hope however he will be able to recover the purchase price from Elba who has impressed me as thoroughly dishonest. There will be judgment for the defendant with costs.

Suit dismissed.

JABER *v.* RADAR

SUPREME COURT (Beoku-Betts, J.): March 2nd, 1951
(Civil Case No. 75/50)

[1] **Civil Procedure — pleading — matters which must be specifically pleaded—condition precedent—due performance presumed if non-performance not pleaded:** Where one of the parties to an action intends to contest the performance of a condition precedent, he must, under O.XVI, r.10 of the Supreme Court Rules, 1947, state specifically what that condition is and plead its non-performance; otherwise its due performance will be presumed (page 104, lines 16–20).

[2] **Civil Procedure—pleading—defence—want of notice—defence must be specifically pleaded:** Questions of notice or time are matters which are conditions precedent to a right of action and therefore must be pleaded specifically under O.XVI, r.10 of the Supreme Court Rules, 1947 (page 104, lines 3–13).

[3] **Civil Procedure — pleading — matters which must be specifically pleaded—defence of want of notice:** See [2] above.

[4] **Equity—relief against forfeiture—court has discretion to grant relief —conduct of tenant to be considered—relief not granted where landlord's title impugned or tenant continues breach of covenant:** The court has a discretion in deciding whether relief against forfeiture should be granted in a particular case, and in doing so must consider the conduct of the tenant: relief will be refused if he impugned the landlord's title in a way which amounts to a disclaimer or renunciation of the relationship between them, or if he continues in breach of covenant (page 104, lines 30–33; page 106, lines 7–27).

[5] **Evidence—presumptions—presumption of law—omnia praesumuntur rite esse acta—condition precedent—due performance presumed if non-performance not pleaded:** See [1] above.

[6] **Land Law—fee simple—incidents—estate confers all rights of ownership and transfer subject to existing interests or tenancies not inconsistent with freehold:** A fee simple estate, being the most extensive in quantum and the most absolute in respect to the rights it confers of all estates known to the law, confers the lawful right to exercise over, upon and in respect of the land every act of ownership imaginable, including the right to commit unlimited waste and the

absolute right of alienation *inter vivos* and of devise by will; but a purchaser's interest does not override or disregard interests or tenancies created by previous owners which are not inconsistent with the freehold (page 101, line 30—page 102, line 11).

[7] **Landlord and Tenant—determination of tenancies—forfeiture—relief against forfeiture—court has discretion to grant relief—conduct of tenant to be considered—relief not granted where landlord's title impugned or tenant continues breach of covenant:** See [4] above.

[8] **Landlord and Tenant—repair, fitness and alteration—tenant's liability for alteration—breach of covenant to repair for tenant to open and keep open partition without landlord's consent:** It may be a breach of a covenant to repair for a tenant to open a partition without the landlord's consent and to keep it open after being requested to close it (page 103, lines 13–22).

[9] **Landlord and Tenant—repair, fitness and alteration—tenant's liability for repair—covenant to repair performed if tenant keeps premises reasonably and substantially in repair—not sufficient to employ competent persons who do not execute repairs properly:** A covenant to repair is performed if the tenant keeps the premises substantially in repair and does all that he reasonably ought to do, and whether he has done so or not is always a question of fact; but it is not sufficient performance for the tenant to employ competent persons who fail to execute the repairs properly (page 103, lines 6–11).

The plaintiff brought an action against the defendant to recover possession of certain premises.

The defendant was the tenant of premises which were sold by the owners to the plaintiff, who had previously been the defendant's sub-tenant. Under the terms of the defendant's lease he covenanted that he would "substantially maintain and keep in good condition and repair" the leased premises. The defendant failed to carry out his obligations under the lease and also failed to rectify matters when notice to repair was served on him by the plaintiff. The plaintiff instituted the present proceedings against the defendant to recover possession of the premises occupied by the defendant.

The defendant, who in giving evidence impugned the title of the plaintiff, contended that the plaintiff was not the fee simple owner of the premises, that no breaches of covenant had been committed, that no sufficient notice of repair was given by the plaintiff, and that in any event he was entitled to relief from forfeiture of the lease.

Cases referred to:

(1) *Doe d. Vickery* v. *Jackson* (1817), 2 Stark. 293; 171 E.R. 651.

(2) *Doe d. Gray* v. *Stanion* (1836), 1 M. & W. 695; 150 E.R. 614.

(3) *Doe d. Pittman* v. *Sutton* (1841), 9 C. & P. 706; 173 E.R. 1019.

(4) *Evelyn* v. *Raddish* (1817), 7 Taunt. 411; 129 E.R. 164.

(5) *Gange* v. *Lockwood* (1860), 2 F. & F. 115; 175 E.R. 984.

(6) *Horsey Estate Ltd.* v. *Steiger,* [1899] 2 Q.B. 79; [1895–9] All E.R. Rep. 515.

Legislation construed:

Supreme Court Rules, 1947 (P.N. No. 251 of 1947), O.XVI, r.10:

"Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and subject thereto, an averment of the performance or occurrence of all the conditions precedent necessary for the case of the plaintiff or the defendant shall be implied in his pleading."

Betts for the plaintiff;
R.B. Marke for the defendant.

BEOKU-BETTS, J.:

This action was expedited for hearing and short-notices of hearing given and received at the consent of the parties. The hearing came up soon after an interlocutory matter was disposed of by me. Although the interlocutory mater did not have anything to do with the issue involved in the action, I considered that some other judge should try the case. Counsel for the parties suggested I should try the case and expressly stated that they would have no objection to my doing so. It so happened no other judge was available at the time of trial and until its conclusion, as Mr. Justice Kingsley had gone to the Protectorate to hold sessions of the court, or left during the progress of the case, and Mr. Justice Wright was a witness in the case and was called to give evidence.

The main issues as alleged in the statement of claim are as follows:

1. That, by a lease dated September 25th, 1936, one Marian Taylor leased premises at No. 6 Garrison Street and No. 44a Little East Street to the defendant. By the lease the defendant agreed "substantially to maintain and keep in good condition and repair" the premises in the lease.

2. That by the lease it was agreed that on a breach of the covenants the lessor should have the right to re-enter the premises and determine the lease after one month's notice.

3. That the plaintiff on July 22nd, 1948 purchased the premises from Marian Taylor and thereby became the owner.

4. That, the defendant having broken the condition of the lease, a notice was served on the defendant to do certain repairs within a month. The defendant failed to do this and thereby forfeited the lease.

The defendant admitted the making of the lease but denied that the terms of the covenant to repair were correctly stated in the statement of claim, although he did not state in what way they were incorrect. The defendant also denied that he had committed any breach of the covenants to repair, and stated that he substantially maintained the premises and kept them in repair in accordance with the covenant. The defendant then counterclaimed that if, contrary to what he contends, it should be found that he committed any breach of the covenants of the lease to repair, he should be relieved from forfeiture under s.14 of the Conveyancing and Law of Property Act, 1881, as the court may think fit.

Counsel for the plaintiff further claims that the defendant has disavowed the rights of the plaintiff landlord and on that ground alone the plaintiff should succeed.

The matters which I consider necessary for consideration may conveniently be stated as follows:

1. Whether the defendant has committed a breach of the covenants of the tenancy.

2. Whether notice has been given as required by the lease.

3. Whether, if so, the defendant failed to do the repairs and thereby forfeited the lease.

4. Whether, if the defendant failed to do the repairs, the court should grant relief from forfeiture.

5. Whether, as alleged by the plaintiff, the defendant has done anything which may be said to be disavowing or disputing the title of the landlord and, if so, what is the effect in law.

On the first question, whether the defendant has committed a breach of the covenants of the lease, it is necessary to consider the allegations and to come to a decision on the facts. By a lease dated September 25th, 1936, made between Marian Taylor of the one part and Abdul Radar of the other part, the defendant covenanted by para. 61 that he—"will at the like expense (his own expense) during the said term well and substantially maintain and keep in good condition and repair the said dwelling-house and shop-

basement and all other buildings which shall be built upon the said parcel of land . . . ."

By Exhibit B dated September 6th, 1946, the plaintiff took a sub-lease of a portion of the premises from the defendant, namely, part of the shop comprising four doors in Little East Street and one door in Garrison Street, being a portion formerly let out to Kassim Basma with one bedroom on the first floor, for a term of four years. By Exhibit F dated October 7th, 1948, the plaintiff bought the freehold of the whole of the premises from Marian Taylor and two other persons. By this act, in my opinion, the plaintiff became the freehold owner of the whole of the premises, subject to the lease granted by Marian Taylor to the defendant, and the defendant was the lessee of the portion of the premises over which he held a lease from Marian Taylor.

It is this right which the plaintiff acquired in the freehold that the plaintiff seeks to enforce in the action by claiming the forfeiture for breach of covenant. This action is apparently complicated by the fact that after Marian Taylor granted a lease of what was then described as the whole of the premises by Exhibit A, the plaintiff took out a lease of part of the premises (part of which was so granted) from the defendant by Exhibit B. It has therefore been said, and with some vehemence, that while the defendant is a lessee of the plaintiff, by virtue of Exhibit F the plaintiff is also a lessee of the defendant of a portion of the premises. But a proper consideration of the matter will show what is the real and proper legal position of the parties and reduce the position to one of simplicity. When the plaintiff acquired by purchase the freehold of the property, he received what in law is the highest interest possible in the land. As stated in *Cheshire's Modern Real Property*, 5th ed., at 115 (1944):

> "Extent of ownership. A fee simple estate is and always has been the largest estate known to the law, and it is now more than ever clear that it is practically equivalent to the absolute ownership which obtains in the case of personal goods."

In *Cheshire*, at 116, the remarks of *Challis's Real Property*, 1st ed., at 218 (1911), are referred to as follows:

> "A *fee simple* is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates known to the law.
>
> It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect of the land, every act of ownership which can enter

into the imagination, including the right to commit unlimited waste. . . . Besides these rights of ownership, a fee simple at the present day confers an absolute right, both of alienation *inter vivos* and of devise by will."

Although the plaintiff by the purchase acquired the highest interest in the land, that did not override or disregard interests or tenancies not inconsistent with the freehold. Just as a freehold owner may himself grant a lease which recognises the right of the lessee to exercise rights over the land not inconsistent with the right of the owner, so rights created by previous owners continue with the same condition.

The defendant has the right to enforce the lease held from Marian Taylor to the extent that she had properly created it. The new owner is bound by such lease subject to the right of enforcing his rights on any breach. When Exhibit B was made, neither party was the freehold owner of the property. Subsequently the plaintiff bought the freehold. In my opinion he would not be bound by any diminution of his freehold. The defendant has not denied his liability to do repairs on the premises nor his liability if he failed to do so. He however pleads that there were no breaches of covenant and, if there were any, that he has done all the repairs complained of. By Exhibit C, the plaintiff specified several breaches complained of and evidence was given by two witnesses (O'Conor and Henry Brookfost Taylor, chief building inspector) as to the condition of repair. The defendant himself and the second defence witness (Bangura) gave evidence as to what was done to put the premises in a good, substantial and proper state of repair.

[The learned judge reviewed the evidence of the parties and their witnesses, inspected the *locus in quo*, and then continued:]

I have reviewed at length the evidence on this question as to whether the defendant has failed to carry out his obligations under the lease. It should be recollected that the premises were built by the defendant, and according to Exhibit A, para. 2(b) he was to build a good and substantial dwelling-house and shop-basement with proper and sufficient out-buildings and conveniences. Then under the same exhibit (para. 2(b)) he was to "well and substantially maintain and keep in good condition and repair the said dwelling-house and shop-basement and all other buildings which shall be built upon the said parcel of land." The defendant cannot be liable in this action for any defect in the building, but only for failure to

"substantially maintain and keep in good condition and repair" the premises, and my decision is confined to this aspect of the case.

What I have to consider is whether the defendant has fulfilled his obligations under the lease. I have to bear in mind the principles in Williams & Yates, *Law of Ejectment*, 2nd ed., at 92 (1911):

> "The covenant to repair is performed if the tenant keeps the premises *substantially* in repair, and does all that he reasonably ought to do in performance of the covenant; it is always a question of fact whether he has done so . . . . It is not sufficient for the tenant to have employed competent persons to do the repairs if they have not in fact executed them properly."

See *Evelyn* v. *Raddish* (4) and *Doe d. Pittman* v. *Sutton* (3).

A question arose as to whether a partition was opened with the consent of the original landlord. She denied that she gave any such consent. O'Conor, a witness for the plaintiff and the person who built the house, said that the original owner did give such consent. Since the defendant continued to keep the partition open after he had been requested to close it by Exhibit C on November 23rd, 1949, the cases of *Doe d. Vickery* v. *Jackson* (1) and *Gange* v. *Lockwood* (5) are authorities that the opening of a doorway and keeping it open may in principle be a breach, and in this case is a breach, of the covenant. I was impressed by the evidence of Marian Taylor that she never gave consent to the opening of the partition. O'Conor is a witness for the plaintiff, but I cannot say he impressed me to the same extent. Using my own judgment on the evidence, I am satisfied Marian Taylor never approved of the opening of the partition. The defendant found the money and instructed his builder (O'Conor) to open the partition. Even if she did, when the plaintiff gave notice that it was a breach of the covenant of the lease to continue to leave it open, the defendant should have acted on it. His continuing to keep it open is a legitimate ground of complaint.

This apart, the question I have to decide is whether, taking the whole of the evidence in this case, I can come to the conclusion that the defendant has well and substantially maintained and kept in good condition and repair the premises according to the lease. I have reviewed, as I stated, the whole evidence, and I have come to the conclusion that the defendant has failed to carry out his obligations under the lease and I find he has not substantially kept the premises in repair as required by the covenant.

It was then stated during the address that the notice to repair was

not in accordance with the agreement in that notice required by Exhibit A was for three calendar months and the defendant was given one month. This question was not raised in the pleadings. The defendant could have raised the point by his pleadings, and not having raised it he is taken to have waived it. The case proceeded to trial as if this point had not arisen. The defendant pleaded that he had done the work and then pleaded relief from forfeiture. In fact he went further and pleaded that there was no breach of the covenant and stated that he had well and substantially maintained and kept the premises in accordance with the covenant. Questions of notice or time are matters which are conditions precedent to the right of action, and therefore they should have been pleaded specifically: see *Horsey Estate Ltd.* v. *Steiger* (6), *Hill & Redman's Law of Landlord and Tenant,* 10th ed., at 426, para. 357 (1946), the Supreme Court Rules, 1947, O.XVI, r.10, and the English Rules of the Supreme Court, O.XIX, r.14. The cases quoted state that it is for the defendant, if he contends that there was a condition precedent and that it has not been duly performed, to state specifically what that condition is and to plead its non-performance; otherwise its due performance will be presumed.

In the circumstances of this case, the defendant, if ever there was a condition precedent, has waived it. If this question had been pleaded, the court would have had to consider whether the notice given was reasonable: see *Horsey Estate Ltd.* v. *Steiger* (6). The notice in this case was given on February 22nd, 1949 and the writ issued on February 22nd, 1950. That surely was reasonable notice. The defendant must have regarded it as such for he did the work within 15 or 16 days. The matter I have dealt with only out of abundant caution as it does not arise in the pleadings.

The next question is whether this is a case in which relief against forfeiture should be granted by the court. This is a discretion which must be exercised judicially. In doing so, the conduct of the defendant must be considered. Counsel for the plaintiff submits that relief should not be granted, for by his action the defendant would ordinarily forfeit any right he had under the lease; the defendant has impugned the title of the plaintiff. When the plaintiff was re-called to give evidence, counsel for the defendant asked this question: "What are your title deeds doing with the bank? Are the premises mortgaged to the bank?" I disallowed this question since the defendant as tenant is bound to accept the title of the plaintiff. At the close of the case for the plaintiff counsel

for the defendant submitted there was no case to answer, and in argument said that Exhibit A is a lease between Marian Taylor and the defendant, and that Exhibit F was a conveyance between Marian Taylor and two other persons and the plaintiff. He then said that when the plaintiff bought the property he took over the rights of Marian Taylor, and therefore all the plaintiff could enforce is one part share of the interest in the property. He stated that when the plaintiff claims re-entry into the whole property, he must fail as his rights are limited to those of Marian Taylor.

With all respect to counsel for the defendant, I must state that the contrary is the case. The position is that the defendant took a lease of the property from Marian Taylor. Later the defendant bought the property with two others. In fact he acquired not only the interest of Marian Taylor but the interests of two other persons. If any person failed to have the full interest in the property, it is not the plaintiff but the defendant. The defendant took a lease from Marian Taylor. From Exhibit F Marian Taylor had only one-third share of the property and that the defendant took; but when the plaintiff acquired the property he acquired not only the one-third share of Marian Taylor but the whole of the property. So that it is the defendant who, having the lease under or from Marian Taylor, has only a one-third share of the property, while the other two-thirds remained in the other persons who sold to the plaintiff at the time Marian Taylor sold her one-third share.

At the close of the case for the defendant, counsel again referred to this question and stated that the lease was between Marian Taylor and the defendant; that by Exhibit F Marian Taylor appeared to have had only one-third share while the other two-thirds shares were in some other persons. When I reminded counsel of the risk he was running, he stated that he was not questioning the title of anyone, but in effect that was what he was doing. Title under the lease was from Marian Taylor, and whether Marian Taylor had the whole interest or only a portion the defendant could not dispute the title and could not properly contend that Marian Taylor had no title she could convey to the plaintiff. But it so happens that the plaintiff's title was based not only on the deed of Marian Taylor but also on the sale of the other two-thirds interests by the two other persons. The defendant's counsel, with all respect to him, completely misconceived the position. It was his client who had only a one-third interest in the property as he derived title only from Marian Taylor, but not from the two other co-owners of the property.

In this matter where the defendant, who had only an interest as a lessee in a one-third share of the property, is asserting that since the plaintiff who had not only the one-third share of the original owner, but also the two-thirds shares of the two co-owners, was attempting to question the right of the plaintiff, he must be regarded as doing an act which this court must view with disfavour. If the defendant relies on the discretion of the court, his conduct must be such as entitles him to favourable consideration. The action of the defendant does not in my opinion place him in this category. After considering not only the attitude of the defendant by the act of his solicitor, but also from the nature of the breach proved and the failure to repair them I am of the opinion that this is not a case where the defendant should be relieved from forfeiture. Up to the time the court inspected the premises, from the evidence given, the property showed grave breaches of covenant. Forfeiture cannot be relieved against when the complaint continues as in this case.

Counsel for the plaintiff further stated that even if there had been no breach of covenant, the defendant having impugned the title of the plaintiff the plaintiff was on that ground entitled to forfeiture. I am of the opinion, as I have already stated sufficiently, that the defendant has committed a breach of the covenant and that the case is not of a nature that he should be relieved against the effect of forfeiture. But I propose to consider whether the allegations about impugning the title of the plaintiff are further grounds for forfeiture. To be sufficient to affect a lease the defendant must have committed an act which amounts to a disclaimer or renunciation of the relation of landlord and tenant: see *Redman's Law of Landlord & Tenant*, 6th ed., at 523 (1912). The contention of the defendant through his solicitor is that the plaintiff could not maintain this action as Marian Taylor only had a one-third share of the property, and that the plaintiff also could have only a one-third share of the property. As I pointed out before, if Marian Taylor had only a one-third share and conveyed that one-third to the plaintiff, and the plaintiff in addition bought the two-thirds share from some other persons, the plaintiff then had the whole share himself, and for his tenant to maintain that he had not the whole of the fee simple interest and to set up that portion of the interest in property in some other person is in my opinion setting up title in some other person. This is contrary to law: see *Redman*, at 524, and *Doe d. Gray* v. *Stanion* (2).

To sum up, therefore, I find that the defendant committed serious

breaches of the covenant of the lease, that he did some of the repairs complained of but left others which seriously support the claim of the plaintiff. From the nature of the breach and the continued want of repair I do not consider this is a proper case where the defendant should be relieved from forfeiture.

As I stated, this should be sufficient ground for the plaintiff to succeed, but I find further an additional ground that the defendant has impugned the title of the plaintiff. I therefore order that the plaintiff should recover possession of the premises. On the claim for mesne profits, the plaintiff is entitled to the rent due from the date the action was instituted on this claim, that is, February 22nd, 1950, at £4 a month to the date possession was recovered. The defendant is to pay the costs.

Judgment for the plaintiff.

RADAR *v.* JABER

SUPREME COURT (Beoku-Betts, J.): March 9th, 1951
(Civil Case No. 348/50)

[1] **Land Law—adverse possession—owner in possession unaffected by adverse possession—entry on land by owner vests actual possession in him notwithstanding adverse claimant:** If the owner of property is in possession of it, no person with any adverse possession can eject him, and no tenant can claim any right which will have the effect of putting him out of possession; and entry on the land by the person who is entitled to the freehold vests in him for legal purposes the actual possession, and consequently the seisin, notwithstanding that an adverse claimant is on the land (page 113, lines 18–24).

[2] **Land Law—title—merger—lesser estate merges into greater estate acquired by same person in same land:** Where a lesser and a greater estate in the same land come together and vest, without any intermediate estate, in the same person and in the same right, the lesser is immediately extinguished by operation of law and merged in the greater estate; and this is so whether the estates involved are leasehold and freehold or both leasehold (page 111, lines 19–34; page 112, lines 9–24).

[3] **Landlord and Tenant—determination of tenancies—remedies of tenant—equitable relief or damages but no right to eject landlord:** While the person having the freehold of certain property has the right to terminate any leasehold interest in the property under the lease, the