THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal: P-183 of 2014

CV 2011-003545

BETWEEN

KAMEEL KHAN

APPELLANT

AND

C.G.A.S. DEVELOPMENT COMPANY LIMIITED

RESPONDENT

PANEL: **Mendonca, J.A.**
Jones, J.A.
Rajkumar, J.A.

APPEARANCES: **Mr. R. L. Maharaj and Mr. R. Dass for the Appellant**
Mr. R. Montano for the Respondent

DATE OF DELIVERY: **Tuesday 16th April, 2019**

I have read the judgment of Jones J.A. and I agree.

Mendonca JA
Justice of Appeal

I too agree

Rajkumar JA
Justice of Appeal

JUDGMENT

Delivered by J. Jones, J.A.

1. This appeal concerns the lease of a parcel of land ("the land") situate in Sangre Grande. The Appellant, the claimant in the High Court, seeks declarations and orders confirming his entitlement to a statutory lease of and an option to purchase the land in accordance with the **Land Tenants (Security of Tenure) Act Chap 59:50** (the Act).

2. In 1961 the land was leased to the Appellant's predecessor in title for a period of twenty-five years. Of relevance to this appeal are two covenants contained in the lease ("the original lease"). A covenant against assigning or parting with possession of the land or any buildings thereon without first obtaining the written consent of the landlord and a covenant which prevented the lessee from using or occupying the premises or any part of it for any other purpose other than as a single private dwelling house. The original lease also included a provision that permitted the landlord to re-enter onto the premises if rent remained unpaid for 30 days after it was due or if any covenant on the tenant's part was not observed.

3. In 1973 the original lease was assigned to the Appellant. There is no suggestion that this assignment was contrary to the terms of the original lease. Between the years 1973 and 1984 the Appellant used the premises as a single dwelling house. On the 1st June 1981, by operation of law, the tenancy of the land created by the original lease was converted to a 30 year statutory lease pursuant to the Act. Among other things this statutory lease gave the Appellant the option to purchase the land at a price not exceeding half of the market value and the right to renew the lease for a further period of 30 years.

4. From the year 1984 the Appellant, without the consent of the landlord, let the buildings on the land to various commercial tenants. The rents received were at all material times in excess of that payable by the Appellant for the land. It is not in dispute that the letting of the land by the Appellant comprised a subletting of the land and was contrary to the covenants against subletting and the user of the land. It was also contrary to section 5(8) of the Act.

5. In April 2004 the Respondent purchased the reversion of the land. On 9 September 2004 the Appellant served on the Respondent's predecessors in title a notice of his intention to purchase the land pursuant to the Act. The notice was brought to the attention of the Respondent by its predecessor in title. Nothing turns on the fact that the notice was not served directly on the Respondent. Thereafter the Respondent and the Appellant entered into discussions with respect to the sale of the property.

6. These discussions were never concluded. The Respondent maintained the position that the user of the land by commercial tenants was in breach of the operative covenants of the statutory lease and as a result the Appellant could not rely on the option to purchase granted him by the Act. It was however prepared to sell the Appellant the land but not at half the market price as provided for by the Act. The Appellant, on the other hand, maintained that he was entitled to the benefit of the Act. In the meantime the Appellant continued to rent the buildings on the land contrary to the covenants and section 5(8) of the Act.

7. According to the Appellant on 19 March 2010 he served a notice of his intention to renew the statutory lease on the Respondent. The Respondent denies this. The Judge however found that the notice was properly served on the Respondent in accordance with the Act. This finding has not been challenged by the Respondent and is not an issue for our determination.

8. By letter dated 13 July 2011 the Respondent informed the Appellant that he was in breach of the lease by virtue of his sub-letting to commercial tenants and gave the Appellant 30 days to remove the buildings and improvements erected by him on the land. This requirement was in accordance with a term of the original lease that required to the Appellant to remove the buildings and improvements made by him on the land upon the termination of the lease. By a letter dated 27 July 2011 the Appellant advised the Respondent that he had taken steps to terminate the subleases by giving his tenants notices to quit. By that letter the Appellant also called upon the Respondent to state its position with respect to the notice to purchase served on it in September 2004.

9. On the 12 September 2010 the Respondent entered onto the land and demolished the buildings on it. By letter of the same date the Respondent advised the Appellant that it had exercised its right of re-entry. Thereafter the Appellant commenced this action seeking, among other things, a declaration that he holds a statutory lease of the land and a declaration that he is entitled to purchase the land pursuant to the Act. The Appellant also sought damages including a claim for aggravated damages and for the loss of the buildings on the land.

10. By way of an agreement made prior to trial the parties agreed to split the trial into separate hearings of liability and damages. With respect to the hearing on liability the parties also agreed to lead no oral evidence. That hearing proceeded by way of agreed facts and written submissions.

11. In her written judgment the Trial Judge determined that there were only two issues for her determination: (i) whether the renewal notice was served by the Appellant on the Respondent and (ii) whether, given the admitted breaches, the lease could have been renewed. With respect to the first issue the Judge found that the renewal notice had been properly served by registered post. On the second issue the Judge concluded that the lease could not have validly been renewed since the Appellant was in violation of section 5(8) of the Act. She determined that the lease was voidable and that the Respondent as landlord had exercised his right to terminate the relationship.

12. With respect to the Appellant's claim that he was entitled to purchase the land pursuant to his exercise of the option to do so contained in the Act the Judge was of the view that, in accordance with a consent order made by the parties, this was no longer an issue for determination. In any event she was of the opinion that the Appellant was in clear violation of the covenant referring to the user of the land.

13. The Appellant has challenged the findings by the Judge insofar as she determined that (i) the question of the exercise of the option to renew was a non-issue given a consent order made by the parties; (ii) the Appellant's breaches prevented him from validly renewing the statutory lease and exercising his option to purchase the land; and (iii) the Respondent had validly terminated the tenancy.

14. The Appellant does not deny the breaches. Essentially he submits that the breaches do not affect his right to renew the lease nor his exercise of the option to purchase the land. He submits that the failure of the Respondent to object to the subletting prior to trial amounts to a waiver on its part resulting in it being now unable to rely on the breach. In any event he submits that the Respondent was required and failed to comply with the provisions of section 70 of the **Conveyancing and Law of Property Act Chap. 56:01** (The CLPA) and in the circumstances the Respondent's purported re-entry onto the land was premature and ineffective in law.

15. The issues for determination of this appeal therefore are: (i) was there an agreement between the parties which had the effect of the Appellant abandoning his claim that he was entitled to purchase the land; (ii) what was the effect on the statutory lease of the Appellant's admitted breaches; and (iii) what is the effect of the Respondent's entry onto the land.

Was there an agreement between the parties to limit the issues for determination.

16. An examination of the statements of case shows that one of the issues for the Judge's determination was the effect of the exercise by the Appellant of his option to purchase the land pursuant to section 5(5) of the Act. In addition one of reliefs sought by the Appellant was for an order that the Respondent convey the freehold land to him at a price not exceeding 50% of the open market value.

17. In concluding that this was no longer a viable issue for determination, the Judge in her judgment refers to and relies on a consent order made between the parties on 18 March 2014. According to the Judge:

> "For the removal of all doubt, I shall reproduce the terms of the Consent Order of 18th March 2014 by which this trial on issue is to be determined.
>
> ISSUE TO BE DETERMINED BY THE COURT
>
> 1.1 Whether the renewal notice was served by the Claimant to the Defendant and whether the evidence as presented that is by way of the hearsay notice is admissible;
>
> 1.2 At the date of renewal, could there have been one granted under the Act having regard to the admitted breaches?

> I shall not consider therefore any other issue in particular whether [the Appellant] had validly exercised his option to purchase. That did not form part of the bases for the matter being dealt with in this way. In any event, [the Appellant's] indication of his option to renew as the operative option at the time of the formulation of the issue of law to be tried will supersede any other issues raised. Further it is clear and not disputed that at the time of discussion for the exercise of the option to purchase, [the Appellant] was in clear violation of the covenant referring to user."

18. It is clear here that the position taken by the Judge is that the parties had agreed to limit the issues for her determination to the two issues identified by her and that this was evidenced by a consent order made by them. The record of appeal does not however reveal a consent order of 18 March 2014. What is contained in the record of appeal is an order dated 18 March 2014 made by the Judge and signed by an Assistant Registrar. This order identifies the issues for determination, in the terms as stated by the Judge, and also gives directions for the filing and serving of written submissions.

19. The Appellant submits that the Judge was wrong to conclude that the question of the Appellant's exercise of his option to purchase the land pursuant to the Act was no longer an issue for her determination. In support of this submission he refers to **part 38 of the Civil Proceedings Rules 1998 as amended** (the CPR) which sets out the procedure to be followed in order to discontinue a claim or part of a claim. According to the Appellant since no notice of discontinuance was served in accordance with the rule there could have been no abandonment by him of that part of the claim. I do not agree. The mere existence of the rule cannot prevent parties agreeing to abandon an issue in the course of the management of a trial.

20. The question therefore is was there such an agreement. From the transcripts and the notes of evidence produced by the Judge it is clear that on the date fixed for the trial on liability the parties entered into certain agreements with

respect to the evidence and the procedure to be followed. Neither the transcript nor the notes of evidence reveal any agreement to limit the issues for determination by the Judge to the service of the notice to renew and the effect of the Respondent's entry onto the land.

21. What the transcript reveals is that there was an agreement between the parties with respect to the disputes of fact and the nature of the evidence to be placed before the Judge. This is supported by the notes of evidence prepared by the judge. The transcript records the following interaction between the parties and the Judge with respect to the issues:

"Judge:

……I have as the issue in contention whether the notice was served by the claimant to the defendant and whether the evidence as presented that is why we have a hearsay notice is admissible and at the date so that is one right and at the date of the renewal could there have been one granted under the Act.

Donna Prowell: Yes having regard to the admitted breaches

Judge: So there are two issues basically one big one a sub issue and then two ok.

Rishi Dass: My lady just so I'm clear so that would mean that the evidence of the party stands [as] their witness statement

Judge: Yeah the affidavit evidence stands and you have elected not to cross examine on those affidavits right.

Donna Prowell: That is so my lady

Donna Prowell: My lady upon an enquiry this morning it has become evidence that in terms of business dealings there is a commitment by way of agreement by the defendant to sell the property in question that would have been

made in the course of these proceedings. My friend has raised with me the issue that he is in fact seeking as one of his reliefs the right to purchase in the event that the matter

Judge: The right to

Donna Prowell: To purchase in the event that the matter goes in the way he would like. In these circumstances he has asked for an undertaking that pending decision in the matter that we do not complete the sale. We have instruction to give that undertaking.

Rishi Dass: Am very grateful to my friend.

Judge: So its not to sell property during the pendence.

Donna Prowell: Not to sell or dispose

Judge: Sell or dispose of the subject property. Alright so we have whether the notice was served by the claimant to the defendant and whether the evidence as presented that is why we have hearsay notice is admissible ok so we all agreed on that

Rishi Dass: My lady it's the renewal notice there are two notices my lady.

Judge: The first one is dealing that yes so what is its

Rishi Dass: The first notice is an option to purchase, and the second is a renewal notice

Judge: So it's whether the renewal notice right was served by the claimant to the defendant and whether the evidence as presented that is by way of hearsay notice right is admissible. Two at the date of the renewal could there have been one so granted under the Act having regard to the admitted breaches…..

> I also have the court has agreed to a trial by issue, affidavit evidence stands and parties have elected not to cross examine on that evidence, and the undertaking given by the defendant not to sell and or dispose of the subject property during the pendency of the proceedings right."

22. The Appellant highlights the fact that specific reference was made to two relevant notices: the notice to purchase the land and the notice to renew the statutory lease. There was also a clear reference to the Appellant seeking the purchase of the land as one of the reliefs in the action.

23. From an examination of the transcript it would seem that insofar as the Judge determined that there was an agreement between the parties to limit the issues for her determination there was no such an agreement. Indeed the transcript suggests that the conclusion by the Judge that there was an intention by the parties to limit the issues for her determination was as a result of a misunderstanding on her part.

24. The submissions filed by the parties at trial support such a conclusion. It is clear from the submissions filed by the Appellant that he was pursuing the option to purchase the land. In response to these submissions, rather than allege that there was an agreement to limit the issues, the Respondent submits that the issue was not raised at trial nor put to the Trial Judge for determination. According to the Respondent's submission in those circumstances the attorney for the defendant "surmised that the claimant had abandoned the issue as evidentially statute barred".

25. It is clear therefore that what was referred to by the Judge in her judgment as a consent order was simply an order made by her in the exercise of her case management powers recording her understanding of the positions taken by the parties at the hearing. What the transcript shows and the

written submissions confirm is that this understanding was incorrect. Insofar as the Judge determined that there was an agreement by the parties to limit the issues in this manner therefore she was wrong. There was no such agreement between the parties.

26. What then is the effect of the order made by the Judge based on her misunderstanding of the parties' position. The order limits the issues for the Court's determination. There has been no application to set aside the order nor has there been any appeal from it. In these circumstances the order, even though based upon a misunderstanding by the Judge, remains a valid order: See **Grafton Isaacs v Emery Robertson [1985] AC 97** and **Ansa Merchant Bank v Sara Swan CA P 234-236 of 2017**.

27. It seems to me, in the circumstances of there being no agreement between the parties to limit the issues for the Judge's determination and it being evident that at all material times the Appellant intended to pursue this issue, that this is a proper case in which to apply **section 39(3) of the Supreme Court of Judicature Act Chap 4:01**. **Section 39 (3)** states:

> "The power of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal."

28. The notice of appeal clearly challenges the finding of the Judge that the only issues to be determined was whether the renewal notice was served and whether the renewal could have been granted having regard to the admitted breaches. The application of section 39 (3) of the Supreme Court of Judicature Act to this appeal will allow us to treat with the real issues between the parties notwithstanding the order of the Judge dated 18 March. In particular it will allow us to deal with the issue of whether the Appellant is entitled to purchase the reversion of the land pursuant to section 5(5) of the Act.

29. This was an issue raised frontally in the submissions of the Appellant before us and addressed by the Respondent in its oral submissions before us. Further it is an issue of law to be determined on the basis of agreed facts. The Respondent does not suggest that a further enquiry into the facts is necessary. In these circumstances we, as a Court of Appeal, are in as good a position as the Judge to determine this issue. There is therefore no need to refer this issue back to the High Court for its determination.

What is the effect on the statutory lease of the Appellant's sub-letting the land without the Respondent's consent to commercial tenants at a rental that exceeded that paid by him.

30. It is not in dispute that from the year 1984 the Appellant ceased to reside on the land and, without the consent of his landlord, rented out buildings erected by him on the land to commercial tenants at a rental that exceeded that paid by him. The question here is the effect of this on the statutory lease and, in particular, his rights pursuant to the Act to renew the lease and purchase the land at a reduced price.

31. Despite concluding that the purchase of the land was not an issue for her determination the Judge went on to state that "it was clear and not disputed that at the time of the discussion for the exercise of the option to purchase [the Appellant] was in violation of the covenant referring to user." By this statement it would seem that the Judge was of the opinion that the fact that the Appellant was in breach of section 5(8) of the Act had the effect of denying the Appellant his rights to purchase the land pursuant to section 5(5) of the Act and to renew the statutory lease pursuant to section 4 (2) and (3) of the Act.

32. Section 5 (8) of the Act provides that:

> "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 to the landlord under this Act."

Insofar as the Judge determined that the Appellant was in breach of the section she was correct. The Appellant had sublet the land without his landlord's consent and had rented the land out to subtenants at rents which exceeded that paid by him to his landlord under the Act. The Act however does not provide any penalty for a breach of section 5(8). The answer as to the effect of the breach therefore lies with whether the section operates as a condition or a covenant.

33. Under the common law if the prohibition operates as a condition then the lease will be determinable without an express proviso for re-entry if the event specified in the condition subject to which the term was created happens. If the prohibition operates as a covenant it entitles the landlord to sue for damages but the lease is only determinable where there is an effective provision for re-entry.

34. According to **FOA's Landlord and Tenant (7th ed.), pp. 312**:

> "At Common law, a condition is a qualification annexed to an estate, whereby the latter shall either be created (condition precedent), enlarged, or defeated (condition subsequent), upon its performance or breach. The main distinction between a condition subsequent for the cesser of the term of a lease upon the happening of a certain event and a lessee's covenant is that (subject to any right of relief from forfeiture given to the lessee) upon breach of a condition the lessor may re-enter, because the estate of the lessee is determined; whereas a breach of covenant only gives him the right to recover damages (or to obtain an injunction) unless the right to re-enter is expressly reserved to him, by the lease."

35. Section 5(8) clearly does not constitute a condition precedent. Insofar as the judge determined that it was a condition precedent she was incorrect. The only condition precedent created by the Act was that contained in section 4

which provided the basis for the application of the Act to certain tenancies. Section 5(8) therefore either establishes conditions subsequent the breach which allows the landlord to terminate the statutory lease by re-entry or covenants which, in the absence of a right to re-enter, only entitles the landlord to damages or to an injunction to prevent its recurrence.

36. The Act does not give the landlord a right of re-entry to determine the statutory lease. Section 5 subsections (1) and (2) of the Act however provide for the incorporation of the terms and conditions of an existing tenancy into the statutory lease providing that there is no inconsistency with the terms and conditions contained in section 5 or any other provisions of the Act. Where the terms and conditions of the existing tenancy are inconsistent with the provisions of the Act they are void to the extent of such inconsistency.

37. Under the Act an existing tenancy is one "to which the Act applies as subsisting immediately before its conversion to a statutory lease": **section 2**. The tenancy created by the original lease is an existing tenancy under the Act. In those circumstances, once not inconsistent with the terms and conditions set out in the section or with the Act, the terms and conditions of the original lease will apply to the statutory lease. The phrase "terms and conditions" here must be taken to apply to the conditions and covenants contained in the existing lease. In these circumstances conditions or covenants in the original lease not inconsistent with the terms and conditions specified by the section to be contained in a statutory lease or with the Act will apply to the Appellant's statutory lease.

38. By clause 4 the original lease states:

> "4. PROVIDED ALWAYS and it is here by expressly agreed and declared as follows:-
>
> (i) If the rent hereby reserved or any part thereof shall be unpaid for thirty days after becoming payable (whether formally demanded or not) or if any covenant on the Tenant's part therein contained shall not be performed or observed or if the Tenant or

other the person in whom for the time being the term hereby created shall be vested shall become bankrupt then and in any of the said cases it shall be lawful for the Landlord at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and there upon this demise shall absolutely determine but without prejudice to the right of action of the Landlord in respect of any breach of the Tenant's covenants herein contained."

Clause 4 of the original lease therefore permits the landlord to re-enter and determine the lease for breaches of covenant including the non –payment of rent.

39. While the Act provides a detailed and comprehensive procedure for the termination of the statutory lease for non-payment of rent it makes no provision for termination of the statutory lease for breach of any other term or condition of the tenancy or provision of the Act. On the other hand the Act does not specifically prohibit a termination of the statutory lease during the currency of the lease. A term of an existing lease that provides for the determination of the lease for breaches of covenants or conditions committed during its currency therefore is not inconsistent with the provisions of the Act except insofar as it may provide for the determination of the lease for the non-payment of rent.

40. By virtue of section 5 (1) and (2) of the Act therefore, except insofar as it treats with the non- payment of rent, clause 4(i) of the original lease (the proviso for re-entry) has been incorporated into the Appellant's statutory lease. Given the incorporation of the proviso for re-entry into the Appellant's statutory lease it is not strictly necessary here to determine whether section 5(8) establishes a covenant or a condition. The effect of the breaches of section 5(8) is to permit the Respondent to terminate the lease by a re-entry either pursuant to the proviso for re-entry or in accordance with the common law as a result of a breach of a condition.

41. In addition, by its clause 2 (viii), the original lease provides that the Appellant shall: "not use or occupy the demised premises or any part thereof or any building erected thereon as a shop or for the purpose of any public show or business or as a barrack or any other purpose or in any way other than as a single private dwelling house". The Respondent submits that the Appellant is also in breach of this covenant. Again the question here is whether this is a term or condition that has been incorporated into the statutory lease. In other words is this covenant inconsistent with the provisions of the Act.

42. Before answering this question, given the position taken by the Judge and by the Respondent before us, it is necessary to digress to make the distinction between the provisions of the Act that identify those tenancies to which the Act applies, the conditions precedent to the application of the Act, and the terms and conditions of statutory leases under the Act. This is a distinction that became somewhat blurred during the course of the hearing of the appeal.

43. Both the Appellant and the Respondent rely on statements made by the Privy Council in the case of **Gopaul on behalf of HV Holdings v Vitra Imam Baksh on behalf of the Incorporated Trustees of the Presbyterian Church of Trinidad and Tobago Privy Council Appeal No. 0092 of 2010.** The Appellant submits that once the criteria for the conversion of the existing tenancy into a statutory lease is satisfied any subsequent change of user is irrelevant. He relies on statements by Lord Walker to the effect that a statutory lease is a once and for all transfer of rights. The Respondent, on the other hand, submits that the judgment in **Gopaul** supports his position that the purpose and intent of the Act is to provide security of tenure for tenants of residential land and a user for commercial purposes does not accord with the intent of the Act.

44. In **Gopaul** the issue for the court's determination was whether the Act applied to a tenancy that comprised both a Church and a dwelling house. This

is the context in which the statements relied on by the Appellant were made. What **Gopaul** determined is that once the tenancy has been converted to a statutory lease it is a once and for all transfer. The fact that the premises may not necessarily have continued to be used as a dwelling does not remove the tenancy from the ambit of the Act. What **Gopaul** does not do is give any assistance on the terms and conditions of a statutory lease.

45. The effect of section 5 subsections (1) and (2) of the Act is that all statutory leases are not necessarily alike. Differences will arise based on the terms and conditions of the existing tenancies incorporated into the statutory lease. A distinction must therefore be made between the application of the Act to tenancies of land in existence on the 1st June 1981 and the terms or conditions to be applied to those tenancies converted by the Act to statutory leases.

46. Insofar as the Act applies to tenancies it is to all tenancies existing on the appointed date, 1 June 1981, on which a chattel house used as a dwelling was erected or where a chattel house intended to be used as a dwelling was in the actual process of being erected. It is this that establishes the once and for all application of the Act. In accordance with **Gopaul** a subsequent change of user of the land would not affect the application of the Act to those tenancies.

47. Once the Act applies however a change of user may become relevant if it is in breach of a term of the statutory lease. Since a change of user is not specifically prohibited under the Act a provision against a change of user is only made a term of a statutory lease if it was a term or condition of the existing lease and incorporated into the terms and conditions of the statutory lease pursuant to section 5 subsections (1) and (2).

48. This brings us back to the consideration of whether clause 2(viii) (the prohibition against change of user) has been incorporated into the Appellant's statutory lease. From an examination of the Act the prohibition

against change of user is not inconsistent with the terms and conditions of a statutory lease as set out in section 5 or any other provisions of the Act. Apart from section 3 of the Act, which identifies the tenancies to which the Act applies, the Act does not treat with the user of the land. In the circumstances by virtue of section 5 (1) and (2) of the Act the prohibition against the change of user in the original lease is incorporated into the terms and conditions of the Appellant's statutory lease. Accordingly, like breaches of section 5(8), a change of user will entitle the Respondent in this case to re-enter onto the land and terminate the tenancy.

49. The Judge found that the Appellant's breaches disentitled him to the benefit of sections 4(2) and 5(5) of the Act. Section 4(2) entitled the Appellant to renew his statutory lease for a further period of 30 years. In this regard the Judge concluded that the Act did not specifically state that it is necessary to have a valid and subsisting lease. According to the Judge:

> "The Act is silent as to whether there must be a valid and subsisting lease at the time of renewal but there is nothing in the Act to suggest that there is to be any departure from the established common law that this condition precedent must exist in order for the tenant's right to exercise the option to renew to arise."

50. Where the Judge erred is in her conclusion that the Act did not require a subsisting lease at the time of renewal and that a change of user of the premises during the term of the tenancy amounted to a breach of a condition precedent and that by virtue of established common law this invalidated the lease. The conclusion that a change of user simpliciter, without reference to the terms and conditions of the particular lease, amounted to a breach of a condition precedent which entitled the landlord to terminate the tenancy had already been debunked in the case of **Gopaul.**

51. In any event a breach of a covenant or condition subsequent only entitles the landlord to exercise the right of re-entry. It does not entitle the landlord to an automatic termination of the lease: **Warner v Sampson and another [1959] 1 All ER 120; Canas Property Ltd v KL Television Services Ltd. [1970]2 All ER 795.** In this regard the breach of a covenant and/or condition makes the lease voidable and not void: see **27 Halsbury Laws of England Fourth Edition paragraph 222 page 327**. Accordingly the Respondent would have been required to take a positive step to determine the lease.

52. **Section 4 subsections (2) and (3)** of the Act treat with the right of renewal and are in absolute terms. They provide:

> "(2) A statutory lease shall be a lease for thirty years commencing from the appointed day and, subject to subsection (3), renewable by the tenant for a further period of thirty years.
>
> (3) In order to exercise the right of renewal conferred by subsection (2), the tenant shall serve on the landlord a written notice of renewal on or before the expiration of the original term of the statutory lease."

53. It is clear therefore that the Act places only two conditions on the grant of a renewal of the lease. The exercise of the option to renew must be done before the expiration of the original term of the lease and the tenant must serve on the landlord a written notice of renewal. Insofar as the renewal of the statutory lease is concerned therefore there is no requirement under the Act that the tenant must not be in breach of any of the terms and conditions of the statutory lease.

54. At the time of the service of the notice of renewal on 19 March 2010 no steps had been taken by the Respondent to determine the tenancy. At the time of the service of the notice to renew the tenancy the statutory lease was clearly subsisting. In the circumstances the Appellant was entitled to the renewal of

his statutory lease and on 12 September 2011, the time of the entry onto the land by the Respondent, was a statutory tenant of the land.

55. With respect to the Appellant's exercise of the option to purchase the position taken by the Judge seems to be the same as the position taken by her on the renewal of the statutory lease. The Judge was of the opinion that the Appellant's breaches disentitled him to the benefit of the option to purchase.

56. **Section 5(5)** of the Act deals with the option to purchase and states:

> "The tenant shall have an option to purchase the land at any time during the term of statutory lease at a price not exceeding fifty per cent of the open market value of the land without the chattel house ascertained at the date of the service on the landlord of notice of purchase under section 9(1)."

57. The right given by the Act is absolute and subject only to the strictures that it must be exercised during the term of the statutory lease and in accordance with the provisions contained in section 9 of the Act. Neither section 9 nor any other provisions of the Act limit the exercise of the option to circumstances where the tenant is not in breach of any terms and conditions of the tenancy. The position taken by the Judge that the Appellant's breaches disentitle him to the benefit of the section does not accord with the clear provisions of the Act.

58. The case of **Raffety v Schofield [1897] 1 Ch. 937** provides some insight on the effect of the exercise of an option to purchase by a tenant. In that case the defendant entered into a building agreement with the plaintiff to erect some buildings and carry out certain works on the plaintiff's land within a certain time and forthwith to proceed with the works. The agreement provided that should the works be carried out within the specified period the defendant would be entitled to a 99 year lease. In the meanwhile the defendant,

described as the tenant under the agreement, would pay a rent and perform and observe all the stipulations and agreements contained in the agreement and in a draft lease signed by the parties. The agreement contained a proviso for re-entry for breach of any of the stipulations and agreements. It also gave the defendant an option to purchase the land. The exercise of the option simply required the defendant to issue a notice to the plaintiff by a certain time and did not require the payment of any deposit or down-payment.

59. On December 30 the defendant served the plaintiff with notice of his intention to purchase the land. On January 27 of the following year the plaintiff served a notice on the defendant purporting to determine the agreement. The defendant refused to give up possession and the plaintiff commenced an action against him for possession. According to the head note:

> "Held, on the evidence, that the defendant had made default in not "forthwith proceeding" to carry out the stipulations of the agreement; but that as there was no condition precedent that the defendant should not have committed any breach of the conditions contained in the building agreement, the option to purchase was well exercised, and a binding contract was thereby made for the sale and purchase of the property; that the determination of the leasing part of the building agreement by the notice given to the defendant for breach of its conditions, did not destroy or affect the contract for sale created by the exercise of the option to purchase; and that the plaintiff's action must therefore be dismissed."

60. According to Romer J. at page 943 to 944:

> "But there is another consideration which also induces me to hold that the plaintiff ought to fail in this action. After the relation of vendor and purchaser was established between the parties, the purchaser was in equity the owner of the property. And the position of the vendor is clearly stated by Lord Cairns in *Shaw v Foster* (1) as

follows: "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

61. **Section 9 (1)** of the Act provides:

"(1) In order to exercise the option to purchase conferred by section 5(5), the tenant shall, in the prescribed manner, serve a written notice on the landlord of his desire to purchase the land and, where to his knowledge the land is mortgaged, shall at the same time notify the mortgagee in writing and, subject to the provisions of this Act, the landlord shall be bound to make to the tenant, and the tenant to accept, at the price and conditions so provided, a grant of the land free from the landlord's encumbrances, if any, and save as aforesaid the landlord shall not be bound to convey to the tenant any better title than that which he has."

62. Unlike a sale by private treaty, which generally requires an agreement in writing for the sale of land the provisions of which usually require the payment of a deposit to bind the parties, the effect of the Act is that once the tenant validly exercises the option to purchase the parties are bound, one to sell and the other to purchase, subject to the terms and conditions and procedure set out in the Act.

63. In the instant appeal the Respondent has not denied the receipt of the notice to purchase. The Respondent's only challenge is whether the option to purchase is exercisable by the Appellant given the breaches in the terms and conditions of the statutory lease. The Respondent's failure to take steps to re-enter the land prior to the Appellant's exercise of his option to purchase meant that, despite his admitted breaches, at the time of the exercise of the option the Appellant had a subsisting lease. The Act provides no time limit on the tenant exercising its option to purchase. In these circumstances the Appellant was and is entitled to exercise the option to purchase afforded him by the Act, that is, the purchase of the land at a price not exceeding half the open market value of the land at the time of the exercise of the option to purchase.

64. The Act provides that disputes between the landlord and the tenant, including differences between the landlord and the tenant as to the open market value of the land, are to be determined by the Land Commission established by the Land Registration Act: **section 11**. The Act further provides that

> "if on the passing of this Act the Land Registration Act has not as yet come into operation then until the coming into operation of that Act, all references in this Act to the Land Commission shall be construed mutantis mutandis, as references to the High Court or judge thereof." **section 2**.
>
> The Land Registration Act is yet to be passed. Accordingly in the absence of an agreement between the parties on the open market value of the land on the relevant date the Appellant will be entitled to apply to the High Court for the appropriate orders.

65. The effect of the admitted breaches by the Appellant of covenants contained in the original lease and incorporated into the statutory lease and of section 5(8) of the Act entitled the Respondent to re-enter onto the land and

terminate the statutory lease. The failure of the Respondent to re-enter onto the land prior to the Appellant's exercise of his option to purchase the land pursuant to section 5(5) of the Act and his option to renew the statutory lease pursuant to section 4 of the Act meant that these options were validly exercised by the Appellant in accordance with the Act. Accordingly as at the 31 May 2011 the Appellant was entitled to a lease of the land for a further period of 30 years and is entitled to purchase the land at a price not exceeding half of the open market value of the land as of 9 September 2004.

What was the effect of the Respondent's entry onto the land.

66. The Judge found that by its entry onto the land in September 2011 the Respondent had determined the lease. The Appellant's submission in this regard is twofold. He submits that given the length of time that the land had been sublet to commercial tenants the Respondent must be taken to have waived its right to forfeit the lease on the basis of the breaches. In any event, he submits, in the absence of a notice in accordance with s.70 of the CLPA the Respondent's entry onto the land was unlawful and constitutes a trespass entitling him to damages. The Respondent does not dispute that it did not serve a notice in accordance with s. 70 of the CLPA. Its position simply is that no notice was necessary.

67. The Appellant's case on waiver is not a strong one. The Appellant relies on two facts in support of his submissions: (i) that the land had been rented out to commercial tenants "in the 17 years prior to the Respondent's taking possession" and (ii) that it is only in 2004 that the Respondent's predecessor in title refused to accept the rents tendered by the Appellant.

68. To succeed in establishing a waiver the Appellant must not only show that the Respondent knew of the breaches giving a right to the forfeiture of the lease but he must show a positive act of waiver on the part of the Respondent.

The mere act of standing by and doing nothing will not found the basis for a waiver of a forfeiture clause: **Perry v Davis (1858) 3 CB NS 769; Penton v Barnett [1898] 1 QB 276.**

69. The Appellant has provided no evidence of the Respondent taking any step that will amount to a positive act of waiver of forfeiture. There is no evidence of an acceptance of rent after 2004. In any event the breaches are continuing breaches. In those circumstances there is a continually recurring cause of forfeiture. In the case of **New River Co. v Crumption [1917] 1 KB 762 at page 765 Romer J** dealing with a covenant to repair stated:

> "It is clear that at common law acceptance of rent accrued due after a breach of covenant is a waiver of the forfeiture which the breach would otherwise have involved. Here the rent due at Christmas, 1915, was accepted by the plaintiffs; therefore any forfeiture which had arisen before that date was waived. But it is also clear at common law that the breach of a covenant to repair is a continuing breach from day to day, and therefore, though acceptance of rent is a waiver of forfeiture up to the, date when the rent so accepted became due, it is not a waiver of any forfeiture for non-repair after that date; and here the premises continued to be in a state of disrepair after that date and down to the time of action brought."

See also **Penton v Barnett [1898] 1 QB 276**. For these reasons the Appellant's waiver point fails.

70. **Section 70** of the CLPA states:

> "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice –
>
> a. specifying the particular breach complained of; and

b. if the breach is capable of remedy, requiring the lessee to remedy the breach; and

c. in any case, requiring the lessee to make compensation in money for the breach,

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case, thinks fit.

(3) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such

property upon such conditions as to execution of any Deed, or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

(4) For the purpose of this section-

(a) "lease" includes an original or derivative under-lease; also an agreement for a lease where the lessee has become entitled to have his lease granted; also a grant at a free farm rent, or securing a rent by condition;

(b) "lessee" includes an original or derivative under-lessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;

(c) "lessor" includes an original or derivative under-lessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him;

(d) "under-lease" includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted;

(e) "under-lessee" includes any person deriving title under an under-lessee.

(5) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in

the lease in pursuance of the directions of any Order-in-Council or Act or Ordinance or other law.

(6) For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(7) This section does not extend-

a. to a covenant or condition against the assigning, underletting, parting with the possession, or disposing, of the land leased; or to conditions for forfeiture on the bankruptcy of the lease, or on the taking in execution of the lessee's interest; or

b. in case of mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing instruments, or other things, or to enter or inspect the mine or the workings thereof.

(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

71. Section 70 applies to leases made either before or after the commencement of the CLPA. Further, by section 70 (5) it also applies where the proviso for re-entry is inserted into a lease pursuant to an Act. Since the proviso for re-

entry was inserted into the Appellant's statutory lease by virtue of section 5 of the Act section 70 applies to the Appellant's statutory lease.

72. Section 70 of the CLPA requires a landlord seeking to forfeit a lease pursuant to a right of re-entry under any proviso or stipulation in the lease for a breach of covenant or condition in the lease to comply with its terms in certain circumstances. It prevents the right of re-entry or forfeiture being enforceable unless a notice in accordance with section 70(1) is served. The section also provides the tenant with the ability to obtain relief from that forfeiture. It does not however apply to re-entry by a landlord pursuant to a breach of a covenant against assigning, subletting or parting with possession of land.

73. In the instant appeal the proviso for re-entry permitted the Respondent to re-enter for a breach of any covenant contained in the lease. By section 5 of the Act the proviso for re-entry extends to breaches of covenant contained in the Appellant's statutory lease. It however does not extend to breaches of conditions contained in the lease.

74. In its letter of 12 September 2011 the Respondent complained of the Appellant's illegal subletting of the premises to three commercial tenants and refers to the exercise of its right of re-entry on that date. The Respondent's re-entry onto the land was therefore with respect of two breaches: subletting without its consent and at a rental in excess of that paid by the Appellant contrary to section 5(8) of the Act and change of user contrary to clause 2 (viii) of the original lease.

75. The Judge found that with respect to the change of user a notice pursuant to section 70 of the CLPA was necessary before the Respondent could exercise his right of re-entry. She was of the opinion however that the change of user of the land by the Appellant was not the determinative issue but rather the determinative issue was the sub-letting of the land by the Appellant. With

respect to that breach the Judge concluded that, in accordance with section 70(7), the section did not apply to covenants against assigning, under-letting or parting with possession. She was of the opinion that, in any event, the Appellant knew of the breach and in those circumstances there "was no need for any such notice on him in fact or in law".

76. Insofar as the Judge determined that there was no need for a section 70 notice on the Appellant because he knew of the breach she was wrong. Once a notice is required to be served under the section the service of the notice is an essential preliminary to a landlord's ability to forfeit the lease: **Greenfeild v Hanson (1886) 2 TLR 876.**

77. With respect to the change of user the Judge was correct when she determined that a notice in accordance with section 70(1) of the CLPA was necessary. The Appellant was in breach of a covenant contained in the original lease and incorporated into the statutory lease. Insofar as the Appellant was in breach of the covenant as to user it is clear that section 70 of the CLPA will apply. This is a stipulation that arose from a covenant in the statutory lease and was not by section 70(7) excluded from the operation of the section. In these circumstances in the absence of a section 70 notice the Respondent could not have properly re-entered onto the land and determined the lease for the change of user.

78. With respect to the subletting this was a breach of section 5(8) of the Act. The application of section 70 to this breach is dependent on whether the effect of the section is to create a covenant or a condition. If a condition is created then the respondent's re-entry on to the land was not pursuant to the proviso for re-entry but rather as a result of its entitlement under the common law to re-enter for a breach of a condition. In these circumstances section 70 of the act will not apply. If section 5(8) establishes a covenant then to effect a re-entry and a termination of the lease the Respondent's entry onto the land would have to be pursuant to the proviso for re-entry.

79. In these circumstances it is now necessary to determine whether section 5(8) of the Act had the effect of a condition the breach of which would entitle the Respondent to re-enter onto the land without reference to the proviso for re-entry or a covenant the breach of which would only permit a re-entry under the proviso for re-entry contained in the lease.

80. According to **Halsbury's Laws of England**:

> "The question whether the provision in question is a condition (breach of which automatically ends the lease) or a covenant (breach of which gives the landlord an option to end the lease with the possibility of relief against forfeiture being granted to the tenant) is a matter for determination according to the precise words used in the lease and the intention of the parties. It may be possible for the provision to have the dual character of a covenant and a condition."; **Halsbury's Laws of England Fourth Edition Volume 27 paragraph 423**

81. In the case of **Doe d Lockwood v Clarke (1807) 8 East 185** the term of the lease was specifically made to continue and depend upon the personal occupation of the lessee. In these circumstances it was held that a stipulation against subletting was a condition the breach of which allowed the landlord without more to re-enter and determine the lessee's interest.

82. In the case of **Bashir v Lands Commissioner [1960] 1 All ER 117** the Privy Council was called upon to determine whether stipulations contained in a Crown Grant and referred to as 'special conditions' operated as covenants or conditions. The judgment of the Court was delivered by Lord Jenkins. After reciting the quotation from FOA's landlord and tenant referred to at paragraph 33 above he states:

> "The special conditions were clearly not conditions precedent. They all related to things which the grantee was to do or refrain from

doing after the grant had been made. The question is whether they were conditions subsequent, the non-fulfilment of which brought the term to an end without any necessity for an express proviso for re-entry, or were obligations in the nature of covenants, the breach of which (in the absence of any express proviso for re-entry) could only afford the commissioner grounds for relief in the shape of damages or injunction unless he chose to avail himself of the statutory provision for forfeiture contained in s 83 and succeeded in repelling any claim to relief under that section.

To these alternatives must be added the third possibility that the special conditions might combine in themselves the dual character of covenants and conditions of defeasance, as being agreements not only enforceable as such against the lessee but also constituting conditions on the due performance of which the continuance of the term was made to depend. This combination of covenant and condition is commonly brought about by the usual express proviso of re-entry, with which this case is not directly concerned, as the grant contains no such proviso. It would, however, also be brought about by any form of words importing an intention that a given stipulation should possess this dual character……

The point at issue turns on the true construction of the grant, which must be construed in the light of the relevant legislation. "

83. The Court concluded that relief from forfeiture was available to the lessee. The fact that the stipulations were referred to as conditions were not conclusive of their nature; and, from an examination of the terms of the lease and the relevant statutes, they concluded that the stipulations were more in the nature of obligations that the lessee was bound contractually to perform. In any event where the stipulation had the dual nature of both a covenant and a condition it was to be treated as a covenant to which the provisions of the statute providing for relief from forfeiture would apply.

84. Applying **Bashi**r it is clear that the mere use of the word 'condition' to describe a stipulation in a lease is not conclusive of its nature. Ultimately the question in this appeal is what was the intention of the legislation. The purpose of the Act is to provide security of tenure for tenants of land. In this regard while it allows for the incorporation into the statutory lease of terms and conditions contractually agreed upon by the landlord and the tenant these terms and conditions are void where inconsistent with the provisions of the Act. In this regard it is clear that the intention of the Act is not to interfere with the contractual arrangements between the parties as long as it does not conflict with the provisions of the Act.

85. The Act provides for a 30 year lease renewable at the option of the tenant for a further 30 years. It also gives the tenant the option of purchasing the land at a reduced price and by way of installments. The Act restricts the ability of the landlord to increase the rent by requiring the landlord to apply to the Land Commission for a review of the rent. It also makes it an offence for a landlord to receive rent in excess of that payable under the Act.

86. With respect to the ability of the landlord to obtain possession of the land during the term of the lease the Act restricts the ability of the landlord to obtain possession of the land to circumstances where the rent is in arrear for at least six months and an order for possession is obtained from the Land Commission. Further while the Land Commission may make an order for possession, by **section 7(3),** the order "shall be conditional on the failure of the tenant, within a period of 30 days of the Order or such other period as may be prescribed to pay the arrears of rent". If the tenant satisfies the Commission that the arrears have been paid within the relevant period the Commission shall cancel the order. The Act therefore makes it very difficult for a landlord to terminate the statutory lease.

87. In addition where possession is ordered the Land Commission must make orders with respect to the chattel house on the land. By **section 5(4)** where an order for the termination of a statutory lease is made the Land Commission may either order that the landlord pay to the tenant compensation for the chattel house or order the removal of the chattel house by the tenant.

88. In these circumstances it cannot be that it is the intention of the legislation to allow an automatic determination of a statutory lease by way of re-entry onto the land by the landlord. The effect of section 5(8) must be that it operates as a covenant the breach of which would entitle the landlord to re-enter only if, as a result of the contractual arrangements made between the parties, the statutory lease contained a proviso for re-entry. Where there is no express proviso for re-entry a breach of section 5(8) would simply entitle the landlord to an injunction or damages. In these circumstances section 70 of the CLPA would apply to the subletting of the land by the Appellant.

89. The Appellant submits that in order to validly exercise its right to re-enter the premises for breach of the provision against sub-letting the Respondent was required to serve a notice on him in accordance with section 70 of the CLPA. According to the submission qualified covenants against sub-letting are not by subsection (7) excluded from the ambit of the section. In support of this submission the Appellant relies on the statement by Nelson JA in the case of **Blackman v Taurus Services Ltd. Civ. App 66 of 1999**. According to Nelson JA:

> "In my judgment section 70(7) ought to be narrowly construed. I would hold that the sub-section excludes only absolute covenants against assignment without the written consent of the landlord. Accordingly section 70(7) does not stand in the way of the conclusion that the statutory provisions as to notice apply to a qualified covenant against assignment without the consent of the landlord."

90. In this case, the Appellant submits, no notice was served on him and in the circumstances the purported re-entry by the Respondent did not have the effect of determining the tenancy and was a trespass. The Respondent accepts that no notice was given pursuant to section 70 of the Act but maintains the Judge was correct to conclude that in accordance with s. 70 of the Act no notice was necessary. It submits that the statements of Nelson JA relied on by the Appellant were obiter dicta and inconsistent with the earlier case of **Barrow v Isaac & Son (1891) 1 QB 417** and in the circumstances not good law and should not be followed.

91. It is trite law that as a Court of Appeal we are bound by other decisions of the Court of Appeal.

> "The only exceptions to this rule are: - (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2.) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords[1]; (3.) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.": **Young v Bristol Aeroplane Company [1944] KB 718**.

92. None of the three exceptions apply in this case. Contrary to the submissions of the Respondent the statements made by Nelson JA in Blackman were not obiter dicta. One of the key issues in that case was whether the lease had been validly forfeited for breach of the qualified covenant against assignment. The Court held that section 70(7) of the CLPA was to be narrowly construed as only being applicable to absolute covenants. In those circumstances in order

[1] In our case the Privy Council.

to validly forfeit the lease a notice in compliance with section 70(1) would have had to issue.

93. Neither is there any question of the decision being per incuriam. The case of **Barrow v Isaac** was considered by the Court in Blackman albeit for a different purpose. In any event that case dealt with an absolute covenant against assignment and not a qualified covenant as in this case and made no reference to the position with respect to qualified covenants. In these circumstances the decision of Nelson JA in Blackman is binding on this Court.

94. In any event the position taken by Nelson JA that section 70(7) ought to be narrowly construed accords with the general common law position that the court leans towards a literal or strict construction of a forfeiture clause and will construe clauses or sections which seek to limit a tenant's right to relief from forfeiture strictly and in favor of the tenant. So that in **Gentle v Faulkner [1900] 2 QB 267** it was held that an equitable assignment of the premises did not breach a covenant against assignment as that covenant had to be construed as applying to legal assignments only.

95. In **Jackson v Simons [1923] 1 Ch. 373** the court had to deal with section 14 of the Conveyancing Act 1881 (UK) which was on all fours with our section 70. Like our section 70(7) section 14 (6)(i) exempted the lessor from the need to serve a notice of the breach for breaches of a covenant or condition against the assigning, underletting, parting with possession or disposing of the land the subject matter of the lease.

96. The relevant lease contained a covenant by the lessee not to assign, or underlet, or part with the demised premises or any part thereof, or part with or share the possession or occupation thereof or of any part thereof without the consent in writing of the landlord previously obtained provided that such consent should not be withheld from a respectable and responsible tenant.

In addition the lease contained and also the usual proviso for re-entry by the landlord in the event of a breach, non-performance or non-observance of the lessee's covenants.

97. The lessee entered into an arrangement with the proprietor of a nightclub which permitted the sale of tickets granting entrance to the nightclub on the demised premises and allowed patrons to access the nightclub through the premises. Without serving notice of the breach on the lessee the lessor brought an action to determine the lease. Although the court did not treat with the fact that the covenant was a qualified covenant it held that the arrangement between the lessee and the proprietor of the night club was merely a privilege or licence and did not constitute a breach of the covenant not to assign, underlet or part with the demised premises. Further, although the arrangement was a breach of that part of the covenant that prevented sharing the possession or occupation of any part the premises, that was not included in the section that exempted the lessor from serving a notice of breach. Accordingly the omission to serve such a notice rendered the action against the lessee not maintainable.

98. In the appeal before us in accordance with the decision in **Blackman v Taurus,** and consistent with the common law, the exception contained in section 70(7) does not apply. In order to exercise its right to re-enter onto the land and forfeit the tenancy the Respondent was required to comply with section 70(1) of the CLPA and serve a notice on the Appellant. The Respondent failed to do so. In the circumstances the Respondent's re-entry onto the land was a trespass and entitled the Appellant to damages.

99. Accordingly the appeal is allowed and the orders made by the Trial Judge set aside. The Appellant is entitled to the declarations that he holds a statutory lease of the land and that he is entitled to purchase the land at a price not exceeding half of the market value as of 9 September 2004 and damages for trespass. In accordance with the agreement between the parties the question

of damages is remitted to the High Court for its determination as is the question of the market value of the land in accordance with section 9(5) of the Act.

Judith Jones
Justice of Appeal