OC

CIV APPEAL 23/2004

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: ALFRED OLU-WILLIAMS - APPELLANT

AND

RIAD MOULLEM - RESPONDENT

CORAM:

Hon Mrs Justice S. Bash-Taqi, J.S.C.

Hon Mr Justice N C Browne-Marke J.A.

Hon Mr Justice E E Roberts J.A.

COUNSEL:

Berthan Macauley Jnr. For the Appellant

J B Jenkins-Johnston for the Respondent

JUDGMENT DELIVERED ON Tuesday THE 16th DAY OF FEBRUARY,2010

BROWNE-MARKE, J.A.

INTRODUCTION

1. This is an appeal brought by the Appellant, now deceased, ALFRED E OLUKOTUN WILLIAMS, against a Judgment of the High Court, NYLANDER,J presiding, dated 21 April,2004. The Notice of Appeal was filed on 15 June,2004.

THE APPEAL

2. The Grounds of Appeal are stated in the Notice. Briefly, they are that the Learned Trial Judge (LTJ) erred in Law in holding that certain things should be done by the Respondent to Appellant's property within a specified time, when, the clear words of the Lease which, he had himself upheld, did not provide for an optional term beyond that agreed to be granted by the parties, in clause 3(3) of the Lease. That optional term expired on 31 March,2004 before Judgment was delivered. Secondly, that the LTJ erred in Law when he Ordered the Appellant to refund to the Respondent, the sum of Le11,993,520/00 plus interest thereon at the

rate of 25% from July,2004 to Judgment, in that the Respondent's Counter Claim for that sum, was made as an alternative, to the Respondent's claim that he was entitled to an optional term, which term had in any event expired on 31 March,2004. Thirdly, that the award of this sum to the Respondent, was erroneous in that the same had not been properly quantified by the LTJ, and was not supported by evidence. Fourthly, that the LTJ erred in law when he Ordered Solicitors on both sides and the parties, to meet to agree, and to give Respondent 3 months to complete the remaining 20% of development to be done, when at the same time, he had also found that the Respondent was in breach of his obligations under the Lease; once he had so found, the LTJ should have awarded the Appellant, Damages. Also, the Respondent did not pray for such an Order in his Counter Claim. Fifthly, that the LTJ failed to adjudicate on the Appellant's claims notwithstanding the evidence adduced. Sixthly, that the LTJ erred in Ordering that each party bears its own costs, when it was clear, that the Appellant had won the action. The Appellant asks this Court to Set Aside the Judgment, and that Judgment be entered for the Appellant.

3. On 19 November,2007, the Appellant filed an Amended Notice of Appeal pursuant to an Order of this Court dated 13 November,2007. In place of the original Appellant, CORNELIUS AYO HUDSON WILLIAMS and BERTHAN MACAULAY Jnr (Trustees of the Trust created by a Deed of Gift dated 4 February,1988) were substituted as Appellants, due to the demise of the original Appellant. Notwithstanding this amendment, references in this Judgment to "the Appellants" or "the Appellant" mean the present Appellants or, the deceased Appellant. The Grounds of Appeal remained unchanged. The Appellants, argued their joint case by way of written submissions dated 14 June,2008, and by way of oral arguments before us on 25 November,2008. The Respondent, in turn, addressed written submissions to us dated 24 November,2008, and also oral submissions on 25 November,2008.

FACTS OF THE CASE

4. The brief facts of the case could be gleaned from the pleadings filed in the High Court by both sides. The case turns on whether the Appellants are entitled to possession of the Ground and 1st floors of property situate at, and known as 12 Percival Street, Freetown presently in the occupation of the Respondent.

5. By Lease dated 26 May,1994 and duly registered as No 63 at Page 131 in Volume 88 of the Record Books of Leases kept in the office of the Registrar-General, Freetown, the Appellant leased this property to the Respondent for a term of 5 years commencing 1 April,1994 and ending on 31 March,1999. The Respondent covenanted to carry out, and to execute repairs to the demised premises, within 8 months of the commencement of the Lease, certain works specified therein, which were to cost the respective sums of USD27,091 then equivalent to Le15,713,231, and Le2,966,000. The Respondent, according to the Appellant, failed to carry out these works. He was notified of the breach, and requested to remedy the same. By letter dated 29 October,1998 the Respondent promised to remedy the breach complained of. He however failed to do so. The original term granted in the Lease expired on 31 March,1999 but the Respondent failed to deliver up possession to the Appellant.

PLEADINGS

6. Thus the action was brought by way of Writ of Summons dated 4 May,1999. In that Writ, The Appellant claimed, inter alia, possession of the Ground Floor premises situate at 12 Percival Street, Freetown; Damages for Breach of Contract; Mesne profts at the rate of USD10,000 with effect from 1 April,1999 until possession is delivered up; and interest on any sums awarded by the Court; and the costs of the action.
7. The Respondent filed a Defence and Counter Claim dated 8 June,1999. In that pleading, the Respondent contended that he did not fail to carry out the repairs he had agreed to carry out; that he was in the process of doing so, when it became apparent that required repairs were more extensive than he had anticipated, and that the roof would have to be removed and changed; and that the Ministry of Housing and Country Planning would not grant its approval for the agreed repairs to be carried out without repairs being done to the roof; and that he did carry out the repairs with the knowledge and consent of the Appellant. Respondent claims he spent Le11,993,520. He averred also, that, at that point in time, work on the premises was ongoing, that he had greatly improved the value of the property; and that the Coup d'etat in May,1997, and rebel invasion of Freetown in January,1999 respectively, delayed the completion of the work; and lastly, that he was still willing and able to continue the work.
8. In paragraph 6 of his pleading, the Respondent readily concedes that the term of his Lease had expired, but claimed he was entitled to a further

grant by virtue of Sub-Clause 3(3) of the Lease, and surprisingly, at a rent to be agreed.

9. In the Counterclaim, the Respondent argues that the Appellant is Estopped by his conduct from insisting on his strict legal right to recover possession of his property because of the money spent by the Respondent in carrying out repairs to Appellant's property which sum was over and above that agreed by the parties. He therefore prayed the Court below to Grant him Specific Performance of Sub-Clause 3(3) of the Lease; and alternatively, the refund of the sum of Le11,993,520 spent by him in carrying out repairs, plus interest thereon.
10. Appellant's Reply was a refutation of the claims made by the Respondent as to his entitlement to a further term. The Appellant averred in that pleading that there had been correspondence between both sides as to Defendant's breach of Sub-Clause 2(3) of the Lease, and denied giving his consent to the Respondent to carry out the additional repair works to the roof. He contended that the Respondent was not entitled to a grant of a further term, because of his breach of the terms of the Lease. Additionally, the Appellant argued, that did not at any time encourage the Appellant to expend the sum of Le11m on his, the Appellant's property; nor did he represent by conduct or otherwise, that he was minded to grant the Respondent a further term, and that in any event, the Respondent had not provided any consideration to support his contention that the Appellant was stopped by his conduct from insisting on his, the Appellant's strict legal rights. The Appellant, in this pleading, joined issue with the Respondent.

TRIAL

11. The trial commenced before NYLANDER,J on 3 December,1999. PW1, John Casa Sesay, tendered in evidence the Lease dated 26 May,1994 as exhibit "A". Next was AYODELE HUDSON WILLIAMS, a brother of the Plaintiff. He testified that he gave professional advice to the Appellant as regards the Lease and the schedule of works to be carried out by the Respondent; and that he gave a written report on the state of the property to the Appellant. By September,1998 the work remained uncompleted. No one consulted him before work was done on the roof, and that the work specified in the schedule, was never done. He tendered in evidence, exhibit "B", an estimate for the renovation work: and exhibit "C" an estimate for the extension work. He agreed with Counsel for the

Respondent that the Appellant had been occupying part of the building since 1998, and that he the witness, had been also been occupying part of the extension since 1997, using the same as an office. The Appellant also testified as PW3. He tendered in evidence, a series of correspondence as "D1-8", and exhibit "E" the Report compiled by Jenkins-Johnston &Mason, Architects.

12. The Respondent gave evidence as DW1. He claimed that after the Lease had been executed, the roof caved in, and that rain was entering the store. He invited Appellant and his brother, PW2 to inspect the roof. Appellant told him they should meet with his lawyer the following week. At his the respondent's lawyer's office, he requested a further term of 10 years because he had spent over Le14m on repairs to the roof. Nothing was concluded, and he subsequently had to flee Sierra Leone when the rebels came into Freetown. He tendered in evidence as exhibit "F" an 'extra' estimate he had obtained. He said, he also built a '3 room and toilet office' for Appellant and PW2, and that it was discussed and agreed that if he built the office "my time would be extended."

ADDRESSES AND JUDGMENT

13. At the close of DW1's testimony, Counsel on both sides, addressed the Court. Judgment was delivered on 21 April,2004. The Learned Trial Judge's (LTJ) Judgment appears at pages 28-34 of the Record. I shall quote his findings on the issues at stake. The LTJ says, inter alia, at pages 31-34, beginning at the fourth paragraph of page 31,: *".....From my experience in such matters, prices increase between the preparation of the Agreement and the signing of such agreement, and such prices keep rising. And so, if the Lease (probably Lessee) is under a time frame to complete his development, in most cases, he is bound to fail to complete within the time frame and so a breach of the agreement. The agreement is so watertight with no reasons for eventualities. Things do not happen on the ground these days. The Courts 'after' (probably 'have') (to) sought out things at the end of the day. The first stumbling block in this case as I see it, is the roof of the building. I am rather surprised that with all the expert hands around, not one was able to detect the true state of the roof. I now quote part of the Defendant's evidence-in-chief .....it is clear from this evidence that at the time of the signing of the Lease agreement, the true state of the roof was never known.....Defendant undertook and replaced the entire roof with steel ...at a cost in excess of*

Le13 millions. This was not called for in the lease, but I am of the view that the defendant had no alternative but to remedy the roof as a priority in order to get the go ahead from Housing for the rest of the job.....from the evidence before me, it would appear that the Plaintiff was not interested in increasing the term of the defendant, nor does he want to know about the additional expense incurred in replacing the roof. It is debateable whether a cheaper roof would have been equally suitable. But what is not debatable is that plaintiff property is on lease and has increased in value. I am of the view that there are legitimate grounds for a delay considering that the defendant only has 8 months within which he has to complete the agreed development.....the defendant should have finished his development in 1995. What happened in fact was 1) the collapse of the roof requiring additional expense; 2) (First of) Ministry of Housing stopping all development until the roof is remedied; 3) the uncertainty which defendant was put under by plaintiff is not knowing whether his fixed term of 5 years certain would be increased to 10 years due to the occurrence of the collapse of the roof. ....evidence before me shows that the plaintiff and also the defendant suffered as a result of these disruptions. And yet on the part of the plaintiff he now sues for vacant possession of his property...in Law there is no doubt the defendant is in breach of the lease agreement - development to complete within 8 months of signing lease. I need not restate the subsequent events which covered various delays." Finally, at the bottom of page 33, the LTJ says: *"I am satisfied in my mind that this is one of those cases in which equity is right(ly) to step in to dilute the strict application of the law. With that in mind I promise an equitable judgment.."* He thereupon proceeded to give what in his lights, was an equitable judgment: *"1) both parties and their respective solicitors shall meet and give defendant 3 months to complete the remaining 20% work to be done; 2) if the work is completed within 3 months, then the defendant shall be given a further optional term, the duration and rent to be agreed upon; 3) if the Plaintiff is aggrieved by this decision of the court, then 4) in the alternative I order that the plaintiff makes a refund of Le11,993,520 to the defendant plus 25% interest from July,1994 to judgment, 5) I order that each side bears its costs. Liberty to apply".* It is against this Judgment, the Appellant has appealed as stated above.

ISSUES IN THE APPEAL

14. The issues which arise in this appeal, appear to me to be as follows:

(1) Did the Respondent breach the express terms of the Lease dated 26 May,1994 particularly, sub-clause 2(3) thereof in which he covenanted with the Appellant to, *"at his own cost and expense within the period of eight months from the date of this Lease to expend in building the extension on the first floor, and in making the repairs renovations and improvements on the first floor as set out in the schedule that appears hereinafter at the foot of these presents and in the plan annexed hereto upon the demised premises the sum (of) USD27,091 then equivalent to Le15,713,231 on the extension of the first floor and the sum of Le2,666,000 for the repair of the first floor at least and to execute such works with the best materials of their several kinds and to the satisfaction of the Lessor's surveyor for the purpose of inspecting the execution of the said works shall have the right at all reasonable time of entering upon the demised premises,* and particularly also sub-clause 2(10) thereof in which he covenanted with the Appellant "*to yield up the land hereby demised together with extension to be erected at the end or sooner determination of the lease in such a state or (of) and repair as shall be in accordance with the covenants herein contained*?

(2) Sub-clause 3(3) of the said Lease having purportedly given the Lessee an option to renew the Lease for such further term, and at such annual rent as may be agreed, if the Lessee gives to the Lessor at least 3 months notice in writing of his intention to renew, and provided the Lessee has not breached or has not failed to observe any of his covenants, and provided also that the Lessor does not require the premises for his own personal use, did such an option confer an enforceable interest in land on the Respondent, be it legal or equitable?

(3) Assuming for present purposes, that the option was indeed enforceable, the Respondent having clearly failed to request a renewal for a further term, had not the said Lease expired by effluxion of time, thereby converting Respondent's status from a fixed term tenant, to that of a tenant at sufferance?

(4) The Learned Trial Judge having found as a fact at page 33 that the Respondent was "in breach of the Lease agreement -

development to complete within 8 months of signing lease", was he right in law to go on thereafter as appears immediately thereafter on the same page, to say that "*I am satisfied in my mind that this is one case in which equity is right(ly) to step in to dilute the strict application of the law...*"?

(5) Was the Appellant Estopped, as claimed by the Respondent, from insisting on his right to seek possession of the demised premises at the expiration of the demise on 31 March,1999 because, again as claimed by the Respondent, he had led the Respondent to believe that his tenancy would be renewed in view of the renovation work he had carried out, particularly to the roof?

(6) Can the High Court, in the name of equity, grant an Order which was not sort by a party to the litigation, and which was unsupported by the evidence led at the trial?

15. It is clear, that the LTJ did indeed find, that the Respondent had breached the provisions of sub-clause 2(3) of the Lease as extensively quoted in paragraph 13 above. But the LTJ, erroneously in our view, having so found, then went on to find extenuating circumstances for the failure of the Respondent to comply with his obligations under the said sub-clause 2(3). The Lease was made by Deed dated 26 May,1994.

EFFECTS OF A DEED

16. It is clear on the authorities, that the terms of a Deed can only be varied by the execution of another Deed. Extrinsic evidence is not admissible to vary its terms. At paragraph 517 of HALSBURY'S LAWS OF ENGLAND, 3RD Edition, under the rubric "*Effect: rule against derogation*" the Learned Editors of that work state that: "*The effect of executing a Deed is that the party, whose deed and act it is, is conclusively bound by the intention or consent expressed therein, provided that it has been delivered unconditionally, and not as an escrow; he is in general so bound even though another party has not executed the deed; he is, as a rule, ESTOPPED from averring and proving by extrinsic evidence that the intention or consent so expressed was not in truth his intention or consent, or that there are reasons why he should not be obliged to give effect to the intention or consent so expressed.*"

17. At paragraph 628 of the same work, under the rubric, "*Object of interpretation*" it is stated that: "*The object of all interpretation of a written instrument is to discover the intention of the author, the written*

declaration of whose mind it is always considered to be. Consequently, the construction must be as near to minds and apparent intention of the parties, as it is possible, and as the law will permit.....Documents receive the same construction in equity as at law, for there is no such thing as equitable, as distinct from legal construction of an instrument, equity in this respect following the law." At paragraph 629, it is stated: "*The intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, and not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being for the purpose of interpretation , equivalent to the intention. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention.*" At paragraph 632, it is stated that: "*the words of a written instrument must in general be taken in their ordinary sense notwithstanding the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out."*

18. At paragraph 646, it is stated that: "*Where the intention of the parties has been reduced to writing it is, in general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions.....preliminary agreements, either to show that intention or to contradict, vary or add to the terms of the document. This principle applies to ,,,,,,leases.*" And at paragraph 648: "*Thea construction of a document cannot be controlled by previous negotiations.....nor is the construction of a written instrument varied by the subsequent declaration or conduct of the parties. The instrument is to be construed as at the time of its execution."*

19. CHITTY ON CONTRACTS 26th Edition states at paragraph 852 that "*Where the contract is one which by statute must be evidenced by a note or memorandum in writing.....as in the case of a contract for the sale or other disposition of land or any interest in land, the memorandum must contain a statement of the material terms of the contract. Extrinsic evidence is not admissible to prove that the parties orally agreed material which ought to have been, but were not included in the memorandum, since the admission of such evidence would plainly not satisfy the statute.*" The statute there was Section 40 of the Law of Property Act,1925 which reproduces substantially Section 4 of the Statute of

Frauds which still applies in this country. These principles are reiterated by GELAGA-KING,JA in BITTARNOL INTERNATIONAL TRADING COMPANY & ASSOCIATES at pages 8-9 of his cyclostyled Judgment in the Court of Appeal; and in PHIPSON ON EVIDENCE 13TH Edition at paragraphs 37-01 to 37-06; in SCHULER AG v WICKHAM MACHINE TOOL SALES LTD [1973] 2 All ER 39, House of Lords, by LORD REID at page 46 para a; LORD WILBERFORCE at page 53 paras c-f; page 54 para b; LORD SIMON at page 55 paras e-f; page 56 paras a-c; page 58 para e; page 59 paras f-g; page 61 paras a-g; LORD KILBRANDON page 63 para g; following JAMES MILLER AND PARTNERS LTD v WHITWORTH STREET ESTATES (MANCHESTER) LTD [1970] 1 All ER 796 HL per LORD REID at page 798 paras e-h.

PRINCIPLES APPLICABLE TO THE LEASE IN THIS CASE

20. Applying these principles to the present case, it is clear that the LTJ was clearly wrong in holding as he did as quoted in paragraph 13 above, that had the parties known the true state of the roof at the time the Lease was executed, they must have made provision for its repair. As the LTJ himself readily admitted "*This was not called for in the lease, but I am of the view that the defendant had no alternative but to remedy the roof as a priority in order to get the go ahead from Housing for the rest of the job.....*". He had in the previous sentence compounded the error, by stating that "*the first stumbling block in this case as I see it, is the roof of the building. I am rather surprised that with all the expert hands around, not one was able to detect the true state of the roof. I now quote part of the Defendant's evidence-in-chief.....it is clear from this evidence that at the time of the signing of the Lease agreement, the true state of the roof was never known.....Defendant undertook and replaced the entire roof with steel ...at a cost in excess of Le13 millions.*" Apart from the self-serving exhibit "F" in respect of which there is no evidence that it was communicated to the Appellant or to his brother, PW2 at the trial, before the work was allegedly done. Likewise, there is no evidence to support Respondent's contention that he spent about Le15m on repairs to the roof to the knowledge of the Appellant and his brother, PW2. Respondent is a contractor according to his evidence under cross-examination by Mr Macauley at page 23. He therefore had knowledge of repairs to buildings. It is hardly possible, given that knowledge, Respondent would not have known before executing exhibit "A1" that the

roof needed replacement. Further, even his estimate, exhibit "F" is dated 15 June,1995 more than a year after the execution of the Lease; it includes items which could not have been needed in just repairs to the roof, such as "*plastering the house complete inside and outside, new electrical material, new plumbing with complete fittings, trousses with galvanised pipes, flush door, metal doors.*" Lastly, according to the quantity survey carried out by Jenkins-Johnston , Mason & Associates, and reported on in the memorandum dated 8 May,1996, additional works as per schedule dated 15 June,1995 (which presumably is exhibit "F", Respondent's estimate), it was recommended: "*remove old roof - complete*". If, as Respondent contends, the roof had been repaired by him in June, 1994 (see page 24 evidence given on 6 June,2003), it seems rather strange that two years later, and before the coup in May,1997 and the rebel onslaught on Freetown in January,1999, that in May,1996 his appointed quantity surveyors should be recommending replacement of the whole roof. In addition, he had already covenanted in A1 to roof the extension at a cost of Le819,000. This amount was part of the total sum of le15,713,231 agreed as the cost of repairs in the schedule to exhibit "A1".

21. The position is that there was provision in the Lease for doing the roof over the extension at a cost of Le819,000. If, as Respondent claims, the roof over the main building became an issue outside the terms of the Agreement, it seems rather curious that he never sought any readjustment to the annual Lease rent he had contracted to pay, but rather, in his own words, he began pressing for an additional term. It is our view that the LTJ had no legal basis for importing equity into what was clearly an arms-length transaction between two antagonists who were well-represented by reputable lawyers, Wright&Jusu-Sheriff, and J B Jenkins-Johnston Esq.
22. Further, Respondent was clearly in breach of sub-clauses 2(1) and 2(3) of the Lease, as early as 11 August,1995 the date of the letter from Wright & Jusu-Sheriff, notifying him of the several breaches. He had not paid rent; nor had he carried out the repairs and work set out pages 53-54 of the Record. The excuses made by the LTJ on behalf of the Respondent, quoted above in paragraph 13, to wit: "... *What happened in fact was 1) the collapse of the roof requiring additional expense; 2) (First of) Ministry of Housing stopping all development until the roof is remedied; 3) the uncertainty which defendant was put under by plaintiff is not knowing*

whether his fixed term of 5 years certain would be increased to 10 years due to the occurrence of the collapse of the roof, cannot hold in view of the evidence which plainly contradicted such explanations. It seems to me unlikely in the extreme, that a Landlord would consider extending the tenancy of a tenant who has not only failed to pay the annual rent, but has failed consistently to carry out his covenanted obligations to repair.

WHETHER RESPONDENT HAD A RIGHT TO AN OPTION TO RENEW

23. The 2nd question I have posed above, is whether Respondent did have an enforceable right to an extension of the lease term, or to the right to exercise his apparent option to renew contained in sub-clause 3(3) of the Lease. It reads as follows (page 38 of the Record) "*THAT the Lessor will on the written request of the Lessee made three calendar months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants or of (if) the Landlord does not require the premises for his own personal use on the part of the Lessee hereinbefore contained at the expense of the Lessee grant to him a lease of the demised premises for the further term and at a rent to be agreed between the parties containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal.*" This so-called option clause does not contain a precise or certain lease term; nor does it contain a rent clause, or any clause which stipulates how rent should be agreed. It was with respect, to Respondent's Counsel, an agreement to agree if possible in the future. In all my researches, the optional term is always specified; if not, language is used which suggests that the parties have in mind a certain term. In none of the cases I have come across, has an option to renew for an unspecified term and for an unspecified annual rent, been upheld. In RE GREENWOOD'S AGREEMENT, PARKUS v GREENWOOD [1950] 1All ER436 CA, the option to renew was for a term of three years. In BEESLY v HALLWOOD ESTATES, LTD [1960] 2 All ER 314 Ch.D, BUCKLEY,J presiding, the option was to renew for a further term of 21 years. There, BUCKLEY,J whilst dealing with issue of whether correspondence between the parties' Solicitors could be said to have created new contractual obligations, said at page 322 paragraphs F-H, "*I am satisfied that none of the parties concerned thought or intended at the time that any new contractual rights would or should be created by this correspondence, except, of course, so far as the exercise of the*

option (if valid) would have constituted a new contract. Any transaction between two or more parties can, in my judgment, only result in a contract between them if they enter into that transaction with an intention to create binding contractual obligations or in circumstances in which such an intention must be attributed to them." The correspondence between the respective Solicitors on both sides in the instant case, show quite clearly that there was no intention on the part of the Appellant to create new contractual relations with the Respondent. A fortiori, nor did his conduct.

24. Even in JOHNSON v ZACHARIAH [1957-60] ALR SL 118 HC Judgment of BAIRAMIAN,CJ at page 120 LL13-15, a case cited by Respondent's Counsel as authority for another position taken by the Respondent, which shall be dealt with shortly, after the expiration of the Lease term, the tenant continued paying rent at the old rate. No such thing happened in this case. It follows that there was no option to renew which the Court below could have enforced. Just one and a half years after the commencement of the original Lease term, on 11 August,1995 Appellants' then Solicitors served on him Notice of Forfeiture for breach of covenant - pages 52-55. By Notice dated 24 September,1994 the Appellants' then Solicitors, served Notice on Respondent that (at page 58) *"...4. In view of the said breaches the Lessor gives Notice of his unwillingness to grant a renewal of the Lease upon its expiry on 31st March,1999."* Here was the clearest indication that the Appellants' had no intention of granting an optional term to the Respondent. The Appellants' stance was reinforced in another letter addressed to the Respondent by his then Solicitors on 6th November,1998 - page 61. Finally, by letter dated 20 April,1999 Appellants' present Solicitors reminded Respondent that his Lease had expired by effluxion of time on 31 March,1999, and demanded vacant possession of the property within 7 days of that date - page 62. Clearly, there was no optional term in the contemplation of the parties.

25. It follows, also that my answer to the 3rd question I have posed above, is that as of 1 April,1999 the Respondent was holding over unlawfully, and had become a tenant at sufferance. He had not become a tenant from year to year as canvassed by Mr Jenkins-Johnston, who in support of his contention relied on the case of JOHNSON v ZACHARIAH cited above. There, after the expiration of the original term granted, the tenant, he continued paying rent at the old rate. It was only at the beginning of 1956 that the Landlord began refusing rent - per BAIRAMIAN,CJ at page 122

LL18-19. Here, no rent was offered nor paid and accepted by the Landlord. The Respondent here was therefore liable to pay mesne profits for his continued occupation of the Appellants' property as of 1 April,1999. Therefore, the answer to question 4 posed above, is that the LTJ was therefore clearly wrong in importing equity in aid of the Respondent's case. As Mr Macauley has rightly pointed out, the LTJ in exercising, wrongly, in our opinion, his equitable jurisdiction, eventually gave the Respondent more than he had asked for: at page 34, the LTJ Adjudged that "if the work is completed within 3 months, then the defendant shall be given a further optional term, the duration and rent to be agreed upon." The date of that Judgment was 21 April,2004, more than 5 years after the original lease term had expired. The answer to question 6 above, is that the Court below certainly could not give the Respondent much more than he had asked for in the name of equity.

ESTOPPEL

26. As regards, question 5 posed above, there is no evidence that Appellants' conduct raised an estoppel by conduct in favour of the Respondent. Correspondence going back as far as August,1995 show quite clearly, that the Appellants had no intention of renewing the Lease.

MESNE PROFITS

27. Lastly, I would deal with the issue of what the proper award of mesne profits should be for a tenant holding over unlawfully. A tenant at sufferance holding over unlawfully, that is without the consent and concurrence of the property owner, is in the same position as a trespasser. Mr Jenkins-Johnston has argued that the annual sum of USD10,000 claimed by the Appellants, is exorbitant. At page 36, sub-clause (3) of the Lease states that at the date it was made USD1 was equivalent to Le580. 1 USD is now approximately equivalent to Le4,000. Mr Jenkins-Johnston argues, citing HALSBURY' LAWS OF ENGLAND Vol 23rd Edition paragraph 1230, that "*the Landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land*". That is quite true. In the 4th edition of that work, the Learned Editors state at para 1170 in Vol. 12 that: "*where the defendant has by trespass made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact*

thereby impeded or prevented from using his own land either because he did not wish to do so or for any other reason." This passage was cited with approval by MEGAW,LJ in SWORDHEATH PROPERTIES LTD v TABET and others [1979] 1 All ER 240 CA at page 242 para d. But I disagree with Mr Jenkins-Johnston when he argues further, that the "*figure of USD10,000 per annum is wholly arbitrary...*". The SWORDHEATH Case dealt with residential property, but the reasoning there of the Court of Appeal holds true in the case of a property rented out as an office or for business purposes. At paras g-h on the same page 242, MEGAW,LJ states that: "*It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.*" Also, in CLIFTON SECURITIES LTD v HUNTLEY AND OTHERS [1948] 2All ER283 CA per DENNING,J at page 284 paras C-D: "*At what rate are the mesne profits to be assessed? When the rent represents the fair value of the premises, mesne profits are assessed at the amount of the rent, but, if the real value is higher than the rent, then the mesne profits must be assessed at the higher value.*" By letter dated 20 April,1999 the Respondent was expressly told that the fair value of the property was then USD10,000. At that time, and because of the large scale burning of properties after the invasion of Freetown, particularly along that street, Percival Street, property value was at a considerably high premium. But notwithstanding that letter, Respondent has continued to occupy Appellants' property, more than 10 years later, and nearly 7 years after the Judgment which stated that "*if the work is completed within 3 months, then the defendant shall be given a further optional term, the duration and rent to be agreed upon.*"

28. Given the location of the property in the central business district of Freetown, we think USD10,000 is a reasonable annual rent for office or business space. There is no contention the Respondent used, or intends using the premises for residential purposes.

DAMAGES

29. On the question of Damages for breach of covenants, we think there was ample evidence before the LTJ that the Appellants were entitled to this relief, as he, the LTJ had himself said that there had been a breach of the covenant to repair and to build an extension. The Appellants were therefore entitled to Damages under this head. Such Damages have not been quantified by the Appellants in monetary terms, but the letters exhibits "D1&2" respectively, set out in detail the full extent of the breach committed by the Respondent. As we have not been provided with figures in this respect by the Appellants, we shall prefer to err on the side of caution, when making an award. Whatever loss the Appellants may sustain in this regard, will be counter -balanced by the award of interest.

COSTS

30. On the question of Costs, we think the LTJ was wrong. On the principal claims: that there were breach of the covenants to repair and to improve- page 33; and that the initial Lease term had expired - page 32, the LTJ found for the Appellant. Having found for the Appellant, it was only right and proper that Costs should follow the event, and that Costs should have been awarded the Appellant. We hold the view, and so adjudge that the Appellant was entitled to the Costs of the action in the Court below.

RESPONDENT'S COUNTERCLAIM

31. As there was no uncontroverted and irrefragable evidence before the LTJ that Respondent had indeed spent the sum of Le11,993,520 on repairs to the roof and to other parts of the property, over and above the respective amounts he had covenanted in the Lease to expend, the LTJ ought to have dismissed the Respondent's Counterclaim, instead of tying it to whether Appellants were aggrieved with his decision in 2) - page 34 - or not. His award of interest also on this sum, was unsupported by the evidence.

DUTY OF APPELLATE TRIBUNAL

32. Mr Jenkins-Johnston has cited to us the cases of WATT v THOMAS [1947] AC 484 and BENMAX v AUSTIN MOTOR CO LTD [1955] 1 All ER 326 per LORD REID at page 329. We agree and accept the propositions of law stated in those decisions, but they do not help the Respondent's

case. Where a trial Judge has made findings of doubtful validity - WHITE CROSS INSURANCE v TAYLOR [1968-69] ALR SL per MARCUS-JONES,JA at page 182 LL33-37, this Court will interfere with those findings, and per DOVE-EDWIN,JA at page 179 LL17-19: " *This appeal is by way of rehearing and I am in the same position as the Learned Acting Chief Justice, who saw the witnesses, to come to my own conclusions";* and per DOVE-EDWIN,JA at page 180 LL35-40 citing with approval HENN-COLLINS,MR in IN RE MOULTON (1906) 94 L T 454 at 458: " *We are aware of the great weight properly attributable to the opinion of the Judge who has seen and heard the witnesses; but an appeal is a rehearing, and we cannot avoid the responsibility of forming a judgment on the matter for ourselves.*" Further, in JOINT VENTURE CONSTRUCTION COMPANY v CONTEH [1970-71] ALR SL 145 per TAMBIAH,JA at 149 Line 38 to page 150 Line 22, "*Although this Court is reluctant to interfere with the findings of fact of a trial Judge, this case comes within the principles under which an appellate Court can interfere with the findings of a trial Judge.....it is open to an appellate court to find that the view of a witness was ill-founded...Where the point in dispute has to be decided by the proper inferences to be drawn from the proved facts, an appeal court is in as good a position to evaluate the evidence as the trial Judge, and may form its own independent opinion.....the Learned judge, having misread the evidence, failed to evaluate the whole of the evidence led and, what is more, came to the wrong inferences on the proved facts, and, with respect, gravely misdirected himself in the law"* the appeal would be allowed. We think the LTJ in this case not only misread and failed to properly evaluate the evidence, but also "*came to the wrong inferences on the proved facts,*" and thereby gravely misdirected himself in law. In such circumstance, we have no alternative but to reverse the Judgment in its entirety.

CONCLUSION

33. In the result, the appeal is allowed, and the Judgment of the Court below is set aside. The Appellants are entitled to immediate possession of the property situate at and known as 12 Percival Street, Freetown; Mesne profits at the rate of USD10,000 with effect from 1st April,1999 until possession is delivered up; Damages for breach of the covenants contained in the Lease dated 26 March,1994 in the sum of LE10,000,000 bearing in mind that Mesne profits have been awarded at the rate

pleaded by the Appellants; interest on such Damages at the rate of 22% per annum with effect from 11th August,1995 the date of the letter from Wright & Jusu-Sheriff unto the date of Judgment, and thereafter, at the statutory rate until payment; and the Costs of this appeal, and in the Court below.

HON MR JUSTICE N C BROWNE-MARKE, Justice of Appeal

HON MRS JUSTICE S BASH-TAQI, Justice of the Supreme Court

HON MR JUSTICE E E ROBERTS, Justice of Appeal

16th February,2010.