REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 43 of 2009

BETWEEN
BALWANT CAPIL GAYADEEN

APPELLANT

AND

CHITRANJAN GAYADEEN
otherwise BOOCHAN GAYADEEN

AND

RAMANAND GAYADEEN
otherwise RAMANAN GAYADEEN

RESPONDENTS

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.A.
C.V.H. Stollmeyer, J.A.

APPEARANCES: **Mr. H. Seunath, S.C. appeared on behalf of the Appellant**
Mr. G. Mungalsingh appeared on behalf of the Respondents

DATE DELIVERED: April 5th, 2012

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The Appellant, Balwant Capil Gayadeen, and the Respondents, Chitranjan Gayadeen and Ramanand Gayadeen, are brothers. The dispute in this matter relates to a parcel of land at 12 Jaipaul Street, St. Madeleine (the lands). The Appellant claims that he was the lessee of the lands jointly with his and the Respondents' mother at the time of her death and on her death, by virtue of the right survivorship, he became the sole tenant of the lands. The Respondents, on the other hand, claim that their mother was the sole tenant of the lands and on her death on September 7th, 1992 her interest passed to her estate.

2. On June 20th, 2008 the Respondents commenced these proceedings against the Appellant and Caroni (1975) Limited (Caroni) seeking a declaration that the unexpired residue of the lease of the lands forms part of the estate of the deceased. The proceedings were however subsequently discontinued against Caroni. In the Respondents' statement of case, the Respondents alleged that their mother was up to the date of her death the tenant of the lands. As at June 1st 1981 there was a building constructed on the lands which was used as a dwelling house and they contended that the tenancy was converted to a statutory lease for a term of thirty years from June 1st, 1981 by virtue of the provisions of the Land Tenants (Security of Tenure) Act, 1981 (the Land Tenants Act). They further alleged that a dispute arose between them and the Appellant as to whether there was an absolute assignment by the deceased of the statutory lease to herself and the Appellant as joint tenants, which upon the death of the deceased would enure solely for the benefit of the Appellant by the virtue of the principle of jus accrescendi of joint tenants. The Respondents however alleged that the assignment was incomplete and as a consequence the statutory lease created by the Land Tenants Act formed part of the estate of the deceased on her death to be administered in accordance with the provisions of her will under which the Appellant and the Respondents all benefited.

3. The following particulars are material to understanding why the Respondents contended that there was an incomplete assignment from the deceased to the Appellant of the lands. The Respondents say that the deceased, for no consideration, requested Caroni to have the tenancy converted to a joint tenancy between herself and the Appellant and to have the tenancy agreement between themselves and Caroni approved and completed. The request was made on a form prepared by Caroni and is in four parts: part A, Part B, Part C and Part D. The form is headed "House Lot Transfer Application" and is annexed to the statement of case and marked "D". For convenience I will refer to this document as Exhibit D.

4. Part A, of Exhibit D, is addressed to Caroni and states:

> *"I wish to have the tenancy which I now hold on [the lands] converted to a joint tenancy between myself and [the Appellant]".*

This is signed by the deceased opposite an attestation clause which reads *"Signed by the within named, I having first truly and audibly read over to him/her the contents of the above written when he/she appeared perfectly to understand the same and made his/her mark hereto in my presence"*. There is a signature appearing below this clause.

5. Part B is also addressed to Caroni and states that:

> *"We wish to apply to the Company to be placed on its records as tenants of the [the lands] which tenancy is now held of the Company by the deceased jointly. We hereby forward a tenancy agreement on behalf of [the deceased and the Appellant] for approval by the Company. This will be completed and approved by the Company only if it agrees to your application."*

The names, addresses and occupations of the Appellant and the deceased are then set out, as well as their relationship to each other. Part B is signed by both the deceased and the Appellant opposite a similar attestation clause as in Part A. Both Parts A and B were signed on May 10th 1989.

6. Part C is reserved for the Section/Area/Cultivation Manager to indicate whether or not he approves of the application. Part D is reserved for Caroni to indicate its

approval of the application. Both sections are signed indicating the Manager's as well as Caroni's approval of the application.

7. The tenancy agreement referred to in Part B was forwarded to Caroni with Exhibit D. The tenancy agreement purports to grant a tenancy of the lands for one year with effect from July 1st, 1989, and thereafter from year to year until the tenancy is determined, at the annual rent of $2.00. The tenancy agreement was signed on behalf of Caroni on December 1st, 1989 which is the same date on which Caroni indicated their approval of the application in Part D of Exhibit D. The tenancy agreement was however not signed by the Appellant until November 25th, 1992, after the death of the deceased, and it was never signed by the deceased.

8. The Respondents alleged that the assignment was incomplete because of the failure/refusal of the deceased to sign the tenancy agreement and by Caroni continuing to accept rent from her until she died.

9. The Appellant in his defence denied that the Land Tenants Act applied to the lands. He also denied that the assignment was incomplete. He averred that the deceased applied to Caroni to have the tenancy made into a joint tenancy on May 10th 1989 and the application was granted by Caroni on December 1st, 1989. On that date Caroni affected the lease to himself and the deceased. He further pleaded that on August 19th, 1993, after the death of the deceased, Caroni removed the name of the deceased from its records and he became the sole tenant of the lands. The Appellant contends that the transfer of the tenancy to himself was done in accordance with clause M of the tenancy agreement.

10. At a case management conference before the Trial Judge, the parties agreed to proceed without oral evidence, and according to the Judge, to determine the matter by written submissions on the relevant law. The Judge in his judgment stated that it was agreed between the parties that the issue "which effectively decided the case was whether Exhibit D created a joint tenancy between the deceased and [the Appellant] by which Caroni was bound". The Judge subsequently received and considered written submissions from the parties and subsequently delivered a written judgment. In his judgment, the Judge asked himself three questions namely:

1. Did the Land Tenants Act apply to the lands?
2. Did the Appellant become a joint tenant of the lands?
3. Did the tenancy become vested in the estate of the deceased upon her death?

11. With respect to the first question the Judge answered it in the affirmative. The consequence of that conclusion was that the tenancy of the lands in favour of the deceased subsisting immediately before June 1st, 1981 became a statutory lease for thirty years subject to the provisions of the Land Tenants Act.

12. With respect to the second question the Judge held that the Appellant did not become a joint tenant of the lands. He was of the opinion that there could not be a valid assignment of the tenancy to the deceased and the Appellant unless it was done by deed. He stated:

> "*In this case exhibit "D", the House Lot Transfer Application Form, along with Exhibit E, the tenancy agreement, bearing commencement date December 1st, 1989,show, at most, an intention which may have existed on the part of [the deceased] at some point and time, to transfer the said tenancy to herself and [the Appellant] as joint tenants.*
>
> *This indication of such intention was never followed by the requisite preparation, execution and registration of a deed of assignment. Based on the authorities cited above, this was clearly required by law for the assignment and thus, the creation of a joint tenancy to have been effective and more importantly enforceable against a third party. The application form and the tenancy agreement, quite apart from their completeness or lack thereof, do not constitute a requisite deed in writing and hence were ineffective in assigning the statutory lease from [the deceased] to herself and Balwant Gayadeen as joint tenants.*
>
> *As a matter of law and on the pleadings, there is no assignment of the tenancy of [the deceased] to herself and [the Appellant], and as a result [the Appellant] could not claim to be joint tenants of the said premises."*

13. The Judge then appeared to consider the position in equity. He stated that Exhibit D was at most an intention to transfer the tenancy by way of gift. It put the completion, approval and agreement by the landlord of the proposed joint tenancy, along with the completion of the new tenancy agreement, to some date in the future. The Judge stated

that a donor has no enforceable obligation in equity and a donee no enforceable right. The Appellant therefore had no enforceable right in equity to compel the completion of the new tenancy arrangement.

14. With respect to question 3, following on his conclusion that the deceased was the sole tenant of the lands at the time of her death, the Judge concluded that the tenancy formed part of her estate and fell to be distributed in accordance with the provisions of her will.

15. The Judge's treatment of the matter reflected the submissions made in the matter by Counsel for the parties. The main focus of the argument was whether there was an assignment or transfer of the tenancy by the deceased to the Appellant effected or evidenced by Exhibit D by which Caroni was bound. That, however, I think is to misunderstand the true effect of Exhibit D, since neither Caroni, nor the Appellant and the deceased purported by that document to transfer or sign the existing tenancy.

16. To properly understand Exhibit D it must be read as a whole. Part A of Exhibit D is an indication to Caroni of the deceased's intention or desire to have the tenancy of the lands "converted" to a joint tenancy in favour of the deceased and the Appellant. There are two ways that that could have been accomplished, namely by an assignment of the existing tenancy by the deceased to the Appellant and herself or by a surrender of the tenancy and the grant of a new tenancy by Caroni to the Appellant and the deceased. Part B of Exhibit D does not refer to an assignment of the existing tenancy at all. Rather it refers to a tenancy agreement which was forwarded to Caroni for its approval. That proposed agreement, which at the time it was forwarded to Caroni was not signed by anyone, provided for Caroni to grant an annual tenancy at a yearly rent of $2.00 with effect from July 1st, 1989.

17. Before this Court it was not disputed by the parties that the Judge's conclusion that the Land Tenants Act applies to the lands was correct. It has been suggested by my brother Jamadar, JA that the determination by the trial Judge of the issue whether the Land Tenants Act applied to Caroni lands was unfair to the parties, particularly the Appellant. Whether or not that is so I do not regard as relevant because it was open to the

parties before this Court to make the concession that they did. It would not be binding on Caroni so no issue of fairness to them arise. In any event I would think that the parties would know Caroni's position vis a vis the lands before discontinuing the action against it and conceding the point. On the face of it, I have no concerns with the concession. Section 3(2) of the Lands Tenants Act, which sets out the lands to which that Act does not apply, is clear and unambiguous. It does not exempt lands of Caroni. In those circumstances, I do not think that reliance can be placed on **Pepper v Hart** [1992] AC 593 to allow reference to Parliamentary materials. But even if reference is made to the Parliamentary debates it was not the intention that the Land Tenants Act would not apply to lands of Caroni. What appears very clearly from the remarks of the Attorney General(see **Hansard,** March 23rd, 1981, at 1886-1888) is that the State intended to purchase lands from Caroni and grant leases to the tenants of those lands. Of course if the State did purchase the lands before the coming into force of the Land Tenants Act, then that Act would not apply as it does not bind the State. If the Government did not follow through with its stated intention, an explanation is perhaps that the Land Tenants Act provided to tenant at least what the Government intended to do and more. It is also relevant to note that the Caroni (1975) Limited and Orange Grove National Company Limited (Divestment) Act, which was passed in 2006 and which, inter alia, transferred to the State the real estate holdings of Caroni, provided that that Act shall not operate to derogate from any rights already acquired by tenants under the Land Tenants Act (see s.13); an indication that the Land Tenants Act applies to such lands.

18. The Lands Tenants Act in essence, as I have indicated before, converted tenancies of lands subsisting immediately before June 1st, 1981, on which at the said date there was erected a chattel house used as a dwelling house or on which there was a chattel house intended to be used as a dwelling house in the course of construction, to a statutory lease for thirty years. The parties, therefore, accepted that as at June 1st, 1981 the deceased held a statutory lease for a period of thirty years subject to the provisions of the Land Tenants Act. The consequence of that was that the tenancy agreement forwarded with Exhibit D was so fundamental an alteration in the relationship between Caroni and the deceased that it could only have been effected by a surrender of the statutory lease and

the grant of a new tenancy, which in this case is the annual tenancy referred to in the tenancy agreement.

19. This was recognized in the tenancy agreement itself at clause 5(4), which provides:

> *"The existing tenancy (if any) of the Tenant in respect of the said lands and all tenancy agreements (if any) between the Landlord and the Tenant relating to the said lands and subsisting immediately before the signing of this Agreement shall cease and determine upon the thirtieth day of June One Thousand Nine Hundred and Eighty-nine and it is hereby expressly agreed and declared that this Agreement and the tenancy thereby created shall come into force and take effect on the First day of July One Thousand Nine Hundred and Eight-nine and such Agreement shall thenceforth be in substitution for all such earlier tenancy agreements as aforesaid."*

20. It is also evident from the outline of the Appellant's defence above that what the Appellant was saying was that a new lease was granted to him on December 1st, 1989. He was not contending that there was an assignment of the lease. The following paragraphs of the Appellant's defence make this clear (in these paragraphs the First Defendant is a reference to the Appellant and the Second Defendant refers to Caroni.).

> *6. The First Defendant denies paragraph 5 of the Statement of Claim and avers that [the deceased] applied to the Second Defendant to have the tenancy made into a joint tenancy on May 10th, 1989 and the said application was granted on December 1st, 1989 by the Second Defendant.*
>
> *10. The [First] Defendant denies paragraph 7 and avers that the lease granted by the Second Defendant to both the [deceased] and the First Defendant was affected by the Second Defendant on December 1st, 1989*

21. The question whether there was in fact a surrender of the existing lease and a grant a new lease to the deceased and the Appellant was not addressed by the Judge.

22. A surrender may be expressed or implied by operation of law.

23. It has been held that for there to be an express surrender that it must be by deed (see PCCA Appeal 11 of 1980 **Tokai v Mohammed** and the Civil Appeal 98 of 1987

Samuel v Joseph and Another and s.10 of the Conveyance and Law of Property Act). I have seen nothing in the Land Tenants Act that would alter this requirement in relation to a statutory lease created by that Act. This was also the view of the Court of Appeal in Civil Appeal 14 of 2003 **Dickson v Singh**. It is clear that in this case there is no deed of surrender. There is therefore no express surrender of the statutory lease.

24. A defective surrender, such as where there is an agreement to surrender other than by deed, may take effect in equity as an agreement to surrender the lease under the principle of **Walsh v Lonsdale** (1882) 21 Ch. D 9. I have already set out clause 5(4) of the tenancy agreement. The purport of that provision is to effect a surrender of existing leases of the lands. But was there any agreement as to that provision? Part D of Exhibit D which refers to the tenancy agreement is signed by the deceased as well as the Appellant and one may draw the inference that the deceased must therefore have agreed to the terms of the tenancy agreement in which clause 5(4) is contained. On these facts it is arguable that there is an agreement to surrender that may take effect in equity. On the other hand the tenancy agreement itself was not signed by the deceased. What is the inference to be drawn from that? So too, what is the inference to be drawn from the fact that Caroni collected rent from the deceased at a rental, it appears, which is not that proposed in the tenancy agreement. These matters do not support an agreement to surrender the statutory lease. Further clause 5(4) of the tenancy agreement contemplated that for the clause to have effect there must be the grant of a new lease. In other words it was not simply an agreement to surrender the existing lease but to do so on the basis that a new tenancy will be granted as set out in the tenancy agreement. Was there therefore a grant of the annual tenancy as contemplated by the tenancy agreement? This is relevant also to the question of surrender by operation of law to which I will now turn.

25. The doctrine of surrender by operation of law is founded on the principle of estoppel in that the parties must have acted towards each other in a way that is inconsistent with the continuation of the tenancy. The conduct must be unequivocally inconsistent with the continuation of the tenancy. As was said by Hassanali, J.A in PCCA 11 of 1980 **Tokai v Mohammed and Others**:

> *"There cannot be a surrender by operation of law unless there is evidence of unequivocal conduct by the parties which is inconsistent with the continuance of the existing tenancy - so that the tenant is estopped from asserting otherwise."*

26. As a surrender by operation of law is dependent on the conduct of the tenant and the Landlord, it can occur in several ways. Of relevance here is that there can be a surrender of an existing lease on the acceptance of a new lease. The question is whether the deceased and the Appellant accepted a new lease. As was mentioned before although the decease signed Part B of Exhibit D, she never signed the tenancy agreement even after it was approved by Caroni. It is difficult to view this without more as an acceptance of the new lease by the deceased. There are other questions that arise that impact on the acceptance by the deceased of a new lease to herself and the deceased such as the question of the collection of rent alluded to earlier, and the fact that Caroni did not put the Appellant's name as a tenant on its records until after the death of the deceased. If there was a grant of a new lease to the Appellant and the deceased in 1989 why did it take almost three years for Caroni to acknowledge this?

27. There may be, of course, explanations for the questions raised that are consistent with the surrender of the statutory lease and the grant of a new tenancy to the deceased and the Appellant. In my judgment however those questions cannot be simply answered on a construction of Exhibit D and the pleadings.

28. From the submissions made before the Judge what in essence he was asked to determine was whether there was an assignment or transfer of the lease from the deceased to the Appellant and herself. How that question came to be asked of the Judge in view of the pleadings and the clear intent of Exhibit D is not clear. What, however, is clear is that that question is very different from whether there was a surrender of the statutory lease and a grant of a new lease by Caroni to the deceased and the Appellant. I think that if the parties had appreciated the real question in the matter they would not have proceeded with the matter in the manner that they did. The answer to those questions, which requires the determination of questions of fact, can only be properly and fairly answered after the relevant evidence is admitted and tested. It would be wrong for the Court to

proceed to investigate these questions and come to a conclusion on material put before the Court which the parties thought relevant and sufficient to answer a different question.

29. As what I regard to be the crux of the matter was not properly put before the Judge, the effect was to mislead him. I think that justice requires that the orders of the Judge be set aside and the matter be remitted before a Judge. The trial Judge who dealt with this matter was holding an acting or a temporary appointment. In any event he is no longer on the bench. The matter will therefore be assigned to a new Judge in the usual way. It is expected that the way forward will be determined at an appropriate case management conference.

30. Before I leave this appeal there is one further matter to which I would like to refer and this relates to the Judge's finding that a legal assignment of a statutory lease under the Land Tenants Act has to be done by deed. The determination of this issue is not necessary for this appeal but it was argued before this Court and the question is one of general importance and significance.

31. It should be noted that the position of the Appellant was that a deed is not necessary for an assignment in law of a statutory release under the Land Tenants Act. The Respondents initially sought to defend the Judge's position but in the end conceded that a deed was not necessary. I agree with the position of the parties and given the significance and importance of the issue, I think it is appropriate to briefly set out why I think that is the correct position.

32. An appropriate place to begin is with section 10 of the Conveyancing and Law of Property Act. Section 10(1) provides:

> "*All conveyances of land or any interest therein are void for the purpose of conveying or creating a legal estate unless made by Deed.*"

33. The meaning of the word "conveyance" is defined in the Conveyancing and Law of Property Act to specifically include a lease and is wide enough to include an assignment of a lease.

34. Section 10(2) however creates certain exceptions to the generality of section 10 (1). Of particular relevance to this matter is section 10 (2)(c) which is as follows:

"10 (2)This section does not apply to -

> *(c) leases or tenancies or other assurances not required by law to be in writing."*

35. These provisions (s.10 (1) and 10 (2)(c)) are identical to sections 52 (1) and 52 (2)(d) of the English Law of Property Act 1925. That Act however contains other provisions, namely sections 53 (1)(a) and 54 (2) that are relevant to the creation or disposal in law of an interest in land otherwise than by deed. These sections however are not reproduced in our legislation and their omission has had an effect on the interpretation of the law in this jurisdiction.

36. In **Jones v Pereira** (1950) Trin LR 78 the West Indian Court of Appeal had to consider whether there was an assignment of a monthly tenancy from A to B. The Court held that the issue was determined on the pleadings as there was a clear and unambiguous allegation in the statement of claim that the tenancy was assigned which was not traversed in the defence. Although it was not necessary to its decision the Court, however, considered the question whether the assignment was void because it was made by deed. The Court was unanimously of the view that the assignment of a monthly tenancy was not void because it was not made by deed.

37. Furness-Smith, C.J and Collymore, C.J noted that the position in England was that an absolute assignment of a periodic tenancy must be by deed. They however observed that section 53(1)(a) when read with section 54(2) of the English Law of Property Act, 1925, expressly prohibited oral assignments and these sections were not reproduced in our legislation. They continued (at p. 83):

> *"I am aware of no express provision in Trinidad law which requires the assignment of a monthly tenancy to be in writing, and it is certainly not to be found in the Law of Property Ordinance. Subsection (1) of the Ordinance [i.e. section 10(1) of the Conveyancing and Law of Property Act] which renders void all conveyances of interests in land unless made by deed does not, by*

virtue of subsection (2), apply to leases and tenancies and other assurances which the law does not require to be made in writing. Unless therefore some provision of law can be found which requires an assignment of the kind now under consideration to be made in writing, I am unable to understand how it can be said that the requirements of subsection (1) apply to it. I am clearly of the opinion that they do not."

38. Worley, C.J in his judgment was of a similar opinion. He also noted that the English position was that the law required the assignment in law of a periodic tenancy to be made by deed. He stated that this was as a consequence of section 52(1) and (2)(d) of the law of Property Act, 1925 when read with sections 53(1)(a) and section 54 of the same Act. The latter provisions were however not reproduced in our legislation. He therefore indicated that it was *"necessary to look elsewhere to see whether there was any provision of law in the Colony which requires that the assignment of a monthly tenancy must be by deed."* He stated that he was unable to find any such position.

39. **Jones v Pereira** was considered by the Court of Appeal in **Rampersad v Phagoo and others** (1960) 2WIR 492. In that case the question arose whether a deed was necessary for the absolute assignment of an annual tenancy. It was held that it was not. With reference to **Jones v Pereira** the Court stated (at p.497):

"We have examined and considered the reasoning of the judges of that court and, if we may say so with respect, we agree with and adopt for the purpose of our decision the view and reasoning of the judges on the question, namely that a deed is not necessary for the assignment of a monthly tenancy or, as is the case here, a tenancy from year to year."

40. The law in this jurisdiction is therefore that an assignment in law of a lease that is not itself required to be in writing need not be by deed. The Judge in this case, rightly considered that to be the position. He however referred to and applied to CV 2005-00439 **Rajkumar v John** where it was held that a statutory lease under the Land Tenants Act had to be in writing and so too the assignment of it. The Judge consequently concluded that an assignment of such a lease had to be by deed.

41. In **Rajkumar v John** Stollmeyer, J. (as he then was) indicated his agreement with the submission of the defendant in the following terms:

> *"It is submitted on behalf of the Defendant that the decision in Jones v Perriera (1950) 10 Trinidad Law Report 70 permits oral assignments of tenancies. I agree but this is in relation only to a tenancy - or lease - not itself required to be in writing."*

42. It is apparent from the above that I agree with Stollmeyer J's understanding of **Jones v Pereira**. The Judge however then considered that a statutory lease under the Land Tenants Act had to be in writing. He therefore concluded that an assignment of it had to be done by deed. In coming to that conclusion he noted that regulation 3 of the Land Tenants (Security of Tenure) (Forms and Notices) Regulations made under section 18 of the Land Tenants Act set out at form 1 a memorandum of statutory lease which either the landlord or tenant may require the other to sign and which may be registered as a deed. He noted also that the Land Tenants Act provides for nearly all conceivable matters relating to a statutory tenancy to be in writing including the renewal of a lease and the request for and consent to an assignment. The Judge further referred to section 3 of the Landlord and Tenant Ordinance which provides that no lease for a term exceeding three years shall be valid unless made by deed duly registered.

43. It is true that the Land Tenants Act provides for a number of things to be done in writing. However as Stollmeyer, J observed not everything is required to be. So for example, although the Act requires the consent of the landlord to an assignment of the lease to be in writing, it does not require the assignment to be in writing. Similarly although the Land Tenant Act requires the landlord to be given written notice to renew the lease, the Act does not provide that the renewed lease should be in writing. Stollmeyer J thought that the intention to be derived from the fact that the Land Tenants Act provides for many things to be in writing is that all things in relations to the lease should be in writing. But I think that the more appropriate inference is that as the draftsman has provided that some but not all things should be in writing, he intended that where he made no provision for something to be done in writing it need not be.

However, with specific reference to the question whether the statutory lease should be in writing, I think that there is no doubt that there is no requirement for it to be in writing.

44. Section 4(1) of the Land Tenants Act which provides for subsisting leases to which the Act applies to be converted to a statutory lease provides that the subsisting lease shall become a statutory lease from the appointed date. The creation of the statutory lease is not dependent upon it being reduced into writing. It takes effect immediately from the appointed day. Similarly the Regulations on which reliance was placed in **Rajkumar v John** provide that the landlord and tenant at any time during the continuation of the statutory lease may require the other to sign a memorandum of such lease setting out the terms and conditions thereof (see Regulation 3). The memorandum may therefore be made at any time during the continuance of a statutory lease which would include any renewal of the original lease. The memorandum is therefore not required for the statutory lease to exist. The preparation and signing of a memorandum of lease are voluntary acts in which the parties may engage at any time "during the continuance of a statutory lease" (see Regulation 3). There can hardly be a clearer indication that a statutory lease need not be by written instrument.

45. Given the clear intent of the Land Tenants Act that a written instrument is not required for a statutory lease I entertain no doubt that section 3 of the Landlord and Tenant Ordinance does not apply to such a lease. The framers of section 3 of the Ordinance could not have had in their contemplation a statutory lease under the Land Tenants Act.

46. In my judgment therefore as a statutory lease may not be in writing it is not necessary for there to be a legal assignment of such lease that it be done by deed.

47. In the circumstances this appeal is allowed and the matter is remitted to a Judge. I would like to hear the parties on the question of costs both here and in the Court below.

Allan Mendonça
Justice of Appeal

Delivered by P. Jamadar, J.A.

48. I have read the Judgment of Mendonca, J.A. and I agree with him that justice requires that this appeal be allowed, the orders made by the trial judge set aside and the matter remitted to be heard before another judge. The relevant facts in this matter have been set out by him and there is no need for me to repeat them. There are however two matters about which I wish to make a few comments.

The issue of a statutory lease in relation to Caroni lands

49. This matter proceeded without any evidence being taken. It appears that on the 17th October, 2008 it was "agreed … that the issues in this case could be successfully determined by written submissions on the relevant law," and that "the issue which (would) effectively decide the case was whether 'Exhibit D' created a joint tenancy between Mynee and Balwant Gayadeen by which Caroni (1975) Limited was bound".[1]

50. That this was the agreed issue is confirmed by the opening paragraphs of the written submissions filed by both the Claimants and the Defendant pursuant to the above agreement.

> The Claimants' formulation of the issue was stated as follows:
>
> At a case management conference held on the 17th day of October, 2008 it was ordered that the issue which decides the whole case is whether

[1] Paragraph 2 page 2 of the judgment of the trial judge.

"Exhibit D" … created a joint tenancy by which Caroni (1975) Limited "Caroni" was bound.

The Defendant formulated it in this way:
On the 17th October, 2007 by consent of the parties the court directed that skeleton submissions be filed on the following issue, viz: "Whether the signed documents exhibited to the Claimants' Statement of Case as "D" and "E" effectively created a Joint Tenancy by which Caroni (1975) Limited was bound".

51. Exhibits 'D' and 'E' were exhibited to the Statement of Case filed on the 20th June, 2008. A Defence had also been filed on the 30th July, 2008. On the pleadings, the Claimants asserted that Mynee Gayadeen was a tenant of the subject parcel of land renting from Caroni (1975) Ltd. And, that on the 1st June, 1981, pursuant to the Land Tenants (Security of Tenure) Act, 1981 (the Act), the said tenancy was converted to a statutory lease (pursuant to the provisions of the Act).[2] Indeed, the main relief sought was an order that the unexpired residue of the statutory lease formed part of the estate of Mynee Gayadeen. The Defence filed by Balwant Gayadeen specifically denied that the Act applied to the tenancy or that the tenancy fell to the estate of Mynee Gayadeen.[3] Though the Claimants had sued Caroni (1975) Ltd. (the Company) as a Co-Defendant, the Company did not file any defence and at some time prior to the 17th October, 2008 the Claimants withdrew their case against the Company.

52. In these circumstances the judge went ahead and directed "that the matter would be determined by filed written submissions, hence removing the need for a trial in the matter".[4]

53. An examination of the written submissions reveals that the Defendant only addressed documents 'D' and 'E', arguing that a proper interpretation and construction of

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[2] Paragraphs 3 and 4 of the Statement of Case.
[3] Paragraph 5 of the Defence.

both show that Mynee and Balwant Gayadeen had the intention to create a joint tenancy in their favour with respect to the tenancy that Mynee held with the Company for the lands and which was approved and agreed to by the Company. Significantly, no written submissions were made on the applicability of the Act and/or the conversion of the tenancy into a statutory lease. However the Claimants' submissions did contain passing reference to the applicability of the Act, but it is fair to say that their written submissions also concentrated almost exclusively on documents 'D' and 'E'.

54. In this context, and remarkably so, the trial judge identified three issues to be determined. The first issue was whether the tenancy was converted into a statutory lease pursuant to the Act. He noted the denial in the Defence and the absence of any written submission on this issue by the Defendant, yet went ahead to hold that the Act applied and the tenancy had been converted to a statutory lease on the 1st June, 1981.

55. In the Defendant/Appellant's written submissions before this court, this overreaching of the issue agreed before the judge is pointed out and quite diplomatically protested. Nevertheless a succinct submission was made, that 'since no deed is required for the creation of the statutory lease, no deed is required for the assignment',[5] asserting thereby that the judge fell into error when he held that an assignment of a statutory lease pursuant to the Act had to be by deed.[6]

56. In my opinion that adventure into the first issue identified by the trial judge was not warranted and was unfair. It was unfair both to the Claimants and to the Defendant, but especially to the Defendant. To have ruled against the Defendant on an issue that was not agreed and on which the Defendant had made no submissions, was an overreaching of judicial function however well intentioned it may have been (and even if the outcome was correct).

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[4] Paragraph 3, page 2 of the Judgment.
[5] See paragraph 10 of the Appellant's written submissions.
[6] See pages 11 to 15 of the judgment.

57. In my opinion the issue of whether the Act applied to the lands of the Company in 1981, is one which requires some consideration beyond what may have been pleaded (and disputed) or what may even have been hesitatingly conceded by attorneys at the bar.

58. It is quite clear that the Act was not intended to bind the State. This is made explicit by section 3(2) and (3) of the Act. The pertinent question is what was intended by this exclusion in the context of the Act and in particular whether the lands of the Company were intended to be included in the broad coverage effected by the Act.

59. Without suggesting that the requirements of **Pepper v Hart**[7] can be satisfied on this issue, a perusal of the debates in the Hansard on this matter may suggest that the issue needs to at least be explored carefully. This is so irrespective of what the Company may be doing at present. Indeed, the Hansard record shows that the question as to whether the Company's lands were caught by the Act was specifically posed in the House (on more than one occasion), in the context of section 18 of the Bill ("This Act shall not bind the state"), and answered in the negative by the proposer of the Bill, the Attorney General.[8]

60. In my opinion this issue needs to be properly explored and determined in this case and must also be remitted to a trial judge for rehearing. In any event it seems contrary to due process and fundamental fairness to determine this issue after the Company ceased being a party to the proceedings and without giving it an opportunity to be heard on the issue – being one that directly affects it.

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[7] [1992] UKHL 3; [1992] AC 593; and [1992] 3 WLR 1032.

[8] In the Bill before the House (that was passed unanimously) section 18 provided that the Act "shall not bind the State". In the Senate the Bill was referred to a select committee and emerged with a new name and with other changes. Among these changes were those made to section 3 in the Bill, which emerged as section 3 in the Act with the limitations provided by subsections (2) and (3) added on. Subsection (3) of section 3 of the Act was formerly section 18 in the Bill, which was moved to be included as part of section 3 in the Act, no doubt to make certain the non-binding effect of the Act on the State in relation to lands covered by the Act. In this regard, see also section 13 of the Caroni (1975) Limited and Orange Grove National Company Limited (Divestment) Act, 2005.

Must an assignment under the Act be made by deed

61. In so far as the Act was/is applicable to the Company's lands, then I agree with Mendonca, J.A. that an assignment of a statutory lease need not be by deed. Section 10(1) and (2) (c) of the Conveyancing and Law of Property Act states as follows:

> (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by Deed.
> (2) This section does not apply to -
> (c) leases or tenancies or other assurances not required by law to be made in writing.

62. There is nothing in the Land Tenants (Security of Tenure) Act, 1981 (the Act) that requires the statutory lease between parties to be made in writing. Indeed, these leases are not required to be made in writing by reason of the fact that they are statutory leases created pursuant to section 4 of the Act and governed by the Act, the terms of which are set out in Form 1 to the regulations made under section 18.[9]

63. In fact regulation 3(1) states:

> At **any time during the continuance** of a statutory lease either the landlord or the tenant **may** require the tenant or landlord to sign a memorandum of such lease setting out the terms and conditions thereof. [My emphasis].

64. This regulation makes it clear that there is no requirement that such a written memorandum must be signed by the parties for a statutory lease to come into effect or be valid. This can be contrasted with other provisions in the Act which all require something to be done in writing, for example sections 9, 10 and 16: notice of option to purchase, request for consent to assign, and agreement for the erection of a non-removable building.

65. The discretionary or non-mandatory requirement for the execution of a written memorandum of statutory lease is made abundantly clear by section 17A of the Act. Section 17A[10] provides that where a landlord or tenant refuses to execute a memorandum of statutory lease (pursuant to a request under regulation 3(1)) the Land Commission can settle the terms of same and give directives for its execution, and that such an executed memorandum is registrable as a deed. This obviously can occur at any time during the continuance of a statutory lease.

66. Moreover, when it comes to an assignment of a statutory lease, section 5(8) of the Act provides as follows:

> A tenant has the right to assign or sublet with the consent of the landlord whose consent shall not be unreasonably withheld; but the rent payable by any subtenant shall not exceed the rent payable by the tenant to the landlord under this Act.

67. No mention is made of any requirement for an assignment to be in writing, which could have been done as with the above quoted sections. Even more significantly in relation to assignments, the Act does make provision for something to be done in writing. The tenant's application for the landlord's consent to an assignment must be made in writing (section 10 of the Act). Further, a specific form (Form 7) is prescribed for this written request. Thus it is abundantly clear that the Act neither required a statutory lease nor an assignment of one to be in writing.

68. A statutory lease clearly falls within the exception provided for by section 10 (2) (c) of the Conveyancing and Law of Property Act and is in accord with the opinions of the judges of the West Indian Court of Appeal in **Jones v Pereira**[11] and of the Trinidad and Tobago Court of Appeal in **Rampersad v Phagoo**.[12] Therefore the requirements of section 10(1) of the Conveyancing and Law of Property Act and of section 3 of the

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[9] Legal Notice No. 35 of 1982.
[10] Legal Notice No 15 of 1883.
[11] (1950) Trin. L.R. 78.

Landlord and Tenant Ordinance (for a lease exceeding three years to be made by deed) were intentionally and deliberately excepted. Indeed, it would be absurd if under the Act (Regulation 3(1)) a statutory memorandum of lease may be executed at any time during the continuance of a statutory lease if requested, but at the same time a statutory lease or an assignment of one was somehow invalid unless made by deed.

69. The simple position is that the Act provides for the creation of a statutory lease. In these circumstances no deed or writing is necessary or required, even though the statutory lease is for an initial period of 30 years. Section 3 of the Landlord and Tenant Ordinance is inapplicable and irrelevant to this situation. There is no requirement for either the statutory lease or an assignment of one to be by deed.

Peter Jamadar
Justice of Appeal

Delivered by C.V.H. Stollmeyer, J.A.

70. I regret that I am unable to agree that this appeal should be allowed and the matter remitted to the High Court. I do so with all deference to the reasons advanced by the majority, but have come to the conclusion that the appeal should be dismissed with costs.

71. The dispute between the parties can be summarised as follows.

72. Mynee Gayadeen was a tenant of a parcel of land at 12 Jaipaul Street, Marabella, the freehold of which was held by Caroni (1975) Ltd. ("Caroni"). There was a residence on this parcel of land. On 10th May 1989 she and one of her sons, Balwant Gayadeen, signed a standard form of request furnished by Caroni requesting that her tenancy be transferred to herself and Balwant as joint tenants. The claim was by the executors of the estate of Mynee Gayadeen for a declaration that the unexpired residue of the statutory tenancy was an asset of her estate. There was no counterclaim and the defence in essence

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[12] (1960) 2 WIR 492.

is that the transfer of a joint tenancy took place as a consequence of Clause M of the new tenancy agreement, a copy of which was attached to the Statement of Case.

73. The request for the transfer is described by Mendonca JA at paragraphs 3. to 6. above and it is not necessary for me to repeat the details here. It is enough to say that I agree with that description, and that I also agree with what Mendonca JA says at paragraph 7. above, except that it is not apparent to me that the tenancy agreement referrred to in Part B of the "House Lot Transfer Application" ("the Transfer Application") was in fact forwarded by the Gayadeens. Ultimately, however, I do not think this to be of material importance.

74. The issue for determination by the Trial Judge was whether the Transfer Application effectively created a joint tenancy between Mynee Gayadeen and Balwant Gayadeen by which Caroni was bound. This, and the Trial Judge proceeding to determine this issue on the basis only of written submissions, was agreed by the parties at a Case Management Conference on 17th October 2008.

75. The Trial Judge set out and answered three questions:

1. did the Land Tenants (Security of Tenure) Act Chap. 59:54 ("The Act") apply to the lands?
2. did Balwant Gayadeen become a joint tenant of the lands?
3. did the tenancy become vested in the estate of Mynee Gayadeen on her death?

76. The Trial Judge decided 1. above in the affirmative, 2. above in the negative, and 3. above in the affirmative. He did not decide whether Caroni was bound. Indeed he did not need to do so. The dispute was between Mynee Gayadeen and Balwant Gayadeen. As to Caroni, there was no issue of whether it would be bound by the decision of the Court.

77. It has been said that the Trial Judge was wrong to have asked, much less decided, the first question. I do not agree, simply because it was not disputed before this court that a statutory lease existed under the terms of the Act (as Mendonca JA points out at

paragraph 17. above) and that was a correct position to adopt. On the pleadings, and despite the averment that such a tenancy did not exist, it is clear that there was a tenancy of the land as at 1st June 1981 and that a residential building stood on it, although the year in which the house was built and who paid to build it may have been in dispute.

78. The provisions of the Act are clear: it applied to all tenancies of land on which a chattel house had been built as at 1st June 1981 with certain exceptions, none of which applied to lands owned by Caroni. It is correct that the Act did not bind the State, but no question arises as to whether 12 Jaipaul Street was land owned by the State at that time. It was indisputably land owned by Caroni and remained so until 2005 when it was vested in the State by the provisions of the Caroni (1975) Ltd. and Orange Grove National Company Ltd. (Divestment) Act No. 25 of 2005 Chap 64:07, and in particular the provisions of Sections 4 and 13 of that Act.

79. The Trial Judge was correct to both formulate the issue of the existence of a statutory lease under the Act as an issue and to decide it, because the nature of the tenancy might have some bearing on the outcome of the claim. That arises because of the different law to be applied to statutory leases under the Act as compared to a contractual tenancy.

80. I turn to the issue of whether a joint tenancy was created.

81. There was consensus both at first instance and on appeal that the Gayadeens intended that there would be transfer of Mynee Gayadeen's tenancy. No issue was raised below or on appeal as to whether the tenancy agreement "forwarded" together with the Transfer Application constituted a surrender of Mynee Gayadeen's existing lease coupled with the grant of a new tenancy, and no submissions were made on this. It is therefore in my view inappropriate to decide that issue without the benefit of full addresses, whether written or oral. It is in any event, however, not necessary to decide whether the Transfer Application (despite being clearly entitled "House Lot Transfer Application") (my emphasis) was intended to be an assignment or a surrender and grant of a new lease. Given the entitling of the Transfer Application and the very clear use of the word

"Transfer", I cannot see how a request for a transfer can be interpreted to mean a surrender coupled with a request for a new lease. Further, it is highly improbable that Mynee Gayadeen, or Balwant Gayadeen for that matter, would agree surrender a thirty-year statutory lease with all its undeniable rights and accept in its place a mere contractual annual tenancy.

82. Nor does it matter whether the surrender is to be regarded as having taken place by operation of law, since it is accepted that an express surrender of a statutory lease under the Act must be by deed. I return to this at paragraph 119.

83. There is a very good reason for not being required to decide this issue. It is absolutely clear from the outset that Mynee Gayadeen and Balwant Gayadeen intended the joint tenancy to be a gift from her to him. There are two aspects to this.

84. First, the agreement between the Gayadeens brings into focus the concept of the voluntary conveyance.

85. There is no consideration stated, and none to be implied despite Mr. Mungalsingh's apparent concession during oral submissions to this court. That concession was based on the relationship of mother and son giving rise to consideration in the form of "natural love and affection". The Trial Judge's finding that there was no consideration was not attacked directly on appeal.

86. Second, it is well accepted that there must be an intention to create legal relations in order to give rise to a binding contract. *"In the case of family, domestic or social agreements there is a presumption, notwithstanding the presence of consideration, that the parties do* <u>*not*</u> *(my emphasis) intend to create legal relations in the arrangement made between them. This presumption may be seen in respect of agreements between ....[parent and child]..."* (see *Halsbury's Laws of England* 5th Ed. Vol. 9(1) para. 723; *Jones v. Padvatton.*[1969] 2 All ER 616).

87. There is no evidence that what the Gayadeens intended was anything more than a gift. There was no commercial element of any kind, present or intended, nor any other evidence to demonstrate the required intention.

88. It is well accepted that equity will not perfect an imperfect gift, and the issue arises as to whether the gift from Mynee Gayadeen to Balwant Gayadeen was perfected. As was said in *Dillwyn v. Llewelyn* (1862) 4 De G.F.& J. 517 *"A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the Donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received".* There is then the further statement that *"...the equity of the donee and the estate to be claimed by virtue of it depend on the transaction, that is, on the act done and not on the language of the memorandum except as that shews the purpose and intent of the gift".* If the legal interest in the land does not pass by virtue of the promise and the subsequent acts in furtherance of the promise, then the gift is imperfect.

89. It is submitted on behalf of the Appellant that the Transfer Application set out the intention of the Gayadeens, but that document is not in my view sufficient on its own to perfect the gift and create a joint tenancy in their names. Further it matters not whether the joint tenancy was to come into existence as a consequence of an assignment or of a surrender and grant of a new lease. The Transfer Application clearly contemplates a further step being taken to complete the process, and in this case to perfect the gift. Hence it provides:

1. (at Part A) "I wish to have the tenancy which I now hold... converted to a joint tenancy..."; and
2. (at Part B) "we hereby forward a tenancy agreement..." to be completed if approved.

90. That further step is the signing of a further document agreement. This was never done, whether it was to be the new tenancy agreement or any other document. Additionally, no other step of any kind was taken to perfect the gift.

91. The new tenancy agreement was prepared in 1989 and signed by Caroni on 1st December that year. Mynee Gayadeen died on 7th September 1992 without signing it, and Balwant Gayadeen then signed it on 25th November 1992. There is no evidence as to why Mynee Gayadeen did not sign the new agreement in the nearly three years prior to her death, which allowed more than sufficient time for her to do so. It would perhaps be only speculative to say that the failure or refusal was because she had come to appreciate that she was giving up a statutory lease under the Act with all its attendant rights in return for a mere annual tenancy. It is beyond doubt, however, that she never signed the new tenancy agreement, or any other document, or did anything else perfect the gift.

92. The Transfer Application by its very nature can be ranked no higher than reflecting an executory gift to be completed or executed by the signing of a new tenancy agreement. While the relationship of mother and son can be regarded as providing consideration in the form of "natural love and affection", and the latter is sufficient consideration to support a deed, it is not sufficient to support an executory gift (see *e.g Milroy v Lord* (1862) 4 De GF & J 264).

93. It might be a different matter if Balwant had suffered some actual detriment or had been put to expense as a consequence of the promise made, as was the case in *Dillwyn v. Llewelyn* where it was held that valuable consideration had been supplied. That decision has been doubted subsequently, and in the present case there is no evidence that Balwant Gayadeen went into possession as a consequence of any promise made by his mother, or that he supplied valuable consideration, or that he acted to his detriment in any way. He relies solely on the Transfer Application in support of his case. It is not in my view acting to one's detriment merely to become a joint tenant of property together with another person who had previously been the sole owner.

94. The gift from Mynee Gayadeen to Balwant Gayadeen was therefore not supported by consideration and there is no evidence of any intention to create legal relations. Nothing was done, either by way of assignment or surrender to perfect the gift. The gift was imperfect and fails. Balwant Gayadeen did not become a joint tenant of 12 Jaipaul Street, and consequently the statutory lease vested in the estate of Mynee Gayadeen. The

Trial Judge came to the correct conclusion, and in my view the appeal must fail and be dismissed with costs.

95. I turn to two further aspects of the matter.

96. It is of importance to bear in mind that neither party could have agreed that the claim be decided on the basis of the Transfer Application without having first received proper, competent, legal advice. But that was what was agreed. The parties chose to rely solely on the Transfer Application, and Balwant Gayadeen in particular upon its efficacy in respect of his defence. It is only reasonable to conclude that he and his mother did so because there was no other evidence to put forward.

97. Further, it is now twenty years since Mynee Gayadeen's death. She is not available to give evidence, whatever it maybe, and that can only be to the prejudice of her estate. Yet further, any other evidence, from whoever it may come, is certain to be reduced greatly in worth and credibility given the ravages of time on recollections. It must be remembered that the actual events go back to (at least) May 1989.

98. There is consequently little or nothing to be gained, and much potential prejudice to be suffered, by remitting this matter to the High Court.

99. Having come to this conclusion, there is no need to deal with the issue of whether an assignment – or for that matter, a surrender and grant of a new lease – of lands held on a statutory lease under the Act are required to be by deed. The views already expressed above are obiter, so that this issue must therefore await a determination. I think, however, that I would be remiss if I did not set out my own views.

100. In CV 2005-00439 *Rajkumar v. John* I concluded that an assignment of a statutory lease had to be by deed. The reasons set out there merit some expansion.

101. First, the views expressed obiter in *Jones v. Pereira* (and which were subsequently adopted in *Rampersad v. Phagoo*) concerned a monthly tenancy and an annual tenancy respectively. Neither judgment sets out how the tenancies came into

existence, and whether they were oral or written, but they were both obviously dealt with as if the former. Indubitably, however, they were each for a term of less than three years and in that respect they are to be distinguished from *Rajkumar v. Jones* and the present case.

102. Second, a statutory lease under the Act does not fall within the scope of "an agreement in writing", as I may be taken to have expressed it in *Rajkumar v. Jones*, for the purposes of either Section 10 of the Conveyancing and Law of Property Act Chap. 56:01 ("the CLPA") or Section 3 of the Landlord and Tenants Ordinance Chap. 27 No. 16 ("the L&TO"). Both of these statutes have their genesis in the Statute of Frauds 1677 and are intended to protect persons against fraud.

103. The judgment of the Court of Appeal (*per* Hassanali JA at pages 4-6) in PCCA 11 of 1983 *Tokai v. Mohammed and Ors*. is helpful in this regard. What is said there bears some repetition and expansion.

104. The Statute of Frauds 1677 was intended to prevent a wide range of fraudulent activity. In particular, it provided that a lease for a fixed term not exceeding three years could be by parol if it was at a rent reserved of at least two-thirds of a rack rent. This minimum rent requirement was amended by the Law of Property Act 1925 to the best rent available. Leases for a longer term of years, or at a lower rent, were required to be put in writing and signed by the parties or their lawfully authorised agents.

105. The Real Property Act 1845 Section 3 provided that a lease previously required to be in writing was to be made by deed, or it was otherwise void at law. If such a lease was not by deed, but in writing, however, it could be good as an agreement to grant a lease. The equivalent provisions are now to be found at Section 3 of the L&TO which came into force in 1846. The effect of these provisions is that a tenant under a mere agreement in writing was therefore in many respects in as good a position as if the lease had been by deed, but without a deed he does not obtain the legal estate for the term granted to him and his interest remains merely equitable (see *Williams on Real Property* 17th Ed. pages 546-547).

106. Section 3 of the L&TO provides as follows:

> *"3. No lease for a term exceeding three years or surrender of any land shall be valid as a lease or surrender, unless the same shall be made by deed duly registered; but any agreement in writing to let or surrender any land shall be valid and take effect as an agreement to execute a lease or surrender, and the person who shall be in the possession of the land in pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year."*

107. Section 3. has no equivalent to the requirement in England that parol leases are permitted if created at a minimum rent reserved.

108. The Statutes of Frauds also provided that no lease, estate or interest was to be assigned, granted or surrendered unless by deed. The equivalent provision is to be found at Section 10(1) of the Conveyancing and Law Property Act Chap. 56:01 ("CLPA"). Section 10. reads as follows:

> *(1) "All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by Deed.*
>
> *(2) This section does not apply to-*
>
> > *(a) disclaimers made under section 57 of the Bankruptcy Act, and under the Companies Act;*
> >
> > *(b) surrenders by operation of law, including surrenders which may, by law, be effected without writing;*
> >
> > *(c) leases or tenancies or other assurances not required by law to be made in writing;*
> >
> > *(d) receipts not required to be by Deed;*
> >
> > *(e) vesting orders of the Court;*
> >
> > *(f) conveyances taking effect by operation by law."*

109. Analysing the Act and effect of statutory leases under the Act must be carried out in the context of preventing fraud and these statutory provisions.

110. Section 10(1) is a general provision requiring all conveyances creating or conveying a legal estate to be by deed, otherwise the conveyance is void. The expression "conveyance" in Section 10 includes (by Section 2 of the CLPA) leases and "every other assurance of property or an interest therein". It also includes a wide range of documents and indubitably an assignment of a lease as well as a surrender of a lease.

111. The exceptions to this general rule are set out at Section 10(2) and are designed to cater for a range of circumstances in which a deed is not required. The effect of the Section is clear: you cannot transfer land or an interest in land other than by deed, with only few exceptions - all of which are understandable.

112. Section 10(2)(c) is the focus of attention in the present case: a deed is not required to convey or create a lease or tenancy or other assurance which is not itself required by law to be made in writing. In other words, if the law permits the "conveyance" (of whatever nature) to be oral then no deed is required. Consequently, it is said that since a statutory lease created under the Act is not required by law to be made by writing then an assignment of such a lease is not itself required to be in writing. The consequence, ultimately, is said to be that an assignment of such a lease is not required to be by deed.

113. The question therefore arises as to which leases or tenancies are not required by law to be made in writing.

114. Clearly, leases or tenancies for a term exceeding three years must be by deed, and protection is afforded to these parties who enter into leases or tenancies in writing. There is, however, a third category of lease or tenancy to consider – that which is created by parol, or orally as we now express it.

115. It is the parol contractual lease or tenancy that is not required to be in writing. The Statute of Frauds provided that such leases constituted only a tenancy at will, unless it was for a term not exceeding three years and was at a certain minimum rent, but Section

3. of L&TO has no such provision. It is clear that oral tenancies can be created but that they cannot be for a term exceeding three years. Any lesser term is permissible.

116. The consequence of all this is that a statutory lease does not fall within the purview of Section 10(2)(c) because it is not a contractual lease created orally.

117. A lease is itself a legal interest in land, that interest being only less than the interest held by the person granting the lease. Neither a verbal nor a written agreement will give a tenant the legal estate. This is the effect of Section 10(1) of the CLPA. The tenant, however, will have an equitable estate which can be enforced.

118. Expressed differently, a statutory lease cannot be in writing simply because it is a creation of statute and Section 10(2)(c) was, and is, not designed or intended to cater for leases created by statute. There was no need to do so, since the statute itself provides protection against fraud. Section 10(2)(c) is an exception to the general requirement of Section 10(1), and applies only to verbal leases and tenancies, and of less than three years duration at that.

119. There is a second approach to the question: A "conveyance" by its definition at Section 2 of the CLPA includes a lease. The phrase "operation of law" found at Section 10(2)(b) and (f) includes *"The means by which a right or liability is created for a party regardless of the party's actual intent" (Black's Law dictionary* 7th Ed.). That definition can be expanded to include rights or liabilities imposed on a party by the law, without any act of his own, such as the right of an heir to inherit on the death of an intestate, by operation of law; or when a lessee for life or years accepts a new demise from the lessor and there is a surrender of the first lease by operation of law. A lease can also be surrendered by operation of law if the parties act unequivocally in such a way towards each other which is inconsistent with the continuation of the tenancy (see *e.g. Tokai v Mohammed & Ors; Billcourt Estates Ltd v. Adesina* [2005] EWCA Civ 208), such as where the tenant abandons a property and the landlord accepts the abandonment. There is in such a case often nothing in writing and these examples explain, at least in part,

Section 10(2)(b) of the Act. There is nothing in the present case to indicate that there was a surrender by operation of law.

120. "Operation of law" can also include what has been effected by a statute. In England, for example, there is a conveyance of property under the provisions of Section 306 of the Insolvency Act 1986 when a bankrupt's estate vests in the trustee. In Trinidad and Tobago, a very good example is where lands are transferred from one party to and vested in another by Act of Parliament: one such case is the Caroni (1975) Ltd. and Orange Grove National Company Ltd. (Divestment) Act to which I have already referred.

121. If a conveyance is created by operation of law then it obviously cannot be by deed – because it already exists by operation of law.

122. A lease can come into existence by statute in more than one way.

123. In some instances an existing contractual tenancy can be prolonged (*e.g.* under the Landlord and Tenant Act 1954 of England) and there are others where *"...statute engrafts modifications on contractual tenancies..."* (see *Halsbury's Laws of England* 4th Ed. Vol. 27 para. 44). There are also instances where the relationship of landlord and tenant are thrust upon parties where previously no contractual relationship had existed between them at all (see *Halsbury's Laws of England* 4th Ed. Vol. 27 para. 5). Leases arising under the Act fall into the first of these categories given the definitions of landlord and tenant in the Act and the provisions of Sections 4 and 5. in particular.

124. The statutory lease under the Act is therefore the result of statute. The conveyance referred to in Section 10 (2)(f) takes effect by operation of law so that it does not fall within the exception set out in Section 10(2)(c) *i.e.* it is not a lease or tenancy not required by law to be made in writing. Section 10 (2)(c) refers to leases and tenancies which can come into existence by oral agreement *i.e.* leases for not more than three years. The statutory lease under the Act is initially for a term of 30 years.

125. In short: Section 10(2)(c) does not apply to a lease created or converted by statute. It is not a lease "...not required to be made in writing..."; Section 10(2)(f) applies to a lease created or converted by statute. Such a lease takes effect by operation of law.

126. There is yet a further consideration.

127. Whichever of Section 10(2)(c) or Section 10(2)(f) may be the correct categorisation of a statutory lease, Section 10(2) can only except an assignment or surrender of a lease from being by deed if that particular assignment or surrender is itself not required to be in writing or if it takes effect by operation of law. It is not correct to say that if a conveyance takes effect by operation of law that any or every subsequent conveyance of that parcel of land need not be by deed. That would be so only if the subsequent conveyance also takes effect by operation of law.

128. It is only the statutory lease under the Act that need not be by deed. Any subsequent assignment or transfer of title must be by deed unless, again, it takes effect by operation of law. The same applies where a surrender is effected by operation of law.

129. The exceptions under Section 10(2) of the CLPA do not apply to transactions subsequent to those conveyances, surrenders and the like which themselves take effect by operation of law, unless the subsequent conveyance *etc* also takes effect by operation of law.

130. If a tenancy created by parol for a term of three years or less is subsequently extended to a period which exceeds three years, then it is required to be by deed so as to vest the legal estate in the lessee.

131. In the event, a statutory lease under the Act is not an exception within the purview of Section 10(2)(c) of the CLPA. It is a lease (which, as I have said is itself a legal estate) as a consequence of and which has taken effect by operation of law.

132. That being so, the reason for certain provisions of the Act become clear:

1. The automatic renewal of the lease by Section 4(4) after service of the required notice to renew under Section 4(3) is, again, a lease coming into existence by operation of law;
2. The purchase of the freehold estate under the provisions of Section 5 contemplate registration of the conveyance with the Registrar General (see Section 5(7)(c));
3. Section 9 requires written notice by the tenant of his intention to purchase;
4. Section 17 provides for a conveyance to "...give effect" to a purchase under Section 9;
5. Section 10 requires a tenant to apply in writing for consent to transfer the lease and the consent, if given, is also to be in writing. This does not itself constitute the transfer and given the provisions of Section 5 a transfer by deed is obviously contemplated;
6. Regulation 3 of the Land Tenants (Security of Tenure) (forms and notices) regulations provides that either party may require the other to sign a memorandum in the prescribed form setting out the terms of the lease. If the requested party fails or refuses to do so, the Land Commission (in effect, the High Court since no Land Commission had been appointed) may give directions under Section 18 for its execution, and once executed the memorandum can be registered as a deed with the Registrar General. The memorandum is not the lease. It merely evidences the lease;
7. Registration of the memorandum will afford a tenant the protection provided by Section 7 of L&TO. Which provides, as further protection against fraud, that every lease *bona fide* made by deed duly recorded shall be as good as against all parties claiming as creditors of the lessor. The principle underlying Section 7 is that if two innocent tenants/lessees are defrauded by the freeholder, the tenant with the legal estate has the better title based on the maxim "where equities are equal, the law prevails".

All of these weigh against an interpretation of Section 10(2) allowing oral assignments.

133. The Act is not a model of perfection. It does not, for example, make any express provision for leases of land, or memoranda of those leases, held under the provisions of the Real Property Act Chap. 56:02. A competent conveyancing attorney, however, will lodge a caveat under the provisions of that Act in order to protect his client's interest.

134. Nor does the Act make any express provision for the manner in which a lease is to be assigned or transferred to the beneficiary of an estate. Consequently it must be in accordance with the provisions of Section 10(1) of the CLPA (assents by personal representatives in England are also an exception under their equivalent to our Section 10(2)).

135. It is entirely possible, of course, that the surrender of a statutory lease can be by operation of law. It has been held, however, that an express surrender must be by deed (see Civ Appeal 14 of 2003 *Dickson v. Singh*) and as set out at paragraph 23. above. Further, if an express surrender (which is a yielding up of a legal estate) must be by deed, then it would be passing strange that an assignment (which is the transfer of a legal estate) could be oral. Yet further, oral assignments of a legal estate are contrary to Section 4(1) of the CLPA which requires contracts for the sale or other disposition of land or interests in land to be in, or evidenced in, writing and signed by or on behalf of the party to be charged. This provision also has its genesis in the Statute of Frauds.

136. Long standing conveyancing practice in this country since the coming into force of the Act has always been to have the transfer whether, for example, by way of assignment on a purchase or by way of assent to the beneficiary of an estate, to be by way of deed duly registered. This is how every competent conveyancing attorney protects his client who takes an assignment, and, as I have said, a purchase of the freehold is by the Act expressly contemplated to be by deed. It is also long standing conveyancing practice to register with the Registrar General memoranda voluntarily signed under the provisions

of Section 3 and that these memoranda are accepted for registration. It goes without saying that registration is essential for the prevention of fraud, since it is actual notice to the world of the existence of the lease.

137. The background to the Act is set out extensively in the Privy Council judgment in *Gopaul v Baksh* [2012] UKPC 1 and should also be considered. It is enough to say here that it was designed to protect contractual tenants who on rented lands had built substantial residences which could not be removed and taken elsewhere. The Act was also designed to facilitate their protection without great cost. This was achieved by the relatively simple requirements of the Act in certain instances which could perhaps be met without the necessity for retaining attorneys. Having set out to give protection, and protection against fraud as part of that, it would be contradictory that oral assignments be permitted, thus opening the door to potential fraud.

138. Hence the statutory lease itself. It obviated the need to identify the innumerable persons who held the tenancies and have their landlords prepare and sign either written agreements or deeds of lease – a lengthy and expensive process at best. One of the expenses saved was the payment of stamp duty on the leases. It is difficult to accept, however, that the government would necessarily dispense with the payment of stamp duty on all subsequent transactions by way of deed. It did not do so in the case of the purchase of the freehold, and the Act contains numerous provisions designed to ensure that a person holding a statutory lease did not profit therefrom.

139. Ultimately, I have come to the conclusion that an assignment of a statutory lease does not fall within the exception to the general rule which was created by Section 10(2)(c) of the CLPA. The statutory lease comes into existence and takes effect by operation of law and any subsequent dealings with it must be in accordance with the provisions of Section 10(1).

140. For the reasons set out above I would dismiss the appeal with costs.

C.V.H. Stollmeyer
Justice of Appeal