as 89C which is a portion of 89E Ascot Road and continued in exclusive possession thereof until her death on the 6th March, 2000 [paragraph 5]. The Claimant set out the following particulars of possession:

5:1 *The deceased was the wife of Murlidhar Jethanand Kirpalani upon whose death his nephew Ram Kirpalani was granted probate of his estate as the named executor. Thereafter Ram Kirpalani held the estate, devised and bequeathed under the Will in trust for the deceased as the sole beneficiary under the estate.*

5:2 *Ram Kirpalani was the principal mover in the company R.K. Limited and did not deliver over the assets under the estate to the deceased but utilized same in the purchase of properties vested in R.K. Limited including the property at 89E Ascot Road of which 89C is a portion.*

- 5:3 *In or about the years 1979-1981 or thereabouts the said Ram Kirpalani agreed with the deceased that he would assign the leasehold lands now known as 89C to her and would construct a dwelling house to the value of the monies then due and owing to her.*
- 5:4 *In pursuance of this agreement the deceased obtained the services of one Gobin Heera to supervise the construction of a dwelling house which was undertaken by contractors employed and paid for by Ram Kirpalani through his company namely the Second Defendant.*
- 5:5 *The deceased also expended monies of her own in the construction fittings and furnishing of the dwelling house. It was intended between the deceased and the said Ram Kirpalani that upon subdivision of the larger plot the plot upon which the dwelling house was constructed now 89C would be assigned to the deceased.*
- 5:6 *In pursuance of the oral agreement made between the deceased and the said Ram Kirpalani acting on behalf of the Second Defendant and in performance of that oral agreement, upon completion of the dwelling house the deceased moved in and occupied same exclusively right up until her death. Without prejudice to her other claims herein the Claimant will contend that the deceased was entitled to a Deed in her name giving her legal title to the property.*
- 5:7 *From the time she entered into occupation the deceased expended monies for the maintenance and the repair of the property and on improvements.*

10. The Claimant also alleged that since the death of Rani Kirpalani, she and her sister Renuka Koninger continued in exclusive possession of the property devised by the Will and have continued to maintain the property and to pay all its outgoings [paragraphs 6 and 7 of the Statement of Case].
11. The Claimant has also contended that she and Rani Kirpalani have been in possession of the said property for a period well over sixteen (16) years before the commencement of this action [paragraph 9]. Further and/or in the alternative, the Claimant contends that the deceased entered into possession as a tenant at will in or about 1981, which tenancy automatically came to an end one year later and thereafter time continued to run in her favour so as to extinguish the Second Defendant's title some sixteen (16) years later [paragraph 10].
12. Deepak Kirpalani and the Second Defendant ("these Defendants") filed a Defence and Counterclaim in which they inter alia admitted that the Second Defendant paid for the construction, whether of labour or materials of the dwelling house on the said property and alleged that Rani Kirpalani lived at the dwelling house on its completion with the consent of Ram Kirpalani acting on behalf of the Second Defendant [paragraph 4].
13. At paragraph 5 of the Defence, these Defendants allege that Rani Kirpalani's use of the dwelling house on the said property as her residence was at all material times with the consent of the Second Defendant acting through its Director Ram Kirpalani who bore a family relationship to Rani and the said permission was granted as an act of family generosity and/or the Second Defendant's generosity and with no intention to create legal relations between the parties. The following particulars are set out:
- a) *In or about 1981, the deceased resided in England and India as well as in Trinidad between which countries she was transient.*

- b) *She usually spent the winter months in Trinidad and returned to England in the summer.*
- c) *In respectful deference to the memory of the deceased's husband, in acknowledgement of her status as a shareholder of the Second Named Defendant and having regard to the standard of living to which the deceased had become accustomed, she was allowed by the said Ram Kirpalani and/or the Second Named Defendant to occupy the dwelling house on the subject premises which was constructed in a well appointed, exclusive residential area.*
- d) *This facility was granted to her on a purely gratuitous basis and with the consent of the said Ram Kirpalani and/or the Second Named Defendant.*
- e) *At all material times the subject premises and dwelling house have remained the property of the Second Named Defendant, which will invoke and rely upon certain of its accounting records in that behalf.*

14. These Defendants have also alleged that the Second Defendant as [legal and beneficial] owner of the said property was lawfully entitled to take action for the protection of the said property having regard to the advertised intended destruction of the said property, and the said action, the Claimant was informed, was so undertaken to secure such objective [paragraph 13].

15. These Defendants also contend that Deepak Kirpalani had informed the Claimant that he was acting as a Director of the Second Defendant and that the action was that of the Second Defendant [paragraph 14].

16. By its Counterclaim, the Second Defendant contends that the said property is the property of the Second Defendant and does not comprise any part of the estate of Rani Kirpalani and that accordingly, the Claimant as executrix is not entitled to occupy the said property [paragraph 3]. The Second Defendant has also contended that Rani Kirpalani occupied the said property with its consent solely as a licensee thereof, and that the licence automatically terminated at her death.

THE ISSUES

17. The following main issues are to be determined by the Court:
- (1) Whether there was an oral agreement concerning the said property between Ram Kirpalani and Rani Kirpalani as alleged by the Claimant in her Statement of Case.
 - (2) Whether Rani Kirpalani was in possession of the said property as a tenant at will or a licensee and whether her possession thereof caused the title of the Second Defendant to be extinguished.
 - (3) Was the Second Defendant entitled to maintain the counterclaim.

ISSUE 1 – THE ORAL AGREEMENT

18. Having regard to the Statement of Case and the Defence of these Defendants, one fundamental dispute of fact falls to be determined by the Court with respect to the first issue:

Whether there was an oral agreement between Ram Kirpalani and Rani Kirpalani sometime between the years 1979 to 1981 that Ram Kirpalani would assign the said property to Rani Kirpalani and would construct a

dwelling house to the value of legacy monies then due and owing to her from the assets of her deceased husband's estate which Ram Kirpalani had failed to deliver over to her.

19. Since both Ram Kirpalani and Rani Kirpalani are deceased, several hearsay notices have been filed purporting to reflect statements made by them with respect to the said property and the arrangements made between them. In these circumstances, although corroboration as such is not required, the Court must take special care in examining what these deceased persons said or did not say, and did or did not do. The evidence ought to be thoroughly sifted and jealously scrutinized, and the mind of the Court ought to be in a state of suspicion: See **In re Garnett** [1885] 31 Ch. D. 1 at page 8; and the unreported case of **Waddy Elias & Ors v Nagib Elias Holdings Limited & Ors** H.C.A. Cv. S-1142 of 1994).

20. In addition, where there is an acute conflict of facts, the trial judge must check the impression that the evidence of the witnesses makes upon him against

- (i) contemporary documents, where they exist;
- (ii) the pleaded case; and
- (iii) the inherent probability or improbability of the rival contentions. **[Horace Reid v Dowling Charles & Percival Bain** Privy Council App. No. 36 of 1987 (page 6 per Lord Ackner).

21. Mr. Koylass has contended on behalf of these Defendants that there are serious inconsistencies between the Claimant's case and the action commenced by Rani Kirpalani against Kirpalani's Holdings Limited (in receivership), John Hunt

and Republic Bank of Trinidad and Tobago Limited in the year 1987 [H.C.A. No. 4205 of 1987]. By her Statement of Claim in H.C.A. 4205 of 1987 Rani alleged as follows:

1. *The Plaintiff is a widow and resides at No 89E Ascot Road, Goodwood Park, Diego Martin in the Republic of Trinidad and Tobago.*
2. *The First Defendant is a duly incorporated Company in Receivership.*
3. *The Second named Defendant is the purported Receiver of the first named Defendant.*
4. *The Third Defendant is the holder of the Debenture under which the Second named Defendant was purportedly appointed.*
5. *Save for the gift of \$9,600.00 to Chandra Ishwar Kessaram the Plaintiff was the sole beneficiary under the will of Murlidha Jethanand Kirpalani (deceased). Ram Kirpalani was the executor of the said estate.*
6. *Subsequent to the granting of Probate of the said will the said Ram Kirpalani held the benefit of the various policies of insurances and the shares in Kirpalani United Co. Limited being the assets of the said estate in Trust for the Plaintiff.*
7. *The said United Company Limited was restructured and/or reorganized and/or amalgamated with other companies of which the First Defendant is the successor in title. The First named*

Defendant is the successor in title of the said Kirpalani's United Company Limited.

8. *The said Ram Kirpalani held shares in Kirpalani's Holding Limited and its said predecessors in title in trust for the Plaintiff.*
9. *At the end of each and every year the said Ram Kipalani paid to the Plaintiff such sums as represented profits and/or interest and/or dividends accruing to the Plaintiff from the trust property.*
10. *The Plaintiff instructed the said trustee to acquire a parcel of land for the purpose of erecting a dwelling house thereon. A parcel of land then known at 89E Ascot Road, was acquired by the First Defendant from monies due and owing to the Plaintiff by the said Trustee.*
11. *The said parcel of land known as Lot 89E Ascot Road, was divided in four lots now known as 89E, 89A, 89B and 98C Ascot Road. The said trustee as servant and/or agent and/or Managing Director of the First Defendant agreed to convey to the Plaintiff Lot No 89C sometimes described as 89E Ascot Road and gave the Plaintiff permission to commence construction of a dwelling house on the said lot.*
12. *In the alternative the First named Defendant through its servant and/or agent and/or Managing Director the said Ram Kirpalani acting within his ostensible authority in discussions with the Plaintiff in or about the year 1979 informed and/or promised the Plaintiff that if she would construct and maintain the dwelling house on the said property she would be allowed to occupy the said property for as long as she lived.*

13. *Relying on the promise as aforesaid the Plaintiff in expectation that she would be allowed to live there as long as she wished, expended substantial sums of money in constructing and in renovating and furnishing and or fitting up a dwelling house on the said property.*
14. *The said expenditure was encouraged by the said Ram Kirpalani acting as the agent of the First named Defendant, and the Plaintiff expended the said sums by reason of the aforementioned promises and encouragement and not otherwise.*
15. *The Plaintiff by reason of the aforesaid has acquired an equity in the said premises by the terms whereof she is entitled to occupy and retain possession thereof as long as she wishes so to do.*
16. *The Plaintiff is entitled to remain in possession as long as she wishes.*

The Plaintiff therefore claims:-

- (1) *a declaration that she is the owner of and entitled to possession of all and singular the premises known and assessed as No 89E Ascot Road Goodwood Park in the Island of Trinidad. Comprising 990.7 square metres and more properly described in Deed registered as No 9377 of 1985 (hereinafter called the "said property").*
- (2) *a declaration that the First named Defendant its successors in title including the Second and Third named Defendants hold the said property in trust for the benefit of the Plaintiff the First named Defendant having acquired the said property with monies due*

and/or belonging to the Plaintiff. Further the Plaintiff is entitled to hold occupy and enjoy the said property as a beneficiary under the said trust.

(3) *In the alternative a declaration that the Plaintiff has acquired an equity in the said property by the terms whereof she is entitled to remain in possession of the said property for as long as she wishes.*

22. Rani's Statement of Claim was substantially amended by leave of Wills J. granted on the 25th November, 1992. By the Amended Statement of Claim, the following new paragraph 7 was substituted for the original paragraphs 9 to 11 of the Statement of Claim:

7. (a) *The First Named Defendant was from time to time indebted to the Plaintiff such indebtedness represented the Plaintiff's share and/or interest in the First Named Defendant's business or undertaking or dividends or shares of the first Named Defendant.*

(b) *At all material times Ram Kirpalani acted as the agent of the First Named Defendant.*

(c) *In or about the year 1984 the Plaintiff and Ram Kirpalani acting as agent of the First Named Defendant agreed as follows:-*

(i) *That the First Named Defendant would acquire a parcel of land out of the funds then due to the Plaintiff.*

- (ii) *That the First Named Defendant would construct a dwelling house on the said land out of the said funds.*
- (iii) *That the amount expended by the first Named Defendant in respect to Sub-Paragraphs (a) and (b) hereof would be deducted from the amount owing by the First Named Defendant to the Plaintiff and the account balanced accordingly.*
- (iv) *In pursuance of the said Agreement and not otherwise the first Named Defendant through its servant agents or contractors commenced construction of a dwelling house at 89E Ascot Road. The Plaintiff through her agent Gobin Heera supervised the construction of the said dwelling house.*
- (v) *Further, in further pursuance to the said agreement and not otherwise the Plaintiff expended money renovating furnishing and/or fitting up the dwelling house on the said lands.*
- (vi) *At all material times the First Named Defendant held the legal and/or paper title to the said land in trust for the plaintiff.*
- (vii) *The Plaintiff expended monies as is hereinabove described with the knowledge and or consent of Ram Kirpalani acting as the agent for the First Named Defendant.*

23. Mr. Koylass has also submitted that the Claimant sought to do the impossible by marrying the two (2) claims in the following ways:

(a) *the Claimant filed a notice dated the 16th February, 2007, that she would rely on the documents annexed to her affidavit filed on the 12th February, 2007, and her supplemental affidavit filed on the 13th February, 2007 in support of her Statement of Case. The documents in H.C.A. 4205 of 1987 formed part of those annexures.*

(b) *Moreover, in her affidavit filed on the 12th February, 2007, in support of the application for the injunction the Claimant deposed at paragraph 3 that the dwelling-house on the said property was constructed by Rani Kirpalani and her husband in the circumstances set out in the Statement of Claim [in H.C.A. 4205 of 1987].*

24. Having regard to the authorities of **in Re Garnett** (supra) and **Waddy Elias** (supra), the Court must look carefully at the two claims and scrutinize the pleadings. According to Rani's Amended Statement of Claim, Kirpalani's Holdings Limited was indebted to her, such indebtedness representing her share and/or interest in the business or undertaking of Kirpalani's Holding Limited. [paragraph (7)(a)]. Rani alleged that Ram Kirpalani, acting as agent of Kirpalani's Holdings Limited, agreed inter alia to acquire a parcel of land out of the funds then due to her and that Kirpalani's Holdings Limited would construct a dwelling-house thereon; that the amounts expended by Kirpalani's Holdings Limited in respect of the purchase of the said parcel of land and the construction of the said dwelling house would be deducted from the amounts owing to her and the account balanced accordingly.

25. According to the Claimant's Statement of Case, however, Rani's husband had died since 1957, and Ram Kirpalani did not deliver the assets of his estate to Rani but utilized them to purchase various properties, including plot 89E (that is the whole parcel), which were vested in the name of R.K Limited. [paragraph 5:2 of the Statement of Case]. It was supposedly after the purchase of plot 89E that Ram Kirpalani agreed with Rani that he would assign 89C to her and would construct a dwelling house thereon.
26. Having regard to the above cited authorities, the Court, having scrutinized the two (2) cases, finds that there are fundamental inconsistencies between the two (2) versions. The Court agrees with the submission advanced on behalf of these Defendants that these are serious inconsistencies which cannot be reconciled or explained away.
27. The Court notes that Rani Kirpalani never produced in any form whatsoever (whether by way of letter or otherwise) any evidence or proof or particulars that there were monies owing to her, either by Kirpalani's Holdings Limited or Ram Kirpalani. In fact, Rani never alleged that Ram Kirpalani had unlawfully withheld her legacy monies or that Ram had unlawfully purchased properties with those legacy monies.
28. Further, the Claimant has produced no evidence that legacy monies remained owing to Rani from the estate of her deceased husband. Indeed, the Claimant on the 17th July, 2007, supplied particulars of her Statement of Case pursuant to Part 35 of the Civil Proceedings Rules, 1998. Particulars of paragraph 5:3 of the Claimant's Statement of Case had been sought and the Claimant was requested to state the quantum of the total monies alleged to be then due and owing to Rani Kirpalani. In response, it was stated on behalf of the Claimant, that she could not then supply the quantum of the total monies due and owing to Rani.

29. Mr. Koylass has also highlighted inconsistencies between the hearsay statement set out in the Part 30 notice filed on behalf of the Claimant on the 12th May, 2008 and the Claimant's Statement of Case. By the Part 30 notice, Rani Kirpalani was alleged to have made the following statement on numerous occasions during daily conversations from or in or about the year 1979 until her death on the 6th March, 2000:

“Ram never gave me the assets left to me by Murli. Instead he and I agreed that he would use the monies due to me towards purchasing the land at 89 Ascot Road, Goodwood Park and he would construct a house on part of it for me”.

30. The Court finds that the hearsay statement attributed to Rani Kirpalani contradicts in material aspects the Statement of Case filed on behalf of the Claimant. Moreover, nowhere has there been an attempt to explain, if Rani's hearsay statement is true, why there has never been a claim by Rani to the whole of 89 Ascot Road, that is to say, the lands originally acquired as 89E Ascot Road, which were supposedly purchased with monies/assets belonging to Rani.

31. Further, Mr. Koylass has rightly submitted that the Claimant had conceded in cross-examination that the relationship which she had observed through the years between Ram Kirpalani and Rani Kirpalani did not reflect that Ram Kirpalani had deprived Rani Kirpalani of her legacy monies. In fact, in cross-examination, the Claimant admitted that it would not surprise her if Rani was at some stage living at Ram's home. As far as the Claimant understood, as she was growing up, Rani was a Kirpalani and had to be provided for as “Mrs. Kirpalani”.

32. Mr. Koylass has also pointed to the letter of the 30th April, 1999 [agreed document 27] written to Messrs J.D. Sellier & Co., Attorneys for the defendants in H.C.A. No 4205 of 1987 by Mrs. Ria J. Seukeran-May acting as Advocate Attorney for the following persons in three (3) court actions:

- (a) Lachman Ramchandhani;
- (b) Rani Kirpalani;
- (c) Narain Moorjani.

33. By the said letter, Mrs. Seukeran-May made specific proposals for the resolution of the three (3) matters which she described as being “in abeyance”.

Mrs. Seukeran-May made the following offer on behalf of Rani Kirpalani:

Mrs. Rani Kirpalani has instructed me that she is prepared to pay the sum of Three Hundred Thousand Dollars to your clients upon the execution of a Deed of Conveyance of premises she occupies at Ascot Road, Goodwood Park. These premises are in state of great disrepair and are hardly habitable.

34. Whilst it is undisputed that Rani Kirpalani was quite ill in 1999 as is reflected in her letter to Mrs. Seukeran-May dated the 6th September, 1999 [supplemental agreed document 1], the terms of Mrs. Seukeran-May’s offer to settle Rani’s matter are not consistent with the Claimant’s case that the said property belonged to Rani Kirpalani and was acquired with legacy monies which were unlawfully withheld by Ram Kirpalani.

35. The Court wishes to say at this stage that the Claimant was an unimpressive witness. She confessed that she had a defective memory and that she had no personal knowledge of the alleged oral agreement. She also had little or no knowledge of the details of any arrangement or agreement between Ram and Rani. In fact, she admitted that in 1979, she was fifteen (15) years of age. She knew nothing of the ownership of the said property or of the legacy monies alleged owed by Ram to Rani. In addition, the Court finds it unlikely that a fifteen (15) year old girl growing up in that tradition would be told matters of that nature and would, so to speak, be part of “big people” conversations. Further, it

is clear to the Court that the Claimant's evidence contained in her affidavit filed on the 12th February, 2007 (paragraph 3) was faulty. The Claimant had alleged that the building on the said property had been constructed by Rani and her husband in the circumstances set out in the Statement of Claim in H.C.A. 4205 of 1987. Rani's husband was long dead when the dwelling house on the said property was constructed.

36. The Claimant's other witnesses, namely Lachman Ramchandani and Leslie Soverall, added little to the Claimant's case. Lachman was Deepak Kirpalani's uncle and had worked with a Kirpalani company from 1961 until Kirpalani's Holdings Limited went into receivership. His sister had married into the Kirpalani family. Despite all this, he gave no evidence of the alleged oral agreement between Ram Kirpalani and Rani Kirpalani. In fact in cross-examination, he conceded that he did not know the basis on which Rani occupied the said property.

37. As to the witness Leslie Soverall, the Court notes that at the time he was consulted concerning the retaining wall, that is, in the year 1994, Ram Kirpalani had long died and Kirpalani's Holdings Limited had been placed in receivership since 1986. The Court notes as well that the Claimant has produced no evidence whatsoever of the alleged expenditure by Rani with respect to the construction of the dwelling house or maintenance and repairs thereto.

38. In fact, in the particulars supplied on the 17th July, 2007, the Claimant stated in answer to the request that she state details of the costs per item of Rani's alleged expenditure of her own in the construction, fittings and furnishing of the dwelling house, that she could not then provide an itemized list as requested. In addition, in answer to the request that she supply details of Rani's alleged expenditure for maintenance and repair of the said property, the Claimant stated that she could not then provide the precise nature, details and quantum of Rani's expenditure, save for electricity, water and land and building taxes.

39. In all the circumstances, the Court does not accept on a balance of probabilities that Ram Kirpalani owed Rani Kirpalani legacy monies which he utilized to purchase properties which were vested in R.K Limited, including the properties at 89E Ascot Road, and that Ram agreed with Rani to assign the said property to her and to construct a dwelling house thereon to the value of the legacies monies then due and owing to her. On a balance of probabilities, therefore, the Court is not satisfied that there was in existence the oral agreement alleged by the Claimant. Accordingly, the Claimant fails with respect to the first issue.

ISSUE 2 – LICENCE OR TENANCY AT WILL

40. In the Written Submissions filed on behalf of the Claimant on the 19th November, 2008, the Claimant made several submissions on this issue. The Claimant submitted that, assuming but not accepting that the alleged oral agreement did not exist, Rani Kirpalani continued in exclusive possession of the said property as a tenant at will until Rani's death. In the alternative, the Claimant contended that from 1984 until the death of Ram Kirpalani, Rani was in possession of the Ascot Road property as a licensee and from and after Ram's death, Rani could only have been in possession as a tenant at will with the knowledge of the Second Defendant and then the Receiver of the Second Defendant which took no steps to turn her out.

41. It was further argued on behalf of the Claimant that as such tenant at will, from the expiration of one year after Rani went into possession, the tenancy at will was determined. Accordingly, it was contended that the tenancy at will would have determined in or about 1985.

42. In the alternative, it was submitted that assuming that Rani went into possession as a licensee such licence would have been automatically terminated at

the time of Ram Kirpalani's death in July, 1985. Accordingly, it was argued that from the date of death of Ram's Kirpalani, Rani would have become a tenant at will and this tenancy would have determined one year later in July, 1986.

43. On the other hand, it was argued on behalf of these Defendants that Rani Kirpalani was the beneficiary of family generosity and was a pure licensee and that the licence determined at the date of her death. Furthermore, it was contended that Rani Kirpalani was never a tenant at will and that the Claimant had never explained how Rani Kirpalani became a tenant at will.

44. Both parties placed reliance on the case of **Goomti Ramnarace v Harrypersad Lutchman** (2001) 59 W.I.R. 511. I believe it is important to set out the facts fully.

45. In July 1974, with the consent of the owners (her uncle and aunt), the appellant entered into occupation of the disputed land. Her uncle had told the appellant that she could live on the land until she could afford to buy it. She went into occupation with her family. She built a three-bedroom wooden house on the highest part of the land, and lived there ever since without paying rent or other sums for her occupation. Her uncle died in 1977. In 1990, she demolished the wooden house and built a concrete house in its place. She also enclosed an area of two and a half lots of land around the house by erecting a chain-link fence around it. In 1978, the respondent (the son of the appellant's uncle and aunt) served a notice to quit, but made no effort to enforce it; he did the same in 1985. In 1988 the appellant's aunt died.

46. In July 1990 (before she had acquired a possessory title) the appellant instituted proceedings against the respondent claiming inter alia a declaration that she was tenant of the disputed land (later modified to a claim for a declaration that the title of the respondent and his predecessors in title to the land had been extinguished). In a counterclaim served in December 1991, the respondent sought

a declaration that he was the owner of the disputed land together with an order for possession.

47. At first instance, the judge found that the appellant had entered into occupation of the disputed land as tenant at will in July 1974, that such tenancy had been determined after one year under section 8 of the Real Property Limitation Ordinance 1940, and that she had thereafter remained in exclusive possession of the disputed land without interruption. Accordingly, the respondent's title had been extinguished after sixteen years in July 1991 under section 3 of the Ordinance.

48. The Court of Appeal, however, allowed the respondent's appeal, holding that the appellant had entered into occupation originally as a licensee; her licence had been determined either by service of notice to quit in 1985 or by the death of her aunt in 1988; accordingly, she had not been in adverse possession for the sixteen years required to extinguish the respondent's title.

49. On appeal to the Judicial Committee of the Privy Council it was held that the Court of Appeal in reversing the decision of the judge at first instance had given too little weight to the fact that the appellant had been in exclusive possession of the disputed land and the fact that her possession was attributable, not merely to her uncle's generosity, but to the intention of the parties that she should, in due course, purchase the land; having entered the disputed land in July 1974, the appellant's tenancy at will automatically came to an end for limitation purposes one year later (section 8 of the Ordinance); thereafter the service of notices to quit by the respondent without more was insufficient to stop time running in favour of the appellant, and the respondent's title was extinguished some sixteen years later in July 1991 (section 3 of the Ordinance), before he made his claim to recover the land. The appeal was therefore allowed.

50. Lord Millett who delivered the judgment of the Board traced the development of the law as to whether a person was a tenant at will or a licensee. According to Lord Millett, the operation of the Limitation Acts was stultified by the doctrine of implied licence which attributed the presence of a trespasser on vacant land not required by the true owner to a licence. The difficulty of distinguishing between a tenancy at will and a licence led to a change in the law of England following a recommendation of the Law Reform Committee. Lord Millett cited the decision of the House of Lords in **Street v Mountford** [1985] A.C. 809, which re-affirmed the principle that the distinguishing feature of a tenancy is that it grants the tenant exclusive possession. According to Lord Millett, Lord Templeman in **Street v Mountford**, expressly approved the reasoning of Windeyer J. sitting in the High Court of Australia in the case of **Radaich v Smith** (1959) 101 C.L.R. 209 at page 222 where he said:

What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second.

51. According to Lord Millett at page 516,

The effect of ss 3 and 8 of the Ordinance taken together is that if no action is taken by the true owner, his title is extinguished after the expiration of

seventeen years from the commencement of the tenancy even though the possession of the occupier is permissive throughout; see Lynes v Snaith [1899] 1 QB 486. It was the deliberate policy of the legislature that the title of owners who allowed others to remain in possession of their land for many years with their consent but without paying rent or acknowledging their title should eventually be extinguished.

52. Having examined the law, Lord Millett concluded at pages 517-518:

*A tenancy at will is of indefinite duration, but in all other respects it shares the characteristics of a tenancy. As Lord Templeman observed [1985] AC at p 818), there can be no tenancy unless the occupier enjoys exclusive possession; but the converse is not necessarily true. An occupier who enjoys exclusive possession is not necessarily a tenant. He may be the freehold owner, a trespasser, a mortgagee in possession, an object of charity or a service occupier. Exclusive possession of land may be referable to a legal relationship other than a tenancy or to the absence of any legal relationship at all. A purchaser who is allowed into possession before completion and an occupier who remains in possession pending the exercise of an option each has in equity an immediate interest in the land to which his possession is ancillary. They are not tenants at will, see *Essex Plan Ltd v Broadminster* (1988) 56 P & CR 353 at 356, per Hoffmann J.*

A person cannot be a tenant at will where it appears from the surrounding circumstances that there was no intention to create legal relations. A tenancy is a legal relationship; it cannot be created by a transaction which is not intended to create legal relations. This provides a principled rationalization of the statement of Denning LJ in Facchini v Bryson on which the Court of Appeal relied in the present case. Before an occupier

who is in exclusive occupation of land can be treated as holding under a licence and not a tenancy there must be something in the circumstances such as a family arrangement, an act of friendship or generosity or such like, to negate any intention to create legal relations.

*In the present case, the appellant was allowed into occupation of the land as part of a family arrangement and at least in part as an act of generosity. But not wholly so, for the appellant testified that the intention of the parties was that she would buy the land when she could afford to do so, and the judge accepted her evidence. Her uncle was generous in that he allowed her to remain indefinitely and rent-free pending her purchase, and in that he did not press her to negotiate. But a tenancy at will commonly arises where a person is allowed into possession while the parties negotiate the terms of a lease or purchase. He has no interest in the land to which his possession can be referred, and if in exclusive and rent-free possession is a tenant at will. In **Hagee (London) Ltd v A B Erikson and Larson** [1976] QB 209 at 217 Scarman LJ described this as one of the 'classic circumstances' in which a tenancy at will arose.*

Whether the parties intended to create legal relations, and whether there was any genuine intention on their part to negotiate a sale of the land when the appellant could afford to buy it, were questions of fact for the judge. Although he made no express findings in this regard, there was evidence which he accepted from which he could properly conclude that the appellant entered into possession as tenant at will.

53. It is not in dispute that the paper title to the said property rests with the Second Defendant. The said property was originally owned by R.K. Limited which went into voluntary liquidation by a special resolution passed at an extraordinary general meeting of the company held on the 1st October, 1980. The original parcel of land (of which the said property forms part) comprised two (2)

leasehold parcels of land comprising 51,570 superficial feet and 2,966 superficial feet known as Lots 89 and 92B Ascot Road and was acquired by Kirpalani's Holdings Limited by way of a voluntary *distribution in specie* of the assets of R.K. Limited in voluntary liquidation [See Deed dated the 29th December, 1981 and registered as No. 6006 of 1982 – agreed document 19].

54. Kirpalani's Holdings Limited mortgaged the original parcel of land to Republic Bank by deed dated the 23rd April, 1982 and registered as No. 12316 of 1982. [agreed document 6].

55. Kirpalani's Holdings Limited purchased the freehold reversion expectant on the leases of the two (2) parcels of land from Goodwood Park Limited (In Voluntary Liquidation) for the consideration of \$50,000.00 by deed dated the 14th May, 1985 and registered as No. 9377 of 1985. [see agreed document 19].

56. It cannot be disputed that the dwelling house on plot 89C was built with the funds of Kirpalani's Holdings Limited. In Rani's action, John Hunt, then Receiver, swore an affidavit in the year 1990 in support of an application to strike out Rani's Statement of Claim. The Ledger Account of Kirpalani's Holdings Limited was annexed to the Hunt affidavit. That Ledger Account set out the expenses incurred in respect of the property at 89C Ascot Road between the 31st July, 1980 and the 26th May, 1988. [agreed document 19]. The Court accepts the Ledger Account as being an accurate reflection of the expenses incurred by Kirpalani's Holdings Limited with respect to the said property.

57. It has been argued on behalf of these Defendants that Ram Kirpalani was an extremely generous person. The undisputed picture which has been emerged is that of a family man, the patriarch of the family, who took care of family members. Rani was a young widow at age 28 and had no children. She had married into the Kirpalani family and had become accustomed to a certain high standard of living. Her husband had left her without a home. Subsequent to her

husband's death, she lived at various Kirpalani properties, and from about 1984, she began to live at the dwelling-house constructed on 89C Ascot Road and remained in exclusive possession of the property until her death in 2000. She spent the winter months in Trinidad and returned to England for the summer.

58. These Defendants relied on the Part 30 notice filed on the 22nd April, 2008 in support of the witness statement of Deepak Kirpalani. According to the Part 30 notice, the following statement was said to have been made by Ram Kirpalani:

“Babi [Rani Kirpalani] can stay here when she comes over for the winter. I won't let the company rent it or time share it when she is away”.

59. Further, according to the Part 30 notice, Rani Kirpalani was alleged to have said:

“Murli would have been very proud of how kind his nephew has been to me and how he has let me stay at this house. You must also make your uncle proud.”

“I owe your uncle a debt of gratitude for his kindness. Imagine how much money I've saved since he has put me up in these fine houses.”

“I wish I could be here with you all in Trinidad more often. I cherish my fond memories so much. I can't thank your uncle enough for letting me stay here. This has really made things so much easier for me whenever I come.”

60. Deepak Kirpalani said in his witness statement:

25. *As a member of the Kirpalani family I have always known the deceased as “Babi” which is how we referred to her as*

my great-uncle's wife. I have always understood from statements made at family gatherings at which Ram Kirpalani, I and the deceased were together that she was being allowed to live in and occupy the said premises. She never disputed this.

26. *I say further that the deceased's use of the dwelling-house upon the said premises as a residence was at all material times with the consent of the second-named Defendant acting through its director Ram Kirpalani who bore a family relationship to the deceased and the said permission was granted as an act of family generosity by Ram Kirpalani (deceased) personally and through the second-named Defendant's generosity.*
27. *In so allowing the deceased to occupy the said premises there was absolutely no intention to act in a manner so as to create legal relations between the deceased, Ram Kirpalani or indeed the second-named Defendant so as to bring about enforceable rights and obligations and the grant of such accommodation was strictly in honour of the Kirpalani family relationship.*
28. *Indeed during the 1970's prior to her occupancy of the said premises the deceased had been allowed to stay at various other properties owned by R.K. Limited including 90 Sandown Road, Goodwood Park when she visited this country for the period that she did as well as 138 Sunset Ridge, Goodwood Park (which was where my father also resided with his family) in addition to premises at Windsor Road and Goodwood Avenue in Goodwood Park.*

29. *I knew Ram Kirpalani to be a man who sought to secure the welfare of family members and his generosity and charitable disposition even extended to his many employees which is a matter of public record. In deed on more than one (1) occasion in my presence the deceased expressed her gratitude to him for his kindness in respect of her accommodation at these various residences as well as at the said premises which she eventually occupied and for other acts of benevolence on his part.*

61. The Court notes that Deepak Kirpalani has been a director of Kirpalani's Holdings Limited since the year 1986. His uncle, Ram Kirpalani, reposed such trust in him that he was appointed executor of Ram's estate and sole beneficiary under Ram's will whereby he inherited all Ram's shareholding in Kirpalani's Holdings Limited. Ram never married and never had children. The evidence emerged that when Deepak Kirpalani was a young man, Ram began to teach him the business and to groom him to take over. It is clear to the Court that Ram Kirpalani intended that Deepak Kirpalani would be his rightful heir and successor. In fact, Deepak Kirpalani lived at the same residence as Ram Kirpalani. The Court finds that it is likely that Deepak Kirpalani would have witnessed these conversations and accepts his evidence.

62. In cross-examination, Deepak Kirpalani made the important point that neither Rani nor Ram ever mentioned to him that Ram had agreed with Rani to assign 89C to her and to construct a house for her to the value of the monies then due and owing to her. Indeed, Deepak Kirpalani said in cross-examination that after Ram's death, Rani Kirpalani "never mentioned anything like that" to him. According to his evidence, between 1985 (after the death of Ram Kirpalani) until 1986 when the company was placed in receivership, he would have been *out of place* to take steps to put Rani out of the said property. Thereafter, from the 5th

August, 1986 up to the present time, the company remained in receivership. In re-examination, Deepak Kirpalani stated that because of his upbringing, he would have been out of place to put Rani out of the said property after Ram's death.

63. It has been argued on behalf of the Claimant that the defendants in Rani's action, including the Second Defendant in the instant claim, had admitted in their Defence that Rani was a tenant at will. At paragraph 14 of the Defence in H.C.A. 4205 of 1987, the defendants alleged:

Shortly after completion of the said dwelling house the Plaintiff entered into possession of the said premises as a licensee and/or tenant-at-will of the First Defendant [Kirpalani's Holdings Limited (in receivership)].

The Amended Defence contained a similar plea at paragraph 21 thereof.

64. Admissions are receivable to prove matters of law or mixed law and fact, though (unless amounting to estoppels), these are generally of little weight, being necessarily founded on mere opinion: **Phipson on Evidence** (16th edn) paragraph 4-11. In addition, an ambiguous admission carries little weight. Having examined the averment in the Defence the Court finds that it is framed not as an admission, but as a legal contention in answer to Rani's claim of some proprietary right. It speaks as much to the existence of a licence as it does to the existence of a tenancy at will. In the circumstances, the Court attaches no weight to the averment in the Defence and does not accept it as an admission that Rani was a tenant at will.

65. In addition, the Court has looked at the case of **Knowles v Knowles** [2008] UK PC 30 [Privy Council Appeal No. 28 of 2007 delivered on the 9th June, 2008]. The Privy Council was mindful of depriving an owner of property who had done nothing at all to encourage any belief that the occupants could treat the property as belonging to them. Although the two claims are not *on all fours*,

the Court finds the approach of the Privy Council useful. At paragraph 27, Sir Henry Brooke delivering the judgment of the Board said:

“In Jennings v Rice [2002] EWCA Civ 159; [2003] 1 P & CR 100 Robert Walker LJ said at para 56 that the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result. In the opinion of their Lordships it would be unconscionable in this case to deprive George of his property when he had done nothing at all to encourage any belief that his brother and sister-in-law could treat the property as belonging to them. While recourse to the doctrine of estoppel provides a welcome means of effecting justice when the facts demand it, it is equally important that the courts do not penalize those who through acts of kindness simply allow other members of their family to inhabit their property rent free. In E & L Berg Homes Ltd v Grey (1979) 253 EG 473, [1980] 1 EGLR 103 Ormrod LJ said at p 108:

“...I think it important that this court should not do or say anything which creates the impression that people are liable to be penalized for not enforcing their strict legal rights. It is a very unfortunate state of affairs when people feel obliged to take steps which they do not wish to take, in order to preserve their legal rights, and prevent the other party acquiring rights against them. So the court in using its equitable jurisdiction must, in my judgment, approach these cases with extreme care.”

66. In all the circumstances of this case, the Court finds that although Rani was allowed to remain in exclusive possession of the said property, her possession was as a consequence of the generosity of the Second Defendant through its Managing Director Ram Kirpalani. Further, the Court finds on a balance of probabilities that the arrangement between Ram and Rani arose out of the bonds of family and family generosity and with no intention to create legal relations between the parties. Accordingly, the Court agrees with these Defendants that

Rani's possession of the said property was as a pure licensee and not as a tenant at will. The Court adopts the reasoning of Lord Millett in **Goomti Ramnarace** (supra) that a person cannot be a tenant at will where it appears from the surrounding circumstances that there was no intention to create legal relations since a tenancy is a legal relationship and cannot be created by a transaction which is not intended to create legal relations.

67. Further, having regard to the evidence and the law, the Court agrees with the submissions advanced on behalf of these Defendants, that the licence granted to Rani was not terminated by the death of Ram Kirpalani in July, 1985 or by the placing in receivership of Kirpalani's Holdings Limited in August, 1986. In addition, the Receiver never sought to put Rani out of the said property whether by way of notice to quit or counterclaim in Rani's action or otherwise. The Second Defendant never terminated Rani's licence during her lifetime and therefore the licence determined on Rani's death. Accordingly, the title of the Second Defendant has not been extinguished by Rani's possession of the said property.

ISSUE 3 - THE COUNTERCLAIM

68. Having alleged that the said property was the property of the Second Defendant and did not comprise any part of the estate of Rani Kirpalani, the Second Defendant has contended that the licence granted to Rani automatically terminated at the date of her death and, accordingly, the Claimant as executrix is not entitled to occupy the said property. The Second Defendant has therefore counterclaimed for possession of the said property
69. Just prior to the death of Rani Kirpalani, Mrs. Seukeran-May in her letter of the 30th April, 1999 (referred to at paragraphs 32-33 of this judgment),

indicated that the said property was in a state of great disrepair and was hardly habitable.

70. The Claimant contends that since the death of the deceased, she and her sister Renuka continued in exclusive possession of the said property and that they have continued to maintain the said property and to pay all its outgoings.

71. In response to the request of the First and Second Defendants for particulars of the alleged expenditure by the Claimant and her sister, the Claimant alleged that from the year 2000 to the date of the particulars, that is, the 17th July, 2007, they had paid for security, painting, repairs for electrical and plumbing and maintenance and repairs to the said property. The Claimant also alleged that they had paid land and building taxes, WASA rates, T&TEC and insurance for the said property. Several bills, invoices and receipts were annexed to the particulars supplied.

72. Nevertheless, in her witness statement filed on the 14th March, 2008, the Claimant claimed that the house on the said property was in such a bad state of repair that it needed substantial renovations. The Claimant contended in her witness statement that in order to begin renovations and to cut down on the expense of same, they needed to get rid of all the old fixtures and furnishings and therefore arranged a public auction on these items (paragraph 35).

73. Indeed, on Wednesday the 31st January, 2007, the Claimant placed an advertisement in a daily newspaper for a sale by public auction fixed for Saturday 10th February, 2007 at 10.00 a.m. at the said property. The advertisement was under the hand of Mr. Peter Soon, Licensed Auctioneer, and read in part as follows:

“Upon the instructions of the owners I will offer for sale by public auction on the date and place mentioned above the following building materials, fixtures and furnishings.

STEEL BEAMS, STEEL BEAMS, STEEL BEAMS

Roofing materials, lumber, wooden rafters, ceiling materials, suspended ceiling tiles and fixtures, lighting fittings, & fixtures, kitchen cupboards, bathroom cupboards, fittings and fixtures aluminum sliding doors and windows, burglar-proof doors, burglar-proof grates, bedroom cupboards, mirrors, single and double beds, glass coffee table, TV stand, side tables, kitchen appliances, kitchen utensils and cutlery, groceries, carpets

PAINTINGS: ceramic ware, silverware, Bed spreads, sheets, blankets, towels, Window air-condition units, 400 gal water tank

And other items numerous to mention

Dated this 15th day of January, 2007”

It would appear to the Court that the Claimant intended to sell off almost the entire dwelling house.

74. In the meantime, there had been on-going negotiations between Republic Bank and Deepak Kirpalani in an attempt to settle the long outstanding receivership. By letter dated the 15th September, 2006, Republic Bank had written to Deepak Kirpalani indicating inter alia that it had agreed to accept the compromised sum of \$2.5 M for the release of the Debenture dated the 19th August, 1981 and the Bank’s interest in three (3) properties including the said property.

75. Mr. Dave Cowie, Attorney acting for Deepak Kirpalani, by letter dated the 28th September, 2006, replied to the Bank’s letter. Mr. Cowie inter alia enquired whether the proposed sale of the said property and 196 Cactus Ridge, Goodwood

Park was to be freed and discharged from mortgages vested in Republic Finance and Merchant Bank Limited, and whether since the said three (3) properties were currently occupied, whether the Bank was in a position to furnish his client with vacant possession as a term of the proposed offer.

76. Republic Bank responded by letter dated the 2nd November, 2006 advising inter alia that Republic Finance and Merchant Bank Limited had no interest in the said property and the property at 196 Cactus Ridge, Goodwood Park.

77. By further letter dated the 7th December, 2006, Republic Bank replied indicating inter alia that with respect to the said three (3) properties, including the said property, vacant possession would not be given.

78. Thereafter, the Claimant's advertisement for the public auction came to the attention of Deepak Kirpalani, who forwarded the following letter dated the 1st February, 2007 to Mr. Geoffrey Clarke, Director Risk Management of Republic Bank:

Further to our numerous conversations letters and e-mails concerning Kirpalani Holdings Limited and the closure of the debenture date August 19th 1981, I appreciate the compromised position regarding the following properties and assignment of the debenture:

- 1) #14 Wahid Circular Drive Vistabella
- 2) 89c Ascot Road Good wood Park
- 3) 196 Cactus Ridge Goodwood Park

While we appreciate your willingness to convey the properties by way of assignment rather than power of sale it has become more difficult to acquire financing under these conditions.

Just yesterday I had cause to refer you to a page 41 Newsday clipping of January 31st 2007 advertising an auction for sale on February 10th 07 of materials of house #89C Ascot Road, Goodwood Park by Auctioneer Mr. Peter Soon. On discussions with Mr. Soon I was told that the owner of the property instructed him. When I asked him if he had seen a deed to the property he replied no.

I am very concerned about these developments and I fear that this situation may jeopardize our arrangement and may cause problems with my financiers whom we are negotiating with.

In this regard I humbly ask that you give me two things that can make this closure possible:

- 1) Sell me the properties under the power of sale*
- 2) Give me the authority to reenter the property under the receiver and secure the company's property as this property is now abandoned.*

My financiers are prepared to give me the necessary financing to acquire the same.

I trust that you will see the wisdom of what I am trying to achieve. With your help this can be achieved in the shortest possible time.

Your kind cooperation would be greatly appreciated. I look forward to hearing from you shortly.

Best Regards,

*Deepak Kirpalani
Share Holder”*

79. As correspondence disclosed to the Court revealed, since the year 2006, Deepak Kirpalani had been meeting with Mr. David Dulal Whiteway, Managing Director of Republic Bank. Deepak Kirpalani had raised with the Bank the possibility of the Bank's removing the judgments which it had listed against him as well as whether these judgments were now statute barred.
80. By letter dated 5th February, 2007, Deepak Kirpalani again wrote to Mr. Geoffrey Clarke of Republic Bank, indicating that he had decided to take Mr. Clarke's advice, and was therefore enclosing a draft payable to Republic Bank for the sum of \$250,000.00 representing the 10% deposit requested by the earlier proposals of the Bank with respect to the three (3) properties. According to his letter, Deepak Kirpalani was paying this money in good faith pending the signing of an agreement between the Bank and himself under the power of sale of the said property and an assignment of No. 196 Cactus Ridge, Goodwood Park and No. 14 Wahid Circular Road, Vistabella.
81. On the 6th February, 2007, Deepak Kirpalani e-mailed Mr. Clarke indicating to him, that he had driven by the said property and that it was still unoccupied. Deepak Kirpalani urged that they should not lose this opportunity and that either the Bank or Deepak Kirpalani should take possession of what he described as "the company's premises". He concluded by asking permission of the Bank to enter and take possession.
82. Apparently not having received a response from Republic Bank, Deepak Kirpalani wrote to the Bank on the 8th February, 2007 complaining of the non-challant attitude of the Bank and the receiver towards protecting the company's interests. According to the letter, Deepak Kirpalani was not satisfied that anything was being done to assure him that "under the debenture the company's interest was well served".

83. Despite not having responded to Deepak Kirpalani, Republic Bank gave instructions to Messrs. J.D. Sellier & Co, Attorneys for the Bank, who by letter dated 2nd February, 2007 wrote to Mr. Peter Soon, Licensed Auctioneer, inter alia calling upon him to withdraw the advertisement immediately and to cancel the sale by public action. By letter dated the 5th February, 2007, Messrs Daltons, Attorneys at Law, responded to the said letter on behalf of the Claimant and her sister, Renuka, and inter alia contended that they were entitled as devisees to the beneficial ownership of the said property.

84. Deepak Kirpalani in his witness statement filed on the 29th February, 2008, stated as follows at paragraph 13:

“Shortly after that on 9th February, 2007 at or about 4.15 p.m. thereon Geoffrey Clarke, the third-named Defendant’s Risk Management Director with whom I had been in regular contact relative to the discussion in relation to the possible sale advised me and I verily believe that he had received legal advice from the Attorneys at Law for the third-named Defendant to the effect that its interest in the said properties including the subject-matter of these proceedings had become statute-barred so that it (as well as Republic Finance and Merchant Bank Limited) held neither interest in nor charge upon them. He furthermore said that the bank’s draft for \$250,000.00 had not been encashed and would be returned to me.

85. Republic Bank through its Attorneys, by letter dated the 22nd March, 2007, has confirmed that Mr. Clarke had indicated to Deepak Kirpalani that it did not intend to institute any proceedings pursuant to the debenture in order to stop the advertised sale of material at the said property. The Attorneys had indicated, however, that Mr. Clarke did not recall saying to Deepak Kirpalani that the Bank was relinquishing any rights under the debenture.

86. In these circumstances, Deepak Kirpalani testified that having sought legal advice and having been advised that the said property was no longer subject to any encumbrances, on the 9th February, 2007, with the full concurrence of his mother and acting as a director of the Second Defendant and not otherwise, he duly executed on behalf of the Second Defendant, a mandate to a security firm, Scentech K9 Consultants Limited, to secure the said property (paragraph 16 of his witness statement).
87. In fact in cross-examination, Deepak Kirpalani reiterated that he sought to protect the Second Defendant's property when he saw the advertisement seeking to auction off parts of the Second Defendant's assets. According to his evidence, he took the action that he did with the permission of Republic Bank.
88. According to Deepak Kirpalani, by the 9th February, 2007, he was aware that the Claimant had vacated the said property in advance of the proposed auction and demolition of the said property. Deepak Kirpalani also testified that he had taken this action in his capacity as a director of the Second Defendant and not in his personal capacity and that he had indicated this to the Claimant. According to Deepak Kirpalani, the Second Defendant acting through him sought to take peaceful possession of the said property on account that it feared and apprehended that the Claimant would demolish the dwelling house thereon, publicly auction its structural component and constituent parts and thereby cause substantial loss and damage to the Second Defendant [paragraph 23 of his witness statement.]
89. The above circumstances led to the Claimant's application to Stollmeyer J. on the 10th February, 2007 for the ex parte injunction referred to at paragraphs 2 and 3 of this judgment.
90. Towards the end of the cross-examination of Deepak Kirpalani, several new documents were filed and tendered into evidence as a further supplemental

agreed bundle of documents. The further supplemental agreed bundle and the further cross-examination of Deepak Kirpalani revealed that as at the 7th January, 1986, Deepak Kirpalani was a director of Kirpalani's Holdings Limited and his directorship was never terminated. In addition, on the 21st February, 2007, Deepak Kirpalani acting as director of the Second Defendant filed documents to continue the Second Defendant pursuant to the Companies Act Chap. 81:01.

91. In her written submissions filed on the 19th November, 2008, the Claimant submitted:

- (i) the purported act of continuing the Second Defendant was without authority of the receiver manager of the Second Defendant who at all material times had control over all of the affairs of the Second Defendant;
- (ii) the purported actions taken by the First Defendant as a director of the Second Defendant in the protection of the assets of the Second Defendant are unlawful in that at all material times all powers of the directors of the Second Defendant are and were suspended and the receiver manager has exclusive control over the assets and affairs of the Second Defendant and in that respect the board of directors is displaced;
- (iii) the purported appointment of the First Defendant's mother as a director and secretary of the Second Defendant is unlawful having regard to the appointment and continuation of a receiver manager of the Second defendant's affairs;
- (iv) the purported actions taken by the First Defendant as a majority shareholder of the Second Defendant on 9th February 2007 in protection of the assets of the Second Defendant is unlawful

having regard to the appointment and continuation of a receiver manager of the Second Defendant's affairs.

- (v) at all material times the First Defendant well knew that any action to be taken in protection of the Second Defendant's assets had to be taken by the receiver manager of the Second Defendant.
- (vi) no authority from the receiver manager was sought and/or obtained by the First Defendant to file a defence in these proceedings and/or to file a counterclaim on the Second Defendant's behalf.
- (vii) the First Defendant's real motive for committing the act of entering the Ascot Road property and excluding the Claimant is personal in that he wishes to get control of the Ascot Road property for himself.

92. Mr. Jairam on behalf of the Claimant placed reliance on section 292 of the Companies Act Chap. 81:01, which provides that when a receiver-manager of a company is appointed by the Court or under an instrument, the powers of the directors of the company that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged. In my view, however, where the rights of the debenture holder have become statute barred, the receiver-manager cannot be said to possess powers or to be authorized to exercise those powers to the exclusion of the directors in relation to the company's assets which fall under the debenture. The Court notes that Republic Bank had recorded its position on the 8th May, 2007, that its rights to possession conferred by the said debentures were statute barred and that it did not propose or intend to take any steps by way of enforcement of such rights under the said debentures. In the judgment of the Court, therefore, where all the rights to possession of Republic Bank conferred by the said debentures are statute barred, the receiver-manager cannot be said to possess powers or to be authorized to

exercise those powers to the exclusion of the directors in relation to the said property. In my judgment, therefore, section 292 of the Companies Act is inapplicable in these circumstances.

93. On the other hand, Mr. Koylass on behalf of these Defendants submitted inter alia that there exist residual powers in the directors although the company has been placed in receivership and that the First Defendant was entitled to take the actions that he did. Mr. Koylass also submitted that a plea of lack of authority cannot be taken at this late stage of a trial.

94. As to the lateness of the plea of lack of authority, these Defendants placed reliance on the unreported case of **Caribbean Food Corporation v Enviro Farms Limited** Civ. App. No. 148 of 1989 and the judgment of M. de la Bastide C.J. delivered on the 15th December, 1995. The appeal arose from the judge's refusal of an application made by the defendant to have the action dismissed on the ground that the attorneys who brought and continued this action (they are not the same), did not have proper authorization from the plaintiff company to do so. During the course of the argument before the Court of Appeal, the Court invited Attorneys to make submissions, if the factual issue had been resolved against the plaintiff, whether the defendant might have been debarred by delay and/or waiver from taking the point (page 7). Mr. Thorne Q.C. who appeared for the respondent in the appeal conceded that there is a time limit for taking such an objection, that is to say, the objection of absence of authority. He conceded that it would be too late to take it at the trial or, a fortiori, after the trial. De la Bastide C.J. made the point that it was clear from the case of **Danish Mercantile Company Limited v Beaumont** [1951] 1 A.E.R. 925, that delay may result in the loss of the right to take the objection even if the delay does not persist right up to the trial (page 8).

95. Having looked at the reasoning of de la Bastide C.J., the overriding objective of the Civil Proceedings Rules, 1998, and the policy underlying these Rules, the Court agrees with Mr. Koylass' submission. In my judgment, it is too

late for the Claimant to raise for the first time a plea of absence of authority at the end of the cross-examination of the only witness who gave evidence on behalf of these Defendants.

96. Furthermore, Mr. Koylass has also relied on the text **The Law Relating to Receivers, Managers and Administrators** (Hubert Picarda) 4th edition, 2006. According to Picarda, it is now clear that the receiver-manager does not usurp all the functions of the company's board of directors. The directors have continuing duties and residual powers (page 116). Further, the power given to the receiver-manager to bring proceedings was an enabling provision so that he could realize the company's assets and carry on business for the benefit of the debenture holder. The provision did not divest the directors of the company of their power to pursue a right of action if it was in the company's interest and did not impinge prejudicially on the position of the debenture holder by threatening or imperilling the assets which were the subject of the charge (**Newhart Developments Ltd v Co-operative Commercial Bank Ltd** [1978] Q.B. 814). Shaw LJ made the point that if, in the exercise of his discretion, the receiver chooses to ignore some asset such as a right of action, or decides that it would be unprofitable from the point of view of the debenture holders to pursue it, there is nothing in the authorities which suggest that it is not then open to the directors of the company to pursue that right of action if they think that it would be in the interests of the company.

97. The Court agrees with Mr. Koylass' submissions in the circumstances of this case. In the light of the undertaking given to the Court by Republic Bank and having regard to the fact that the Bank's rights under the said debentures were statute barred, there were no competing interests between the directors of Kirpalani's Holdings Limited and Republic Bank or the receiver-manager with respect to the said property. The absence of prejudice to the debenture holder was a crucial factor. The Court finds, therefore, that the actions of Deepak Kirpalani acting as a director on behalf of the Second Defendant in seeking to secure and

protect the said property were not prejudicial to the debenture holder. Republic Bank had made it clear that it did not intend to commence proceedings to stop the auction or to protect the Second Defendant's assets and had formally recorded its position that its rights to possession under the said debentures were statute barred.

98. As to the issue of continuance under the Companies Act, section 346 provides that where a former-Act company fails to apply to the Registrar for a certificate of continuance within the time limit therefor under section 340, then, after the expiration of that period, that company may not, without leave, sue or counterclaim in any court, but it may be made a defendant to a suit [section 346(1)(a) of the Companies Act]. Notwithstanding section 346(1), when a company described in that section is issued a certificate of continuance, the company may then maintain an action, suit or other proceedings as though the company had never been disabled under that subsection [section 346(2)]. The Court notes that Kirpalani's Holdings Limited was continued on the 21st February, 2007.

99. In all the circumstances of the case, therefore, the Court finds that the Second Defendant is entitled to the relief claimed in the counterclaim. As to the issue of costs, in the Court's discretion, this is not an appropriate case to order prescribed costs. According to C.P.R. Part 67.5 the award of prescribed costs is a general rule only. Having regard to the complexity of the issues, the fact that the costs of the injunction have to be assessed, and further, having regard to the fact that the First and Second Defendants have succeeded on the Defence, but only the Second Defendant has sought relief on the Counterclaim, the Court will order that the costs of the injunction, the claim and the counterclaim be assessed by the Court pursuant to C.P.R. Part 67.12.

ORDER

It is hereby ordered as follows:

- (1) The Claimant's claim is hereby dismissed.
- (2) There shall be judgment for the Second Defendant on the counterclaim.
- (3) The Claimant shall forthwith deliver up possession of the property known as No. 89C Ascot Road, Goodwood Park to the Second Defendant.
- (4) The Claimant shall pay to the First and Second Defendants costs of the claim and to the Second Defendant costs of the counterclaim to be assessed by the Court on a date to be fixed.

MAUREEN RAJNAUTH-LEE
JUDGE