IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 292 of 2008

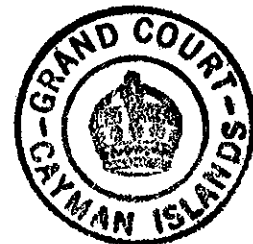
BETWEEN: **DAWN MCLEAN-SAWNEY**

AND: **MERLENE MCGAW-CARTER**

Appearances: **Mr. Hector Robinson of Mourant Ozannes for the Plaintiff**

Ms. Laura Clemens of Bodden & Bodden for the Defendant

Before: **Hon. Justice Henderson**



Heard: **October 9, 2013**

1

2 # JUDGMENT

3

4 1. The Plaintiff Dawn McLean-Sawney seeks an order to compel specific performance of an
5 option to purchase and, in the alternative, damages for breach of the option agreement.
6 This ruling disposes of some, but not all, of the issues raised in the claim.

7 **Facts**

8 2. The Defendant Merlene McGaw-Carter owns a home in Prospect ("the premises") which
9 was badly damaged during Hurricane Ivan. In May, 2005 the parties agreed that Ms.
10 McLean-Sawney would rent the (not yet repaired) premises and be given an option to
11 purchase it. They entered into a written agreement dated June 13, 2005 but almost
12 immediately replaced that agreement with a fresh agreement executed by the parties
13 on July 21 and 26, 2005; I refer to this second contract as "the Agreement".

14

15 3. Neither party has any legal training. A form of agreement was obtained from the
16 internet and then modified by the parties to record their bargain. The material parts of
17 the Agreement read as follows (use of bold face and formatting replicates that
18 contained in the document):

19 **1.** **Rent.** Lessee agrees to pay, without demand, to Lessor as rent for the
20 demised premises the sum of **one thousand six hundred fifty dollars (CI$
21 1,650)** per month in advance on the first day of each calendar month
22 beginning **01 July, 2005** payable to **Merlene McGaw Carter. Note: CI
23 $900 goes towards purchase price of the home and CI $750 is applied as**

rent. If the house is not purchased then the entire CI $1,650 is applied as rent.

...

5. **Security Deposit. On execution of this lease, Lessee deposits with Lessor $2,000 CI __AND a house deposit of $16,000 CI ____ Dollars (S) [sic], receipt of which is acknowledged by Lessor, as security for the faithful performance by Lessee of the terms hereof, to be returned to Lessee, without interest, on the full and faithful performance by him of the provisions hereof. (TOTAL DEPOSIT OF $18,000) ($10,000 TO BE GIVEN BY JULY 1, 05, $4,000 in October 05 and $4,000 in January 06)**

...

15. **Maintenance and Repair.** Lessee will, at his sole expense, keep and maintain the leased premises and appurtenances in good and sanitary condition and repair during the term of this lease and any renewal thereof. In particular, Lessee shall keep the fixtures on or about the leased premises in good order and repair; keep the walks free from dirt and debris; and, at his sole expense, shall make all required repairs to the plumbing, range, and electric and gas fixtures whenever damage thereto shall have resulted from Lessees [sic] misuse, waste, or neglect or that of his employee, family, agent, or visitor. Major maintenance and repair of the leased premises, not due to Lessees [sic] misuse, waste, or neglect or that of his employee, family, agent, or visitor, shall be the responsibility of Lessor or his assigns. Lessee agrees that no signs shall be placed or painting done on or about the leased premises by Lessee or at his direction without the prior written consent of Lessor. **Note: House leased as is maintenance and repairs are carried out at Lessees** [sic] **expense. CIDB will repair roof and windows from damage caused by Hurricane Ivan, as part of the hurricane relief fund offer to the lessor. All other repairs are at the lessee** [sic] **expense.**

...

1 23. **Holdover by Lessee.** Should Lessee remain in possession of the demised
2 premises with the consent of Lessor after the natural expiration of this
3 lease, a new month-to-month tenancy shall be created between Less and
4 Lessee which shall be subject to all the terms and conditions hereof but
5 shall be terminated on thirty days written notice sent by either Less or
6 Lessee on [sic] the other party.
7

8 ...

9

10 26. **Default.** If any default is made in the payment of rent, or any part
11 thereof, at the times hereinbefore specified, or if any default is made in
12 the performance of or compliance with any other term or condition
13 hereof, this lease, at the option of Lessor, shall terminate and be
14 forfeited, and Lessor may re-enter the premises and remove all persons
15 there from. Lessee shall be given written notice of any default or breach,
16 and termination and forfeiture of the ease [sic] shall not result if, within
17 thirty days of receipt of such notice, Lessee has corrected the default or
18 breach or has taken action reasonably likely to effect such correction
19 within a reasonable time. Lessee shall pay all reasonable attorneys [sic]
20 fees necessary to enforce Lessors [sic] rights.
21

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22 ...

23

24 32. **Purchase Option. It is agreed that Lessee shall have the option to**
25 **purchase real estate known as: 102 Buttonwood Avenue, Block 25,**
26 **Parcel 295 for the purchase price of one hundred eighty thousand**
27 **dollars (CI $180,000) with a down payment of thirty two thousand four**
28 **hundred dollars (CI $32,400) and a deposit of _$18,000CI Dollars ($**
29 **EIGHTEEN THOUSAND_) (amount to be determined and agreed by**
30 **Lessor and Lessee)** payable upon exercise of said purchase option, and
31 with a closing date no later than thirty days thereafter. This purchase
32 option be [sic] exercised in writing no later than **01 August, 2008**, but
33 shall not be effective should the Lessee be in default under any terms of
34 this lease or upon any termination of this lease. **If the Lessee or lessor**
35 **does not follow through with the purchase option of the above-**
36 **mentioned home, this down payment will be considered rent (As above**

$900 x 12 x 3 years) and it will not be returned to lessee. However, the $18,000 deposit will be returned to the lessee.

4. Ms. McLean-Sawney paid the initial deposit of $10,000 and moved into the premises.

5. The second payment of $4,000 on the deposit was due "in October 05" under clause 5 of the Agreement. Finding herself unable to make this payment on time, Ms. McLean-Sawney asked for additional time and received what she says she understood to be "a general extension of time" (Witness Statement, para. 74). By the end of January, 2006, at which time the third and final $4,000 deposit payment was due (see clause 5), Ms. McLean-Sawney had still not made the second payment.

6. On February 8, 2006 Ms. McGaw-Carter asked in an email message, "What's going on with the $8,000 balance due?" After some discussion of the reasons why she had been unable to pay on time, Ms. McLean-Sawney replied: "I was able to secure CI $4,000 and I was told that I will be able to collect it in two weeks. I am working on the other CI $4,000 and will keep you posted." Just before receiving this last message, Ms. McGaw-Carter wrote by email: "could you please response [sic] to my e-mail with your official notice and that will suffice." Ms. McLean-Sawney then replied:

> "I, Dawn McLean-Sawney, will pay CI $4,000 to Merlene McGaw-Carter on approximately February 24, 2006. The remaining CI $4,000 outstanding I do not have the funds at this time [sic], but if permission received I will work on obtaining that in the very near future. This is my official notice this 10 day of February, 2006."

1 7. Ms. McGaw-Carter responded:

2 "Dawn, I think there must be a break down in our communication - you are still
3 not giving me what I requested. I do not want you to tell me what you owe me
4 or when you will try to pay me. I just want you to state and acknowledge that
5 you do not have the funds and that this breaches our contract."

6

7 8. To this, Ms. McLean-Sawney replied:

8 "I acknowledge that I do not have the remaining CI $8,000 of the deposit and this
9 breaches our contract at this time. I intend on forwarding CI $4,000 on
10 approximately February 24, 2006 – once these funds are in your possession I will
11 resend another email updating you on the status of the final balance of CI
12 $4,000."

13

14 9. The response from Ms. McGaw-Carter was: "Yes and thank you, have a good weekend."

15

16 10. Ms. McLean-Sawney finally made the second deposit payment of $4,000, which had
17 been due in October, on March 10, 2006. By email message on March 13, she advised
18 Ms. McGaw-Carter of the payment and said: "I am working on the other CI $4,000 – will
19 advise you within two weeks on my progress of the final depost." Ms. McGaw-Carter
20 responded that the $4,000 would be returned to Ms. McLean-Sawney, who then asked
21 why the money was to be returned. The response was: "you broke the contract". The
22 $4,000 was not returned.

23

24 11. To this point, Ms. McLean-Sawney had made all of her monthly rent payments. She
25 continued to occupy the premises and to pay rent. Ms. McGaw-Carter continued to

accept the rent money. In October, 2006 the parties agreed in a seemingly amicable manner on a rent increase of $75 per month. Thereafter, Ms. McLean-Sawney paid the increased amount and Ms. McGaw-Carter accepted it.

12. On June 4, 2008 Ms. McLean-Sawney's attorneys wrote to Ms. McGaw-Carter asserting that their client had chosen to exercise the purchase option; the final $4,000 deposit payment was enclosed. When Ms. McGaw-Carter returned the $4,000 and refused to honour the option to purchase, this action for specific performance was commenced. Ms. McLean-Sawney stopped making her monthly rental payments but, as of July 2008, continued to reside in the premises.

1) Is There an Enforceable Option to Purchase?

13. The first question is whether clause 32, the Option to Purchase, contains any enforceable obligation at all. It includes the words "If the Lessee <u>or lessor</u> does not follow through with the purchase option of the above-mentioned home, this down payment will be considered rent ..." (underlining added). Ms. McGaw-Carter argues that the use of this language gives to her an option to "not follow through" with the option to purchase; in other words, she says clause 32 contains no more than an agreement to agree.

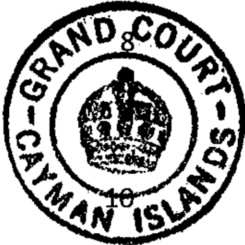
14. Permitting the lessor to determine, at her option and at any time, to decline to convey the property would rob the clause of all commercial efficacy. Clause 5 ("Security Deposit") calls for a deposit of $2,000, which is a bit more than one month's rent, and a "house deposit" of $16,000. The latter is clearly intended to be consideration for the purchase option. Any reasonable and objective observer would find the notion that a lessee would be invited to pay a deposit of $16,000 to obtain a mere agreement to agree to be manifestly unattractive and hence unreasonable. I am satisfied that clause 32 contains an enforceable option to purchase.

2) Was Ms. McLean-Sawney in Default of Any Term of the Lease?

15. The Agreement provides (in clause 32) that the purchase option "shall not be effective should the Lessee be in default under any terms of this lease or upon any termination of this lease". Ms. McGaw-Carter has pleaded that there were three acts of default: the late payment of all three deposit instalments.

16. The first deposit instalment in the amount of $10,000 was due by July 1, 2005. It was paid on that date, according to the sworn evidence of Ms. McGaw-Carter herself. The allegation (in para. 11 of the Defence) that the payment was late, in breach of the Agreement, remains a mystery.

17. Ms. Mclean-Sawney was required to pay the second instalment "in October 05" (see clause 5) but did not make the payment until March 10, 2006. I am satisfied that the content of the communications between the parties late in 2005 demonstrates that this act of default (if that is what it was) was waived by Ms. McGaw-Carter.



18. The third and final payment was tendered on June 4, 2008 but refused. Ms. McGaw-Carter says that the Agreement was terminated in February, 2006 as a result of Ms. Mclean-Sawney's failure to pay the third and final deposit instalment by the end of January, 2006, as clause 5 required. Ms. Mclean-Sawney says that the Agreement was never terminated because the requirement to make the final deposit payment by January 31, 2006 was waived by a "general extension of time" (Reply, para. 24); because Ms. McGaw-Carter failed to deliver a written notice of the breach and provide 30 days of grace for correcting it as required by clause 26; and because, in any event, the $18,000 deposit was "payable upon exercise of said purchase option" under clause 32 and not any earlier. Ms. Mclean-Sawney argues that the purchase option, including the obligation to pay a deposit, is a separate contract and not in any sense part of the "lease". The result, she says, is that her failure to make a deposit payment on time cannot be an act of default "under any terms of this lease".

19. There is no merit in Ms. Mclean-Sawney's contention that she was the beneficiary of a "general extension of time". Even if the language used by Ms. McGaw-Carter in November, 2005 could be construed in that manner (and, in my view, it cannot), the

"general extension" would have ended a reasonable period of time after Ms. McGaw-Carter's inquiry on February 8, 2006. On that date, if not before, Ms. Mclean-Sawney was placed on notice that Ms. McGaw-Carter wanted the second and third deposit payments immediately.

20. There is an inconsistency between the schedule of payments set out in clause 5 and the more usual requirement in clause 32 that the $18,000 deposit was "payable upon exercise of said purchase option". In this instance, the more specific (and much less usual) provision in clause 5 calling for a schedule of payments must take precedence over the traditional requirement of a deposit to be paid when the option is exercised. The reasonable and objective observer would view clause 5 as the dominant obligation and would consider that a breach of clause 5 was intended by the parties to be a breach of the lease itself. The result is that the third and final deposit payment was due on January 31, 2006 and the failure to pay it on that date was a potential act of default under the lease.

21. Upon Ms. Mclean-Sawney's failure to pay the third instalment on the deposit on January 31, 2006 Ms. McGaw-Carter was entitled to treat her failure as an act of default. Under clause 26, she was entitled to give a written notice of the breach and, if the breach was not corrected within 30 days, treat the Agreement as terminated and the lease as forfeited. No such written notice was given. Ms. McGaw-Carter asked for an acknowledgement by email that the contract had been breached. Ms. Mclean-Sawney

1 accepted that she could not afford to pay the balance of the deposit and agreed that
2 this amounted to a breach of the Agreement. In effect, she waived the requirement
3 (upon which she could have insisted) for delivery of a written notice of the breach.
4
5 22. There is no reason to infer that the 30-day period of grace to which Ms. Mclean-Sawney
6 was entitled under clause 26 was waived. She could have preserved her entitlement by
7 paying the remaining $8,000 on or before March 5, 2006. In fact, she paid $4,000 on
8 March 10 and the remainder in 2008.
9
10 23. My conclusion is that Ms. McGaw-Carter was entitled to treat the Agreement as
11 terminated and the lease as forfeited on March 6, 2006. However, I require further
12 argument as to whether there was, in fact and in law, a termination of the Agreement or
13 a forfeiture of the lease. Was the option to purchase still extant in June, 2008?
14
15 24. I also require additional argument on the effect of the principle laid down in the line of
16 cases exemplified by *Bass Holdings Ltd. V. Morton Music Ltd. [1988] 1 Ch. 493 (CA)*. Does
17 the language of clause 32 differ so dramatically from the decisions leading to *Bass* as to
18 take this purchase option outside the principle set down there? Or, did the breach
19 which crystallized on March 6, 2006 become spent on June 4, 2008 when the final
20 deposit payment was tendered?

21

1 25. A number of difficult issues remain to be argued. The parties are at liberty to take out a

2 date for the continuation of the trial.

3 Dated this 10th day of December, 2013

4 Henderson, J.

5 Henderson, J.

6 Judge of the Grand Court