[2021] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER PUSEY JA
THE HON MRS JUSTICE HARRIS JA

SUPREME COURT CIVIL APPEAL NO 57/2016

BETWEEN	**TIKAL LIMITED (T/A SUPER PLUS FOOD STORES)**	**APPELLANT**
AND	**TEWANI LIMITED**	**RESPONDENT**

Vincent Chen and Makene Brown instructed by Chen Green & Co for the appellant

Jonathan DK Morgan instructed by DunnCox for the respondent

19 January and 30 July 2021

MCDONALD-BISHOP JA

Introduction

[1] This is an appeal brought by Tikal Limited, trading as Super Plus Food Stores ('the appellant'), from the decision of Batts J ('the trial judge') made in the Commercial Division of the Supreme Court on 6 May 2016. The trial judge found in favour of Tewani Limited ('the respondent') on a claim it had brought against the appellant for breach of a lease agreement in respect of the Oasis Shopping Centre, a commercial premises situated at the Spanish Town Commercial Centre in the parish of Saint Catherine ('the shopping centre').

[2] The issue for the consideration of this court was whether the trial judge was correct to hold that the appellant was liable to the respondent for breach of the lease agreement, and for damages in the form of rental, maintenance and service charges.

[3] On 19 January 2021, having heard counsel's submissions, this court dismissed the appeal, affirmed the decision of the trial judge, and awarded costs of the appeal to the respondent. We indicated then that we would provide our reasons in writing at a later date. This is in fulfilment of that promise.

Background

[4] The factual background and the procedural history in the court below, in so far as they are relevant to this appeal, will first be outlined. I will begin with the salient undisputed facts.

The undisputed facts that led to the proceedings in the Supreme Court

[5] In 2004, the appellant entered into a 10 year fixed term lease agreement with Plastique Limited, as the landlord, and the appellant, as the tenant, of retail commercial space at the shopping centre for use as a supermarket ('the leased property').

[6] On 16 July 2007, the respondent purchased the leased property from Plastique Limited. Notification of the change of ownership was given to the appellant, by the respondent's attorney-at-law, with a directive that the rent should be paid to the respondent. After the sale of the leased property to the respondent, the appellant remained in possession and continued paying rent to the respondent without objection or challenge to the respondent's right to demand rental. After some time, the appellant complained to the respondent that the supermarket was not receiving customers at a level consistent with what is common for a first class commercial complex and as such, it could not afford the high rental that was being charged. It requested a reduction in the rent from the respondent and indicated that it would be forced to vacate the property if the rent was not reduced.

[7] As a result of the appellant's request, the parties entered into dialogue regarding the reduction of the rent. The respondent refused to reduce the rent and the appellant purportedly terminated the lease and vacated the leased property in January, 2009.

The case in the Supreme Court

[8] The respondent was aggrieved by the appellant prematurely vacating the leased property and, consequently, on 3 May 2013, filed a claim form with particulars of claim, which were subsequently amended on 4 April 2016, seeking the following reliefs:

> "1. Rent due and owing for the period January 2009 to December 2014 in the amount of **US$1,638,746.91** plus GCT thereon in the sum of **US$270,393.24** pursuant to the terms of the Lease Agreement;
>
> 2. Interest on the arrears of rent in the amount of **US$400,224.03** pursuant to clause 4(a) of the Lease Agreement at the rate of 10% per annum from the 1st January 2009 to the 31st December 2014 and continuing to the date of judgment or sooner payment;
>
> 3. Service and maintenance charges in respect of the Rented premises in the amount of **J$31,725,834.00** pursuant to clause 3 of the Lease Agreement and interest thereon in the amount of **JA$3,172,583.40** pursuant to clause 4(a) of the Lease Agreement at the rate of 10% per annum from the 30th September 2012 to the 31st December 2014 and continuing to the date of judgment or sooner payment;
>
> 4. Costs; and
>
> 5. Such further and/or other relief as this Honourable Court deems just." (Underlining and bold as in original)

[9] The appellant, in response, filed an amended defence to the claim on 10 December 2015, in which it averred, among other things, that:

> a. The lease should have been registered in accordance with section 94 of the Registration of Titles Act because it relates to registered land. The lease, having not been registered, was, therefore, ineffectual to pass any estate or interest in the land.

b. Pursuant to section 63 of the Registration of Titles Act, the unregistered lease did not create a term of years and is merely a monthly tenancy.

c. In the alternative, if the court finds that there was a lease between the respondent and the appellant, the appellant had given the required 30 days' notice in accordance with clause 6(D) of the agreement, which applied if the lessor failed to comply with any obligations under the lease.

d. The respondent was in breach of certain covenants under the lease agreement, namely, clause 5(B) (the covenant to provide service and maintenance and an accounting of the expenses and service and maintenance charge); clause 5(C) (the covenant to regularly and promptly pay all property taxes); and clause 5(D) (the covenant to insure).

[10] On the same date, the appellant also filed an ancillary claim in which it claimed the sum of US$60,000.00 that was paid to Plastique Limited as a deposit for the occupation of the leased property. The ancillary claim is, however, not relevant to the appeal and so nothing further needs be said of it.

[11] At trial, the respondent adduced evidence that revealed the following information, which was either disputed or not distinctly admitted by the appellant:

a. The leased property was built to enable the appellant to commence business there.

b. The lease was assigned to the respondent upon the purchase of the leased property, and so the respondent was entitled to the benefit of the lease.

c. The appellant had failed to pay the rental, maintenance, and service charges, which resulted in the sums claimed as being due and owing by the appellant.

d. The appellant had never presented any notice of breach on the part of the respondent, and the respondent had carried out all its obligations under the agreement with respect to the leased property.

e. The appellant, through its attorney-at-law, had acknowledged that a viable and enforceable lease agreement with no termination clause existed between the parties with respect to the leased property.

[12] In support of its pleadings regarding the matters on appeal, the appellant led evidence establishing the following information, which was either denied or not distinctly admitted by the respondent:

a. The appellant was induced to enter into the 10 year lease agreement by representations made by Plastique Limited that the shopping centre would have been populated by several businesses, which would complete and enhance the operations of the supermarket at the shopping centre.

b. The appellant expected that there would have been substantial patronage of the shopping centre, which would make the operation of the supermarket viable.

c. Within several months of the appellant taking possession, several important tenants at the shopping centre ceased to do business with the result that the customer traffic fell significantly and the shopping centre became virtually empty over time.

d. The appellant told Plastique Limited that if customer traffic to the supermarket did not improve, then, the appellant would move out of the leased property. The appellant's attorney-at-law, Mrs Jennifer Messado (who, interestingly, also acted as the respondent's attorney-at-law), advised the respondent that if the rent was not reduced, the appellant would have no alternative but to terminate the arrangement as the supermarket was losing money.

e. Mrs Messado, in her capacity as agent for the appellant, was instructed to give the respondent 30 days' notice and that notice was given. Therefore, the appellant, by giving the requisite notice, would have lawfully terminated the lease and vacated the premises.

The trial judge's decision

[13] On 6 May 2016, after considering the evidence and submissions of the parties, the trial judge made the following orders, as set out in para. [40] of his written judgment recorded as **Tewani Limited v Tikal Limited (T/A Super Plus Food Stores)** [2016] JMSC CD 8:

> "1. Judgment for the Claimant on the Claim:
>
> a. Rent for the period January 2009 to December 2013 in the amount of US$1,378,963.10 plus GCT of US$227,528.91.
>
> b. Interest on arrears of rent in the amount of US$400,224.03 (being 10% per annum) from January 2009 to December 2013).
>
> c. Service and maintenance charges of J$24,860,062.00.

d. Interest on service and maintenance charges in the sum of JA$3,172,583.40 (being 10% per annum from January 2009 to December 2013).

e. Interest will run on the United States dollar portion of this judgment debt at a rate of 3% per annum until payment and on the Jamaican dollar portion at the rate of 6% per annum until payment, (Pursuant to the Judicature (Supreme Court) Rate of Interest on Judgment Debts) Order 2006).

2. Judgment for the Defendant on the Ancillary Claim in the amount of US$60,000.00 being the deposit paid. Interest will run at 3% per annum from the 1st January, 2014 until the date of payment or set off.

3. Two-thirds costs to the Claimant to be agreed or taxed."

[14] In coming to his decision, the trial judge focused on the following issues, as identified by him (para. [9] of his judgment), which are relevant to the appeal:

"(i) Is the [appellant] liable to the [respondent] for rental and maintenance in accordance with the fixed term lease?

(ii) …

(iii) If the Fixed Term lease is not valid and enforceable as such, is there in existence a monthly tenancy and is there any liability in that regard."

[15] In considering the issues, the trial judge considered the Statute of Frauds and the cases of **Leighton Chin-Hing v Wisynco Group Limited** [2013] JMCA Civ 19, **Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ 33 ('**Brady & Chen Ltd**'), and **Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd** [1982] 1 QB 84 ('**Amalgamated Investment**').

[16] He had regard to the fact that the appellant expressly acknowledged that the lease was valid and binding, the duration of the lease had not expired, and had paid rent and maintenance to the respondent in accordance with the terms of the lease. At para. [25] of his judgment, the trial judge opined:

> "[25] It seems to me therefore, that in circumstances where the parties clearly intended and agreed to be bound by the lease the [appellant] will be liable notwithstanding its non-registration. There is in law an enforceable agreement. A Court of equity, all other things being equal, will not permit the [appellant] to deny its existence."

[17] In keeping with this line of reasoning, the trial judge concluded that there was an enforceable contract between the appellant and the respondent, as it was their intention to be bound by all the terms of the lease. Accordingly, he held, among other things, that the appellant was liable to pay the rental for the unexpired portion of the lease, and the service and maintenance charges with interest at the contractual rate.

The appeal

[18] Dissatisfied with the trial judge's decision on the respondent's claim, the appellant filed its notice and grounds of appeal on 3 June 2016. It raised 11 wide-ranging and substantially overlapping grounds of appeal. They are:

> "(1) The trial judge failed to have any or any sufficient regard to the evidence of the Appellant to the effect that the Landlord had covenanted (Clause 5E) to operate the Spanish Town Commercial Centre (herein 'the Plaza') as a first class commercial centre and failed to do so;
>
> (2) The rental was fixed at a high level in reliance upon the covenant to maintain the Plaza as covenanted and the letter referred to at paragraph 8(f) of the Judgment were written in the context of several requests that the Plaza be so operated or else the Appellant would be constrained to vacate the leased premises as the rental [was] prohibitive;

(3) That the [respondent] owned only 3 strata lots in the plaza which consisted of approximately 33 strata lots and was not in control of the Plaza nor did he have the legal right to operate the Plaza;

(4) That the contract to lease was frustrated as the [respondent] was unable to perform the duty imposed on him by virtue of Clause 5E of the contract;

(5) That the [respondent] could not claim the benefit of the contract by insisting upon high rental and not at the same time discharge its burden to operate the Plaza in accordance with Clause 5E;

(6) The land the subject of the lease was registered land and no estate or interest was created in the land as the lease was for a period of 10 years and was not registered;

(7) On the evidence there was an agreement for a month-to-month tenancy;

(8) That communication of the appellant's intention to Mrs. Jennifer Messado who acted as the attorney-at-law for both parties was communication to the Respondent;

(9) The need for the respondent to cause the Plaza to be operated as required by Clause 5E of the agreement for the lease was communicated to Mrs. Jennifer Messado who was informed by the Appellant that if this default was not remedied then the rental was to be reduced or else the Appellant would vacate the premises;

(10) The action by Mrs. Jennifer Messado to find suitable tenants to take over the leased premises was as a result of the Appellant's claim for a reduction of the rent or else the Appellant would be constrained to vacate; and

(11) The appellant had lawfully terminated the lease."

The issues

[19] At the commencement of the hearing of the appeal, counsel for the appellant, Mr Vincent Chen, indicated to the court that the appellant had no issue with the trial judge's finding that there was a contractual relationship between the parties. In the light of that concession, and for expediency sake, I have summarised the pertinent issues that arose for the court's consideration from the relevant grounds of appeal. I found, when the grounds were stripped of much of the details in which they were formulated, that the overarching inter-related questions were:

(1) whether the trial judge erred in his finding that the appellant had unlawfully terminated the lease (grounds 1, 2, 3, 4, 5, 8, 9, 10, and 11); and

(2) whether the trial judge erred in holding that the appellant was liable to the respondent in accordance with the terms of the fixed term lease and not a monthly periodic tenancy (grounds 6 and 7).

[20] I recognised that these two issues had given rise to two sub-issues, which had a material bearing on the trial judge's conclusion on the core issues; they were:

(i) whether the trial judge erred in finding that the appellant had not given the requisite contractual notice in terminating the contract (the notice point); and

(ii) whether the contract was frustrated thereby relieving the appellant of its obligations under it (the frustration of contract point).

[21] I will now proceed to an analysis of the two core issues by firstly examining the sub-issues identified for resolution.

Issue (1): Whether the trial judge erred in his finding that the appellant had unlawfully terminated the lease (grounds 1, 2, 3, 4, 5, 8, 9, 10, and 11)

(a) Sub-issue (i) - the notice point

[22] The lease agreement provides in clause 6 how the lease agreement may be determined by the parties. The relevant provision is headed in bold, "**It is mutually agreed as follows**" and subheading 6(D) reads as follows:

> "(D) Termination
>
> …
>
> In the event that the Lessor fails to comply with any of the obligations to be performed under this lease then the Lessee shall have the right to termination by written notice of not less than thirty (30) days."

[23] The appellant in its amended defence had averred that it had given the respondent 30 days' notice of its intention to leave the premises because the respondent had breached three covenants in the lease agreement. These were the covenants regarding the obligations of the respondent to provide service and maintenance and an accounting of the expenses and service and maintenance charge (clause 5(B)), to pay all property taxes (clause 5(C)), and to pay insurance for the property (clause 5(D)). Outside of the averments contained in the pleadings, the appellant advanced a case before the court that the respondent also failed to perform its obligations set out in clause 5(E) of the lease, which provided that the respondent agreed to operate the shopping centre as a high-class commercial complex.

[24] It was the appellant's argument before the trial judge that the respondent had breached all these obligations, entitling it to terminate the contract, which it lawfully did. Although there was no pleading regarding clause 5(E), the trial judge considered it as part of the case for the appellant, but ruled in the end that there was no evidence that a notice in reliance on these breaches, or any notice at all, was served on the respondent prior to the appellant vacating the premises (see para. [30] of the judgment

of the trial judge). He, therefore, refrained from making any finding regarding the alleged breach of covenants by the respondent.

[25] In determining the issue of whether the lease was lawfully terminated, the trial judge also considered whether the appellant had obtained the consent of the respondent to surrender the lease. The trial judge observed that there was "no evidence, nor indeed was it suggested", that the respondent agreed to a surrender of the lease. He then concluded that the appellant had breached its contract by, among other things, vacating the premises before the term had expired. In coming to that finding, he placed reliance on the principle of law affirmed by this court in **Brady & Chen Ltd**, that a fixed term lease cannot be terminated before the expiration of the term, unless that termination is in keeping with the provisions of the forfeiture clause in the lease or the tenant has received the consent of the landlord to surrender the lease (see paras. [28] and [29] of the trial judge's judgment).

[26] However, Mr Chen submitted on the appellant's behalf before this court, as he did in the court below, that the appellant's intention to terminate the contract was communicated to the respondent through its agent, Mrs Messado, by letter, that if there was no satisfactory adjustment to the rent, the appellant would be forced to vacate the premises. Counsel pointed out that Mrs Messado had the authority, whether apparent or ostensible, to accept notice on behalf of the respondent. In support of this argument, he placed reliance on the case of **Massander Reid v Bentley Rose and Cynthia Rose** [2011] JMCA Civ 48.

[27] Counsel for the respondent, Mr Jonathan Morgan, in response to Mr Chen's arguments, pointed out that the appellant did not terminate the lease on the terms specified in the lease agreement. He noted that the appellant failed to produce a notice to quit and, further, that there was no evidence adduced that proved, in any way, that a notice to quit was served on the respondent. Counsel submitted that a valid notice must indicate, in substance and "with reasonable clearness", an intention on the part of the tenant to determine the tenancy at a certain time. He further contended that the

correspondence adduced by the appellant, in support of the fact that notice was provided, was a letter exchanged between the parties. However, nothing in that letter, or, in any of the letters relied on by the appellant, indicated that the respondent had failed to perform its obligations to insure the property, pay property taxes or perform regular accounting. Counsel also argued that the appellant did not allege any breach as to clause 5(E) in its pleadings or any of the letters exchanged. He concluded that, "certainly, there was no unequivocal language that indicated the date or time the lease would be determined".

[28] This court, in the case of **Brady & Chen Ltd**, relied on by the trial judge, accepted as the correct position in law, the passage from Professor Gilbert Kodilinye in his text, Commonwealth Caribbean Property Law at page 18, that:

> "A lease for a fixed period terminates automatically when the period expires, there is no need for any notice to quit by the landlord or the tenant. Another basic characteristic of a fixed term lease is that the landlord cannot terminate the lease before the end of the period unless the tenant has been in breach of a condition in the lease, or the lease contains a forfeiture clause and the tenant has committed a breach of covenant which entitled the landlord to forfeit the lease. Nor can the tenant terminate the lease before it has run its course, he may only ask the landlord to accept a surrender of the lease, which offer the landlord may accept or reject as he pleases."

[29] Additionally, in addressing the "form of a notice to quit", the learned authors of Hill and Redman's Law of Landlord and Tenant, Chapter 14 at para. 4447, stated that:

> "At common law, subject to the express terms of the tenancy agreement, there is no 'prescribed form' for a notice to quit. The form of notice is immaterial, provided that it indicates, in substance and with reasonable clearness and certainty, an intention on the part of the person giving it to determine the existing tenancy at a certain time."

[30] The learned authors continued at para. 4450-4460:

> "A notice to quit must be unequivocal and be such as the recipient can properly act upon it. Such a notice only can be good as, on a reasonable construction of it, denotes an intention to give up the premises at the lawful time. There must be plain, unambiguous words claiming to determine the existing tenancy at a certain time."

[31] The authorities are clear that for a notice to quit to be valid, it must be unequivocal and indicate, on a reasonable construction of it, the certain time at which the lease will be determined.

[32] There is no dispute that there was a 10 year fixed term lease between the appellant and Plastique Limited. The lease was signed and executed by both parties for a certain rent to be paid in accordance with the terms of the lease. Both Plastique Limited and the appellant acted upon the terms of this lease until the property was sold to the respondent in 2007.

[33] The respondent was unable to establish at trial that it had acquired the benefit of the lease through a written assignment from Plastique Limited because the document it sought to rely on was unstamped. In its pleadings, the appellant had denied the respondent's title as successor landlord, but on appeal it was made clear that the appellant does not deny the contract with the respondent. The title of the respondent as landlord was, therefore, not in dispute before this court.

[34] From the evidence of the appellant itself, through its sole witness, Mr Wayne Chen, it is clear that both parties to these proceedings acted upon the terms of the fixed term lease following the sale of the property. There was a lease agreement between the parties; whether it was a fixed term or a monthly tenancy will be addressed later. For present purposes, it is sufficient to say that there was privity of contract between the parties, rendering the agreement enforceable by either of them.

[35] From the terms of the lease agreement, it is clear, beyond question, that for the appellant to lawfully terminate the lease, the notice to quit must be reduced to writing and be given in not less than 30 days' notice.

[36] The appellant has not challenged the requirements that the notice should be in writing and that it should be given not less than 30 days prior to the date of termination. However, it argued that Mrs Messado, who was its agent, gave a valid notice (albeit that at the same time she was also acting as agent for the respondent in her capacity as its attorney-at-law). In the light of the position taken by the appellant, with regard to correspondence from Mrs Messado on behalf of both parties, the court had considered the trail of correspondence between Mrs Messado and the respondents, on the one hand, and between her and the appellant, on the other. Letters dated from 11 June 2007 to 23 October 2008 were considered.

[37] I have carefully perused the letters relied on by counsel, Mr Chen, and I have found nothing useful in any of the letters that could assist the appellant in its argument that the requisite notice to quit was served by Mrs Messado.

[38] What was abundantly clear from the contents of the letters was that the parties were having discussions regarding adjustments in the rent due to the reported difficulties the appellant was experiencing because of a reduction in customer traffic at the shopping centre. The appellant also expressed its intention to vacate the premises if the rent was not reduced and there was no upturn in the economic prospects. However, there was nothing to show a variation of the lease agreement in the terms proposed by the appellant. More particularly, nothing was said of the appellant giving up possession on a certain day, which would be in keeping with the requirements of clause 6(D) of the lease agreement, and no breach of any covenant was pointed out.

[39] Accordingly, I found that the correspondence from Mrs Messado, that was being relied on by the appellant as containing the requisite notice to quit, was ineffectual in terminating the lease. It was not in accordance with the express terms of the lease agreement and the principles of the applicable law. Therefore, the trial judge could not be faulted for his decision that the appellant did not terminate the contract in keeping with the requirements of the law.

[40] Given that the lease was not lawfully terminated before the appellant vacated the leased property, it follows then that the appellant would have breached the lease agreement, and so the respondent would have been entitled to damages for breach of contract, which would include the rental for the unexpired portion of the lease.

(b) Sub-issue (ii) - the frustration of contract point

[41] The appellant had advanced another basis on which it sought to contend that it had no liability under the lease and, therefore, the trial judge was wrong to hold it liable to the respondent in damages. The appellant's main contention, in this regard, was that the contract was frustrated and so the trial judge erred in law in finding that there was unlawful termination entitling the respondent to damages for breach of contract. Mr Chen argued that if the contract was frustrated, then there was no need for the appellant to give evidence of its termination by a notice to quit as the lease would have been terminated by operation of law.

[42] In advancing this argument regarding the doctrine of frustration, the appellant placed heavy reliance on what it contended was the respondent's breach of clause 5(E) of the lease agreement. It was submitted on the appellant's behalf that the lease was frustrated by acts outside of the control of the respondent that made the contract impossible or radically different from what was contemplated at the time the agreement was concluded. Counsel contended that the lease was frustrated as the respondent was unable to fulfil its obligation under clause 5(E) of the lease agreement as it did not have an interest in the majority of the shops. Therefore, it had no control over the other tenants in the shopping centre and could not prevent or delay the departure of those tenants. According to counsel, clause 5(E) was essential to the relationship between the parties but the trial judge failed to have any or any sufficient regard to the evidence of the appellant that the respondent had failed to operate the shopping centre as a first class or high-class commercial centre as it had covenanted to do. On that basis, the contract was frustrated and that discharged the appellant from its contractual obligations.

[43] Counsel cited several authorities in support of this point, to include: section 3 of the Law Reform (Frustrated Contracts) Act; Halsbury's Laws of England, Contract (Volume 22 (2012)), para. 468; **Krell v Henry** [1903] 2 KB 740; **Lynne Clacken and anor v Michael Causwell and anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2008, judgment delivered 2 October 2009; **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696 ('**Davis Contractors**'), and **National Carriers Ltd v Panalpina (Northern) Ltd** [1981] AC 675.

[44] However, counsel, Mr Morgan, in his response on his behalf of the respondent, strongly contended, that the appellant in submitting on the doctrine of frustration in these proceedings, was seeking to introduce new factual and legal arguments that were not raised in the proceedings in the court below. This point, he said, was raised for the very first time on 3 June 2016, in the notice of appeal, which was less than one month after the trial of the matter in the court below.

[45] Mr Morgan also pointed out that frustration was not pleaded in the appellant's statement of case at trial, it did not amend its pleadings in the Supreme Court, and it failed to seek this court's permission to rely on the new factual argument. He also argued that the appellant had not outlined any exceptional circumstances that would warrant the issue now being raised on appeal. Counsel relied on the case of **Humphrey Lee McPherson v The General Legal Council (*Ex parte* Iela Joyce Stuart)** [2020] JMCA Civ 14 ('**Humphrey Lee McPherson**'), and **Davis Contractors**, in support of these submissions.

[46] Mr Morgan argued, in addition, that, in any event, the ingredients for establishing frustration are not present in this case. He maintained that the frustrating event, as posited by the appellant in its submissions, is incongruent, as the prospect that the appellant would not earn the profits desired because of decreased traffic may be considered a regular incidence of business and ought to have been reasonably

contemplated by commercial players. This is not akin to stating that performance under the contract has become radically different from what was contemplated.

[47] I accepted Mr Morgan's submissions as being meritorious. I will begin with the argument that the appellant had taken the frustration point for the first time when it filed its notice of appeal. Rule 1.16(2) of the Court of Appeal Rules ('CAR') provides that at the hearing of an appeal, a party cannot rely on matters not contained in its notice of appeal or counter-notice of appeal unless it was relied on below or the court has given such permission. Rule 1.16(3) of the CAR, however, permits the court to consider matters that are not set out in the grounds of appeal provided the other party has had sufficient opportunity to contest the ground.

[48] It was established, in keeping with the observations of Mr Morgan, that the appellant had not argued the frustration point below, neither was it part of its pleaded case deployed at trial (see para. [9] of this judgment regarding the pleaded defence). The appellant had, however, raised it in its notice and grounds of appeal. This takes it outside the ambit of rule 1.16(2).

[49] The question now to be considered is whether the fact that notice of the new point was given to the respondent rendered the raising of the issue for the first time in this court permissible. I have answered this question in the negative for reasons that will now be outlined.

[50] It is well settled as to the position the appellate court should take towards a point not raised at the trial. The principle is aptly stated in ***Ex parte*** **Firth**. ***In re*** **Cowburn** (1882) 19 Ch D 419 at page 429, by Sir George Jessel MR, who said:

> "the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."

[51] See also the case of **Alexander William MacDougall v Thomas Knight and anor** (1889) 14 App Cas 194, and **The Owners of the Ship "Tasmania" and the Owners of the Freight v Smith and others, The Owners of the Ship "City of Corinth"** (1890) 15 App Cas 223.

[52] In **Humphrey Lee McPherson**, F Williams JA, in voicing the reasoning of this court, stated in para. [29] that "it has long been recognised that an appellate court frowns upon the raising of new arguments on appeal that were not raised below". He then went on to state:

> "[29] … In the absence of a compelling reason to allow this point to be now advanced, in circumstances in which an objection was not taken below and put to the panel for its consideration, that objection ought not now to be allowed to be used as a point of attack against the panel's decision."

[53] The case of **Nicholas Jones v MBNA International Bank** [2000] EWCA Civ 514, further illustrates the approach the appellate court is entitled to take in these situations. The applicant, Nicholas Jones ('Mr Jones') was an employee of MBNA International Bank Ltd who was summarily dismissed on the ground of gross misconduct. He commenced a matter in the county court contending that there was a breach of an implied term of trust and confidence between employer and employee but accepted that he could only succeed if he could show that the employer had acted in bad faith. Mr Jones was unsuccessful at trial. He appealed the decision. On appeal, he sought to argue a ground of appeal that the employer had been in breach of the same implied term, but without alleging bad faith. Instead, he alleged that the employer's investigation of the facts had been conducted unreasonably. The new ground of appeal required findings of fact, which it was said, would be consistent with or would flow from findings made by the trial judge. The Court of Appeal refused to allow this point to be taken. Lord Justice Peter Gibson in his lead judgment said this:

> "38. It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to

> advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

[54] In my judgment, it would have been unfair for this court to accept arguments on appeal, regarding frustration of the contract. That new argument would have shifted the focus from the case as pleaded by the appellant at trial in respect of which, it had more than adequate time and opportunity to seek to modify for the consideration of the trial judge.

[55] Furthermore, it was noted that the effort was being made, at this late stage of the proceedings, to elevate clause 5(E) of the lease agreement as the pivot on which the appellant's case rested. That clause was never pleaded, albeit that submissions were made on it before the trial judge. The trial judge gave it short shrift. He rejected the appellant's attempt at raising it at the trial because, as he put it, the appellant had not brought a case against the respondent for breach of any covenants (even though it filed an ancillary claim regarding the security deposit). In any event, even in the appellant's belated failed attempt to rely on clause 5(E) of the lease agreement, the doctrine of frustration was never prayed in aid.

[56] By not pleading the alleged breach of clause 5(E), and its reliance on the doctrine of frustration, the appellant stood in breach of part 10 of the Civil Procedure Rules, 2002 ('CPR'), which imposes on a defendant the duty to set out its case and provides a penalty for failure to do so. In this regard, rule 10.5(1) of the CPR provides that the defence must set out all facts on which the defendant relies to dispute the

claim. The consequence for failure to do so is that the defendant may not rely on any allegation or factual argument which is not set out in his defence, but which could have been set out there, unless the court gives permission (see rule 10.7 of the CPR).

[57] This fundamental breach of the procedural rules in the presentation of the appellant's case could not be ignored by this court in its determination of whether the appellant should be allowed to advance the new point on appeal regarding frustration. The trial judge had refused to grant it audience regarding a breach of clause 5(E) to which the frustration point relates, and he would have been correct in doing so on the strength of rules 10.5(1) and 10.7 of the CPR.

[58] Each party had the opportunity to advance its whole case at the trial, especially given the fact that they had amended their statements of case before the trial commenced. It would have been unfair for this court to require the respondent, who was successful in the court below, to now face a new and, significantly, different claim in law and fact. Having regard to the pleaded case of the appellant and the case it had deployed in the court below, I formed the view that the appellant ought not to benefit from the untidy deployment of its case both in the court below and on appeal. The appellant could have advanced the frustration point below but, for some inexplicable reason, did not do so. In my judgment, this court had no proper basis to grant the appellant permission to persist in a case that it never pleaded and pursued in the court below. Therefore, in giving effect to the overriding objective to deal with the case justly, I accepted Mr Morgan's submissions that the appellant ought not to be permitted to rely on the doctrine of frustration.

[59] In any event, I also concluded that, even if the court were to allow the appellant to advance this ground regarding frustration of the contract, its prospect of success was rather dubious, partly for the reasons argued by Mr Morgan. Therefore, I saw no exceptional reason to permit the appellant to rely on the argument that the contract was frustrated or that there was a breach of clause 5(E) that would have justified its premature termination of the contract.

Conclusion on issue (1)

[60] In my view, the appellant had failed to give the requisite notice to terminate the lease and so the trial judge was correct in his finding that the lease was unlawfully terminated, entitling the respondent to damages for breach of the lease agreement.

Issue (2): Whether the trial judge erred by not finding that the appellant and the respondent were operating under a month-to-month tenancy

[61] Mr Chen submitted that the trial judge misdirected himself at para. [15] of the judgment, where he stated that the "[appellant's] counsel denied that there was a privity of contract or estate and further submitted that the lease is ineffectual to pass any interest in land". Counsel submitted that it has always been the appellant's case that there was a contractual relationship between the parties and not one under the Registration of Titles Act. Counsel further noted that there was evidence for the trial judge to have found that there was a month-to-month tenancy between the parties as there were no terms in the agreement for sale between Plastique Limited and the respondent that made the sale subject to the lease.

[62] Mr Morgan, in his response, argued that the trial judge was correct when he ruled that it was not necessary to consider the issue of whether the parties were operating under a month-to-month tenancy, where in the circumstances, they had agreed to be bound by the terms of the lease. Counsel contended that the trial judge, in finding that the parties were so bound, was correct in the face of the overwhelming evidence, which included correspondence exchanged between the parties confirming the nature of the parties' relationship. Mr Morgan pointed out that the correspondence between the parties served to underpin the court's factual finding that the parties were bound by the terms of the fixed term lease.

[63] I was persuaded by the evidence and the applicable law to accept the submissions of Mr Morgan that there was no need for the judge to consider the existence of a monthly tenancy. There was cogent and undisputed evidence, which

shows that the parties acted with each other as proper parties to the lease agreement with reciprocal rights and obligations regarding the leased property.

[64] In the case of **Cuthbertson v Irving** (1859) 157 ER 1034, Martin B instructed:

> "This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is. All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it."

[65] Therefore, the trial judge was correct to find that the non-registration of the lease did not preclude the existence of an enforceable contract for a fixed term lease between the parties. As he correctly found at para. [27] of his judgment, both parties agreed to be bound by the terms of the lease entered into between Plastique Limited and the appellant; the appellant acknowledged the duration of the lease and that it had not expired; and it paid rent and maintenance to the respondent in accordance with its terms.

[66] In such circumstances, the trial judge's deployment of the principles of equity - more particularly, the doctrine of estoppel - to grant the respondent a remedy under the lease agreement cannot be criticised. In this regard, his reliance on the oft-cited dicta of Lord Denning in **Amalgamated Investment** at page 122 was not at all misplaced. Lord Denning MR helpfully opined, in part:

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases... It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has sought to be limited by a series of maxims: estoppels is only a rule of evidence, estoppel cannot give rise to a cause

> of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. **When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands**." (Emphasis added)

[67] The appellant was, therefore, estopped from denying the existence of the fixed term lease.

[68] In any event, as the trial judge reasoned, even if there was a monthly tenancy, the appellant would still have been required to give the requisite notice to terminate it in accordance with the law. At the end of the trial, there was no satisfactory proof of the appellant's assertion that a lawful notice was served on the respondent before it vacated possession and terminated the lease. Therefore, the appellant would have unlawfully terminated the lease agreement even if it were a monthly tenancy.

Conclusion on issue (2)

[69] The appellant was bound by the terms of the fixed term lease. On that basis, the lease continued to subsist between the parties for the term it was agreed and a monthly tenancy was never created. As a result, the appellant was obliged to terminate the contract in accordance with the terms of the lease. The law required that a written notice to quit, indicating, at least, the intended date on which possession would have been delivered up and the reasons for the notice, should have been served on the respondent, no less than 30 days before the date fixed for the delivery up of possession. The appellant, in failing to serve such a notice on the respondent, unlawfully terminated the lease agreement and was, accordingly, liable for breach of contract.

[70] Furthermore, even if the agreement had created a monthly tenancy, the appellant would still have been in breach of contract since no valid notice would have been served on the respondent for the termination of the monthly tenancy.

Disposition of the appeal

[71] I concluded, in disposing of the appeal, that the trial judge was correct in finding that the appellant had failed to give the proper notice before its premature termination of the contract, and that it was liable to the respondent in accordance with the terms of the fixed term lease.

[72] The appellant was not permitted to rely on the doctrine of frustration of the contract on the appeal because of its failure to raise it in the court below and the potential unfairness to the respondent to raise it for the first time in this court. It was, in my view, not consonant with the overriding objective as well as the proper administration of justice for it to be permitted to do so. In the premises, there was no justifiable basis for this court to interfere with the decision and order of the trial judge.

[73] It was for these reasons that I agreed with my learned sisters that the appeal should be dismissed with the consequential orders detailed at para. [3] above.

FOSTER PUSEY JA

[74] I have read the draft reasons for judgment of McDonald-Bishop JA, and I endorse them as my reasons for concurring with the decision of the court made on 19 January 2021.

HARRIS JA

[75] I, too, have read the draft reasons for judgment of my learned sister, McDonald-Bishop JA. I agree with the reasons she gave for the decision of the court made on 19 January 2021, and have nothing useful to add.