IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G292 of 2008

BETWEEN

DAWN McLEAN-SAWNEY

Plaintiff

And

MERLENE McGAW-CARTER

Defendant

Mr. H. Robinson of Mourant
for the Plaintiff

Ms. L Clemens & Ms. P. Golaub-Symons
of Bodden Litigation
for the Defendant

Henderson, J.

Hearing: January 22, 2015

Judgment: February 3, 2015

JUDGMENT

1. In this action for specific performance of an option to purchase (and, in the alternative, damages) I disposed of some but not all of the issues in my judgment rendered on December 10, 2013. The parties (who have no legal training) entered into a written

agreement drafted by themselves containing a lease and an option to purchase. When Ms. McLean-Sawney (the tenant) gave notice that she was electing to exercise the option the landlord, Ms. McGaw-Carter, refused because the deposit required by the agreement had not been paid on time.

2. I have already found that:

    1) clause 32 of the written agreement contains an enforceable option to purchase;

    2) Ms. McLean-Sawney's failure to make the second instalment payment on time, although an act of default, was waived by Ms. McGaw-Carter;

    3) Ms. McGaw-Carter did not give any "general extension of time" to Ms. McClean-Sawney;

    4) Ms. McLean-Sawney's failure to make the third and final deposit payment on time (i.e., on January 31, 2006) was a potential act of default under the agreement;

    5) Ms. McLean-Sawney waived the requirement in the agreement for delivery of a written notice of the breach; and

    6) Ms. McGaw-Carter was entitled to treat the agreement as terminated on March 6, 2006.

Issues

3. I advised counsel that I required argument on two further issues:

1) Was there, in fact and in law, a termination of the option to purchase or was it still extant in June 2008? and

2) What is the impact of the principle laid down in the line of cases summarized in *Bass Holdings Ltd. v. Morton Music Ltd.* [1988] 1 Ch. 493 (CA)?

4. In this judgment I relate only those findings of fact which are relevant to these two issues.

Facts

5. On February 8, 2006 Ms. McGaw-Carter wrote by email to Ms. McLean-Sawney to ask "what's going on with" the unpaid second and third instalments on the option to purchase. The response (on the following day) was:

> *Honestly, since you and I spoke and I advised I simply didn't have the money – you mentioned if I didn't have it not to worry, I hadn't been pressuring myself about it – instead using my extra money to fix up the house (since I was able to make arrangements to pay things in instalments). My mom's land is still up for sale in George Town – once it sells, I will have no problem paying you the entire CI $8,000 ...*

6. On February 10, 2006 Ms. McLean-Sawney wrote again to say:

> *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.*

7. Ms. McGaw-Carter then asked Ms. McLean-Sawney to send her an "official notice". The latter replied by saying that she would make the second instalment payment "on approximately February 24, 2006" but did not have the funds to pay the third instalment. She said that "if permission received I will work on obtaining that in the very near future". Ms. McGaw-Carter responded that

> *I do not want you to tell me what you owe me or when you will try to pay me. I just want you to state and acknowledge that you do not have the funds and that this breaches our contract.*

8. To this, Ms. McLean-Sawney said:

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

9. Ms. McLean-Sawney made the second instalment payment on March 10, 2006 by presenting a cheque in that amount to Ms. McGaw-Carter's agent on Grand Cayman (the latter's daughter). The cheque was negotiated. By that date, the third instalment payment was already past due. She then wrote to Ms. McGaw-Carter by email on March 13, 2006 and said:

> *For your records, I gave Kimberlee CI $4,000 Credit Union check on Friday at 10:15 am. I am working on the other CI $4,000 – will advise you within two weeks on my progress of the final depost (sic).*

10. Ms. McGaw-Carter replied by email on the same day and said:

> *I hope all is well how is the house? The money will be returned to you.*

11. The response from Ms. McLean-Sawney (also by email, on the following day) was:

> *All is fine with the house – doing great. May I ask why the money will be returned?*

12. Ms. McGaw-Carter did not return the money and did not respond to Ms. McLean-Sawney's question until March 23, 2006. Her email message of that day said:

> *Sorry for not getting back to you until now I was so sick when you called and I'm still not 100% better.*
>
> *Anyway, even though I understand your situation the problem is for 1 we were in the process of buying another home but because you did not make our payments we could not make our down payment. So we had to make alternative arrangements so we decided we would keep our home. And 2 because the price was for house as is which did not include work done by CIDB which increase my mortgage I'm understanding this now changes the price of the house. Which I was willing to just leave and eat the cost myself since I already signed the contract. However, now that I lost out on the deal and I have an increase in cost and you broke the contract, everything would have to be revised and Renegotiated.*

13. Seven minutes later she continued:

> *Nothing is for sure as yet so as for now we just decided to keep the house and that was because of as I said earlier you not making on time payment. This may change but because I did not know what was what we (sic) you this is the conclusion I came to.*

14. Ms. McLean-Sawney then replied:

> *I have no choice but to understand and Boone (sic) to blame but myself. I guess I have learned another hard lesson.*
>
> *I am uncomfortable living somewhere without a contract. So we will have to renegotiate very soon. Of course there is the matter of my CI $14,000 deposit on a home that as you say you are no longer selling to me due to*

my breaking the contract. And the investments in the house such as guttering, fill, tiling which are all improvements to your home. Am I to understand that I am simply renting with no contract officially until we renegotiate?

15. The response from Ms. McGaw-Carter by email on March 23, 2006 was:

This is what I am taking (sic) about Dawn you always make me feel bad when it comes to asking for payment or anything to benefit me. All along I have done things to help you and you could not make good on your part because of what you stated. But you said you had to wait until your mother sold her land to pay me which I stated could be any time.

I just do not know what more you want from me, I am not uncomfortable having you in my home because my opinion is the same of you as before you are a good person. As stated to you before I will be giving you back the $4000 check you gave Kimberlee. As a matter of fact you can call her to collect it I did not he get it from her as yet. Her number is 9270632. I do not want take your money and feel bad about her which is how you are making me feel. When I feel I have been noting (sic) but nice to you. But as long as you are to benefit and I am not is a problem with you and that not fair.

16. After this response nothing more was said about the option to purchase for some considerable time. Ms. McLean-Sawney took no step to obtain repayment of the two instalments she had paid towards the purchase of the house. Ms. McGaw-Carter took no step to repay the two instalments. She could have instructed her daughter Kimberlee to repay Ms. McLean-Sawney but did not do so. Evidently she believed she was entitled to keep the money. Ms. McLean-Sawney continued to reside in the house as a tenant and continued to pay her rent in a timely manner.

17. By letter dated November 8, 2006 Ms. McGaw-Carter advised Ms. McLean-Sawney of the following:

> *Re: Increase in Month to Month Rent on House #102 Buttonwood Avenue*
>
> *I write as per your request in our telephone conversation, I am hereby informing you that since the termination of our Lease with a purchase option agreement you have been renting the above home for $1650 per month. I am now informing you in writing as per your request that I am increasing your month to month tenancy rent to $1725.00 per month.*
>
> *I would also like to inform you that should you decide to end your month to month tenancy to give me 30 days notice as required by law. Upon vacating the premises I will return your full deposit to you within no less than 60 days providing that the home is return (sic) to me in a condition to my satisfaction. Any repairs needed to the above home due to damages done by you will be deducted from the deposit and the balance returned to you.*
>
> *Should you not agree with any of the above please inform me in writing with 30 days of the above date.*

18. On February 14, 2007 Ms. McLean-Sawney received a call from a surveyor who intended to appraise the house. She then wrote by email to Ms. McGaw-Carter to ask if she was planning to sell the property and continued:

> *I guess this leads us into the uncomfortable conversation of exactly where we proceed from here with my lease that I so called "broke" your acceptance of my deposit in the amount of CI $14000 and the monies I have invested into the home which will now increase the value of your home.*

19. Ms. McGaw-Carter replied (on the same day):

> *If I was selling the house you would be the first to know. I have nothing to hide from you Dawn. And just what do you mean you so call broke the lease? You did break the lease and you put it in writing. You are quite aware of the consequences of breaking the lease ...*

20. The immediate response was:

> *Yes, I did put it in writing as you requested, but your daughter also accepted the deposit and cashed it after I put it in writing. I have a copy of the lease and all of our emails from the beginning to now. The lease also states I will be paid my deposit back if the lease is broken on my behalf.*

21. Ms. McGaw-Carter then replied:

> *For your information I am entitle (sic) to the entire deposit not just the $14000 even thou (sic) you broke the contract to which I could sue you for. Yes my daughter cash (sic) the cheque but if you remember it was the last payment that you had no idea of (sic) you would get it. And I being good and said keep it until we can come to another agreement, if I wanted I could have taken that from you and I would still have a right to it because you broke the lease remember if a lease is broken the lessor (me) have a right to keep the deposit.*

22. Finally, Ms. McGaw-Carter said to Ms. McLean-Sawney by email on June 20, 2007:

> *Dawn I am once again reiterating theat (sic) the contact (sic) you and I had is void because you broke it and secondly the 2nd lease supersede the first which has a different agreement about repairs and you are aware of this. IF YOU HAVE LOST YOUR COPY I WILL BE MORE THAN HAPPY TO PROVIDE YOU WITH A COPY WHICH YOU SIGNED.*

23. The next communication regarding the option to purchase was contained in a letter dated June 4, 2008 from Ms. McLean-Sawney's solicitors to Ms. McGaw-Carter. The letter asserted that Ms. McLean-Sawney was exercising the option and enclosed a bank draft for the final instalment payment of $4,000. Attempts to serve the letter personally upon Ms. McGaw-Carter were unsuccessful. It was served upon her agent who had been collecting the rent on her behalf but the letter and bank draft were returned to the

solicitors. Ms. McLean-Sawney then commenced the current action and stopped paying rent. Ms. McGaw-Carter served a Notice to Quit. Ms. McLean-Sawney refused to vacate the premises.

Has the Option to Purchase Been Terminated?

24. Clause 32 of the agreement contains the option to purchase and reads as follows:

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

25. I have already held that Ms. McGaw-Carter was entitled to accept Ms. McLean-Sawney's failure to make the third and final deposit payment on time and to treat the option to purchase as terminated. The option to purchase and the lease are two separate and distinct agreements although they were reduced to writing within the same document; Ms. McLean-Sawney took that position in argument (Plaintiff's 1st Skeleton, para. 15) and the Defendant does not disagree. The question is not whether the lease was

terminated but whether the option to purchase was terminated. For that reason, those particular provisions of law which apply specifically to the landlord-tenant relationship have no application. I must determine on the ordinary principles of contract law whether Ms. McGaw-Carter's words and actions subsequent to the breach amount to an election to treat the option to purchase as terminated. Such an election must be unequivocal and must be communicated clearly to the party in default: see, generally, *China National Foreign Trade Transport Corp. v Evoglia Shipping Co. SA of Panama* [1979] 1 WLR 1018 at 1034 (HL); and *Vitol SA v Norelf* [1996] AC 800 (HL).

26. Although Ms. McGaw-Carter was entitled to keep the $900 component of each rent payment, she was required by the terms of her agreement to return the first and second instalments of the deposit (a total of $14,000) if she elected to terminate the option to purchase. She has not done so. At first, she invited Ms. McLean-Sawney to retrieve the second instalment of $4,000 from Ms. McGaw-Carter's daughter but took no further step to see that the money was returned. As time passed, her position hardened and she said she was entitled to keep the deposit because Ms. McLean-Sawney "broke the lease". In short, her course of conduct was equivocal until she received the June 4, 2008 letter. She did not, at any earlier time, manifest in both words and actions what an objective and reasonable observer would understand to be an unequivocal election to treat the option to purchase as terminated. She could have made her intention clear by sending to Ms. McLean-Sawney a cheque in the amount of $14,000. Advising Ms. McLean-Sawney that she could seek out Ms. McGaw-Carter's daughter to obtain

reimbursement of a part only of the deposit was equivocal and does not amount to a decision to terminate the option to purchase.

27. When Ms. McLean-Sawney sent her letter of June 4, 2008 and tendered the final instalment payment she made clear her own intention and desire to treat the option to purchase agreement as still extant. By this time, the third instalment was late by some 2½ years.

28. Ms. McGaw-Carter asked her nephew to return the letter and bank draft to Ms. McLean-Sawney and attempted unsuccessfully to contact her. Telephone messages left by Ms. McGaw-Carter for Ms. McLean-Sawney were not returned. The nephew tried to leave the letter and bank draft at Ms. McLean-Sawney's residence but was rebuffed. He then returned them to Ms. McLean-Sawney's solicitors on June 9, 2008. These acts are sufficient evidence of an unequivocal decision to accept the repudiation and terminate the option to purchase. A simple refusal to accept late payment is commonly viewed as sufficient evidence in itself of an election to terminate: *Brooke Tool Manufacturing co. Ltd. V Hydraulic Gears Co. Ltd.* (1920) 89 LJKB 263; and see Beale, H.; *Remedies for Breach of Contract*; London, 1980; p. 109.

29. Ms. McGaw-Carter did not serve any formal notice of default under clause 26 of the lease. Although the obligation in the clause arises after a default in compliance with "any" term or condition of the agreement, its consequences are concerned with the lease alone. After a notice of default, the lessee has 30 days within which to rectify her

default and, if she does, the consequence is that "termination and forfeiture of the lease shall not result" (underlining added). If the default is not rectified, the consequence is that the "lease ... shall terminate and be forfeited" (underlining added). Failure to serve a notice of default carries no consequence for the separate agreement contained in the option to purchase. Thus, the failure to serve a formal notice of default does not preclude Ms. McGaw-Carter accepting the repudiation.

30. Ms. McGaw-Carter has argued, *citing Howe v Smith* [1884] 27 Ch D 89 (CA) and *Beach Club Enterprises v Horizon Management* 1980-83 CILR 223 (CA), that "it is established law that the deposit is forfeited where there is a repudiatory breach of an agreement": Defendant's Skeleton, para. 1.17. The facts of those two authorities make no mention of any term in the relevant agreements providing for the return of deposit monies. While the general rule is that a deposit is regarded as security for the purchaser's performance and subject to forfeiture in the event of non-performance, it is open to the parties to alter that position by the express terms of their agreement; ultimately, it is a matter of construction of the contract: see, for example, *Chillingworth v Esche* [1924] 1 Ch 97 (CA). Clause 32 is an express departure from what would otherwise be the usual position concerning a deposit. Upon making her decision to terminate in June 2008, Ms. McGaw-Carter fell under an immediate obligation to return not just the last instalment but the sum of $14,000 which had been paid earlier.

31. Ms. McGaw-Carter made no effort to return the $14,000. Does that circumstance mean that she then waived her right to insist upon a termination? The obligation to return the

money arose only after (albeit immediately after) she made a clear and unequivocal election to treat the option to purchase as terminated. Until that point, she was entitled to retain the deposit money as it was open to her to elect to affirm the agreement. Consequently, the failure to return the money cannot function as a waiver even though Ms. McGaw-Carter now has an obligation to account for it to Ms. McLean-Sawney. This, essentially, is the same analysis as that applied by the House of Lords to an analogous fact pattern in *The Mihalios Xilas* [1979] 1 WLR 1018.

32. A further question is whether the very considerable period of delay between the breach of the option agreement (i.e., the failure to make the third payment on January 31, 2006) and the election to terminate that contract in June, 2008 amounts in itself to a waiver of the right. I am satisfied it does not. The decision of the Court of Appeal in *Allen v Robles* [1969] 1 WLR 1193 establishes that the mere lapse of time between breach and election is not, in and of itself, a waiver. The Court said the lapse of time might count against the electing party in three cases: if the delay had caused prejudice to the party in breach; if the rights of a third party had intervened; or if the delay was so long that the court inferred from it that the electing party had decided to affirm. None of these potential exceptions have application here. The Statement of Claim does not allege that Ms. McLean-Sawney altered her position to her detriment or otherwise suffered prejudice resulting from the Defendant's failure to terminate the option agreement before June 2008. No right of a third party has been invoked. The narrative set out above is not consistent with a conclusion that Ms. McGaw-Carter decided at any time after January, 2006 to affirm the contract.

33. In summary, an application of the ordinary principles of the general law of contract leads to my finding that the option to purchase was validly terminated in June, 2008.

Does Bass Holdings Apply?

34. I must also consider the effect of the law set out in *Bass Holdings Ltd. v. Morton Music Ltd.* [1988] 1 Ch 493 (CA).

35. In *Bass Holdings,* a lease granted to the tenant an option to take a further lease for a period of 125 years provided that the tenant had paid the rent and performed the various tenant's obligations set out in the contract. The clause read:

> *If the tenant shall be desirous of taking a further lease of the demised premises for a further term of 125 years from the date of the term hereby granted and shall not later than 29, September 1985 give to the lessors notice in writing of such its desire and if it shall have paid the rent hereby reserved and shall have performed and observed the several stipulations on its part herein contained and on its part to be performed and observed up to the date hereof then [the landlord will grant a further term]*

36. In breach of a provision of the lease, the tenants made two unsuccessful applications for outline planning permission. They were also in arrears in payment of the rent and of the water rates for a period of time. Prior to the date for the exercise of the option to renew, the arrears of rent and the water rates were paid up to date. The tenants then purported to exercise the option. The landlord applied to the Court for a declaration

that the purported exercise of the option was invalid because of the various breaches of the lease.

37. All three judges of the Court of Appeal agreed that the option was valid and could be exercised. They reached that position because of what was characterized as a strong line of authority dating from 1796 which establishes that a tenant's option to renew a lease or to terminate it early (i.e., a "break" option) is not lost because of the tenant's past failure to perform a condition precedent if, at the time of exercising the option, the breach is not "subsisting" but "spent". In other words, a tenant who has breached a provision of a lease may nevertheless exercise an option to renew or break by ensuring that all his obligations have been performed prior to the option date.

38. Evident in the three judgments is some hesitation to affirm the long-standing rule given that it represents a marked departure from the usual law of contract. Lord Bingham said (at page 537):

> *It is of course true that the law has intervened to mitigate the rigours of the landlord-tenant relationship, for example in providing for relief of forfeiture and restricting the damages recoverable for breach of covenant to repair. But an option of the present kind has little to do with the ordinary relationship of landlord and tenant, and if the matter were free from authority I should see very great force in the argument that the effect of the option should be determined on ordinary contractual principles. Unfortunately for the plaintiffs, however, questions closely related to the present have been intermittently mitigated for two hundred years and the current of authority has been against the plaintiff's contention.*

39. His Lordship also observed that:

> *whether this is the rule, starting from scratch, one would devise, I do not know but rather doubt.*

40. The decision in *Bass Holdings* is the result of a perceived need to protect tenants from the loss of valuable rights (such as an option to renew or break) because of a breach which has been rectified with little or no prejudice to the landlord. Lord Kerr expressed the view (at page 518) that

> *Absolute and precise compliance by the tenant with every single covenant throughout the period of the lease prior to the operative date is virtually impossible of attainment.*

He observed that if the Court were to require absolute compliance then "the option would in practice be worthless or merely at the mercy of the landlord". From that, His Lordship inferred that the parties did not intend that the absence of spent breaches should be a condition precedent. Lord Nicholls expressed much the same view:

> *However diligent or even punctilious a tenant may be in carrying out his obligations under his lease, in such cases there will in practice inevitably be occasions when there will be outstanding some dilapidations which would, strictly, constitute breaches of the repairing or the re-decorating covenants. Thus the practical consequence of the "never any breach" construction in some cases would be that the break or renewal option would seldom, if ever, be exercisable by a tenant. Even in the case of other leases, where the tenant's covenants might be less far-reaching, this construction would lead to much uncertainty for tenants and their assigns ... the underlying rationale is that, whilst it is open to parties to agree that the exercise of a break option or a renewal option shall be subject to a condition as onerous and difficult to fulfill as a "never any breach" condition, where the language used is capable of another, more sensible meaning, that meaning is to be preferred.*

41. I accept that an option to renew a lease for a further term (or, alternatively, an option to terminate a lease early) which is subject to a condition precedent that the option is lost if the tenant breaches any term of the lease will be affected only by subsisting breaches; spent breaches will not prevent the exercise of the option. However, because this rule is a significant departure from the general law of contract and because it is grounded in a particular desire to protect the rights of tenants within the landlord-tenant relationship, it need not and should not be extended to an option to purchase. The latter is essentially a separate agreement and need not be governed by the special rules applicable to leases.

42. The parties intended that the option to purchase the property was available to Ms. McLean-Sawney provided that she paid the three instalments totaling $18,000 according to the specified schedule. The failure to make the third instalment payment on time was a subsisting breach which lasted for 2 1/2 years. Ms. McLean-Sawney says that the tendering of the bank draft converted the subsisting breach to a spent breach in June 2008. If the decision in *Bass Holdings* is applied to cure the late payment of a deposit, any payment schedule agreed upon by the parties becomes meaningless. Despite the express words of clause 32, Ms. McLean-Sawney could simply have waited until August 1, 2008 and then tendered the whole $18,000 deposit with her letter exercising the option. This makes the suggested application of the rule in *Bass Holdings* a most unattractive proposition. There is no policy-based reason why a tenant who

intends to exercise an option to purchase should be permitted to ignore an agreed-upon schedule for payment.

43. For these reasons, the plaintiff's claims for specific performance and damages are dismissed. The parties are at liberty to apply with respect to the remaining issues.

Henderson, J.

GRAND COURT CAYMAN ISLANDS

Henderson, J.