BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT (CIVIL DIVISION)

CLAIM No: CV1330 of 2010

IN THE MATTER OF The Last Will and Testament dated 30th January, 1984 of the late George Cuthbert Wakefield Marshall, late of Endeavour in the Parish of St. James in Barbados

AND IN THE MATTER OF The Administration of Estates (Jurisdiction and Procedure) Act, Cap. 242 of the Laws of Barbados, section 44

AND IN THE MATTER OF The Succession Act, Cap. 249 of the Laws of Barbados, sections 60 and 61

AND IN THE MATTER OF The Supreme Court (Non-Contentious) Probate Rules, 1959, Rules 12-14

BETWEEN:

CALMORE ALLEYNE MARSHALL	**CLAIMANT**
AND	
JAMES FREDERICK MARSHALL	**1st DEFENDANT**
ERNEST CUTHBERT MARSHALL	**2nd DEFENDANT**
CLOMIN ONARI SMITH	**3rd DEFENDANT**
TIMOTHY EVAN MARSHALL	**4th DEFENDANT**
CLYTIE WILHELMINA ATHERLY	**5th DEFENDANT**
MARGARETTA EUNICE BAILEY	**6th DEFENDANT**
MEDVIN NAOMI DRAKES	**7th DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2020 18th August
Date of Decision: 2020 3rd November (Oral)
Date of Decision: 2021 6th January (Written)

Appearances:

Ms. Lani Daisley, Moore Daisley for the Claimant

Mr. Andrew Willoughby for the 1st and 2nd Defendants

Will – Gift of Life Tenancy - Option to Purchase after Life Tenancy – Life Tenant Predeceasing Testator – Validity of Option to Purchase – Construction of Will and Terms of Option - Exercise of Option to Purchase – Purchase Price of Option versus Market Value of Property

DECISION

Introduction

[1] This Claim was filed in September, 2010 by Calmore Alleyne Marshall against James Frederick Marshall and Ernest Cuthbert Marshall, in their respective capacities as beneficiary and Executors of the Estate of the late George Cuthbert Marshall, deceased. The parties are children of the deceased who died testate in June, 1995, having left a will dated 30th January, 1984. The Claim as initially filed, sought relief by way of removal of the Defendants as Executors, given their failure as at the date of filing of the Claim, to have obtained a grant of Letters Testamentary for their father's Estate.

Whether by reason of the matter having been brought before the Court or otherwise, Letters Testamentary were issued to the Defendants in the Estate of George Cuthbert Marshall, deceased, on the 28th February, 2012. The matter however did not end there.

[2] The Claimant by way of Notice of Application filed in November, 2013, sought a mandatory injunction from the Court to compel the Defendants to execute a transfer of property in respect of which he had been granted an option to purchase under the Will. The Defendants' position in relation to the option to purchase, was that said option had lapsed, given the terms by which it had been granted under the Will. The option to purchase was exercisable subject to a life interest of the Claimant's mother, who had predeceased the testator (the Claimant's father), since 1988. The Defendants' position was that notwithstanding the failure of the option, they were willing to sell the property to the Claimant at a reasonable price. The parties however, had been unable to agree to such a price, therefore the impasse continued. The resolution of that impasse, now forms the subject matter of the Court's decision. The issues to be decided in the case would be better stated after setting out a brief background and the submissions of counsel.

Factual and Procedural Background

[3] The eight (8) parties in this matter are all children of George Cuthbert Marshall, who died testate in Barbados, in June, 1995 ('the Testator'). After much delay, the Testator's Will was admitted to probate in February, 2012. The first and second Defendants (hereinafter 'the Defendant Executors'), are the Executors of and beneficiaries under the said Will, whilst the Claimant and remaining Defendants are beneficiaries. The remaining Defendants were belatedly joined as parties to the proceedings, as required by the Rules applicable to contentious probate proceedings. The Testator had been the owner inter alia, of property situate in Endeavour, St. James which comprised both land and a dwelling house in which he resided with his wife Marie Marshall, the parties' mother.

[4] The Will of the Testator granted an option to purchase that land to the Claimant, however that option was subject to a life interest in favour of Marie Marshall, the Testator's wife. Marie died in April, 1988, thereby predeceasing the Testator. The terms of the life interest and option to purchase were as follows:-

> "I GIVE DEVISE AND BEQUEATH my dwelling house wherein I now live together with the land whereon the same stands to my wife Marie Louise Marshall for and during the term of her natural life and thereafter my son Calmore Alleyne Marshall shall have the option to

> purchase the said dwelling house together with the land at or for the price of half the market value at the date of her death, the said option to be exercised within six months of the date of Letters Testamentary being granted in my estate."

[5] Stated more directly, the Claimant was granted an option to purchase the property therein described. The option was exercisable within six months of the grant of Letters Testamentary to his deceased father's Estate and the purchase price was to be half the market value of the property at the date of Marie Marshall's death. It was evidently expected that Marie Marshall would survive her husband, but she did not. After Letters Testamentary were granted to the Defendant Executors in February, 2012, the Claimant, in accordance with the option granted to him, gave notice to the Defendant Executors (in June, 2012) of his intention to purchase the property. Also, in accordance with the terms of the option, the Claimant sought to purchase the property for three thousand five hundred dollars, ($3500), that sum representing one half the value of the property at the date of Marie Marshall's death.

[6] The entire sum of seven thousand dollars ($7000), was taken from the value of the land attributed to it for purposes of payment of land tax. As stated before, the Defendant Executors declined to enter into the sale based upon the option to purchase.

The Defendants Executors maintained that the option to purchase granted to the Claimant was not valid, by reason of the fact that Marie Marshall did not survive her husband. Their position was that the property formed part of the residue of the Estate, then to be distributed by the terms of the residual devise to the deceased Testator's children, in equal shares. The Defendant Executors maintained that they were willing to sell the property to the Claimant for a reasonable price, however they had been unable to come to an agreement in relation to such a price.

[7] Procedurally, in July, 2014 the surviving siblings who were not initially named as parties to the proceedings, were ordered to be joined as such. Of the five siblings who were added to the proceedings, three of them filed affidavits in response to the Claim in which they essentially lent support to the Claimant as being entitled to purchase the property in the terms provided in the Will. In October, 2018 with the permission of the Court, the Claimant filed an amended Fixed Date Claim which formally incorporated the joinder of the additional siblings and as should have been done, amended the relief sought to include that which had been sought by way of the Notice of Application filed in November, 2013. The Defendant Executors filed separate defences to the amended claim, albeit in identical terms and the matter eventually made its way to a substantive hearing before the Court as presently constituted.

Submissions of Counsel

[8] Counsel for the Claimant considered the issues to be determined as concerning mainly (i) the intention of the Testator in relation to the devise of the property; and (ii) whether the life interest to Marie Marshall failed. Counsel was of the opinion that the Court should seek to construe the Testator's intention in relation to how the option was meant to operate alongside the life interest. Counsel relied on the case of **Grey v Pearson**[1] in support of the approach to be adopted by the court in construing wills. It was submitted that the Testator's intention regardless of whether his wife predeceased him, was for the option to purchase to remain operative for 6 months following the grant of probate. This position was submitted as supported by the fact that the Testator did not amend or revoke his will following his wife's death; nor had he disposed of the property in spite of the fact that Marie had predeceased him by seven (7) years.

[9] In relation to the question of whether the gift to Marie failed upon her death, Counsel referred to the doctrine of lapse and its exceptions both at common law and by statute. For example, sections 75 and 82 of the Succession Act, Cap. 249 of Barbados, both prescribe exceptions to the circumstances in which a gift of an interest in land lapses.

[1] [1857] 10 ER 1216

Section 75 saves a gift from lapse where a beneficiary predeceases a testator, by same falling into residue unless a contrary intention appears in a will; whilst section 82 excludes the operation of lapse in relation to real estate devised with an interest entail or in quasi-entail. In relation to the case at bar, Counsel submitted that the statutory exception provided under section 82 is applicable, given that the Claimant was a child of Marie Marshall, who was alive at the time of Marie's death. Alternatively, it was submitted that the option represents a substitution under the will of Marie's life interest, thereby preventing the lapse of the gift.

[10] Additionally, it was submitted that the principle in **Jull v Jacobs**[2] regarding acceleration of a gift in remainder of a life interest upon the failure of the life interest, applies. Finally, Counsel for the Claimant submits that upon the terms of the will itself, even if were to be accepted that the gift to Marie failed, the option to purchase remained exercisable. In this regard, unlike the circumstances in the case of **Re Hammersley (deceased)**[3] which was relied upon by the Defendant, the exercise of the Claimant's option was not dependent upon Marie Marshall's life interest.

[2] (1876) 3 Ch. D 703
[3] Foster et anor v Hammersley et anor. [1965] 2 All ER 24

In ***Re Hammersley***, says Counsel, the circumstances were the same to the extent that there was an option to purchase which was to take effect subject to a life interest and the life tenant predeceased the testator. However, the condition giving rise to that option was for it to be exercised within three (3) months from either the date of consent [to sell] given by the wife, or the date of her death.

[11] In the instant case, Counsel points out that given that it was exercisable within six (6) months of the grant of Letters Testamentary to the Testator's estate, the option remained in existence upon the testator's death, unlike the situation in ***Re Hammersley***. The option was therefore validly exercised upon the Claimant giving notice in writing to the Executors in June, 2012, of his intention to purchase the property, such notice being within six (6) months of the grant of Letters Testamentary in February, 2012. To the extent that the case of ***Re Hammersley*** engaged the principle regarding gift overs[4], including the exception thereto referred to as the rule in **Jones v Westcombe**[5] , Counsel submitted that the situation at bar does not engage the principle at all given that the condition for exercise of the option was to give notice within six (6) months of the grant of Letters Testamentary.

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[4] Submissions of Counsel, filed 10 August, 2020, para 5 - A gift over on a contingency cannot take effect unless the exact contingency occurs, Theobalds on Wills, 10th Ed. 456.

[5] (1711) 1 Eq Cas Abr 245 – a gift over can nonetheless take effect where the exact contingency does not occur, where it can be implicitly inferred to take effect upon an alternate event.

Counsel for the Claimant therefore maintained that the option to purchase survived the death of Marie Marshall and the Claimant validly exercised his option to purchase in accordance with its terms, namely by giving notice of his intention to purchase, within six (6) months of the grant of Letters Testamentary to the Testator's estate.

[12] Counsel for the Defendants on the other hand was of the firm view that the option to purchase had ceased to be valid upon the death of Marie Marshall. This view was based on the doctrine of lapse, whereby a gift devised by will fails if the beneficiary thereto dies before the testator and thereupon falls into residue or if there is no residual clause in the will, into intestacy. Counsel's position was that the exercise of the Claimant's option was conditional upon the survival of Marie Marshall's life interest in the property. In fact, the exercise of the option depended on the following sequence of events which did not occur:-

(i) Death of the Testator, thereby giving effect to his will of 30th January, 1984;

(ii) Life interest in property devolving unto Marie Marshall;

(iii) Exercise of option to purchase by Claimant within 6 months of grant of Letters Testamentary;

(iv) Death of Marie Marshall.

[13] Instead, Counsel points out that in the sequence of events which did occur, Marie Marshall died first, thereby invalidating the option to purchase. Whilst acknowledging the existence of exceptions to the doctrine of lapse, Counsel submitted that there were only statutory exceptions, none of which assist the Claimant in the case at bar. Counsel submitted that section 75 of the Succession Act, which is read subject to section 83, is relevant to the case at bar as statutory exception to the doctrine of lapse. According to section 75, the property, upon the death of Marie Marshall, fell into the residue of the Testator's estate. Also relevant is section 83 of the Act, which provides in effect that where a beneficiary of a gift under a will dies leaving issue - because there is such issue - that gift will not fail if the beneficiary predeceases the testator unless a contrary intention appears from the will. Counsel considered that the case at bar would be well illustrated by the case of **Re Hammersley**[6].

[14] ***Re Hammersley***, submits Counsel, illustrates the general common law rule pertaining to 'gifts over', namely that '*a gift over on a contingency would not take effect unless the exact contingency happened.'*

[6] Supra, [1965] 2 All ER 24

The case also illustrates the exception to that rule pertaining to gift overs, under the rule in **Jones v Westcombe**[7]**.** That exception enables gifts over (on a contingency) to take effect even where the exact event has not taken place, because it can implicitly be considered to have been so intended. Counsel however pointed out that it was further stated in ***Re Hammersley***, that the exception in ***Jones v Westcombe*** does not apply to options under a will. As regards Counsel for the Claimant's submissions regarding construing the Testator's intention, Counsel for the Defendant submits that no issue as to construction of the Will arises as it is clear and unambiguous. In relation to Counsel for the Claimant's reliance on section 82 of the Succession Act, Counsel for the Defendant submits that this section is inapplicable given that there was no interest entail which was created by the Will.

Discussion and Analysis

Issues

[15] Having briefly stated the background of the matter and the submissions of Counsel, the Court can now set out the issues as seen to arise in the Court's view. In so doing, the Court removes from its consideration, any issue of ascertaining the Testator's intention.

[7] (1711) 24 ER 149

The Court agrees with Counsel for the Defendant that the terms of the Will are clear and unambiguous. The difficulties in relation to the Will arise from the fact of the events which have occurred, insofar as Marie Marshall predeceased the Testator. The Court is also of the view that the terms of the Will under consideration did not create any interest in tail, so that section 82 is not applicable. Further, the Court notes that by the later in time Property Act, Cap. 236[8], interests in tail have been abolished and become interests in fee simple absolute in possession, (subject to certain limited rights of defeasance)[9]. The effect of section 6 of the Property Act on section 82 of the Succession Act, is either an implied amendment or repeal, but in any event the Will did not create an interest in tail to begin with.

[16] The Will bestowed a life interest, an option to purchase subject to the life interest, with a gift in substitution if the option was declined. The issues to be determined are narrowly considered as follows:-

(i) Was the option to purchase the property under the Will valid given that the Claimant's mother, the life tenant, predeceased the Testator?

(ii) If valid, was the option exercised in accordance with its terms and conditions?

[8] The Succession Act, Cap. 249 came into effect on the 13th November, 1975; The Property Act, Cap. 236 came into effect on the 1st January, 1980.
[9] Section 6, Cap. 236.

(iii) If validly exercised, how was the purchase price of the property to be determined?

Issue (i) The validity of the option to purchase

[17] The validity of the option to purchase has thus far been considered by both Counsel with reference to the failure or not of the life interest of Marie Marshall. The Court considers that the key to resolving the situation created by Marie's death, is to first be clear on what an option to purchase is, and the manner in which it operates or subsists, within a will. In **London & South Western Railway Co. v Gomm**[10] the UK Court of Appeal had under consideration whether or not an option to re-purchase land conveyed by the plaintiff railway company was void for remoteness. The court came to the conclusion that the option which was granted in perpetuity, was indeed void, but in coming to that determination, usefully set out the nature of an option to purchase in the following terms[11]:-

> *"The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-*

[10] 1882 20 Ch.D 562
[11] Ibid @ 580-81

> *money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."*

[18] In further consideration of the application of the rule against perpetuities to the option to purchase, it was suggested to the court that the manner of creation of the option (by contract) exempted it from the rule which was a principle in property and not contract law. Jessel MR said as follows[12] in relation to the nature of the interest created by the option:-

> *"It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference. The question is, what is the nature of the interest intended to be created?"*

Inasmuch as the question was posed in relation to the applicability of the rule against perpetuities to the option created by contract, the Court considers that the nature of the interest created by the option to purchase, was clearly acknowledged as being the same, regardless of its mode of creation – namely, whether by contract, devise or voluntary.

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[12] ***London & South Western Ry v Gomm***, supra @ 581

[19] The dictum of Jessels MR was applied in **Re Lander, Deceased. Lander v Lander**[13] which concerned determining the value of an option to purchase for purposes of calculation of estate duty. The property in question was the subject of an option to purchase, at a value of 14,000l, exercisable within a specified period. The option was exercised, and the property purchased from the trustees under the will for the stipulated sum of 14,000l. At the time of the testator's death however, the property was worth over 21,000l, thus the question arose as to the value of the property for purposes of calculation of estate duty. On the way to determining that issue, Cozens-Hardy LJ pondered *'…What is the equitable nature of such an option*?'[14] and referred to ***London and South Western Ry v Gomm***, at the passage referred to above[15] for the answer. He further stated that at the testator's death, the option holder held the beneficial interest in the property as he had '*a right to acquire a freehold estate in the property*' at the set price stated in the will.

[20] Cozens-Hardy LJ further stated in ***Re Lander***, that the defendant (the option holder), was not a devisee and expressly disapproved of **In Re Jolley**[16], in which the option holder was treated as such.

[13] [1951] Ch. 546
[14] Re Lander, supra @ pg 550
[15] Fn 11 supra.
[16] 17 T.L. 244

This observation by Cozens-Hardy can be regarded as obiter, however firm authority on this point can be found In **Re Eve. National Provincial Bank Ltd. v Eve et al**.[17] In this case, a beneficiary under the will therein was bequeathed an option to purchase a certain number of shares at a specified value. The estate was solvent, but the residue thereof was insufficient to pay all debts and other liabilities. The question arose as to the order in which the assets of the estate should be applied in settling its debts and liabilities. It was held that the shares, being subject to the option to purchase, would be the last to be available for payment of debts. More importantly however, it was stated that the option did not amount to a specific bequest of shares, rather it was a right to purchase.[18]

[21] At this juncture therefore, the Court finds that contrary to the approach of both Counsel in the matter, the option to purchase is not a gift, notwithstanding having been bestowed under a will. Instead, insofar as its nature is concerned, the option to purchase is an equitable interest in land which materializes at the date of the testator's death. The rules pertaining to the validity or otherwise of an option to purchase under a will can therefore not be the same as those generally applicable to gifts devised under a will.

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[17] [1956] Ch. 479
[18] Re Eve, supra @ 482-483

This position in relation to the nature of the option to purchase is finally illustrated by **Re Armstrong's Wills Trusts, Graham v Armstrong et al.**[19] In this case, a son was by his father's will granted an option to purchase property, however the property was subject to a life interest in favour of his mother, the testator's wife. The wife survived the testator but exercised a life tenant's statutory power of sale of the property, thereby overriding the option to purchase.

[22] By virtue of the fact that the option was acknowledged as an equitable interest in the land, the son was held to be entitled to follow the proceeds of sale of the property, having upon the death of the life tenant, exercised his option in accordance with its terms. Cohen J. would have stated thus regarding the son's option to purchase:-

> *"The son's right to purchase the land is, I think, in accordance with the decision in London & South-Western Ry. v. Gomm (1), an interest in land."*

The question now arises as to what effect if any, the death of the life tenant Marie Marshall, before the death of the Testator, had on the Claimant's option to purchase the property. This question is one of construction of the terms of the clause of the will itself, (not of the Testator's intention), in relation to how the respective bequests were to operate.

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[19] [1943] Ch. 400

The Testator's intention was clear insofar as he intended to create a life interest of the property in favour of his wife; and in respect of the said property, to provide the Claimant with an option to purchase same after the death of his wife. It is obvious that it was expected that Marie Marshall would have survived the Testator.

[23] The first consideration is that of the life interest to Marie Marshall. In accordance with the general rule, this gift lapsed upon Marie predeceasing her husband. Counsel for the Claimant submits that the statutory exception provided by section 82 of the Succession Act, is applicable thereby preserving Marie's life interest in favour of the Claimant who is her issue. The Court disagrees. Section 82, as already stated applies in relation to devises in tail, which the life interest was not. Section 82 is not applicable to the case at bar and neither is section 83, as the latter concerns a gift to a child or other issue of a testator who predeceases that Testator. Marie was the spouse of the Testator thus the life interest bequeathed to her cannot be the subject of section 83. The gift to Marie Marshall accordingly lapsed upon her death prior to that of the Testator. The question remains however, of what if any, effect the lapse of Marie's life interest had on the Claimant's option to purchase.

[24] Counsel for the Defendant says that the option failed upon the lapse of the life interest, as illustrated by ***Re Hammersley***. Counsel for the Claimant's position is that ***Re Hammersley*** is distinguishable from the case at bar in such a manner that on the terms of the will itself, the Claimant's option remains valid notwithstanding the lapse of the life interest. The Court is therefore obliged to examine ***Re Hammersley***.

(i) In ***Re Hammersley*** the plaintiff was a beneficiary and one of several trustees under his deceased father's will. The will made specific legacies, a residual bequest, as well as declared that no sale of the testator's real estate should be made during the lifetime of his wife, without her consent. By clause 5 of the will, the testator further declared as follows:-

> *"I also direct that on the death of my wife or in her lifetime with her consent in writing my trustees shall give to my son Richard…notwithstanding that he is a trustee hereof the option of purchasing my freehold property known as Edial House with 170 acres of land or thereabouts thereto belonging at the price of £12,000 and that the said option shall be exercisable my notice in writing to my trustees to be given by Richard…<u>at any time within three months from the date of the consent of my wife or the date of her death as the case may be and that if the same shall be exercised then my trustees shall sell the said property to Richard</u>…in fee simple*

at the said price of £12,000, in such manner as Richard…shall direct"

(ii) The testator's wife predeceased him by almost 3 years and upon the death of the testator, the plaintiff sought to exercise the option to purchase by giving notice to the trustees. The trustees filed a summons to obtain the court's decision on whether the option existed at the time of the testator's death. It was described as common ground in that case, that within the circumstances which occurred, the plaintiff had no option to purchase in accordance with the terms of the will. The plaintiff's argument was however that he did still have an option to purchase based on the rule in **Jones v Westcombe**[20].

(iii) The rule in ***Jones v Westcombe*** was described by Plowman J[21] as an exception to the rule generally applicable to gifts over, the latter he extracted from Theobalds on Wills 12th ed. (1963), p 568, in terms that '…*When there is a gift over upon a certain contingency, it will not take effect, unless the exact contingency happens.*' The exception thereto was thereafter described in terms that '…*There is, however, a class of cases where, though the exact event upon which the gift over is to take*

[20] supra
[21] Re Hammersley, supra @ 27

effect does not happen, the gift over must a fortiori have been intended to take effect in the event that happens.'

(iv) Plowman J was very clear that the rule in ***Jones v Westcombe*** was not applicable to that case which concerned an option to purchase, as the rule pertained only to gifts over. After referring to authorities in which the rule in ***Jones v Westcombe*** was applied, Plowman J said

> *'That statement of the exception was expressly approved by the Court of Appeal in In re Fox's Estate and <u>it appears from those passages in Theobalds on Wills and from all the cases to which I have already referred, that the rule in Jones v Westcombe is confined to cases of contingent gifts over. No case has been cited to me, and I know of no cases, where the rule has been applied to any other type of gift, and in particular, so far as I am aware there is no case in which it has ever been applied to an option conferred by a will</u>.*

(v) It was then argued by the plaintiff's attorney that a certain construction in relation to the distribution of the will should be taken in order to enable the option, and in that regard, Plowman J, declined to do so, on the basis that he would be rewriting the terms of the clause which granted the option so as to allow the plaintiff to exercise it.[22]

[22] In Re Hammersley, supra @ 27

[25] As far as the Court understands the decision in ***Re Hammersley***, there was never any doubt that the option to purchase granted by the testator had totally failed, and it was conclusively held that the rule in ***Jones v Westcombe***, insofar as it pertained to gift overs, had no application to an option to purchase. It is accordingly accepted, as contended by Counsel for the Defendant that ***Jones v Westcombe*** is not applicable to the case at bar and would not be so applicable even if ***Re Hammersley*** were to be properly distinguished. The question nonetheless remains as to the validity of the option herein, based on the decision in ***Re Hammersley***. There was no dispute in that case that the option as expressed under the will therein was not valid, therefore, there was no discussion on why it was not valid. There was also no statement or discussion therein which suggested that it was the fact alone of the death of the life tenant, which rendered the plaintiff's option to purchase invalid. In such case, the Court is of the view that there must be consideration of how the respective options in **Re Hammersley** and in the case at bar, are to be construed.

[26] With respect to such construction, the Court agrees with Counsel for the Claimant that the terms of the respective options are distinguishable. The Court finds that the case is distinguishable in the following manner:-

(i) In ***Re Hammersley***, the option to purchase the property was to be given to the plaintiff by the Trustees in circumstances thereafter specified. In the instant case the option has already been granted by the Testator;

(ii) In ***Re Hammersley*** the will contained the stipulation by the testator that no real property was to have been sold without the consent of his wife. There was no such restriction in the instant case;

(iii) Most importantly however, in ***Re Hammersley***, the exercise of the option was expressly tied to either (a) the death of the testator's wife; or (b) consent to purchase given by the wife. Upon the happening of either of those events, the plaintiff was then at liberty to exercise his option by giving notice to the trustees within the stipulated time of three months thereafter. At the time of the testator's death, neither event (a) nor (b) could have occurred, as the wife was already deceased. This is not the same circumstance in the case at bar;

(iv) In the case at bar, the only condition attached to the option is the time within which it was to be exercised. Unlike in ***Re Hammersley***, the exercise of the option to purchase was not dependent upon Marie Marshall's death, or her consent. Upon the death of Marie Marshall the option to purchase remained available to the Claimant exercisable in accordance with the terms of the will. The terms of the will, were that

the Claimant exercise the option within 6 months of the grant of Letters Testamentary to his deceased father's estate, which is exactly what the Claimant did.

[27] With respect to the validity of the Claimant's option to purchase, the Court's position is that whilst the decision of ***In Re Hammersley*** is similar to the case at bar, it is nonetheless distinguishable. The extent of the similarity is (i) the grant of an option under a will, to purchase property; (ii) preceded by bestowal of a life interest in that property; and (iii) the death of the life tenant before the death of the testator of the will. The exercise of the option in ***Hammersley*** was to have been triggered by the death of the life tenant or grant of her consent to purchase, as the plaintiff was required to give notice of his intention to exercise the option within three months of either event. At the testator's death, both events were impossible. In the case at bar the event giving rise to the option to purchase, was the grant of Letters Testamentary to the deceased father's estate. Had Marie Marshall survived the testator's death, it is not that the Claimant would have had to await the death of Marie Marshall to exercise his option to purchase.

[28] The Claimant would have been obliged to give notice of his intention to purchase within six (6) months of the grant of Letters Testamentary and the completion of the sale would thereafter have had to have awaited the death of

Marie Marshall. Support for the distinction as considered by the Court can be found in the case of **Evans v Stratford**[23] (which was not referred to ***In Re Hammersley***). In this case, a testatrix granted a series of options to respective children in a sequenced order of refusal. The property in question was however subject to a life interest to her husband, remainder to her trustees. The options (in sequence) were all to be exercised within 12 months of the death of her husband, however the options had to be carried out by her trustees. The husband predeceased the testatrix by two years. At the testator's death, the first grantee sought to exercise the option and the question arose whether the option remained valid given that the husband had predeceased the testatrix.

[29] After observing that there were in fact two conditions – one being the death of the husband and the other being the vesting of the estate in the trustees, it was stated that[24] (emphasis mine):-

> *"…If she* [the Testatrix] *had simply made a blunder by supposing that her husband must survive her, and had imposed a condition absolutely and simply dependent on the time of his death, the difficulty could not have been surmounted; but here the husband's death is not referred to irrespective of any other event, because I can see upon the whole will that this epoch is spoken of as identical with that when the estate is to*

[23] (1864) 71 ER 416
[24] Ibid @ 418

> *come to the trustees. I entertain no doubt that there is a sufficient indication that the last-mentioned epoch is that to which the will really points, and I hold, not that the condition is in any way to be departed from or relaxed, but that, according to the true meaning of the condition itself, it relates to the vesting of the estate in the trustees, and is strictly fulfilled by a notice within twelve months of that date."*

In the instant case, it can be seen that the *exercise* of the option bore no connection to the death of Marie Marshall. The event upon which the exercise of the option was contingent was the grant of Letters Testamentary to the Executors. It is therefore concluded that the Claimant's option to purchase the property remained valid notwithstanding the death of life tenant Marie Marshall prior to that of the Testator. The questions now arise as to whether the option was validly exercised and what was the purchase price of the property.

Issue (ii) - The exercise of the option.

[30] The exercise of the option is to be carried out in strict accordance with the terms and conditions thereof. Failure to abide by the conditions of purchase result in the failure of the option. The underlying rationale can be derived from the contractual nature of the option once exercised.

Once the option materializes by the death of the Testator, the exercise of the option results in a contract between the estate and the grantee,[25] which must then be performed according to its terms. The extent to which there must be strict compliance with the terms of the option in order for there to be a valid exercise thereof is illustrated by **Dawson v Dawson.**[26] In this case the testator's son was granted an option to purchase a house at a stipulated price, within three (3) months of the testator's death. The son gave notice of his intention to purchase, but failed to pay the purchase price within the three (3) months, therefore the conveyance was not executed by the trustees. It was held that the terms of the option was to complete purchase within three (3) months and having not paid the purchase price within the stipulated time, the son was unable to enforce the option.

[31] This was similarly the case in **Brooke v Garrod**[27] where an option to purchase a portion of an estate was granted to the testator's brother, the terms being notice of intention to purchase within a month of the testator's death, in addition to payment of the purchase price within two months of the notice of intention. On death of the testator, the brother gave his notice of intention to purchase within the stipulated one month and requested an abstract of title.

[25] Talbot v Talbot [1968] Ch. 1 @ 10 per Harman LJ.
[26] 1837 8 Sims 346
[27] (1857) 44 ER 911

He did not obtain the abstract of title and the purchase was not completed within the two months after the notice of intention was given. The option (therein referred to as a right of pre-emption), was held to be lost, having not been performed in strict accordance with its terms. On appeal, the Court was urged to consider that the contract borne out of the option was in two parts – the first to notify within the specified time; and the other to pay within the specified time. In relation to the latter, given that the son had requested an abstract of title and not received, it, the failure to complete was not of his doing and he should still be entitled to enforce the option.

[32] Cranworth LC disagreed and upheld the decision below that the terms of the contract were that the purchase price was to be in the hands of the trustees within two months of the notice of intention to purchase[28]. The failure to provide the abstract of title did not prevent the provision of the purchase price and to hold otherwise would have been to rewrite the will of the testator. Against these authorities[29], the Court observes that the Claimant was required by the terms of the option herein, to notify of his intention to purchase the property within six (6) months of the grant of Letters Testamentary to the Executors (the 1st and 2nd Defendants).

[28] Brooke v Garrod supra, @ 914
[29] Cf **In Re Avard, Dec'd. Hook v Parker, [1948] Ch. 43 @ 48-49**

The Letters Testamentary were issued to the Executors on the 28th February, 2012 and the Claimant gave notice of his intention to purchase the property on the 6th June, 2012. Unlike the examples of ***Dawson*** and ***Brooke v Garrod***, there was no further stipulation regarding a time for completion of the purchase, therefore it is concluded that the Claimant validly exercised the option to purchase upon giving his notice to the 1st and 2nd Defendants of his intention to purchase, in June, 2012.

Issue (iii) – The purchase price of the property

[33] As stated before, the option to purchase, when exercised, becomes a contract between the grantee and the estate,[30] thus like any other contract, there could be failure on the basis of uncertainty as to its terms. In this particular case, an issue has arisen by virtue of the terms of the option in relation to the purchase price. The option provided for the property to be purchased at one half the value of the property at the date of Marie Marshall's death. Marie predeceased the testator, however it has already been determined that the option to purchase remained valid. Where the price of purchase is fixed by the will, there is usually no difficulty.

[30] Talbot v Talbot fn 23 supra

However, as the evidence in this case reveals, discord in this matter arose because whilst the Executors were willing to sell the property to the Claimant (albeit not under the option), they were demanding a more current market value as the purchase price, than that which existed in 1988 when Marie Marshall died. According to the affidavit evidence, by virtue of certification for land tax, the value of the land when Marie Marshall died was $7000, thus the Claimant was seeking to purchase same in accordance with the option, for $3500.

[34] The refusal of the Executors was humanly understandable, however the law as far as the Court has ascertained is on the side of the Claimant. In **Sudbrook & Trading Estate Ltd. v Eggleton** [31] an option to purchase the reversion of a lease was granted at a price expressed as 'not less than £12,000, to be agreed by two valuers, one each nominated by the parties, in default of such agreement by an umpire appointed by the valuers.' Upon exercise of the option by the lessees, the lessors refused to appoint a valuer and the lessees sued inter alia, for specific performance of the option. It was held at first instance that there was a valid machinery by which the purchase price of the option was to have been ascertained and as such the option was enforceable.

[3131] 1983 AC 444

The Court of Appeal allowed the lessors' appeal, finding that a court could not compel someone to appoint a valuer nor enforce an incomplete contract.

[35] The lessees appealed to the House of Lords, which held that on the true construction of the option, the price was one capable of being ascertained by an objective standard, in accordance with clear and certain machinery. The agreement therefore amounted to a complete contract which was capable of being enforced[32]. By way of example more relatable to the case at bar, reference is made to **In Re Fison's Will Trusts, Fison v Fison.**[33] In this case, the testator granted an option to his sons to purchase shares held in several companies, at par value. After the testator's death, the companies in which the shares were held went through a number of restructuring and changes which resulted in changes in the type of shares held and an increase in their value. A question arose as to what value was to be appended to the shares upon the exercise of the option by the sons.

[36] It was held that a distinction was to be made between an option to purchase at a fair price and one to purchase at a specific price *or* mechanism by which the price was to be determined.

[32] Ibid @ 479 per Lord Diplock & 483-484 per Lord Fraser of Tullybelton.
[33] [1950] Ch. 394

In spite of the changes which had occurred in relation to the shares, the sons were entitled to the par value of the shares at the date of the testator's death. The terms of the option were found to be clearly intended to confer a bounty on the sons, given the specification of the mode of value of the shares, as opposed to prescribing purchase at 'a fair and reasonable price'. In this case, by stipulating the purchase price to be one half the value of the property at the time of Marie Marshall's death, the testator similarly fixed a mechanism for determining the purchase price thereof, which was capable of being ascertained. That Marie Marshall predeceased the testator is considered by the Court to be irrelevant; that there will be a significant difference between the value in accordance with the option and the current market value of the property, is likewise considered irrelevant. Based on the evidence before the Court, the value of the property at the time of Marie Marshall's death was $7000. The purchase price in accordance with the terms of the option, was therefore $3500. The Executors are obliged to convey the property to the Claimant for the sum of $3,500, the option having been validly exercised.

Disposition

[37] The Claim is disposed of in favour of the Claimant and in the following manner;-

(i) The option to purchase the property comprising land with a dwelling house thereon situate at Endeavour, St. James, Barbados, granted to the Claimant by his deceased father George Cuthbert Marshall remained valid at the date of the latter's death, notwithstanding that Marie Marshall predeceased the said George Cuthbert Marshall;

(ii) The Claimant validly exercised the said option to purchase by giving notice to the Executors (the 1st and 2nd Defendants herein), on the 6th June, 2012, of his intention to purchase the said property;

(iii) The Claimant is entitled to purchase the property and the 1st and 2nd Executors are accordingly forthwith obliged to convey the property to the Claimant for the sum of $3,500.00; and

(iv) The Claimant is entitled to his costs against the 1st and 2nd Defendants to be assessed if not agreed.

Shona O. Griffith
Judge of the High Court
of Barbados