[18] On November 12, 1981, the solicitors for the Appellant replied stating that they were of the view that Barnieh could not deliver an agreement for sale which complied with the offer to purchase until the option had been exercised and accepted by the current registered owner. The letter further indicated that unless satisfactory confirmation of the status of title was obtained, an action for specific performance was to be commenced.

[19] On November 16, 1981 Barnieh's solicitors responded repudiating the agreement on the basis that the $600,000 was not "tendered pursuant to the offer to purchase".

[20] 259202 then commenced an action for specific performance of its agreement for sale against Barnieh and in the alternative asked for damages. The claim for specific performance was abandoned. Barnieh defended and counterclaimed for a declaration that the $200,000 deposit paid by 259202 was liquidated damages and asked for additional damages and discharge of the caveat filed by 259202.

[21] The learned Trial Judge gave judgment declaring that Barnieh was entitled to retain the $200,000 deposit as damages and that the caveat of 259202 was to be discharged. The claim of Barnieh for damages for the failure of 259202 to withdraw its caveat was reserved.

[22] 259202 appealed on the following grounds:

> "A. The Learned Trial Judge erred in failing to find that the clear and unequivocal language of the Offer to Purchase between 259202 and Barnieh dated April 29, 1981, required Barnieh to be the registered owner of the property at the time of closing of the agreement on October 1, 1981.
>
> B. Alternatively, the Learned Trial Judge erred in holding that the right to the land held by Barnieh on October 1, 1981 was sufficient to compel 259202 to close."

[23] I shall consider firstly the argument of counsel for Barnieh that Barnieh was not required to exercise the option until such time as would allow it to transfer clear title "upon payment in full of the Agreement for Sale, not later than April 30, 1982" (supra) and that there was no obligation on its part to have exercised its option and be the registered owner on October 1, 1981, the date of closing under the agreement of April 29, 1981.

[24] In support of this position the following cases, which refer to the Vendor's ability to compel a conveyance in order to have title by completion, were quoted:

[25] In The Universal Land Security Co. Ltd. v. Jackson et al [1917] 1 W.W.R. 1352 Beck, J. stated at 1355:

"The purchaser under an agreement of sale of lands can repudiate the contract for want of title in the vendor at any time before the vendor has acquired or placed himself in such a position that he can enforce a right to acquire a title according to the exigency of the agreement. Nimmons v. Stewart, 1 Alta. L.R. 384, per Beck, J.; Graves v. Mason, 2 Alta L.R. 179; 8 W.L.R. 542, per Stuart, J.; Reeve v. Mullen, 6 Alta L.R. 291, 5 W.W.R. 128; 25 W.L.R. 445, Court En Banc.

This rule is perhaps subject to an exception in case there is a want of title only to so comparatively a small portion of the subject matter of the sale that the Court would hold it to be a case of compensation.

If the objection to the title relates only to some defect in the title, as distinguished from an absolute want of title, or relates to a want of title to only such a comparatively small portion of the subject matter of the sale as above mentioned, then the vendor has until the time at which he is bound to show title to perfect the title in the one case, or to acquire title to the small portion in the other, before the purchaser can repudiate; and where the case is one for compensation, and compensation is offered, presumably he could not repudiate.

Under our common form of agreement for sale and purchase of land for a price payable by installments, where a transfer is to be given on payment of the purchase money in full, the purchaser is entitled to demand of the vendor, before he pays any deferred installment, that the vendor show that he has a good title or can compel a conveyance to himself so as to have a good title at the maturity of the last installment."

[26] In the above quotation I have underlined the words "as distinguished from an absolute want of title". Until the option is exercised there is a want of title but I do not think Beck J. necessarily had in mind whether an option would constitute a want of title.

[27] In Goodchild v. Bethel (1914) 7 W.W.R. 832 (Alta. S.C.A.D.) Beck, J. giving the majority judgment of the Alberta Appellate Division said at p. 835:

"A good title is shown if although the vendor is not in fact the registered owner he is entitled to compel a transfer to him. It is good even if subject to encumbrances even though exceeding the purchase price provided the encumbrancee is compellable to take his money by the time a good title is to be proved. See Williams, Vendor & Purchaser, 2nd ed. pp. 164, et seq. Fry, Specific Performance, 5th ed., s. 1385.

When the time for completion of the contract by transfer by the vendor and payment of the purchase money by the purchaser arrives both must be ready to fulfil these mutual obligations, subject I think to this, that in a proper case the purchaser will be ordered or permitted to pay his money into court for the purpose of discharging encumbrances against the land. This I think is the settled practice of this court. If either is not ready at the time fixed, or appointed, a time may be fixed by a notice to the other fixing a reasonable time for completion and making time of the essence (Williams, Vendor & Purchaser, pp. 579; 1035-6) on non-compliance with which the party giving the notice may call the contract off."

[28] In the above as well as in the case of Universal Land Beck, J. was dealing with the situation in which the person sued was entitled to the lands under an agreement for sale from the registered owner and was entitled to compel a transfer upon payment.

[29] In Goodchild v. Bethel it was further stated that the purchaser could pay his purchase price into Court to protect himself in respect of the discharge of the mortgage. There was no provision in the agreement for 259202 to pay the installment of $600,000 into Court to protect itself in case the option was not exercised.

[30] These cases differ from the case at bar in that Barnieh was entitled to the property under a lease option agreement but only to a title if it complied with the terms of the option by making the required payments. Under an agreement for sale the purchaser has an equitable title to the lands subject to complying with the terms of the agreement while under an option he has an equitable interest but not an equitable title. (See Canadian Long Island Petroleums Ltd. et al v. Irving Industries Ltd. (Irving Wire Products Division) et al (1974) 50 D.L.R. (3d) 265 (S.C.C.).

[31] These positions may be quite different. For instance, if the purchaser does not comply with the terms of an agreement for sale he may be entitled to come to court and obtain terms for relief. Such is not the case with an optionee. Unless he complies strictly with the terms of the option the optionee cannot obtain the land. An optionee has a much more precarious position than a purchaser under an agreement for sale.

[32] In my opinion, the ratio decidendi in the Alberta cases I have quoted do not cover the situation here. Those holding under agreements for sale and those holding under options are not in the same position. The purchaser under an agreement for sale may be protected by the Court by making his payments into Court until such time as his title may be assured: Goodchild v. Bethel (supra). But I do not see how the purchaser could be protected in respect of the $600,000 to be paid by him in this case if for some reason the option was not or could not be exercised.

[33] Turning now to the submission of counsel for 259202 that the agreement between Barnieh and 259202 required the exercise of the option by Barnieh before October 1, 1981, the date 259202 was required to make its second payment, the $600,000. In support of the submission, counsel referred to various clauses in the documents of title.

[34] The acceptance clause by Barnieh of the offer stated "We, Barnieh Investments Ltd., being legal owners of the property noted herein hereby agree to the terms and conditions as contained herein." Any lawyer considering this acceptance would not be put on notice that Barnieh had only an option to acquire the property but quite the contrary. When the offer was accepted and the lawyer for 259202 received documents of title and authorized the release of the deposit, he knew that Barnieh had only an option. The first closing date, however, was in October and this provision would tend to make one think that on that closing date Barnieh would have exercised its option and thus acquired legal title according to its representation.

[35] In another clause in the agreement, the Vendor covenanted "... not to encumber the land without the express written consent of the Purchaser". This might well be sufficient if the Vendor were the legal owner of the land. Where it was not the legal owner any purchaser should require a much broader covenant that the land could not be encumbered by Chariot who was the legal owner and by Time who was in possession of the property.

[36] In the offer and acceptance between Barnieh and Time, Clause 3 (supra) provided that, upon closing of the transaction between the parties, transfer of title in freehold fee simple free and clear of all but permitted encumbrances was to be made. Such would require that Time exercise the option before it could transfer title. This was contrary to the later provision in Clause 1(c) (supra) which related to the purchase price and provided that $1,907,583 of the purchase price was to be paid by assumption of the lease and option to purchase. Counsel for Barnieh submitted that this latter provision should prevail. With this I agree. However, this contradiction demonstrates the carelessness with which the documents were drawn. They were not drafted by the firms of the counsel engaged in this case. In fact, some of them may have been drafted by the real estate agents. Except for the original lease and option, it is hard to conceive of a worse set of documents for a property transaction of this magnitude.

[37] There were other clauses referred to by counsel for 259202 as demonstrating his position that it was necessary that Barnieh should have exercised its option before October 1, 1981. However, in view of the conclusion to which I have come, I find it unnecessary to deal with them.

[38] When the first agreement of April 29, 1981 was entered into in the case at bar, there is no evidence that the purchaser, 259202, knew of the state of the title. It was not until May 4th that the documents of title were sent to the solicitor for the purchaser who released

the deposit of $200,000 on the same day. After considering the documents he raised the question of the exercise of the option in his letter of May 6th (supra). Although by releasing the deposit he acknowledged that he knew Barnieh had only an option, this does not settle whether the option should be exercised before the closing date of October 1, 1981.

[39] This is not the case of construing an agreement in which there is an ambiguity where the contra proferentem rule might apply. The agreement simply did not deal specifically with the question whether the option was to be exercised by October 1 when the $600,000 payment was to be made. The problem which faces us is how to construe an agreement containing an option which does not state when the option is to be exercised.

[40] The parties to an agreement which provides for the sale of land may ordinarily make such provisions as to performance as they deem adequate. The parties could have done so in this case but they did not do so. They left the question as to whether the option should be exercised in the air.

[41] I have been unable to discover any cases directly on point nor have any been called to our attention. Although the following quotations are not strictly on point, they create the atmosphere in which I think this case should be decided.

[42] Seaton v. Mapp (1846) 63 E.R. 859 at 862:

> "The Vice Chancellor (Sir J.L. Knight Bruce) said:
>
> 'I do not greatly admire the case on either side; but I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is encumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself.' "

[43] Dart on Vendors and Purchasers (8th ed.) p. 103:

> "Particulars and conditions of sale, if intended to exclude the purchaser from that to which he would otherwise be entitled, must be expressed in clear and unambiguous terms'; if there is any reasonable doubt or misapprenhension as to the meaning, the construction will be in the purchaser's favour."

[44] Harvey, C.J. stated in Greene v. Appleton (1915) 25 D.L.R. 333 (Alta S.C.)at 339:

> "The plaintiffs need not have sold the land they did not own. They might have sold and assigned their interest under the agreement. Then they could have compelled the purchasers to have saved them from their liability and the purchasers could have dealt

directly with the original vendors. They apparently preferred to sell something they did not own."

[45] It was stated in Evernden v. Neuman and Neuman (1958) 17 D.L.R. (2d) 491 (Alta. S.C.A.D.) at p. 501:

> "It seems to me there was no obligation on the appellant to pay any part of the purchase-price until he would be assured that the male respondent could deliver to him, on payment in full, a registrable transfer, that on registration, would result in a title free from encumbrances."

[46] I am of the opinion that, unless there were stipulations in the contract of April 29, 1981 providing that the vendor Barnieh was not required to have exercised its option by October 1, 1981, being the time when it was to enter into the second agreement of sale with 259202 as purchaser, and under which the purchaser was required to make a payment of $600,000, it was required to exercise its option and have title. Having refused to do so, 259202 was justified in repudiating the agreement and having its deposit refunded. The onus is on the vendor to show that, by the the terms of the agreement, it was discharged from such an obligation. Customarily, when a person makes a sale of land he has title to the land, either legal or equitable. This is the common practice. As stated, one entitled to land under an agreement for sale has an equitable title and that is sufficient as one with such title is in a position to compel a transfer and thus obtain legal title. Further, the Court will assist the equitable owner in the protection of his payment. In conveyancing documents, where one party intends to depart from the usual and normal practice, it only makes commercial and legal nous that the party so departing make provision in the document for the aberation so that the other party may so understand the position.

[47] The vendor who has only an unexercised option does not, in my opinion, afford a purchaser the protection he requires and this is not normally what a purchaser and his legal advisers would expect. It is an extraordinary position for a vendor. He could assign the option and then the position of the purchaser would be clear. If he chooses not to follow the customary procedure then it is incumbent on him to provide in the agreement that he is not required to do so. In my opinion, as Barnieh did not do so it was required to exercise its option before October 1, 1981.

[48] The Court has noted the following matters; but, as no argument was directed to them, I make no comment on them:

1. The mines and minerals in lots 1 and 2 were excluded in the Chariot agreement but not in the offer and acceptance agreement between Barnieh and 259202.

2. The original option granted by Chariot required consent before its assignment.

[49] I would allow the appeal and direct that 259202 have judgment for $200,000, the amount of its deposit. The question of interest may be spoken to, 259202 is entitled to costs here and below on the same terms as set by the Trial Judge.

DATED at Calgary, Alberta
this 24th day of April,
1984.

REASONS FOR JUDGMENT OF

THE HONOURABLE MR. JUSTICE STEVENSON

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[50] I have read the judgments of my brothers McDermid and Prowse, JJ.A.

[51] The issue is whether the appellant may repudiate its real estate purchase in the particular circumstances of this transaction. At the time fixed for the closing of a purchase of a fee simple the vendor did not have title. The test is whether the vendor could compel title by the payment of money.

[52] Here the vendor could not, alone, require the registered owner to transfer the fee simple to it. It had the hope or anticipation that Amfac would join in the exercise of the option. If Amfac did not join in the exercise of the option it had the right to claim an assignment of the option from Amfac. If Amfac did not join in the exercise of the option, and neglected or refused to execute an assignment it would, of course, have a cause of action against Amfac. But it certainly could not be said, having regard to the time limitations for the exercise of the option, that the vendor would have been entitled to specific performance as against the original registered owner. In short, the vendor could not, even with the payment of money, compel the registered owner to convey.

[53] I agree with Mr. Justice Prowse that the agreement between the appellant and the vendor Barnieh is not to be read as requiring Barnieh to have a clear title at the time of closing. What was required was that Barnieh show that it could compel a conveyance at the time at which it was required to produce title. That is the requirement established in this

province by *Goodchild v. Bethel* (1914), 7 W.W.R. 832 and *Universal Land Securities Co. Ltd. v. Jackson et al,* [1917] 1 W.W.R. 1352, and it could not meet that requirement.

[54] I therefore concur with Mr. Justice McDermid.

DATED at CALGARY, Alberta
this 24th day of April,
1984.

REASONS FOR JUDGMENT

OF THE HONOURABLE MR JUSTICE PROWSE

[55] I have had the advantage of considering the judgment of my brother McDermid where the facts are set out fully and for that reason I will limit my comments on the facts to those particularly material to the conclusions I have reached. Although this case is a difficult one I have reached the conclusion that the appeal should be dismissed for the reasons set out below.

[56] The appellant, 259202 Alberta Ltd. will be referred to as "the appellant" and the respondent will be referred to as "Barnieh".

(1) The option, set out in the base option agreement between Chariot and Amfac, was assignable with the consent of Chariot such consent not to be unreasonably withheld.

(2) On September 30, 1980 Amfac assigned the lease option, as it applied to the Time land, to Time. This was consented to by Chariot.

(3) On March 24, 1981 Time assigned its lease and option to the Time lands to Barnieh. This agreement read in part as follows:

> "1. PURCHASE PRICE
>
> The total pruchase [sic] price for the Property shall be Three Million and Forty Three Thousand ($3,043,000.00) Dollars to be paid as follows:-
>
> (a) One Hundred Thousand ($100,000.00) Dollars Canadian by way of a deposit to Cowley & Keith Ltd., as a cheque accompanying this Offer. The sum of One Hundred Thousand ($100,000.00) Dollars shall be credited to the Purchaser as part of the purchase price on closing.
>
> $ 100,000.00

(b) Two Hundred Thousand ($200,000.00) Dollars Canadian on or before July 31, 1981. The sum of Two Hundred Thousand ($200,000.00) Dollars shall be credited to the Purchaser as part of the purchase price on closing.

$ 200,000.00

(c) One Million Nine Hundred and Seven Thousand Five Hundred and Eighty Three ($1,907,583.00) Dollars Canadian by way of assumption of the Vendor's lease and option to purchase for the subject property. The option to purchase is exercisable on or before March 30, 1982. Subject lease and option to Purchase attached hereto as Schedule "A".

$1,907,583.00

(d) Seven Hundred and Thirty Five Thousand Four Hundred and Seventeen ($735,417.00) Dollars Canadian payable on closing.

[This change was initialed by both parties] $ 835,417.00

TOTAL PRICE $3,043,000.00

[emphasis added]

3. TITLE

Upon closing of this transaction, the Vendor warrants, covenants and agrees to deliver ... Transfer of title to the Purchaser in freehold fee simple free and clear of all but permitted encumbrances."

(4) Under a document dated April 29, 1981 Barnieh accepted an offer to purchase the Time lands from the appellant. Barnieh had inserted a clause making its acceptance of the offer "subject to confirmation of chain of title by May, 1981." On April 30, 1981 Barnieh's solicitors wrote the solicitors for the appellant setting out a waiver of that condition.

[57] The agreement is referred to in the judgment of my brother McDermid.

[58] On the same date, May 1, 1981, the appellant's solicitors forwarded the deposit of $200,000.00 to Barnieh's solicitors. The deposit was subject to trust conditions that required Barnieh's solicitors to provide the appellant's solicitors with copies of the relevant documents as they wished to confirm Barnieh's " interest in the property and its ability to convey clear title to [the appellant] on closing."

[59] On May 4th following receipt of the documents referred to above in (1) (2) and (3) the appellant authorized the release of the deposit to Barnieh. On May 6, 1981 in a letter confirming the release of the deposit the appellant's solicitors added the following:

"We note that under the Offer to Purchase between our client and Barnieh Investments Ltd. vacant possession is to be given on October 1, 1981 and that an agreement for sale will be entered into between our client or nominee, and your client, and presumably at that time title will be registered in the name of your client free and clear of all encumbrances. ..."

[emphasis added]

[60] As a result of this latter statement and three subsequent letters from the appellant in which it sought, advice from Barnieh that it was taking steps to obtain legal title to the property by October 1, 1981. Barnieh's solicitors replied as follows on September 23rd:

" Please be advised that, after dicussions [sic] with our client, our client has indicated that he will not in fact be paying out the items as contemplated in your July 8, 1981 letter. Our client, we understand, has discussed this with your client's agent and he will be giving to your client an Agreement for Sale with an undertaking to maintain in good standing the existing encumbrances on the property. He has advised and we will undertake to insure that notice is given pursuant to the clauses contained therein to terminate the Lease and deliver the property free and clear to your client not later than April 30, 1982."

[61] The appellant's solicitors replied as follows on September 24th:

"We would acknowledge receipt of your letter of September 23, 1981. It would be very much appreciated if you could clarify the suggestion that" our client has indicated that he will not in fact be paying out the items as contemplated in your July 8, 1981 letter". Presumably Barnieh Investments Ltd. is not in a position to enter into an agreement for sale as long as their interest is under a lease option agreement. Presumably, therefore, Barnieh Investments Ltd. will have to purchase an interest in the land in order to in turn sell the land to our client. We are of the view that unless the option to purchase is exercised, your client cannot sell the land under an agreement for sale to our client. The offer to purchase and interim agreement provides for "possession to the purchaser on closing". Your letter seems to suggest that the lease to Time Motors can only be terminated as of April 30, 1982 and that is not acceptable to our client. Pursuant to the provisions of the offer to purchase our client expects vacant possession of the property. It may well be that they will negotiate arrangements with Time Motors to extend the occupation by that company of the subject lands, but those negotiations are a matter between our client, or its nominees, and Time Motors."

[62] On October 1st, the appellant's solicitors wrote to Barnieh's solicitors enclosing a cheque in the sum of $600,000.00, subject to conditions, one of which was as follows:

"2. they [the $600,000.00] are not to be released unless and until:

(a) we have received an Agreement for Sale in favour of Sefel Properties & Development Ltd. [the appellant's nominee] in form satisfactory to us and to the solicitors representing Sefel Properties & Development Ltd. and have had the opportunity of filing or having Sefel Properties & Development Ltd. file a caveat protecting their interest under such Agreement for Sale;

(b) We have advised you that this firm and the solicitors representing Sefel Properties & Development Ltd. are satisfied that your client is entitled to enter into the Agreement for Sale of the subject lands and will be able to deliver clear title pursuant to the Agreement for Sale on April 1, 1982;

(c) satisfactory possession of the subject property has been obtained;"

[63] On October 1st, 1981 Barnieh claimed its interest in the land under the following documents:

(1) the agreement between Time and Barnieh of March 24, 1961 under which Barnieh acquired the lease option to the Time lands which Time had acquired from Amfac.

(2) The Agreement dated October 1, 1981 between Time and Barnieh consented to by Chariot, which set out more particularly the manner in which Barnieh could trigger the option by requiring Amfac to either exercise the option to the Chariot lands or assign the option to Barnieh.

[64] On November 9th, Barnieh tendered a draft agreement for sale of the Time lands to the appellant. In the cover letter Barnieh's solicitors stated that unless the $600,000.00 was releasable by November 13, 1981 Barnieh would "consider the transaction to have been aborted and the funds forwarded as deposit forfeit".

[65] On November 12th the appellant's solicitors replied to the letter of November 9th. The reply reads in part as follows:

"As noted in our letters to you dated May 6, 1981 and July 8, 1981, we are of the view that your client cannot deliver an Agreement for Sale in compliance with the provisions of the Offer to Purchase unless and until he has exercised the option to purchase originally granted by the current registered owner and some confirmation has been received from such registered owner that the option to purchase has been accepted in accordance with the provisions thereof.

Our client's instructions to us are to insist that your client comply with the provisions of the Offer to Purchase and Interim Agreement by exercising the option and acquiring title to the subject lands sufficient to support the Agreement for Sale contemplated in the Offer to Purchase and Interim Agreement.

Our client has further instructed us that unless satisfactory confirmation has been supplied to us as to the status of title, we are to commence proceedings for specific performance.

Your advice would be appreciated."

[66] On November 16, 1981 Barnieh's solicitors replied to the letter of November 12th repudiating the agreement of April 29th on the ground that the $600,000.00 tendered was not "tendered pursuant to the offer to purchase".

[67] Thereafter the appellant commenced an action for specific performance of the agreement as interpreted by it. It then abandoned this claim and sought only the alternative relief of return of the deposit and damages. The trial Judge dismissed the appellant's action. Barnieh succeeded on its counterclaim for a declaration that it was entitled to retain the deposit of $200,000.00. The parties agreed to reserve any questions of damages.

[68] The appellant submits that since Barnieh was not the registered owner of the land on October 1, 1981, the closing date set out in the agreement, the right held by Barnieh, on this date, was not sufficient to compel the appellant to close.

[69] That Barnieh did not have legal title to the Time lands on October 1st is not in issue.

[70] The agreement between the parties did not contain a specific covenant on the part of Barnieh to have legal title to the land on that date. The only wording in the agreement that purports to warrant that Barnieh was the legal owner of the Time lands is found in Barnieh's acceptance of the appellant's offer which reads as follows:

> " WE, BARNIEH INVESTMENTS LTD., being legal owners of the property noted herein hereby agree to the terms and conditions as contained herein."

[71] It will be noted that the appellant's solicitors authorized the release of the deposit of $200,000.00 after they had in their possession the documents under which Barnieh claimed an interest in the land. They would therefore have known at that time that Barnieh was not the legal owner of the land but merely held the right to acquire the said lands. The lands could be acquired by Barnieh taking steps to set in motion the actions required to have Amfac either exercise the option with Chariot to all of the lands including the Time lands or assign that option to Barnieh if Amfac did not wish to exercise the option.

[72] In my view, if it had been open to the appellant to put an end to the contract at the time it became aware of the manner in which Barnieh claimed an interest in the land, the appellant waived its right when it failed to repudiate the agreement and instead authorized the release of the deposit of $200,000.00 to Barnieh.

[73] The parties have treated October 1, 1981 as the closing date under the agreement of April 29, 1981. In the circumstances of this case and the wording of the agreement, I am of the view that they were right in so doing. That was the date on which a substantial payment was required by the appellant and the date on which Barnieh agreed to enter into a formal agreement for sale of the land for the balance then owing, such agreement to be assignable. Under that proposed agreement for the sale of the land Barnieh agreed to transfer legal title to the appellant on the completion date; that is, not later than April 1, 1982, the date set for payment of the total sum set out in the agreement for sale. (The original completion date was April 30, 1982 but this was apparently-changed by mutual consent.) The appellant had the right to require a transfer of the land to it by Barnieh at an earlier date by giving Barnieh 90 days notice in writing of its intention to prepay the balance owing under the agreement for sale. Such notice could only be delivered after the agreement for sale was executed by the parties, that is, after October 1, 1981. When the 90 day notice provision is considered in the light of the documents setting out Barnieh's claim to an interest in the land it is clear that this is the period required to trigger the option and require Chariot to execute a transfer to the holder of the option.

[74] In support of the submission that the agreement required Barnieh to have legal title to the Time lands on October 1, 1981 the appellant referred to paragraph (3) of the agreement between Time and Barnieh which sets out that Time shall deliver to Barnieh a title ... in freehold fee simple free and clear of all but permitted encumbrances".

[75] While what appears to be an ambiguity in the agreement between Time and Barnieh, where it deals with the character of the title Time was to grant to Barnieh on September 30, 1981, and the assumption by Barnieh of Time's option, may have afforded the appellant the defence to an action for specific performance I am of the opinion that it does not afford a defence to an action at law, as is the case here. (See Williams on Vendor and Purchaser 4th ed. Vol. 2 pp. 1027-28, 1056-56) When the agreement as a whole is considered it is noted that if Time purported to exercise the option no provision was made for reimbursement by Barnieh of the expense incurred by Time in so doing. I am of the opinion that when the agreement as a whole is considered it merely provided for the assumption of the lease option agreement by Barnieh and did not require Time to exercise that option.

[76] The appellant also refers to the letter of May 6th, written after the contract was affirmed by the release of the trust conditions imposed in relation to the deposit monies. It

was said in that letter, (referring to October 1, 1981) "... and presumably at that time title will be registered in the name of your client free and clear of all encumbrances excepting our client's caveat". Barnieh did not disclose their interpretation of the agreement until September 23, 1981.

[77] In ray view Barnieh did not owe a duty to the appellant to point out to it that its presumption about the effect of the agreement between Time and Barnieh and the agreement between the appellant and Barnieh was not in accord with the Barnieh's interpretation of either contract. In that regard I would refer to the decision of Shearman J. in Leslie and Company v. The Commissioner of Wales 78 J.P. 462. There the plaintiff, whose tender for work had been accepted, discussed the terms of the formal contract with the defendant. After executing the document the plaintiff returned it with a letter stating that it was executed on their part "... on the assumption that in the event of the Bill dealing with Workmen's Insurance, now before Parliament, becoming law the payments thereunder which will fall upon this company as employers would be recouped to the company... " by the Commissioner of Works. No reply was received to this letter and the plaintiff proceeded with the work. The headnote summarizes Shearson J.'s conclusion as follows:

> " the commissioners were not bound by the terms of the letter, nor estopped from relying upon the true construction of the sealed contract."

At p. 464 he stated:

> "No authority has been cited to me, nor. I am inclined to think could such an authority be cited, that persons are estopped from denying the true construction of a contract by failing to answer a letter, in which the other party to the contract says that he thinks that the contract means so and so."

[78] In conclusion I am of the opinion that the agreement between the appellant and Barnieh cannot be construed as requiring Barnieh to have legal title to the Time lands on October 1, 1981 and that Barnieh may rely on the true construction of the agreement.

[79] The law relating to the obligation of a vendor under an agreement of sale is set out in 29 Hals. 2nd ed, para. 404 as follows:

> "In the absence of any express stipulation as to title, a contract for sale of land implies an agreement on the part of the vendor to make a good, that is, a marketable title to the property sold. He discharges this obligation when he shows that he, or some person or persons whose concurrence he can require, can convey to the purchaser the whole legal and equitable interest in the land sold.

In general, it is sufficient if the vendor shows that he has a good title by the time fixed for completion, but, if it appears before that time that he has not a title, and is not in a position to obtain one, the purchaser can repudiate the contract."

[80] Beck, J. stated in Goodchild v. Bethel (1914) 7 W.W.R. 832 at p. 835:

"A good title is shown if although the vendor is not in fact the registered owner he is entitled to compel a transfer to him. It is good even if subject to encumbrances even though exceeding the purchase price provided the encumbrancee is compellable to take his money by the time a good title is to be proved. See Williams, Vendor & Purchaser. 2nd ed., pp. 164 et seq. Fry, Specific Performance, 5th ed. s. 1385.

When the time for completion of the contract by transfer by the vendor and payment of the purchase money by the purchaser arrives both must be ready to fulfil these mutual obligations..."

[81] The question that now arises is whether on October 1, 1981 the interest held by Barnieh was such as to enable it to compel a transfer of the property to it or its nominee by the date set out for completion of the agreement for sale; that is, on or before April 1, 1982?

[82] In Canadian Long Island Petroleum Ltd. et al v. Irving Industries Ltd. et al (1974) 50 D.L.R. (3d) 265 the Supreme Court of Canada considered the application of the rule against perpetuities to a right of first refusal to acquire an interest in land. In so doing the Court dealt with the distinction between the interest of an optionee under an option and the right acquired by the beneficiary of a right of first refusal.

[83] In delivering the judgment of the Court, Martland, J. referred to an earlier decision of the Court in Frobisher v. Canadian Pipelines Petroleums Ltd. et al (1959). 21 D.L.R. (2d) 497 and stated at pp. 276 - 277:

" The Frobisher case was not concerned with the application of the rule against perpetuities, but was concerned with the question as to whether an option to purchase certain mining claims in Saskatchewan created an interest in those claims. Regulations enacted pursuant to the Saskatchewan Mineral Resources Act. R.S.S. 1953, c. 47, provided that no person or company not a holder of a licence could acquire any mineral claim or any right or interest therein. The optionee did not have such a licence when the option was obtained.

The majority of this Court followed the Gomm case to hold that the option did create an interest in the mining claims. Judson. J., at p. 532 D.L.R., p. 169 S.C.R., said:

'Does an option to purchase land give rise to an equitable interest in land? The question has usually been considered in connection with conveyances and leases and the rule against perpetuities, and it has been held that the option is too remote if it can be exercised beyond the perpetuity period. The underlying theory is that the option to purchase land does create an equitable interest because it is specifically enforceable. There is a right to have the option held open and this is

similar to the right that arises when a purchaser under a firm contract may call for a conveyance. In both cases there is an equitable interest but in the case of the option it is contingent one, the contingency being the election to exercise the option.'

The rationale for the conclusions reached in these cases is, I think, accurately stated in a passage from Morris and Leach, The Rule Against Perpetuities, 2nd ed. (1962), pp. 219-20:

'The reasoning by which this result was reached was as follows. An option to purchase land is specifically enforceable. This gives the option-holder an equitable interest in the land; this interest is contingent upon his election to exercise the option. Contingent interests in land are void unless they must vest (if at all) within the perpetuity period. Therefore, an option to purchase which may be exercised beyond the perpetuity period is void to the extent that it creates an interest in land.'

In my opinion this reasoning is not applicable to the right of first refusal provided for in cl. 13.

An option gives to the optionee, at the time it is granted, a right, which he may exercise in the future, to compel the optionor to convey to him the optioned property. As Jessel, M.R., puts it in the passage previously cited:

'... 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.'

In other words, the essence of an option to purchase is that, forthwith upon the granting of the option, the optionee upon the occurrence of certain events solely within his control can compel a conveyance of the property to him."

[84] He then went on to hold that a right of first refusal did not give the party holding it the right to require a conveyance of land to it since the right merely arose when the other party received an offer it was prepared to accept.

[85] In my view the right acquired by Barnieh to require Amfac to exercise the option, or assign the option to Barnieh, was an interest in the land. Under its agreement with Time, Barnieh could, upon the occurrence of certain events solely within its control, compel a conveyance of the property to it on or before April 1, 1982, or earlier if required to do so upon notice from the appellant.

[86] I should comment on a further point and that is the nature of the agreements considered by the Court. Admittedly the appellant was required to pay a further $600,000.00 on the 1st of October, 1981 a date on which Barnieh merely held a marketable but not a legal title to the land. That is the agreement the parties made and I can see no reason why the Court should not enforce it. On the other hand, Barnieh was obliged to exercise the option

and assume an obligation for the purchase price of the land 90 days before it became entitled to call upon the appellant for payment of the balance owing. It may well be that an assignment by Barnieh to the appellant of its interest under the lease option agreement may have afforded further security to both parties but it is not for me to speculate why the agreement was framed in its present form as no doubt the parties had their own reasons for structuring the agreement in the manner in which they did.

[87] In conclusion, I would hold that Barnieh is entitled to retain the deposit for its own use and benefit and dismiss the appeal with costs to Barnieh.

DATED AT CALGARY, ALBERTA
THIS 24th DAY OF APRIL, A.D. 1984.

5

Ted Kreick (*Plaintiff*) *Appellant;*

and

John Leonard Wansbrough (*Defendant*) *Respondent.*

1973: January 29; 1973: February 28.

Present: Martland, Judson, Ritchie, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Agreement for sale of land for sum exceeding vendor's indebtedness to purchaser—Option to repurchase for amount of indebtedness—Purchaser to pay balance of purchase price if option not exercised—Whether transaction one of sale or mortgage—Whether purchaser entitled to specific performance.

On September 10, 1965, the appellant and the respondent executed an agreement which superseded earlier agreements and provided for the sale of specified land. The appellant wanted to be secured for certain loans that he had made to the respondent by taking title to the respondent's lands and the respondent agreed to transfer his lands to the appellant to secure him. The transaction into which they entered, through a common solicitor, embraced this purpose by the provision for a sale of the lands for a sum exceeding the outstanding indebtedness, with an option to repurchase for the amount of the indebtedness and with an obligation of the purchaser to pay the balance of the purchase price within a ten-month period following the expiry date of the option. In the event that the option to repurchase was not exercised, the vendor could remain in his house, situated on part of the subject lands, and occupy it rent free for as long as he wished.

The respondent having failed to exercise the option, the appellant brought an action for specific performance of the agreement. The action was dismissed at trial and an appeal was dismissed by the Court of Appeal, whereupon the appellant appealed to this Court. The main issue was whether the agreement of September 10, 1965, took effect, according to its terms, as a contract of sale of land with an option to repurchase, or whether, as an admitted security arrangement, it necessarily must be regarded as a mortgage transaction with the consequence that the vendor's failure to exercise the option before its expiry date did not bar him from asserting a right to

Ted Kreick (*Demandeur*) *Appelant;*

et

John Leonard Wansbrough (*Défendeur*) *Intimé.*

1973: le 29 janvier; 1973: le 28 février.

Présents: Les Juges Martland, Judson, Ritchie, Spence et Laskin.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Contrat—Contrat de vente d'un terrain pour une somme excédant la créance du vendeur—Faculté de racheter pour le montant de la créance—Acheteur devant payer le solde du prix de vente si le droit de rachat n'était pas exercé—S'agit-il d'une vente ou d'une hypothèque—L'acheteur a-t-il droit à une ordonnance d'exécution directe.

Le 10 septembre 1965, l'appelant et l'intimé ont signé un accord qui remplaçait des accords antérieurs et prévoyait la vente de terrains déterminés. L'appelant voulait comme garantie d'emprunts consentis à l'intimé le titre des terrains de l'intimé et ce dernier a convenu de transférer ses terrains à l'appelant pour fins de garantie. L'opération qu'ils ont conclue par l'entremise de leur avocat commun réalisait cette fin par la disposition qui prévoyait la vente des terrains pour une somme excédant la créance à recouvrer avec la faculté de racheter pour le montant de la créance, l'acheteur s'engageant à payer le solde du prix de vente dans les dix mois suivant la date d'expiration de la faculté de racheter. Dans le cas où le droit de rachat n'était pas exercé, le vendeur pouvait demeurer dans sa maison, sise sur une partie des terrains en question, et l'occuper sans payer de loyer, aussi longtemps qu'il le désirait.

L'intimé n'ayant pas exercé le droit de rachat, l'appelant a institué une action en exécution directe de l'accord. L'action a été rejetée en première instance et à la Cour d'appel. D'où le pourvoi devant cette Cour. La question principale à déterminer est celle de savoir si l'accord conclu le 10 septembre 1965 prend effet, en vertu de ses dispositions, comme contrat de vente de terrains assorti d'une faculté de racheter, ou si, comme convention de garantie, tel qu'il a été présenté, il faut nécessairement le considérer comme un acte d'hypothèque dont la conséquence est que le défaut du vendeur d'exercer la faculté de racheter avant sa date d'expiration ne l'empêche pas

redeem. The Court below sustained the respondent's position that the transaction must be viewed as a mortgage.

Held: The appeal should be allowed.

The evidence relied upon by the trial judge as credible supported rather than negated the integrity of the written agreement of September 10, 1965. At best, it fell short of providing the proof required to found a legal conclusion that a solicitor-drawn agreement of sale with option to repurchase should be regarded as a mortgage only. There was no basis for recasting the transaction to make it a security one alone to the exclusion of the overriding element of sale. *Herron v. Mayland*, [1928] S.C.R. 225, followed; *Wilson v. Ward*, [1930] S.C.R. 212, distinguished.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of Disbery J. Appeal allowed.

E. C. Leslie, Q.C., and *H. T. Hepting*, for the plaintiff, appellant.

C. F. Tallis, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

LASKIN J.—The main issue in this appeal is whether an agreement of September 10, 1965, between the respondent Wansbrough as vendor and the appellant Kreick as purchaser takes effect, according to its terms, as a contract of sale of land with an option to repurchase, or whether, as an admitted security arrangement, it necessarily must be regarded as a mortgage transaction with the consequence that the vendor's failure to exercise the option before its expiry date does not bar him from asserting a right to redeem. The Saskatchewan Courts, Disbery J. at trial and the Court of Appeal speaking through Woods J.A., sustained the defendant-respondent's position that the transaction must be viewed as a mortgage.

[1] [1972] 2 W.W.R. 404.

de faire valoir un droit de rachat. Les Cours d'instance inférieure ont retenu le point de vue de l'intimé qui prétend que l'opération doit être considérée comme une hypothèque.

Arrêt: L'appel doit être accueilli.

Le témoignage que le juge de première instance a jugé digne de foi tend à confirmer plutôt qu'à nier le caractère entier de l'accord écrit du 10 septembre 1965. En mettant les choses au mieux, ce témoignage ne parvient pas à fournir la preuve qui doit être apportée pour établir en droit qu'un acte de vente assorti d'une faculté de racheter et rédigé par un avocat ne doit être considéré que comme une hypothèque. Il n'y a rien sur quoi on peut se fonder pour transformer l'opération en un acte de garantie seulement, en en excluant l'élément dominant, la vente. Arrêt suivi: *Herron c. Mayland*, [1928] R.C.S. 225. Distinction faite avec l'arrêt: *Wilson c. Ward*, [1930] R.C.S. 212.

APPEL d'un jugement de la Cour d'appel de la Saskatchewan[1], rejetant un appel d'un jugement du Juge Disbery. Appel accueilli.

E. C. Leslie, c.r., et *H. T. Hepting*, pour le demandeur, appelant.

C. F. Tallis, c.r., pour le défendeur, intimé.

Le jugement de la Cour a été rendu par

LE JUGE LASKIN—Dans le présent appel, la question principale à déterminer est celle de savoir si l'accord conclu le 10 septembre 1965 par l'intimé Wansbrough en tant que vendeur et par l'appelant Kreick en tant qu'acheteur prend effet, en vertu de ses dispositions, comme contrat de vente de terrains assorti d'une faculté de racheter, ou si, comme convention de garantie, tel qu'il a été présenté, il faut nécessairement le considérer comme un acte d'hypothèque dont la conséquence est que le défaut du vendeur d'exercer la faculté de racheter avant sa date d'expiration ne l'empêche pas de faire valoir un droit de rachat. Les Cours de la Saskatchewan, le Juge Disbery au procès et le Juge d'appel Woods au nom de la Cour d'appel, ont retenu le point de vue du défendeur intimé qui prétend que l'opération doit être considérée comme une hypothèque.

[1] [1972] 2 W.W.R. 404.

I do not agree with this characterization. The evidence relied upon by the trial judge as credible supports rather than negates the integrity of the written agreement of September 10, 1965. At best, it falls short of providing the proof that Wansbrough must bring to found a legal conclusion that a solicitor-drawn agreement of sale with option to repurchase should be regarded as a mortgage only.

Je n'accepte pas cette qualification. Le témoignage que le juge de première instance a jugé digne de foi tend à confirmer plutôt qu'à nier le caractère entier de l'accord écrit du 10 septembre 1965. En mettant les choses au mieux, ce témoignage ne parvient pas à fournir la preuve que Wansbrough doit apporter pour établir en droit qu'un acte de vente assorti d'une faculté de racheter et rédigé par un avocat ne doit être considéré que comme une hypothèque.

The parties were and have apparently remained on friendly terms. Each owned extensive farm lands in neighbouring districts. Beginning in September 1964, Kreick made loans to Wansbrough who needed cash to protect a speculative investment. As of September 10, 1965, the loans with accumulated interest amounted to almost $90,000. The first two loans of $8,000 and $5,000 were unsecured, and were followed on June 22, 1965, by a further loan of $19,362.95, the bulk of which was used to purchase a section of land. On July 16, 1965, the parties executed an agreement, prepared by a solicitor who acted for both of them, whereby Wansbrough sold the section of land to Kreick for $33,000 with an option to Wansbrough to repurchase for that sum with interest at 6 per cent before December 31, 1965. Title was issued in Kreick's name on July 19, 1965, subject to a caveat of July 16, 1965, registered by the solicitor to protect Wansbrough's interest. On the latter day Kreick made a further loan of $4,000 to the respondent. On August 16, 1965, another agreement of sale, with option to repurchase on or before March 31, 1966, prepared by the common solicitor of the parties, provided for the sale of other lands of the respondent to the appellant for $50,000 with interest at 6 per cent. Kreick on August 17, 1965, issued a cheque for $47,000 to Wansbrough's credit, and on September 2, 1965, paid a further $4,000 for the respondent's account to the solicitor.

Les parties entretenaient et apparemment entretiennent toujours des rapports amicaux. Elles étaient toutes deux propriétaires de vastes terrains agricoles situés dans des districts voisins. En septembre 1964, Kreick a commencé à consentir des prêts à Wansbrough qui avait besoin d'argent comptant pour protéger un placement spéculatif. En date du 10 septembre 1965, le montant des prêts, avec l'intérêt accumulé, s'élevait à près de $90,000. Les deux premiers prêts de $8,000 et de $5,000 respectivement étaient sans garantie et le 22 juin 1965, un autre prêt de $19,362.95 a été consenti, dont la plus grande part a servi à acheter une parcelle de terrain. Le 16 juillet 1965, les parties ont signé un accord rédigé par un avocat agissant au nom des deux parties et selon lequel Wansbrough vendait la parcelle de terrain à Kreick pour la somme de $33,000 et se réservait le droit de racheter l'immeuble pour cette somme avec un intérêt de 6 pour cent avant le 31 décembre 1965. Le titre a été délivré au nom de Kreick le 19 juillet 1966, sous réserve d'une opposition datée du 16 juillet 1965 que l'avocat avait fait enregistrer pour protéger le droit de Wansbrough. C'est aussi le 16 juillet 1965 que Kreick a consenti un autre prêt de $4,000 à l'intimé. Le 16 août 1965, un autre contrat de vente assorti d'un droit de rachat à être exercé le 31 mars 1966 ou avant cette date et rédigé par l'avocat des parties, stipulait la vente à l'appelant d'autres terrains appartenant à l'intimé pour la somme de $50,000 avec un intérêt de 6 pour cent. Le 17 août 1965, Kreick a émis un chèque de $47,000 au crédit de Wansbrough et le 2 septembre 1965, il a remis à l'avocat une somme de $4,000 pour le compte de l'intimé.

The parties attended at their solicitor's office on September 10, 1965, to review the state of accounts between them. As of that date, according to the trial judge's calculations which are not disputed, Wansbrough was indebted to Kreick in the sum of $88,639.70, inclusive of interest. Kreick gave the following written instructions to the solicitor at that meeting:

Give Ted Kreick credit for 104,000. This includes taxes on 10 quarters and interest paid up to April 1.

If land is recovered at that date this is the total sum Len owes me.

If no recovery I owe him $56,000 to Jan 31st 1967. This sum to be paid in full by Jan 31-1967.

I am to pay for the N W 29 if Len procures it.

The price to be the Govt asking price.

If land is recovered before April 1 Len will be entitled to a reduction of 6% per annum on above figure.

Stipulation re, dwelling to remain as in present agreement land involved is Sec 31-¾ on 30½ on 35.

The agreement executed on September 10, 1965, superseded the earlier agreements and provided for the sale of specified land, including the section already standing in Kreick's name, for $160,000 of which receipt of $104,000 was acknowledged by Wansbrough. This sum was made up of the advances to date, other advances made on that date for taxes and a sum of $10,000 to be paid by Kreick to one Hillis from whom Wansbrough had borrowed it, and interest calculated to April 1, 1966. In fact, the stated sum of $104,000 was a "convenience figure", overstating by almost $1,500 what was owing by way of loans and accumulated interest to September 10, 1965. Kreick agreed to pay the balance of $56,000 on the overall purchase price on or before January 31, 1967. As before, the agreement gave the respondent an option to repurchase his lands on or before April 1, 1966, for $104,000. The concluding clause of the agreement stated that if the option to repur-

Le 10 septembre 1965, les parties se sont réunies au bureau de leur avocat pour examiner l'état de leurs comptes. D'après les calculs du juge de première instance, qui ne sont pas contestés, au 10 septembre 1965, Wansbrough devait à Kreick la somme de $88,639.70, intérêts compris. Lors de cette réunion, Kreick a donné à l'avocat les directives écrites suivantes:

[TRADUCTION] Portez la somme de 104,000 au crédit de Ted Kreick. Cette somme comprend les taxes pour 10 trimestres et les intérêts payés jusqu'au 1er avril.

Si le terrain est récupéré à cette date, c'est la somme totale que Len me doit.

S'il n'y a pas récupération, je lui dois $56,000 au 31 janvier 1967. Cette somme sera payable en entier le 31 janvier 1967.

Je dois payer le lot 29 N.-O. si Len l'achète.

Le prix sera le prix demandé par le gouvernement.

Si le terrain est récupéré avant le 1er avril, Len aura droit à une réduction de 6% par année sur le montant susmentionné.

La stipulation concernant l'habitation dans l'accord présentement en vigueur demeurera inchangée; le terrain en question est Sec 31-¾ sur 30 ½ sur 35.

L'accord signé le 10 septembre 1965 remplaçait les accords antérieurs et prévoyait la vente de terrains déterminés, y compris la parcelle qui était déjà enregistrée au nom de Kreick, pour la somme de $160,000 de laquelle Wansbrough a reconnu avoir reçu $104,000. Cette somme représentait les avances faites à cette date, d'autres avances faites à cette date pour payer les taxes et une somme de $10,000 que Kreick devait payer à un certain Hillis à qui Wansbrough l'avait empruntée, plus l'intérêt calculé à partir du 1er avril 1966. En fait, la somme indiquée de $104,000 a été fixée pour des «raisons de commodité»; elle dépassait d'environ $1,500 la dette constituée de prêts et d'intérêts accumulés jusqu'au 10 septembre 1965. Kreick a convenu de payer le solde de $56,000 sur le prix d'achat total le 31 janvier 1967 ou avant cette date. Comme il avait été convenu précédemment, l'accord donnait à l'intimé la faculté de racheter ses terrains le 1er avril 1966 ou avant

chase was not exercised the vendor should have the right to occupy the house in which he was living for so long as he should wish without any rent or charge.

The evidence establishes, among other things, that Kreick wanted to be secured for his loans by taking title to the respondent's lands and that Wansbrough agreed to transfer his lands to Kreick to secure him. The transaction into which they entered, through their common solicitor, embraced this purpose by the provision for a sale of the lands for a sum exceeding the outstanding indebtedness, with an option to repurchase for the amount of the indebtedness and with an obligation of the purchaser Kreick to pay the balance of the purchase price within a ten-month period following the expiry date of the option. In short, the sale was to be fully carried out by payment of the balance of an agreed purchase price if the option to repurchase was not exercised, and in that event the vendor Wansbrough could remain in his house, situated on part of the subject lands, and occupy it rent free for as long as he wished.

The parties understood the reach of the transaction into which they entered and there is no suggestion that advantage was taken by Kreick of Wansbrough, either in the price fixed at the time for the lands that were to be transferred or in any of the other terms of the agreement and option. Is there then any basis for recasting the transaction to make it a security one alone to the exclusion of the overriding element of sale?

Wansbrough urged this position in his defence and counterclaim to an action by Kreick for specific performance of the agreement, brought upon failure of Wansbrough to exercise the option to repurchase on or before April 1, 1966. A tender was in fact made on behalf of Wansbrough under date of March 29, 1966, but it was short of the required amount and consequently rejected. The money had been put up by two others who wished to become Wansbrough's creditors in place of Kreick. Although Wansbrough signed the notice of exercise of option,

cette date pour la somme de $104,000. La clause finale de l'accord stipulait que si les terrains n'étaient pas rachetés, le vendeur aurait le droit d'occuper la maison où il habitait aussi longtemps qu'il le désirait sans loyer ni frais.

La preuve démontre, entre autres choses, que Kreick voulait comme garantie des emprunts le titre des terrains de l'intimé et que Wansbrough a convenu de transférer ses terrains à Kreick pour fins de garantie. L'opération qu'ils ont conclue par l'entremise de leur avocat commun réalisait cette fin par la disposition qui prévoyait une vente des terrains pour une somme excédant la créance à recouvrer avec la faculté de racheter pour le montant de la créance, l'acheteur Kreick s'engageant à payer le solde du prix de vente dans les dix mois suivant la date d'expiration de la faculté de racheter. Bref, la vente devait se réaliser par le paiement du solde d'un prix de vente convenu si le droit de rachat n'était pas exercé, et dans ce cas, le vendeur Wansbrough pouvait demeurer dans sa maison, sise sur une partie des terrains en question, et l'occuper sans payer de loyer, aussi longtemps qu'il le désirait.

Les parties savaient la portée de l'opération qu'ils signaient et il n'a pas été suggéré que Kreick a abusé de Wansbrough, soit par le prix fixé à l'époque pour les terrains qui devaient être transférés, soit par toute autre disposition de l'accord et de la faculté de rachat. Dans ces conditions, sur quoi peut-on se fonder pour transformer l'opération en un acte de garantie seulement, en en excluant l'élément dominant, la vente?

Wansbrough a fait valoir cette position dans sa défense et il a présenté une demande reconventionnelle lors d'une action en exécution directe de l'accord que Kreick a intentée quand Wansbrough n'a pas exercé le droit de rachat le 1er avril 1966 ou avant cette date. En fait, une offre de paiement a été faite au nom de Wansbrough le 29 mars 1966, mais elle était inférieure à la somme requise et elle a donc été rejetée. L'offre émanait de deux autres personnes qui désiraient se substituer à Kreick comme créanciers. Bien que Wansbrough ait signé l'avis d'ex-

he immediately informed Kreick of the prospective tender and urged him to reject it because he preferred to have Kreick as his creditor. On March 30, 1966, Wansbrough gave Kreick a signed memorandum reading as follows:

March 30th 66

Re: Present agreement Vendor and Purchaser

Its my intention not to proceed further in the recovery of the titles involved on the condition herein set ahead to April 12 Referring to the expiration of present agreement terminating April 1st.

J. L. Wansbrough.

No further tender was made by Wansbrough.

The trial judge was of the opinion that the transaction of September 10, 1965, was a security one, that the parties had from the beginning been in a creditor-debtor relationship, and that, having regard to the evidence, their transaction should be regarded as a mortgage and not what on its face it purported to be. On this view, he held, and the Court of Appeal concurred, that Wansbrough had an equitable right to redeem which could not be fettered by the option provisions. The question of fetter or clog does not arise unless the transaction is first characterized as a mortgage, and the option to repurchase clause, which the trial judge seemed to regard as the alleged fetter or clog, cannot be the basis in this case upon which the transaction is to be regarded as a mortgage only. The obligation of the purchaser to pay a fixed balance of the purchase price beyond the date of permitted exercise of the vendor's option and the provision for continued occupancy by the vendor of his house rent free reflect the primary character of the transaction as reduced to writing; and they are, moreover, consistent with the purchaser's written instructions to the solicitor at the time the document was drawn up and with the vendor's understanding as manifested by his memorandum of March 30, 1966. I add as a relevant factor that the price fixed for the acquisition of the vendor's lands by the purchaser was not shown nor even alleged to be inadequate.

ercice du droit de rachat, il a immédiatement informé Kreick de l'offre possible et il l'a prié de la rejeter parce qu'il préférait avoir Kreick comme créancier. Le 30 mars 1966, Wansbrough a remis à Kreick une note signée de sa main qui se lisait comme suit:

[TRADUCTION] Le 30 mars 1966

Objet: Le présent accord entre le vendeur et l'acheteur.

J'ai l'intention de ne pas faire d'autres démarches en vue de recouvrer les titres visés par la condition avant le 12 avril. Je me refère au présent accord qui expire le 1er avril.

J. L. Wansbrough.

Aucune autre offre n'a été faite par Wansbrough.

Le juge de première instance était d'avis que l'accord du 10 septembre 1965 constituait une convention de garantie, que depuis le début, les parties étaient liées par des rapports de créancier à débiteur et que, en ce qui a trait à la preuve, l'opération devrait être considérée comme un acte d'hypothèque et non comme ce qu'elle paraissait être à sa lecture. A ce sujet, il a statué, et la Cour d'appel a souscrit à son avis, que Wansbrough avait un droit de rachat en equity dont les dispositions relatives à la faculté de racheter ne pouvaient empêcher l'exercice. La question de l'empêchement ou de l'obstacle à l'exercice du droit de rachat ne se pose pas à moins que l'opération soit d'abord qualifiée d'hypothèque, et la faculté de racheter, que le juge de première instance a semblé considérer comme le prétendu empêchement ou obstacle, ne peut être en l'espèce ce sur quoi on se fonde pour considérer l'opération comme une hypothèque seulement. L'obligation de l'acheteur de payer un solde déterminé du prix de vente après la date d'expiration de l'exercice du droit du vendeur et la disposition permettant au vendeur d'occuper sa maison d'une façon continue sans payer de loyer, reflètent le caractère premier de l'opération telle que consignée par écrit; et ces dispositions sont en outre compatibles avec les directives écrites que l'acheteur a données à l'avocat au moment de la rédaction du document et avec l'accord du vendeur, comme

quate at the time the agreement of September 10, 1965, was excuted.

Different considerations would apply if the evidence in this case was related to a conveyance absolute in form or to an agreement of sale with an option to repurchase for the amount of the vendor's debt without more. The present case is stronger on its facts than *Herron v. Mayland*[2], where this Court held that an agreement with option to repurchase (which was in fact exercised within the prescribed period) must stand according to its terms and could not be translated into a mortgage transaction.

Wilson v. Ward[3] bears a resemblance to the present case in that it involved an agreement of sale with option to repurchase whereby the designated purchaser-creditor was to pay the vendor-debtor a considerable sum (beyond the agreed loan) for the debtor's land if the option to repurchase was not exercised as prescribed. This Court concluded that the transaction was a mortgage and not a sale agreement with option to repurchase as some of its terms stated. The reasons for this conclusion are clear enough. The document itself recited that the alleged vendor was desirous of obtaining a loan of $1,800 on his land which the alleged purchaser was willing to advance on the conditions following. These provided for a sale of the land for $24,320 payable (less the amount of the loan) at the rate of $5,000 per year but with an option to repurchase for $1,840 within 90 days. The contemporaneity of the loan and the grant of security and the fact that the agreement for sale was a term of the loan which was the primary purpose of the transaction were enough, when supported by the admissible oral evidence, to show that a security arrangement was intended. Indeed, the

[2] [1928] S.C.R. 225.

[3] [1930] S.C.R. 212.

celui-ci l'a indiqué dans sa note du 30 mars 1966. Il convient d'ajouter qu'il n'a pas été démontré ni même allégué que le prix fixé pour l'acquisition des terrains était insuffisant au moment où l'accord a été signé le 10 septembre 1965.

Il y aurait lieu de s'arrêter à d'autres considérations si, en l'espèce, la preuve se rapportait à un transfert inconditionnel ou à un contrat de vente assorti d'une faculté de racheter pour le montant de la dette du vendeur, sans plus. La présente affaire est mieux fondée du point de vue des faits que l'affaire *Herron c. Mayland*[2], dans laquelle cette Cour a statué qu'un accord assorti d'une faculté de racheter (qui a en fait été exercée dans les délais prescrits) doit subsister en conformité avec ses dispositions et ne peut être interprété comme un contrat d'hypothèque.

L'affaire *Wilson c. Ward*[3], ressemble à la présente affaire en ce qu'elle comporte une convention en vue d'une vente assortie d'une faculté de racheter, en vertu de laquelle le créancier-acheteur désigné devait verser au débiteur-vendeur une somme d'argent considérable (supérieure au prêt convenu) pour le terrain du débiteur si la faculté de racheter n'était pas exercée tel que stipulé. Cette Cour a conclu que l'opération constituait une hypothèque et non une convention en vue d'une vente assortie d'une faculté de racheter, comme l'indiquaient certaines de ses dispositions. Les motifs de cette conclusion sont assez clairs. D'après l'acte lui-même, le prétendu vendeur désirait obtenir un prêt de $1,800 sur la garantie de son terrain, et le prétendu acheteur était disposé à consentir le prêt aux conditions suivantes: la vente du terrain au prix de $24,320 payable (moins le montant du prêt) par versements annuels de $5,000, sous réserve d'une faculté de racheter pour la somme de $1,840 à être exercée dans un délai de 90 jours. La contemporanéité du prêt et de l'octroi de la garantie et le fait que la convention en vue de la vente était une condition du

[2] [1928] R.C.S. 225.

[3] [1930] R.C.S. 212.

alleged purchaser knew that this was the alleged vendor's understanding and the document was put in its particular form to satisfy the alleged purchaser's banker. The difference between *Wilson v. Ward* and the present case is a difference in kind and not merely of degree.

I would accordingly allow the appeal, set aside the judgments below and direct that the agreement of September 10, 1965, should take effect according to its terms, and that the appellant is entitled to a decree of specific performance. He should have his costs throughout. In view of the conclusion to which I have come, it is unnecessary to deal with *The Land Contracts (Actions) Act*, R.S.S. 1965, c.104. Nor, for the same reason, need I pass upon a motion made at the hearing by counsel for the appellant to add certain caveats to the record of proceedings.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the defendant, respondent: Goldenberg, Taylor, Tallis & Goldenberg, Regina.

prêt qui constituait l'objet premier de l'opération suffisaient, lorsqu'ils étaient étayés par la preuve verbale recevable, à démontrer que les parties avaient en vue un contrat de garantie. En fait, le prétendu acheteur savait que c'était là ce qu'avait convenu le prétendu vendeur et l'acte a reçu cette forme particulière pour satisfaire le banquier du prétendu acheteur. La différence entre l'affaire *Wilson c. Ward* et la présente affaire est une différence de nature et non simplement de degré.

Par conséquent, je suis d'avis d'accueillir l'appel, d'infirmer les jugements des cours d'instance inférieure et d'ordonner que l'accord du 10 septembre 1965 prenne effet suivant ses dispositions, et que l'appelant ait le droit d'obtenir une ordonnance d'exécution directe. Il devait avoir droit à ses dépens dans toutes les cours. Vu la conclusion à laquelle je suis arrivé, il n'est pas nécessaire de traiter de la loi dite *Land Contracts (Actions) Act*, R.S.S. 1965, c. 104. Pour le même motif, il n'est pas nécessaire non plus que je me prononce sur une requête présentée à l'audition par l'avocat de l'appelant en vue de faire ajouter certaines oppositions au dossier.

Appel accueilli avec dépens.

Procureurs du demandeur, appelant: MacPherson, Leslie & Tyerman, Regina.

Procureurs du défendeur, intimé: Goldenberg, Taylor, Tallis & Goldenberg, Regina.

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Supreme Court of Canada | Cour suprême du Canada

SAIL LABRADOR LIMITED

- v. -

THE OWNERS, NAVIMAR CORPORATION LTÉE AND ALL OTHERS INTERESTED IN THE SHIP *CHALLENGE ONE*, HER EQUIPMENT, BUNKERS AND FREIGHTS, and THE SHIP *CHALLENGE ONE*, HER EQUIPMENT, BUNKERS AND FREIGHTS
(F.C.A.) (26083)

CORAM:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major
The Hon. Mr. Justice Bastarache
The Hon. Mr. Justice Binnie

Appeal heard and judgment rendered:
October 9, 1998

Reasons delivered:
February 4, 1999

Reasons for judgment by:
The Hon. Mr. Justice Bastarache

Concurred in by:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Concurring reasons by:
The Hon. Mr. Justice Binnie

SAIL LABRADOR LIMITED

- c. -

LES PROPRIÉTAIRES, NAVIMAR CORPORATION LTÉE ET TOUTES AUTRES PERSONNES AYANT UN DROIT SUR LE NAVIRE *CHALLENGE ONE*, SON ÉQUIPEMENT, SES SOUTES ET LE FRET, et LE NAVIRE *CHALLENGE ONE*, SON ÉQUIPEMENT, SES SOUTES ET LE FRET
(C.A.F.) (26083)

CORAM:
Le très hon. Antonio Lamer, c.p.
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie

Appel entendu et jugement rendu:
le 9 octobre 1998

Motifs déposés:
le 4 février 1999

Motifs de jugement:
L'honorable juge Bastarache

Souscrivent à l'avis de l'honorable juge Bastarache:
Le très hon. Antonio Lamer, c.p.
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge Iacobucci
L'honorable juge Major

Motifs concordants:
L'honorable juge Binnie

Counsel at hearing:

For the appellant:
Elizabeth M. Heneghan, Q.C.

For the respondents:
Alain R. Pilotte
Julie Bergevin

Avocats à l'audience:

Pour l'appelante:
Elizabeth M. Heneghan, c.r.

Pour les intimés:
Alain R. Pilotte
Julie Bergevin

Citations	Références
F.C.T.D.: [1996] 3 F.C. 821, 115 F.T.R. 128, [1996] F.C.J. No. 919 (QL).	C.F. 1re inst.: [1996] 3 C.F. 821, 115 F.T.R. 128, [1996] A.C.F. nº 919 (QL).
F.C.A.: [1997] 3 F.C. 154, 212 N.R. 256, [1997] F.C.J. No. 451 (QL).	C.A.F.: [1997] 3 C.F. 154, 212 N.R. 256, [1997] A.C.F. nº 451 (QL).

sail labrador *v.* challenge one

Sail Labrador Limited *Appellant*

v.

The Owners, Navimar Corporation Ltée and All Others Interested in the Ship *Challenge One*, Her Equipment, Bunkers and Freights, and the Ship *Challenge One*, Her Equipment, Bunkers and Freights *Respondents*

Indexed as: Sail Labrador Ltd. *v.* Challenge One (The)

File No.: 26083.

Hearing and judgment: October 9, 1998.

Reasons delivered: February 4, 1999.

Present: Lamer C.J. and Gonthier, Cory, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the federal court of appeal

Contracts -- Option to purchase -- Conditions precedent -- Substantial performance -- Charter party providing for option to purchase vessel at end of lease -- Option made subject to "full performance" of all obligations under charter party -- One of lease payments made late owing to bank error -- Whether doctrine of substantial performance applies -- Whether option to purchase still valid.

The appellant entered into a five-year agreement with the respondent Navimar to charter a vessel. Under clause 30 of the charter party, the appellant had an option to purchase the vessel at the end of the five-year period subject to "full performance of all its obligations in [the] Charter Party, including but not limited to payments being made promptly and in accordance with the schedule of Clause 10 throughout [the] Agreement". Clause 10 specified the annual payment rate, while clause 11 set out a payment schedule of seven monthly instalments each year. The accepted practice between the parties was for the appellant to submit seven post-dated, uncertified cheques to the respondent at the beginning of each operating season. While there were no problems with the cheques for the first four years, the cheque for the first payment in the fifth year was returned by reason of insufficient funds. The trial judge found that the bank's refusal to honour the appellant's cheque was due to an error by a bank employee. The respondent wrote to the appellant informing it that the option to purchase was void and of no further effect because of the appellant's failure to make the payment as required. In this same letter, the respondent gave the appellant instructions on how it could remedy its late payment. The appellant promptly made the payment with interest in accordance with the respondent's instructions. All subsequent payments were made on time. Under clause 25 of the charter party, the appellant had to supply deck and engine room logs if required by the respondent. After the appellant's late payment the respondent made such a request; it argued at trial that the appellant had breached clause 25 by failing to provide all copies of the logs as requested. At the end of the five-year lease the appellant gave the respondent notice of its intention to exercise the option to purchase and tendered payment. The respondent refused to execute a bill of sale. The Federal Court, Trial Division, granted the appellant's action for a declaration that it was entitled to exercise the option. The Federal Court of Appeal allowed the respondent's appeal.

Held: The appeal should be allowed.

Per Lamer C.J. and Gonthier, Cory, Iacobucci, Major and **Bastarache JJ.**:

While an option may be a unilateral contract, it may also be an element of a bilateral contract in which it is contained. Whether a contract which contains an option clause establishes a single, bilateral contract or two separate contracts, one bilateral and the other unilateral, is a matter of construction. Courts must examine the text of the contract and the context surrounding it in order to determine the intention of the parties, keeping in mind that this Court has previously approved of the tendency by courts to treat offers as calling for bilateral rather than unilateral performance whenever a contract can fairly be so construed. In this case, the lease and the option form a single, bilateral contract. The option and the charter party in which it is contained are intimately connected to one another. The option requires consideration to be binding on both parties, but it can be assumed that it is based on the same consideration as the underlying lease, namely the lease payments. Further connections between the option and the charter party are the fact that the option is specifically made dependent on the performance of the terms of the charter party and the fact that the option and the charter party involve the same property. This single contract contains many terms, some relating to the lease, others to the option. The option itself forms part of the consideration flowing from the respondent to the appellant under this bilateral contract.

Time is not of the essence of a contract unless the parties have expressly made it of the essence or the nature of the property or circumstances allow for such a presumption. Commercial parties should be familiar enough with the applicable law to know that they must use very precise words if their intention is to make time the essence of a contract. The words used in the option clause are simply not precise enough to satisfy this Court that these parties intended to make timely lease payments the essence

of this contract. This conclusion is bolstered by the respondent's admission that contracts used in this industry often include the actual words "time is of the essence" when that is in fact the parties' intention. Even if it could be said that the words of the option clause are adequate to make time of the essence in relation to the lease payments, the actual wording of the clause could only support a finding that time is of the essence in relation to clause 10. The trial judge properly found no breach of clause 10 because the appellant's single late payment did not breach the clause 10 requirement to pay $85,000 for the year in which the late payment occurred. Since the presumption that time is not of the essence has not been displaced, the bilateral nature of the contract in this case requires that the substantial non-performance doctrine be applied.

The trial judge's finding that there was substantial compliance with clause 25 should not be disturbed. The vessel in question falls within the scope of s. 261(1) of the *Canada Shipping Act*, which dictates that the logs must remain on board the vessel. Furthermore, clause 25 makes no reference to the removal of the logs from the vessel or the making of copies of the logs, but refers to the actual logs only. The clause 25 requirement that the appellant supply the logs to the respondent upon request should therefore have been interpreted as requiring them to be made available on board the vessel.

Although clause 11 of the charter party specifically states that the appellant is to make monthly payments "in cash in Canadian currency by way of Bank Transfer and/or certified cheque", the fact that the respondent accepted the practice of making payment by post-dated, uncertified cheques indicates that it was not insistent on strict compliance with the method of payment set out in clause 11. It follows that the respondent cannot now insist on a strict application of clause 11. The modified method of payment accepted by the parties involved a risk of delay in clearing the cheques. The

respondent must bear the consequences of this risk equally with the appellant because it materialized as a result of their mutually accepted alteration of the strict terms of the agreement. The appellant had sufficient funds in its account to cover its cheque and had no reason to suspect a bank error might delay payment of those funds to the respondent. The appellant always had the intention to pay on time and took all the steps that it could reasonably have been expected to take given the modified payment arrangement into which the parties had entered. Upon being notified by the respondent that its cheque had been refused, the appellant promptly paid the amount due plus interest in accordance with the respondent's instructions. The appellant also made all of the remaining payments under the charter party on time. In these circumstances, the appellant substantially performed its modified clause 11 obligations.

The respondent has no right to cancel the appellant's option to purchase the vessel in this case. This result is consistent with the true intentions of these parties as revealed by all of the circumstances and with the applicable policy reasons. The respondent has received a significant benefit from the appellant's defective performance which it cannot restore. Furthermore, there is no proportionality between the impact of the appellant's defective performance on the respondent and the benefit the appellant will lose if the respondent is permitted to void the option. The deficient performance did not give rise to uncertainty because there was no reason for the respondent to believe that the single late payment, which was caused by a bank error rather than any fault of the appellant, would put future lease payments in doubt. The concern in this instance must be with fairness. On the facts of this case, the respondent was simply not deprived of what it bargained for.

Per **Binnie** J.: The question of whether a contractual term is satisfied by substantial performance, or whether strict (or "complete" or "exact") performance is required, is a matter of interpretation. Everything turns on the intention of the parties as expressed (in this case) in the charter party. Here, the contracting parties stipulated "full performance" as a condition precedent to the exercise of the option, and this stipulation should be respected by the courts. The words "all obligations" refer to all of the things required under the contract, and the words "full performance" must therefore refer to the sufficiency of performance of each of them. Substantial performance is less than full performance, according to the ordinary meaning of the words. An option is a unilateral obligation, irrespective of whether it is contained in a unilateral or a bilateral contract. The general approach in *Pierce v. Empey* was therefore agreed with. It is not without significance that in this case the parties stipulated for "full performance" in relation to the exercise of the option (i.e., by including the stipulation in the option clause itself) rather than in relation to their contract generally. While in some contracts the parties can be interpreted to have agreed to the option being governed by the more flexible standard of "substantial" performance, they did not do so here. However, on a proper interpretation of the charter party the conditions precedent to the exercise of the option were satisfied in "full" (or, in the instance of the banking arrangements, the owners were estopped from saying otherwise), and the charterers were thus entitled to exercise the option.

Cases Cited

By Bastarache J.

Applied: *A/S Tankexpress v. Compagnie Financière Belge Des Pétroles S/A* (1948), 82 Lloyd's L. R. 43; **distinguished:** *Pierce v. Empey*, [1939] S.C.R. 247; **referred to:** *Canadian Long Island Petroleums Ltd. v. Irving Industries (Irving Wire Products Division) Ltd.*, [1975] 2 S.C.R. 715; *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187; *Margaronis Navigation Agency, Ltd. v. Henry W. Peabody & Co., of London, Ltd.*, [1964] 2 Lloyd's Rep. 153; *Tenax Steamship Co. v. The Brimnes (Owners)*, [1975] Q.B. 929; *Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26; *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.*, [1968] 1 All E.R. 104; *Sudbrook Trading Estate Ltd. v. Eggleton*, [1983] 1 A.C. 444; *West Country Cleaners (Falmouth) Ltd. v. Saly*, [1966] 1 W.L.R. 1485; *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779; *Dawson v. Helicopter Exploration Co.*, [1955] S.C.R. 868; *Daku v. Daku* (1964), 49 W.W.R. 552; *Friesen v. Bomok* (1979), 95 D.L.R. (3d) 446; *Nieckar v. Sliwa* (1976), 67 D.L.R. (3d) 378; *Nilsson v. Romaniuk* (1984), 59 A.R. 39; *Re Kennedy & Beaucage Mines Ltd.*, [1959] O.R. 625; *Davis v. Shaw* (1910), 21 O.L.R. 474; *Lombard North Central Plc. v. Butterworth*, [1987] Q.B. 527; *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904; *Parkin v. Thorold* (1852), 16 Beav. 59, 51 E.R. 698; *Stickney v. Keeble*, [1915] A.C. 386; *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana — The Scaptrade*, [1983] 2 All E.R. 763; *LeMesurier v. Andrus* (1984), 31 R.P.R. 143, rev'd on other grounds (1986), 54 O.R. (2d) 1; *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (1921); *Lang v. Provincial Natural Gas and Fuel Co. of Ontario* (1908), 17 O.L.R. 262; *Sprague v. Booth* (1908), 21 O.L.R. 637, aff'd [1909] A.C. 576; *Hare v. Nicoll*, [1966] 2 Q.B. 130; *Krause v. Bain Bros. Alta. Ltd.* (1972), 29 D.L.R. (3d) 500; *Bass Holdings*

Ltd. v. Morton Music Ltd., [1987] 2 W.L.R. 397; *Birchmont Furniture Ltd. v. Loewen* (1978), 84 D.L.R. (3d) 599; *Petrillio v. Nelson* (1980), 114 D.L.R. (3d) 273; *Runnymede Iron & Steel Ltd. v. Rossen Engineering and Construction Co.*, [1962] S.C.R. 26; *Gillespie v. Wells* (1912), 2 D.L.R. 519; *Zim Israel Navigation Co. v. Effy Shipping Corp. — The Effy*, [1972] 1 Lloyd's Rep. 18.

By Binnie J.

Applied: *Pierce v. Empey*, [1939] S.C.R. 247; **referred to:** *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904; *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.*, [1968] 1 All E.R. 104; *Dominion Grange Mutual Fire Insurance Association v. Bradt* (1895), 25 S.C.R. 154; *Regina Industries Ltd. v. City of Regina*, [1947] S.C.R. 345.

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APPEAL from a judgment of the Federal Court of Appeal, [1997] 3 F.C. 154, 212 N.R. 256, [1997] F.C.J. No. 451 (QL), reversing a judgment of the Federal Court, Trial Division, [1996] 3 F.C. 821, 115 F.T.R. 128, [1996] F.C.J. No. 919 (QL), granting a declaration that an option to purchase could be exercised. Appeal allowed.

Elizabeth M. Heneghan, Q.C., for the appellant.

Alain R. Pilotte and *Julie Bergevin*, for the respondents.

Solicitor for the appellant: Elizabeth M. Heneghan, St. John's.

Solicitors for the respondents: Alain R. Pilotte Law Office, Montréal.

SUPREME COURT OF CANADA

SAIL LABRADOR LIMITED

v.

THE OWNERS, NAVIMAR CORPORATION LTÉE AND ALL OTHERS INTERESTED IN THE SHIP *CHALLENGE ONE*, HER EQUIPMENT, BUNKERS AND FREIGHTS, and THE SHIP *CHALLENGE ONE*, HER EQUIPMENT, BUNKERS AND FREIGHTS

CORAM: The Chief Justice and Gonthier, Cory, Iacobucci, Major, Bastarache and Binnie JJ.

BASTARACHE J. --

1 The main issue in this appeal is the effect of deficient performance of the terms of a lease upon an owner's right to cancel a purchase option which is expressly made exercisable subject to full performance of the terms of the lease.

Facts

2 The respondent Navimar is the owner of the vessel *Challenge One*. On June 21, 1985, the appellant Sail Labrador entered into a five-year charter party agreement with the respondent to charter this vessel. Under clause 30 of the charter party, the appellant had an option to purchase the *Challenge One* at the end of the five-year period subject to full performance of all its obligations in the charter party. The relevant provisions of the charter party are:

Hire

10. The Charterer shall pay to the Owner for the use of the vessel a rate of $85,000. Canadian currency per year for each year commencing on and from the day of delivery or June 10, 1985 which ever is the later: hire to continue until the date of redelivery. If the vessel is lost the hire payable for the year of the loss being calculated prorata of the number of days the vessel was available of 208 days. Should the vessel be lost after December 1st of any operating year (which concludes on January 3rd of the following calendar year) the annual Charter of that operating year is payable in full.

Annual Schedule Payments

11. The annual Charter hire shall be payable in seven (7) monthly instalments each and every year of the Charter in accordance with the following schedule.

First year of Charter 1985

1. 1985	August	10th	$12,142.85
2. 1985	September	10th	$12,142.85
3. 1985	October	10th	$12,142.85
4. 1985	November	10th	$12,142.85
5. 1985	December	10th	$12,142.85
6. 1986	January	10th	$12,142.85
7. 1986	February	10th	$12,142.90

Second year of Charter 1986

1. 1986	August	10th	$12,142.85
2. 1986	September	10th	$12,142.85
3. 1986	October	10th	$12,142.85
4. 1986	November	10th	$12,142.85
5. 1986	December	10th	$12,142.85
6. 1987	January	10th	$12,142.85
7. 1987	February	10th	$12,142.90

Third year of Charter 1987

1. 1987	August	10th	$12,142.85
2. 1987	September	10th	$12,142.85
3. 1987	October	10th	$12,142.85
4. 1987	November	10th	$12,142.85
5. 1987	December	10th	$12,142.85
6. 1988	January	10th	$12,142.85
7. 1988	February	10th	$12,142.90

Fourth year of Charter 1988

1. 1988	August	10th	$12,142.85
2. 1988	September	10th	$12,142.85
3. 1988	October	10th	$12,142.85
4. 1988	November	10th	$12,142.85
5. 1988	December	10th	$12,142.85
6. 1989	January	10th	$12,142.85
7. 1989	February	10th	$12,142.90

Fifth year of 1989

1. 1989	June	10th	$12,142.85
2. 1989	July	10th	$12,142.85
3. 1989	August	10th	$12,142.85
4. 1989	September	10th	$12,142.85
5. 1989	October	10th	$12,142.85
6. 1989	November	10th	$12,142.85
7. 1989	December	10th	$12,142.90

Payments herein above set out are payable to Owners at Quebec City in cash in Canadian currency by way of Bank Transfer and/or certified cheques deposited to the account of:

Navimar Corporation Ltd.

. . .

Should any one of the payments not be deposited as set forth herein, the Owner may forthwith withdraw the vessel from the service/or the Charterer without prejudice to any claim which the Owner may have against the Charterer pursuant to this Charter, nor to any additional rights and/or claims of the Owner pursuant to any collateral guarantee provided by Sail Labrador Ltd. and/or any one of its share holders and/or directors and/or any other guarantors.

. . .

Reports

25. The Charterer, shall keep the Owner informed of the arrival and departure of this vessel at and from all ports of call other than those referred to in Clause 3. At the end of each month the Charterer shall supply deck and engine room logs of the voyages if required by Owner.

. . .

Option to Purchase

30. Subject to full performance of all its obligations in this Charter Party including but not limited to payments being made promptly and in accordance with the schedule of Clause 10 throughout this Agreement, the Charterer shall have an option to purchase the vessel after the five (5) year period of this Charter for the sum of Two Hundred Thousand Dollars ($200,000.00) cash if he notifies the Owner in writing of his intention to purchase by no later than March 31, 1990.

    This option shall be enforceable only for a period of fifteen (15) days from the time the Charterer's notice is sent to Owner and is subject to cash payment.

3 Clause 11 of the charter party required the appellant to make a total of 35 monthly payments to the respondent, seven payments during each year of the five-year charter party. The accepted practice between the parties was for the appellant to submit seven post-dated, uncertified cheques to the respondent at the beginning of each operating season. There were no problems with the cheques for the first four years. However, the cheque for the first payment in the fifth year, due on June 10, was returned by reason of insufficient funds. The trial judge found that the bank's refusal to honour the appellant's cheque was due to an error by a bank employee.

4 In a letter dated June 28, 1989, the respondent notified the appellant that its cheque had been refused. The respondent informed the appellant that the option to purchase was void and of no further effect because of the appellant's failure to make the payment as required on June 10, 1989. In this same letter, the respondent gave the appellant instructions on how it could remedy its late payment. The appellant promptly made the payment with interest in accordance with the respondent's instructions. All subsequent payments were made on time.

5 On October 31, 1989, the appellant wrote to the respondent expressing its view that the option to purchase remained effective. The appellant noted that the default had been due to a bank error and that the error had been promptly remedied in accordance with the respondent's instructions.

6 Under clause 25 of the charter party, the respondent had the right to be supplied with the vessel's deck and engine room logs upon request. Prior to the June 1989 late payment, the respondent had made no such requests. The respondent's first request under clause 25 was contained in a letter to the appellant dated July 13, 1989. The respondent argued at trial that the appellant had breached clause 25 by failing to provide all copies of the logs as requested.

7 On January 5, 1990, the appellant gave the respondent notice of its intention to exercise the option. On January 19, the appellant tendered the sum of $200,000. The respondent refused to execute a bill of sale on the basis that the appellant had breached several clauses of the charter party agreement thereby rendering the option void.

8 The appellant commenced an action against the respondent in the Federal Court, Trial Division, seeking a declaration that it was entitled to exercise the option. The learned trial judge granted the declaration. The Federal Court of Appeal disagreed and allowed an appeal by the respondent. The appellant obtained leave to appeal that decision to this Court with regard to the breaches of clauses 11 and 25 of the charter party.

9 On October 9, 1998, this Court set aside the decision of the Federal Court of Appeal with costs throughout, reasons to follow. These are our reasons.

Judicial History

Federal Court, Trial Division, [1996] 3 F.C. 821

10 In response to the appellant's action, the respondent alleged that the appellant had breached eight separate clauses of the charter party agreement. Nadon J. found that the appellant had breached two clauses of the charter party agreement: clauses 11 and 25.

11 In assessing whether there had been breaches of the charter party, Nadon J. made findings of fact relevant to clauses 11 and 25. For example, in relation to clause 11, he found that the appellant's late payment had been due to a bank error. He also found that the appellant had quickly remedied the late payment with interest in accordance with the respondent's instructions. With reference to clause 25, Nadon J. found that a lack of commercial photocopiers at the appellant's disposal had contributed to its failure to provide copies of its log books as required by this clause. No discussion of the effect of the actions of the appellant preceded Nadon J.'s conclusion that the appellant had effectively breached clauses 11 and 25.

12 After concluding that the appellant had breached two clauses of the charter party, Nadon J. undertook an analysis of the legal principles which would permit him to decide whether the option to purchase was still enforceable. He began by stating that

charter party agreements are governed by ordinary principles of contract law. He then cited s. 3 of the *Federal Court Act*, R.S.C., 1985, c. F-7, to reach the conclusion that the Federal Court has jurisdiction to grant equitable relief.

13 Nadon J. examined the general characteristics of option contracts. To this end, he cited this Court's decisions in *Canadian Long Island Petroleums Ltd. v. Irving Industries (Irving Wire Products Division) Ltd.*, [1975] 2 S.C.R. 715, and *Mitsui & Co (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187.

14 Nadon J. then addressed the *de minimis non curat lex* principle. He concluded that this principle prevents minor or trivial divergences from the terms of a contract from being considered breaches. He cited *Margaronis Navigation Agency, Ltd. v. Henry W. Peabody & Co., of London, Ltd.*, [1964] 2 Lloyd's Rep. 153 (C.A.), for the proposition that negligible divergences from required performance should be disregarded when considering whether a contractual obligation has been broken.

15 Nadon J. next made reference to the doctrine of "spent breach". He cited British authorities for the proposition that British law requires strict performance of conditions precedent of unilateral contracts, including option contracts. He noted, however, that English courts have recognized the doctrine of spent breach as an exception to the requirement of strict compliance in cases involving option contracts. According to this doctrine, if an option is conditional upon the performance of covenants, the optionee will not be prevented from exercising the option because of past breaches of the covenants if the breaches are "spent", in the sense of not giving rise to a subsisting cause of action at the time the optionee seeks to exercise the option.

16 Nadon J. held that Canadian law also recognizes a requirement that conditions precedent be strictly complied with prior to the exercise of an option to purchase. He held, however, that Canadian law leaves room for the operation of equitable doctrines to relieve optionees from this strict performance requirement. To support this conclusion, Nadon J. cited Duff C.J. in *Pierce v. Empey*, [1939] S.C.R. 247, at p. 252:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them . . . [Emphasis added.]

17 Nadon J. then cited numerous authorities for the proposition that the doctrine of spent breach has been recognized in Canadian law. Accordingly, he concluded that a party will not be denied the right to exercise an option if a previous breach has been remedied by the time the option is exercised.

18 Nadon J. then turned to clause 30 of the charter party, the option clause. He held that this clause required only that the appellant substantially perform its obligations under the charter party.

19 Turning to the breaches of clauses 11 and 25, Nadon J. then held that since the appellant had remedied its breach of clause 11 before the exercise of the option, this "spent" breach could not prevent it from exercising the option. Nadon J. made no finding of fact as to when or if the appellant's breach of clause 25 had been remedied.

He simply concluded that it would not be equitable to dis-entitle the appellant from exercising the option because of this trivial breach.

20 Nadon J. therefore concluded that the appellant was entitled to exercise the option to purchase set out in clause 30. He issued a declaration to this end.

Federal Court of Appeal, [1997] 3 F.C. 154

21 The respondent's main ground of appeal was that Nadon J. had erred in deciding that the appellant could exercise the option to purchase notwithstanding its failure to perform its obligations under clauses 11 and 25 of the charter party agreement.

22 Décary J.A. delivered the unanimous judgment of the court. He proceeded on the basis of Nadon J.'s findings that the appellant had breached clauses 11 and 25.

23 Décary J.A. held that Nadon J. had improperly applied the *de minimis* principle. According to Décary J.A., *de minimis* is only a rule of interpretation used to determine whether a breach has been committed. That is, the principle only applies to prevent the finding of a breach on the basis that the parties have implicitly agreed that substantial performance will be tantamount to strict performance. The principle cannot be used to qualify a breach as minimal. Therefore, Décary J.A. held that Nadon J., having found that a breach had been committed, could no longer look to the *de minimis* principle to conclude that the breach was so negligible as to not constitute a breach.

24 Décary J.A. also suggested that Nadon J. had misinterpreted the words of Duff C.J. in *Pierce*. According to Décary J.A., *Pierce* does not stand for the general proposition that Canadian law leaves room for the operation of equitable doctrines to relieve optionees from strict performance. Rather, *Pierce* will only relieve deficient performance of conditions precedent if the deficiency can be related to the conduct of the owner. Décary J.A. then held that no such relation had been established in this case.

25 Décary J.A. held that Nadon J. erred when he related the doctrine of "spent breach" to equity considerations. According to Décary J.A., even though courts have endeavoured to soften the harsh consequences of requiring strict performance by examining whether the wording of the agreement could support an interpretation that all conditions must be fulfilled by the time the option was exercised rather than at the time they initially were to be fulfilled, the basic principle of strict performance remains good law. Whether strict performance is required at any given time prior to the exercise of the option is a matter of construction of each contract and the doctrine of spent breach is not an exception to this principle.

26 Décary J.A. held that the language used by the parties is key to the interpretation of contracts because courts must give effect to the intention of the parties. He held that if the parties insisted that a condition precedent be fulfilled at a certain time, then it should not be open to the courts to decide that it could be fulfilled at a later time. This would amount to rewriting the contract. To this end, Décary J.A. cited the words of Cairns L.J. in *Tenax Steamship Co. v. The Brimnes (Owners)*, [1975] Q.B. 929 (C.A.), at p. 971: "While it can properly be said that a person who has paid late has remedied his failure to pay, it cannot be said that he has remedied his failure to pay punctually."

27 Turning to clause 30, the Court of Appeal held that the inclusion of the words "promptly", "in accordance with the schedule" and "throughout this Agreement" in this clause led to the inescapable conclusion that the appellant could only enforce the option if it had made each and every payment the very day it was due under clause 11. I would note that the Court of Appeal's reference to the option clause includes the notation "[*sic*]" after the words "Clause 10". Décary J.A.'s reasoning suggests that he proceeded on the assumption that the reference to clause 10 in the option clause was a typographical error intended to read clause 11, although no such finding was made by the trial judge.

28 Décary J.A. allowed the appeal on the basis of the appellant's breach of clause 11. As a result, he did not find it necessary to address the breach of clause 25.

Analysis

Nature of the Contract

29 A great deal of the written and oral arguments in this case were directed at establishing whether the option is an independent contract from the underlying charter party or whether it is simply a term of the charter party. In other words, the question which arose was whether the facts of this case give rise to a single contract or to two separate but related contracts.

30 The respondent urged this Court to find that the option clause creates a separate contract from the charter party. According to the respondent, the option is a

"contract within a contract". In order to understand why the respondent takes this position, it is useful to examine the performance of contracts more generally. For this purpose, I will refer to two well recognized textbooks on contracts: G. H. Treitel's *The Law of Contract* (9th ed. 1995) and S. M. Waddams' *The Law of Contracts* (3rd ed. 1993).

31 Both Treitel and Waddams recognize that, as a general rule, parties to a contract must perform their obligations specifically as dictated by the contract. However, if the performance is deficient, for example in quality, quantity or timeliness, it is accepted that the defect in performance must attain a certain minimum degree of seriousness to entitle the non-offending party to rescind the contract. The failure in performance must substantially deprive the other party of what was bargained for. This concept is referred to as substantial non-performance or as a requirement that a breach go to the "root" of the contract. In English legal literature, the expression "substantial failure" is used. If this minimum standard is not met, rescission will not be available to the non-offending party. This party will be forced to settle for a remedy in damages. Thus, courts are concerned with the consequences of the deficient performance and the nature of the prejudice caused to the non-offending party when determining whether rescission is available (Treitel, at pp. 685-86; Waddams, at pp. 394-96). The case of *Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.), stands for the proposition that courts will apply this type of substantial non-performance test to determine if rescission is available in cases involving charter party contracts like the one in question.

32 The important point for the purposes of this case is the fact that, in the past, courts have distinguished deficient performance in bilateral contracts from deficient performance of options, which have generally been categorized as unilateral contracts. A brief review of basic contract law principles may be in order.

33 A bilateral contract is a contract in which both parties undertake obligations through an exchange of promises. Acceptance of a bilateral contract, as a general rule, occurs when the offeree communicates its counter-promise to the offeror. In contrast, a unilateral contract is one in which a party makes a promise in return for the performance or forbearance of an act. There is no counter-promise to perform this act or forbearance. In this way, a unilateral contract is a contract in which only one party undertakes a promise. This promise takes the form of an offer which can only be accepted by performance of the required act or forbearance. Such performance provides the other party's consideration, allowing it to enforce the original promise (Treitel, at pp. 35-36; Waddams, at p. 111; *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.*, [1968] 1 All E. R. 104 (C.A.)).

34 As noted above, courts have generally categorised options as unilateral contracts. In *Mitsui, supra*, Major J. set out the three principal features of options, at pp. 200-1: (1) exclusivity and irrevocability of the offer to sell within a specific time period; (2) specification of how the contract of sale may be created by the option holder; and (3) obligation of the parties to enter into a contract of sale if the option is exercised. At page 201, Major J. cites the following words of Lord Diplock in *Sudbrook Trading Estate Ltd. v. Eggleton*, [1983] 1 A.C. 444 (H.L.), at pp. 476-77, with approval:

> The option clause cannot be classified as a mere "agreement to make an agreement." There are not any terms left to be agreed between the parties. In modern terminology, it is to be classified as a unilateral or "if" contract. Although it creates from the outset a right on the part of the lessees, which they will be entitled, but not bound, to exercise against the lessors at a future date, it does not give rise to any legal obligations on the part of either party unless and until the lessees give notice in writing to the lessors, within the stipulated period, of their desire to purchase the freehold reversion to the lease. The giving of such notice, however, converts the "if" contract into a synallagmatic or bilateral contract, which creates mutual legal rights and obligations on the part of both lessors and lessees.

35 In *Canadian Long Island Petroleums Ltd.*, *supra*, at p. 732, Martland J. states:

> In other words, the essence of an option to purchase is that, forthwith upon the granting of the option, the optionee upon the occurrence of certain events solely within his control can compel a conveyance of the property to him.

36 Thus, it is clear that an option may take the form of a unilateral contract. Upon granting the option, the optionor undertakes the promise to honour its terms if it is exercised by the optionee. The optionee, on the other hand, is under no corresponding obligation to exercise the option. However, if the optionee chooses to exercise the option, it can do so simply by performing the required conditions precedent.

37 In contrast to the substantial non-performance doctrine which they have applied to bilateral contracts, courts have historically tended to require that conditions precedent to the exercise of options be strictly performed to give rise to liability on the part of the optionor. For example, in *Pierce*, *supra*, a mortgagor in default executed a quit claim deed of the mortgaged land to the mortgagee, who was in possession

following foreclosure proceedings. In a letter from the mortgagee's solicitor to the mortgagor's solicitor which accompanied the quit claim deed, the mortgagor was granted a right, for a period of three months, to repurchase the land upon payment of the full amount due under the mortgage. This Court found, at pp. 250-51, that even though the option formed part of the arrangement by which the equity of redemption was released, the parties had clearly expressed their intention that the land rest in the mortgagee free from the equity of redemption. Clearly, the option was a separate, unilateral contract and the conditions precedent to its exercise had to be strictly performed. According to Duff C.J. (at p. 252):

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them . . . . [Emphasis added.]

38 Likewise, in *West Country Cleaners (Falmouth) Ltd. v. Saly*, [1966] 1 W.L.R. 1485 (C.A.), Danckwerts L.J., at p. 1489, noted that "an option of this character is a privilege — a right which has always been treated by the law as requiring complete compliance with the terms and conditions upon which the option is to be exercised". According to the Court, this principle applies even if the condition is the performance of an obligation under another term of the contract in which the option is contained (at p. 1485).

39 The apparent rationale for the inapplicability of the doctrine of substantial non-performance to the conditions precedent for the exercise of options is the absence

of mutual promises in unilateral contracts. That is, since the optionee has made no counter-promise, the optionor has no remedy if the performance is deficient except to refuse to honour its promise. The unavailability of the substantial non-performance doctrine is thus not based on a requirement for certainty (Treitel, at p. 723). The end result is that deficient performance of a condition precedent to the exercise of an option will allow the optionor to refuse to honour the option without showing that there was substantial non-performance. On the other hand, if the performance in question is a promised term of a bilateral contract, like a charter party, the substantial non-performance doctrine would apply to limit the non-offending party's right to rescind. In this way, it appears that the current law prevents the substantial non-performance doctrine from relieving deficient performance of conditions precedent in option contracts because it automatically categorizes them as unilateral in nature.

40 It thus becomes clear why the respondent urges this Court to find that the option is a separate contract from the underlying, bilateral charter party. It seeks to have the option categorised as an independent, unilateral contract to prevent the appellant from relying on the argument that it has substantially performed the contract. However, while an option may be a unilateral contract, not all options are unilateral contracts. *Pierce, supra*, has been interpreted as establishing that all options are unilateral contracts. I disagree and would add that any previous case law which restricts the interpretation of options in this way must not be followed. That an option may be an element of a bilateral contract in which it is contained rather than an independent, unilateral contract is supported by this Court's decision in *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779, where it was recognized that a single contract can contain terms which relate to different subject matters.

41 Whether a contract which contains an option clause establishes a single, bilateral contract or two separate contracts, one bilateral and the other unilateral, is a matter of construction. Courts must examine the text of the contract and the context surrounding it in order to determine the intention of the parties, keeping in mind that this Court has previously approved of the tendency by courts to treat offers as calling for bilateral rather than unilateral performance whenever a contract can fairly be so construed: *Dawson v. Helicopter Exploration* Co., [1955] S.C.R. 868, at p. 874, *per* Rand J.

42 In the case at bar, the option and the charter party in which it is contained are intimately connected to one another. For example, an examination of the issue of consideration reveals such a connection. Without consideration, an option is treated like a simple offer. In such a case, the offeror can withdraw the option at any time prior to acceptance, a power clearly running contrary to the very nature of the option. See for example Annotation, "The Law of Options", [1930] 1 D.L.R. 1, at p. 2; M. J. Cozzillio, "The Option Contract: Irrevocable Not Irrejectable" (1990), 39 *Cath. U. L. Rev.* 491; P. M. Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991), 70 *Can. Bar Rev.* 1, at p. 3; V. Di Castri, *Law of Vendor and Purchaser* (1988 (loose-leaf)), vol. 1, at pp. 6-16.1-6.18. In his article, *supra*, Cozzillio notes that in the case of options contained in lease agreements, American courts have been willing to presume that the rental payments under the lease serve as consideration for the option (at p. 509). In his book, *supra*, Di Castri notes that Canadian courts, like those in the United States, are also willing to presume that options contained in lease agreements gain consideration through the payment of rent under the lease (at pp. 6-17). In his article, *supra*, Perell confirms that this is the practice in Canada (at p.

4). For Canadian cases which found that options contained in lease agreements gain consideration through the payment of rent under the lease, see for example *Daku v. Daku* (1964), 49 W.W.R. 552 (Sask. C.A.); *Friesen v. Bomok* (1979), 95 D.L.R. (3d) 446 (Sask Q.B.); *Nieckar v. Sliwa* (1976), 67 D.L.R. (3d) 378 (Sask Q.B.); *Nilsson v. Romaniuk* (1984), 59 A.R. 39 (Q.B.).

43 The option in the present case requires consideration to be binding on both parties, but it can be assumed that it is based on the same consideration as the underlying lease, namely the lease payments. In this way, the charter party and the option in this case are specially connected.

44 Another connection between the option and the charter party is the fact that the option is specifically made dependent on the performance of the terms of the charter party. An option is not always made dependent on the performance of the underlying contract. In *Re Kennedy & Beaucage Mines Ltd.*, [1959] O.R. 625 (C.A.), an agreement gave the defendant a 99-year lease of land which included an option to purchase that same land at any time during the currency of the lease. This agreement did not expressly make the option dependent upon fulfilment of the covenants of the underlying lease. Nevertheless, the optionor brought an action seeking a declaration that the optionee was not entitled to exercise the option because it had breached the covenants of the lease. The Ontario Court of Appeal found that the lease and the option were separate and independent contracts, although contained in the same document. One of the reasons the court came to this conclusion was the fact that the option was not made dependent on the covenants in the underlying lease.

45 The present case involves another significant connection: the option and the charter party involve the same property, namely the vessel the *Challenge One*. In *Daku v. Daku*, the plaintiff brought an action for specific performance of an option contained within a lease. Under the agreement, the plaintiff received a three year lease of real property and an option to purchase that same property. The Court of Appeal unanimously allowed the application. In a concurring decision, Brownridge J.A. stated, at p. 557: "It is true, of course, that a lease and an option may be two separate agreements although contained in one document".

46 However, Brownridge J.A. went on to find that the option and the lease could not be separated on the facts of that case. He concluded that the document as a whole would have to stand or fall in its entirety (at p. 557). Thus, since the lease stood, so too did the option.

47 In contrast, in *Davis v. Shaw* (1910), 21 O.L.R. 474 (Div. Ct.), a document contained a purchase and sale agreement for one parcel of land, and an option to purchase another parcel of land. In that case, the plaintiff sought specific performance of the option and argued that the sale of the first parcel of land constituted the consideration for the option to purchase the second parcel. The court rejected this submission. According to the court, the option to purchase the second parcel of land was not sufficiently connected to the sale of the first parcel of land to allow for a finding that the sale price also constituted consideration for the option. The court thus found that the two agreements, the sale and the option, though contained in the same document, were two independent agreements.

48 The apparent inconsistency between the cases of *Davis* and *Daku* can be reconciled by the fact that in one case the underlying contract and the option applied to two separate parcels of land, while in the other the underlying contract and the option applied to the same property. Thus, in *Davis*, where the underlying contract and the option applied to two separate parcels of land, the court found two separate contracts, though contained in the same document. In *Daku*, where the underlying contract and the option applied to the same property, the court found a single contract.

49 Based on the examination of the facts in the present case, it is my opinion that the lease and the option form a single, bilateral contract. This single contract contains many terms, some relating to the lease, others to the option. The option itself forms part of the consideration flowing from the respondent to the appellant under this bilateral contract.

Interpretation of the Contract

50 Having found that the option in the present case is a clause of the bilateral charter party, it must next be determined whether the parties have expressly provided for literal and strict enforcement of any or all of the terms of this contract. Courts will generally give effect to the parties' intentions by upholding any clear contractual provisions which provide that the breach of a certain term, no matter how slight, will justify rescission of the entire contract by the non-offending party [Waddams, pp. 400-401; Treitel, pp. 694-95; *Lombard North Central Plc. v. Butterworth*, [1987] Q.B. 527 (C.A.)]. If the parties have made no such provisions, the bilateral nature of the contract