IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: APPAU, JSC (PRESIDING)
PWAMANG, JSC
AMEGATCHER, JSC
TORKORNOO (MRS.), JSC
KULENDI, JSC

CIVIL APPEAL
NO. J4/66/2021

1ST DECEMBER, 2021

ROYAL INVESTMENT COMPANY …….. PLAINTIFF/RESPONDENT/RESPONDENT/ RESPONDENT

VRS

1. MADAM RUTH QUARCOOPOME
2. MADAM ANNA O. QUARCOPOME …… DEFENDANTS/APPLICANTS/APPELLANTS/ APPELLANTS

JUDGMENT

AMEGATCHER JSC:-

It is rare for a party who has had his appeal to an appellate court allowed to further appeal against the judgment in its favour to a second appellate court. But, this is what has happened in the current appeal before us. According to the appellants in paragraph

3 of their affidavit in support of an application for extension of time to file an appeal and later in their statement of case, though they were satisfied with the holding and final outcome of the appeal in the Court of Appeal, the legal reasoning behind the decision opened another door for the respondent to pursue a third leg of that litigation by the filing of another writ of summons and an injunction against them, thus allowing the litigation over the property to persist. We do not think the appellants can be faulted for this course of action. For when the legal reasoning behind a decision of court is faulty and will not end the litigation, it is within the right of any of the parties to challenge that part of the decision within the hierarchy of the courts. The rules also provide for this in the notice of appeal where a party can appeal against any part of the decision of the court he is dissatisfied with.

Against this backdrop, the defendants/applicants/appellants/appellants (hereafter referred to as the appellants) has filed this appeal to this court against thereasoning behind part of the decision of the Court of Appeal dated 25 June 2019 allowing an appeal against the High Court's ruling which dismissed the appellants' motionto strike out the plaintiff/respondent/respondent/respondent's (hereafter referred to as the respondent) statement of claim for not disclosing a reasonable cause of action and to dismiss the suit.

BACKGROUND

By a lease dated 31 January 1976, the appellants granted a fortyyear term commencing from 1 January 1977 to one Adel Dakmak. Under the lease, the lessee had to demolish the existing buildings and erect a modern building on the land. After erecting the building, Adel Dakmak on 18 September 1980 assigned the residue of the term to the respondent. The respondent as the assignee therefore became bound by the terms and conditions of the said lease.

By clause 4 (c) of the lease, if the lessee was desirous of taking a new lease at the expiration of the forty years, it had to notify the lessor in writing not less than three months before the expiration of the term. The respondent failed to notify the appellants

of its intention to exercise the option to renew the lease prior to its expiration. According to the respondent, new management took over the company and only obtained a copy of the lease in or around December 2016. Furthermore, the respondent claimed that it could not locate the appellants to seek for a renewal.

On the 19thApril 2017, the appellants by a letter notified the respondent of theexpiration of the lease as far back as 31stDecember 2016 and demanded a surrender of the property. In the ensuing correspondence, the respondent indicated its desire to renew the lease. This prompted an offer from the appellants to negotiate a new lease but attempts between the parties to negotiate was unsuccessful.The respondent then raised the legal issue of a breach of the lease agreement on its part for not giving the appellants the requisite notice for renewal and demanded that the appellants complied with sections 29 and 30 of the provisions of the now repealed Conveyancing Act 1973 (NRCD 175) to serve it notice of the breach to enable it remedy the breach.

High Court Proceedings

When the parties could not agree on the legal issues arising from the renewal of the lease, the respondent issued a writ of summons and statement of claim in the **High Court claiming the following:**

a) **Declaration that the Plaintiff is entitled to the renewal of her lease for a further term of 40 years from 1st January, 2017 to December 2056 as relief against re-entry by the Plaintiff.**
b) **Declaration that the Defendant is entitled to compensation for the Plaintiff's breach of the condition of the lease dated 31st January, 1976 to give notice of intention to renew the lease.**
c) **An order for the Defendant to execute a lease in favour of the Plaintiff on the terms and conditions stated in the lease.**
d) **An order fixing the amount of compensation due the Defendant for the Plaintiff's breach of a condition of the lease.**

e) **An order for injunction restraining the Defendant either by itself or agents, privies assigns, servants or otherwise howsoever from dealing with H/No. 37/1, Borwah House, Kwame Nkrumah Avenue, Adabraka, Accra in any way including selling, renting or leasing its until 31st December, 2056.**

f) **Cost**

The respondent, then, followed the suit with an application for interlocutory injunction seeking to restrain the appellants from dealing with the property in dispute pending the final determination of the suit. The High Court in its ruling dated 5thDecember 2017 dismissed the application on the basis that the appellants had not taken possession or commenced proceedings for possession by way of action in courtand so the respondent's claim for relief against forfeiture had not accrued,making the application for interlocutory injunction premature.

As if the drama unfolding in this case has been destined to pass through several stages of legal challenges, shortly after this ruling, the appellants filed an application under Order 11 Rule 18 of the High Court (Civil Procedure) Rules, 2004 C.I 47 to strike out the statement of claim and to dismiss the suit for not disclosing any reasonable cause of action, there being no agreement between the parties. As expected, the respondent resisted the application on the basis that the suit disclosed a reasonable cause of action.

The High Court in a ruling dated 5 February 2018 dismissed the appellant's application to set aside the suit.

Appeal to the Court of Appeal

Dissatisfied by the refusal of the High Court to set aside the suit, the appellantsmounted an appeal to the Court of Appeal which on 25June 2019 allowed the appeal and set aside the High Court's ruling.The Court of Appeal dismissed the suit after finding that the Statement of Claim did not disclose a reasonable cause of action and that its contents were frivolous and vexatious. However, in coming to that

conclusion, the Court of Appeal reviewed the terms of the lease and the applicable law and held that the respondent had breached the lease agreement by failing to renew the lease before its expiration and invoked the provisions of the then law in force regulating relief against re-entry and forfeiture, i.e. section 29 of NRCD 175(now revoked and replaced by sections 57 and 58 of the Land Act 2020 Act 1036) to the effect that the appellants ought to have notified the respondent about the breach and given it a reasonable time to remedy the breach.

Appealto the Supreme Court

As noted in the introduction, the appellants won their appeal in the Court of Appeal. The respondent did not appeal against the dismissal of their suit but quickly filed a fresh suit at the High Court to grant it relief against forfeiture under sections 29 and 30 of NRCD 175.This prompted the appellants on 5thFebruary 2020 toapply to the Court of Appeal for an order of extension of time to file an appeal before this Court against the Court of Appeals invocation of sections 29 and 30 of NRCD 175 to the peculiar facts of this case. The notice of appeal dated 18 February 2020, had the following grounds of appeal:

1. **The Court erred in law when it followed the court below in applying provisions of section 29 and 30 of the Conveyancing Act on restriction against re-entry and forfeiture to the facts of the instant case involving a lease already terminated by effluxion of time and therefore not subject to forfeiture.**

2. **The Court erred in law in holding that the failure of the respondent to give notice of their intention for renewal constituted a breach of covenant whereas the respondent were (sic) under no obligation to renew the lease and therefore give notice of same.**

GROUND 1

In this ground, the appellants submits that Sections 29 and 30 of NRCD 175 on restrictions and relief against re-entry and forfeiture are inapplicable to the facts of this case and cannot ground a cause of action. The appellants also submit that these provisions of re-entry and forfeiture are triggered upon a breach of a covenant, condition or agreement in a lease and not for the acquisition of a new lease or the renewal of expired leases for a further term. Therefore, according to the appellants, the Court of Appeal erred when in arriving at its reasoning, it determined that the pleadings and reliefs claimed were grounded under the rights of re-entry and forfeiture provided under sections 29 and 30 of NRCD 175.

The respondent disputes this position and submits that this case is subject to Sections 29 and 30 of NRCD 175. According to the respondent,NRCD 175 is applicable to conveyances in Ghana thus; a lease being a conveyance, its provisions on rent, term and renewals are subject to the Act. Further, the respondent argues that Section 29(3) of NRCD 175 applies notwithstanding provisions to the contrary. Therefore, the Act applies under all circumstances and the notion that Sections 29 and 30 should be avoided amounts to a profound subversion of statute.

The critical issue to be resolved here is when restrictions on and reliefagainstre-entry and forfeiture provided for under sections 29 and 30 of NRCD 175can be invoked. Is the relief applicable during the pendency and or after the expiration of the lease? To do justice to the issue at hand it would be worthwhile to explore the law of forfeiture and re-entry.

What is forfeiture and re-entry?

According to the EleventhEdition of the Black's Law Dictionary, forfeiture is defined as:

> **"The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty. Title is instantaneously transferred to another, such as the government, a corporation, or a private person".**

Re-entry is also defined as:

"a landlord's resumption of possession of leased premises upon the tenant's default under the lease".

From the definitions above, a lease is forfeited when a lessee breaches the lease agreement and a lessor is entitled to resume possession of the leased property upon the breach. In order to gain a better understanding on the concept of forfeiture, re-entry and relief against it, we would undertake a historical excursionunderpinning the antecedentsthat developed this area of the law.

History of Relief against Forfeiture

Relief against forfeiture originated as an equitable relief. Equity is a body of principles which alleviates the strict application of rules of law in appropriate cases. At common law, equity's intervention to grant relief against forfeiture of leases started from the early 17th century. It commenced in the British Courts of Equity and was initially restricted to a tenant resisting a landlord's efforts to recover possession of a property due to the tenant's failure to pay rent on time. The British Courts originally adopted a restrictive approach because they did not want to assume authority to vary the contracts of private parties.

The case of **PEACHY v DUKE OF SOMERSET(1721) Prec Ch 568; 24 ER 255; 1 STR 447**was one of the earliest cases on the jurisdiction of Chancery to relieve against penalties and forfeiture. It was held that equity would not interfere to relieve forfeiture for breaches of covenants and conditions where there could not be any just compensation for the breach. This case sought to confine the jurisdiction to relieve against forfeiture to only breaches of money covenants. Lord Macclesfield stated in this case that:

'The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all that he expected or desired: but it is quite otherwise in the present case. These penalties or forfeitures were never intended by way of compensation, for there can be none."

However, in the case of **SANDERS v POPE (1806) 12 Ves Jun 282; 33 ER 108**, Lord Erskine adopted a more flexible albeit discretionary stance on relief against forfeiture. The position of Chancery was that if the breach was compensable, there was jurisdiction, but whether it should be exercised went to jurisdiction.

This seemingly flexible position was short lived when in the 1811 case of **HILL v BARCLAY (1811) 18 Ves Jun 56, 64; 34 ER238**, the Lord Chancellor,Lord Eldon held th88at relief for forfeiture had to be for a breach of nonpayment of money. He opined:

> **"The distinction has been taken, that relief may be had against the breach of a covenant to pay money at a given day; but, not, where anything else is to be done. … In all these cases the law having ascertained the contract, and the rights of the contracting parties, a Court of Equity ought not to interfere."**

Accordingly, Lord Eldon declined to grant relief against forfeiture for a willful breach of covenant not involving the failure to pay rent even where the same was capable of adequate compensation.

The jurisdiction ofChancery to relieve against forfeiture remained in a state of confusion throughoutmost of the 19th century. However, in 1881, the English legislature granted the High Court power to relieve against forfeiture of a lease for breach of non-rent covenants. TheEnglish Conveyancing and Law of Property Act 1881 contained similar clauses as Sections 29 and 30 of NRCD 175Thereafter, the statutory provisions in the 1881 Act governed cases dealing with forfeiture and re-entry of leased premises.

However,in 1973, the landmark decision of **SHILOH SPINNERS LTD v HARDING(1973) AC 691**reviewed and revived the scope of equity's jurisdiction to relieve against forfeiture. The essence of the decision was that despite legislative intervention, equity would still intervene to grant relief against forfeiture. It was held that the grant of equitable relief was not limited to the two classical heads of jurisdiction: (a) where the object of forfeiture was to secure a payment of money and

(b)where forfeiture was exacted as a result of accident, mistake or surprise on the part of the promisor. Lord Wilberforce acknowledged a third head of jurisdiction as follows:

> **"....we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word "appropriate" involves consideration of the conduct of the applicant for relief, in particular whether his default was willful, of the gravity of the breaches, and of the disparity between the values of the property of which forfeiture is claimed as compared with the damage caused by the breach."**

This ruling ensured that the Court could grant relief for breaches of other covenants where a landlord may be adequately compensated and receive proper undertakings asto future performance so that the forfeiture clause is merely security to achieve these results.

Tracing through the history of the progression of the principles of relief against forfeiture and the conduct of the English Courts in relieving same, it is evident that relief was granted based on breaches of ongoing leases. Under both the 1881 law and equity, the effect of these decisions was to provide reprieve to tenants who were still enjoying the term of their leases but who had breached a condition or covenant which allowed the landlord to re-enter and take possession of the demised premises. Both the equitable and statutory relief against forfeiture were primarily targeted to protect tenants against re-entry by landlords once the breach complained of could be compensated for. In other words, the term of a lease would not be disturbed or prematurely terminated due to a tenant's breach. In Ghana, the situation was no different.

Prior to the enactment of NRCD 175, the common law equitable principles governing re-entry, forfeiture and relief against forfeiture were applicable. As the common law developed, the ability to claim relief against forfeiture was dependent on the nature of the breach.

Where forfeiture was based on nonpayment of rent, equity would relieve the tenant once he paid the rent. In the case of **INTERPLAST v BONSU (1979) GLR 285**, the Court of Appeal then sitting as the highest appellate Court held per Apaloo CJ that:

> **"Where such an action as the present is brought to enforce a right of forfeiture, the attitude of a court of equity is quite settled. Since in the eyes of equity, the object of a right of re-entry is to give the landlord security for his rent, it will relieve the tenant against forfeiture if he pays all the arrears and costs, even though such payment does not take place until after the date of forfeiture has passed".**

On the other hand, where there was a breach of a covenant there could not be forfeiture unless there was an express provision for re-entry in the lease based on the breach of the said covenant. This position was advanced by Ollennu J (as he then was) in the case of **BASSIL v SAID RAAD & SONS (1958) 3 WALR 231**as follows:

> **"Now at common law there can be no forfeiture for breach of covenant under a lease unless there is express provision in the lease for re-entry".**

Ollennu J in this case further held that where forfeiture was based on a breach of a condition, the Lessor was automatically entitled to forfeit the lease without an express provision for re-entry.

Finally, the Courts refused to grant relief against forfeiture where a tenant denied his landlord's title. This is still the position of the law and it is fortified by Section 27 of the Evidence Act 1975 (NRCD 323). In the case of **ANTIE &ADJUWUAH v OGBO [2005-2006] SCGLR 49** this court per Georgina Wood JSC (as she then was), held as follows;

"The Common Law rule as to forfeiture by a licensee or tenant who challenges the title of his licensor or landlord has received statutory recognition under sections 27 and 28 of the Evidence decree 1975 (NRCD 323). The law is that a licensee or tenant who denies the title of his licensor or landlord, either by claiming that title to the subject matter is vested in himself or herself or someone else forfeits his or her interest. In view of the plaintiff's direct challenge to the defendant's lawful claim to ownership, he has forfeited his right to remain in the premises."

In Ghana, prior to the passage of the Land Act 2020, Act 1036, restrictions on and relief against re-entry and forfeiture received statutory backing in 1973 with the enactment of NRCD 175. The Sections which dealt with these rights were sections 29 and 30 which are now reproduced almost verbatim in sections 57 and 58 of Act 1036. We reproduce below the provisions for ease of reference.

Section 29—Restriction on Re-Entry and Forfeiture.

(1) A right of re-entry or forfeiture under any provision in a lease for a breach of any covenant, condition or agreement in the lease shall not be enforceable, by action or otherwise, until—

(a) the lessor serves on the lessee a notice:

(i) specifying the particular breach complained of;

(ii) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(iii) (except where the breach consists of a non-payment of rent) requiring the lessee to make reasonable compensation in money for the breach; and

(b) the lessee has knowledge of the fact that such notice has been served;

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and, (except where the breach consists of a non-payment of rent) to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a notice has been sent by registered post addressed to a person at his last known postal address in Ghana, then, for the purposes of subsection (1), that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

(3) This section applies notwithstanding any provision to the contrary in the lease.

Section 30—Relief against Re-Entry and Forfeiture.

(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any provision in a lease, or for non-payment of rent, the lessee of the property and also a sublessee of the property comprised in the lease or any part thereof may, either in the lessor's action (if any) or in any action brought by such person for that purpose, apply to the court for relief.

(2) Subject to subsection (1) of section 29, where a lessee applies to the court for relief, the court may grant or refuse relief as it thinks fit having regard to the proceedings and conduct of the parties and to all the other circumstances; and relief when granted may be upon such terms, if any, as to costs, expenses, damages, compensation, penalty

or otherwise, including the granting of an injunction to restrain any similar breach in the future, as the court in the circumstances of each case thinks fit.

(3) Where a sublessee applies to the court for relief, the court may make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in that sublessee upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise as the court in the circumstances of each case may think fit; but in no case shall any such sublessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease.

The interpretation of the above sections constitute the crux of the appeal before us. The law is clear that judicial interpretation of a statute is required where there is a doubt or dispute as to its true meaning and effect. However, where the words of the statute are clear and the ordinary meaning is discerned from the language of the Act, there is no basis for applying principles and canons of statutory interpretation. See **DAKPEM ZOBOGU-NAA HENRY A. KALEEM VS LANDS COMMISSION, ATTORNEY-GENERAL AND DAKPEMA ALHASSAN MOHAMMED DAWUNI Supreme Court, Civil Appeal No J4/17/2020 dated 13th May 2020 (unreported) and CROXFORD VS UNIVERSAL INSURANCE COMPANY [1930] 2QB 253 at 281.**

It is only where the construction of the words used in the statute leads to 8ambiguity that recourse could be had to the principles of statutory interpretation. What then constitutes ambiguity for which reason, canons of interpretation would be resorted to? Lord Buckmaster in **ORMOND INVESTMENTS CO LTD VS BETTS [1928] AC 143** stated it succinctly as

"a phrase fairly and equally open to diverse meanings".

A careful reading of sections 29 and 30 admit of no ambiguity. Contrary to the common law position, Section 29 of NRCD 175 treated the right of re-entry based on breaches of rent payment, covenants andconditions as one and the same. The law did not differentiate or impose exceptions based on the type of breach. It recognized breaches of covenants, conditions or agreements as breaches that could all trigger re-entry in so far as the relevant procedure was complied with. Additionally, these were all breaches that could attract relief against forfeiture.

That notwithstanding, these statutory provision on restrictions of re-entry and forfeiture as well as relief against re-entry and forfeiture sought to ensure the same outcome as the common law. Fundamentally, the goal was to prevent the premature termination of a lease based on a breach where the breach could be compensated for.Once a lessor had granted a lessee a lease for a fixed term, it was assumed that the lessee would enjoy the full term and that re-entry would not occur if there were no breaches. Yet, even if breaches occurred, in so far as they could be compensated for, the term of the lease should not be disturbed.

Thus, section 29 anticipated situations where breaches of conditions, covenants and agreements in a subsisting lease could be remedied by reasonable compensation to the satisfaction of the lessor. Also, a breach of rent obligations could be remedied by paying the accrued rent to the lessor.The effect of this section was to restrict the lessor's right of re-entry based on a breach until the lessor had given the lessee notice of the said breach together with the opportunity to remedy the breach by making reasonable compensation. The purpose being that once the breach was capable of being remedied, the defaulting tenant should be allowed to enjoy the subsisting lease and not suffer the consequences of a premature termination and eviction.

Next, section 30 offered extra protection by affording a tenant the opportunity to apply to court for relief against forfeiture where a breach had occurred. Indeed, subsection 2 allows the Court to grant relief upon such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to

restrain any similar breach in the future, as the court in the circumstances of each case thinks fit.

The grant of relief is to ensure that the lessee remains in possession of the demised premises in so far as the lease is still subsisting and the lessor's compensation would be by way of costs, expenses, damages, penalty or injunction to prevent a similar breach. Also, the fact that section 30 prescribes an injunction as one of the compensable reliefs to a lessor presupposes that future breaches would be restrained under a pre-existing lease and not a future as-yet-to-be-entered into lease. In fact, the law would not restrain a future act over an interest in land that is yet to be created.

It is clear that relief against forfeiture prescribed in NRCD 175 did not anticipate relief where a lease had run its course and expired. The position is buttressed by Section 30(3) of the Act which restricts relief in the case of a sublessee to the term he had under his original lease. This section is express thus:

"...but in no case shall any such sublessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease."

By parity of reasoning, if relief against forfeiture will not grant a longer tenure than prescribed under an original lease, then relief cannot be given to create a new lease.Indeed, if the statute meant for it to cover failure to exercise an option for renewal, it would have expressly stated same. Also, if the Act intended it to be used as a shield following failure to exercise a renewal option, it would have expressly provided relief which has the effect of creating a new lease.

In the case of **FLORINI LUCA AND FLORINI ALESANDRO v. MR. SAMIR, DIVESTITURE IMPLEMENTATION COMMITTEE AND ATTORNEY GENERAL (SUPREME COURT CIVIL APPEAL NO. J4/49/2020, UNREPORTED)**, this Court citing with approval the case of **ABU RAMADAN & NIMAKO V EC & A-G [2013-2014] 2 SCGLR 1654** stated that **i**n the interpretation of statutes, a court ought to render an interpretation that would achieve the purpose of the enactment and not to defeat it. It is clear that Sections 29 and 30 of the Act by no means extends to creating

a renewal in favour of a party who has failed to exercise its renewal rights. To arrive at that conclusion will not only defeat the purpose of NRCD 175, it will amount to an undue interference in an individual's proprietary and contractual rightswhich a court of law will not entertain.

Indeed, the original concept of forfeiture and re-entry was to put an end to a lease forever. DA ROCHA and LODOH in their book **GHANA LAND LAW AND CONVEYANCING 2ND EDITION** at page 72 explains the position as follows:

> "**Re-entry by way of forfeiture by the lessor puts an end to the lease forever".**

Also, in **HALSBURY'S LAWS OF ENGLAND VOLUME 27, FOURTH EDITION,** paragraph 422 on Forfeiture: right of re-entry, the learned authors explains as follows:

> **"A lease may contain an express provision for re-entry or forfeiture by the Landlord on specified events such as non-payment of rent, non-performance or non-observance by the tenants of the covenants of the lease, the tenant's bankruptcy or the levy of execution on his goods….. The proviso does not by itself enable the tenant to treat the term as at an end, as the lease is not void but voidable, and only the landlord can void it…..Hence notwithstanding the cause for forfeiture, thetenancy continues until the landlord does some act which shows his intention to determine it".**

Again,on the effect of a forfeiture order on lease, the authors at paragraph 438 of the same volume stated:

> **"Where relief is granted,it is not necessary for a new lease to be executed as the tenant continues to hold the premises under the old lease**"

These authorities further embolden us in our opinion that relief against forfeiture is granted when the lease is still in operation or in existence and not after it has lapsed.

Even though the nature of a lease is to create an interest in land for a fixed period of time, it is also a contractual agreement between a Lessor and a Lessee and, therefore, must be determined in accordance with its terms. Thus, once a lease expires, a lessee would be expected to give up vacant possession to the lessor.

This court in time past has had the opportunity to discuss and pronounce on cases dealing with sections 29 and 30 of NRCD 175. In the case of**WESTERN HARDWOOD ENTERPRISE LTD AND ANOTHER v WEST AFRICAN ENTERPRISE LTD [1997-98] 1GLR 645,**Amuah JSC in discussing forfeiture stated as follows:

> **'Under native law and custom one of the methods for determining a lease is by the grantor forfeiting the lease on account of a breach of covenant**. **Re-entering brings the lease to an end**.."

In arriving at his opinion, Amuah JSC quoted the learned author Kludze in his book Ghana Law of Landlord and Tenant, that:

> **' ... Although the right of forfeiture may be automatic, forfeiture itself is not automatic and the landlord may elect not to enforce his right of forfeiture. Even though as a general statement it is said that a breach of a condition terminates the lease, it is only true to the extent that the lease is liable to be forfeited. Therefore when a right of forfeiture accrues, whether as a result of a breach of condition or a covenant, the effect truly is that it renders the lease voidable at the instance of the landlord, the lease does not, thereby become automatically void...'**

Also, in the case of **QUIST (No 1) v DANAWI (No 1) [2015-2016] 2SCGLR 1444**Baffoe-Bonnie JSC in discussing forfeiture stated that:

> **"The lease merely becomes liable to forfeiture until the landlord elects to enforce his right or waives it. The fact that the tenant has incurred a forfeiture does not necessarily mean an end to the lease. The landlord merely has the right to terminate the lease when a forfeiture has been incurred; but he is not obliged to exercise the right. If the landlord**

wishes to exercise the right, he must do so by some positive and unequivocal step to re-enter."

Additionally, this Court in discussing forfeiture in the case **of BOSTON AND ANOTHER v KHEMLAND BROTHERS AND OTHERS [1964] GLR 277-284** stated per Apaloo JSC (as he then was) that:

'The sub-lease in this case was not due to expire until April 1963, and if the option was validly exercised, until April 1973. Had the learned judge acceded to the plaintiffs' request and enforced the forfeiture, the sub-lease would have determined immediately. As the court declined the order of forfeiture, it followed that the sub-lease remains valid and would run in accordance with its tenor".

The import of the above authorities is that if a lease has been breached, it is liable to be forfeited and when the forfeiture accrues, a lessor has to exercise his right of re-entry to bring the lease to end. More importantly, the predominant principle gleaned for the purpose of this appeal is that the effect of forfeiture and re-entry under NRCD 175 is to prematurely terminate a subsisting lease.

On the other hand, when a lease agreement has expired, the parties are no longer bound by its terms unless there are clauses which survive the expiration of the agreement. The parties are relieved from their rights and obligations to effect and receive future performance under the agreement. The expiration of a lease results in the dissolution of the relationship that existed between the parties to a lease in respect of the leased property. In the absence of an express renewal duly exercised in accordance with the terms of the lease agreement, a property the subject matter of a lease will revert back to the lessor and the lessor may resume exercising his proprietary rights.

EFFECT OF STATUTORY TENANCY ON THIS APPEAL

Under common law, where a lease has expired due to the effluxion of time, the parties are absolved of their responsibilities under the lease and a lessor is entitled to recover possession. However, statutory restrictions in the Rent Act 1963 (ACT 220) impose limitations on the lessor's common law right to re-enter the leased premises upon expiry. In other words, the mere expiration of leased premises does not automatically entitle the lessor to recover possession of the premises. Under the Rent Act, if a lessee remains in possession of premises after the expiry of a lease, that lessee becomes a statutory tenant and cannot be dispossessed by the lessor.

Thus, one may be tempted to argue that the respondent can take refuge under the ever loving arms of section 36 of the Act 220 on "statutory tenancy" to avoid being dispossessed. This is however not the case. A careful study of the Rent Act discloses that its provisions would be inapplicable to the facts before us. **Section 1 (2c)** states as follows:

> **'This Act shall not apply to-**
>
> **where a lease whether entered into, before, on or after the date of the commencement of this Act, was entered into as a lease of land upon which there were premises but the premises were demolished and new premises erected within five years after the grant of the lease, such lease after the erection of the new premises;"**

In the respondent's statement of case, it averred that Adel Dakmak was to demolish the structures on the land and erect a modern building which he did. In the respondent's pleadings, the demolition and erection of the new structures occurred within four years of the original lease. It is important to point out that although the lease had expired and the respondent had held over possession of the property, it is not a statutory tenant and accordingly would not receive the protection of the law.

Furthermore, our understanding of the rights conferred on statutory tenants are rights limited to tenants of premises constructed and ready for occupation and not lessees of vacant land. The Rent Act was enacted among other things to protect such tenants and

not the lessees under long term leases of bare lands. In our view, under the Rent Act, a tenant is any person who rents or leases premises from another person in consideration of the payment of rent for the premises. References, therefore to a 'lease' under the Rent Act should be limited to agreement for the letting of premises. The Rent Act further defines "premises" in section 36 as **"any building, structure, stall or other erection or part thereof, movable or otherwise, which is the subject of a separate letting, other than a dwelling house or part thereof bona fide let at a rent which includes a payment for board or attendance, and includes land outbuildings and appurtenances let together with such premises at a single rent when adjoining the premises let therewith".**

We must state that rent laws are only a subsect of the general property laws of Ghana and so must not be used interchangeably with the laws which affect leases of land. The nature of a lease contemplated under the repealed NRCD 175 (now the Land Act 2020 Act 1036) is different from the lease referenced in the Rent Act. Leases under NRCD 175 originated from the common law concept of leases. A lease is a form of a conveyance which transfers an interest in land for a certain period of years. Thus, a lease is an interest in land which is created to last for a fixed period. NRCD 175 defined land as **"including land covered by water, any house, building or structure whatsoever, and any interest or right in, to or over land or water".**

Thus, leases under the Rent Act specifically apply to buildings or structures while leases under NRCD 175 cover land and buildings thereon. It is therefore evident that the Rent Act was not enacted to cover lessees of bare land. Applying this analogy to the facts before us, the property that was leased to the respondent's assignor Adel Dakmak was to be demolished and he was to erect new structures on the land. In effect, the lease to Adel Dakmak was not for a building but for the land and one of the conditions of the lease was to put up a new structure.

It is one of the principles of our conveyancing laws that an assignee steps into the shoes of its assignor and is bound by the terms of the head lease entered into with its assignor. Accordingly, the effect is that, the respondent leased a bare land from the

appellant. In this instance, the provisions of the Rent Act will not apply to offer the respondent statutory tenancy protection from being dispossessed.

EQUITY'S INTERVENTION TO GRANT RELIEF:

Equity, it is said, is the darling of litigants who sought solace after the strict application of the law had failed to grant them their remedy. From time immemorial, it has been the practice of the court to put on its chancery hat in peculiar situations and determineif any of the equitable remedies will ameliorate the pain, lessen the burden and grant relief if appropriate to the peculiar circumstances of a case.

Francois JA (as he then was) was confronted with a similar situation in **Ayitey v Mantey [1984-86] 1 GLR 552**where he had to order recovery of possession of a completed property erected on land which the builder did not own. Reflecting on the role of equity in such situations he said at page 559 as follows:

"In the Anglo-Saxon jurisdictions from which our own courts derive their existence, equitable relief has been born of the assiduous effort that has been utilised to ameliorate the harshness and unjust rigours of the law. It has required stalwart pioneers to forge equitable principles to promote fairness and relief".

With our chancery hat and Francois' dictum in mind, we have in this appeal, gone the extra mile to research through the various equitable remedies including how they have been interpreted in other jurisdictions. We have done so to convince ourselves that the respondent has not been treated harshly by the law. If they had, then what relief, if any, is there for the intervention of equity?Our research has revealed interesting comparative analysis with some jurisdictions which we feel obliged to discuss just two at this stage. These jurisdictionshave been confronted with similar issues as the present in this appeal and have granted relief against re-entryon limited grounds despite the expiration of a lease.

In the American case of **J.N.A. REALTY CORP v CROSS BAY CHELSEA, INC 42 N.Y, 2D 392, 397 N.Y. S 2D 958 (1997)** the New York Court of Appeals determined that equity will intervene to relieve a tenant who fails to timeously exercise a renewal option in a lease where the tenant's failure to exercise the option was due to excusable default and the tenant would suffer forfeiture if the lease is not renewed and that the landlord was not prejudiced by the default.

Also, in the Canadian case of ***VELOUTE CATERING INV. V. BERNARDO*, 2016 ONSC 7281**the Ontario Superior Court of Justice determined that it had jurisdiction to grant relief against forfeiture in equity for failure of a tenant to properly renew a lease. The Court granted relief because the facts revealed that the tenant had informed the landlord several times prior to the expiration of the lease that it wished to renew the lease and the landlord had indicated that a renewal notice would not be required until October 2016. The Court found that the tenant's failure to renew the lease was as a result of the landlord's miscommunication. Secondly, the tenant had attempted to set up an appointment with the landlord to discuss the renewal but the landlord delayed with his response. Lastly, the tenant had made a large investment into the property which would have been lost if relief was not granted.

It is important to note that in the two cases, there was some degree of 'excusable fault' or honest mistake on the part of the tenants. Accordingly, the above cases sought to stretch equity's protection to relieve against forfeiturebased on an excusable fault or non-willful default to renew a lease. The import of these decisions is that **in those jurisdictions** equity would apply in very limited situations to relieve against forfeiture for a tenant's failure to comply with a renewal clause.

The facts pleaded in the statement of claim make this appeal distinguishable from the American and Canadian cases cited above. Firstly, those cases were brought under equity while in the present appeal the respondent sought relief against re-entry and forfeiture under the former sections 29 and 30 of NRCD 175. As discussed above, sections 29 and 30 are very clear and apply to limited situations.

Secondly, the respondent in its statement of claim pleaded that the reason it could not renew the lease was that it could not locate the appellants to notify them of its intention to exercise the renewal clause. This explanation, apart from it not being plausible did not also constitute 'excusable fault' asexplained in the American and Canadian cases which prompted the Court's invocation of its chancery powers.The reason is the head lease provides that all notices shall be delivered to the appellants by hand or by prepaid registered post at their last known address in Ghana. If the respondent had been minded to organize its affairs properly, it could have exercised its renewal options via this mode and that would have sufficed as evidence that it had taken diligent steps to trigger a renewal.

We have looked at the equitable intervention made by the US and Canadian courts in the cases cited above Vis a Vis the current appeal. We are firm in our minds that the respondent would still not have been eligible for equity's protection to relieve it against re-entry by the appellant. The longstanding equitable principle that 'equity aids the vigilant' still applies as good law in our jurisdiction. The respondent was not vigilant but rather tardy and negligent. Relieving a lessee who through its own negligence failed to renew its lease within the prescribed renewal period will open Ghanaian law to a plethora of uncertainties and instabilities in commercial property transactions.

This is not to say that in Ghana, equity can never relive against forfeiture. Indeed, we agree with the position of Lord Wilberforce in **SHILOH SPINNERS LTD v HARDING (SUPRA)**where he indicated that the intervention of the legislature in the area of relief against forfeiture had not taken away the powers of equity. He stated as follows:-

> **"In my opinion, where the courts have established a general principle of law or equity, and the legislature steps in with particular legislation in a particular area, it must, unless showing a contrary intention, be taken to have left cases outside that area where they were under the influence of the general law. To suppose otherwise involves the conclusion that an existing jurisdiction has been cut down by implication, by an enactment moreover which is positive in character**

(for it amplifies the jurisdiction in cases of leases) rather than negative."

Article 11 (2) of the 1992 Constitution states the laws of Ghana to comprise the common law and the common law also encompasses the doctrines of equity among others. As such, this court has power in appropriate cases to invoke equity's intervention in peculiar situations which require relief against re-entry and forfeiture and which are outside the scope of law.

GROUND 2

The Court erred in law in holding that the failure of the respondent to give notice of their intention for renewal constituted a breach of covenant whereas the respondents were under no obligation to renew the lease and therefore give notice of same.

Before addressing this ground, it must be clarified that the Court of Appeal cited the respondent's failure to renew its lease as a breach of condition and not a breach of covenant as indicated under this ground. As such the ensuing analysis has sought to correct the error in the drafting of the ground. We have, therefore, limited the discussion below to a breach of a condition.

It is the appellants' contention that the respondent sought to characterize its failure to exercise an option for renewal as a breach of a condition of the lease. The appellants further contend that the Court of Appeal affirmed this erroneous position when it applied sections 29 and 30 of NRCD 175 to hold that the appellantsought to have notified the respondent to remedy the breach.

The respondent submits that a lease consists of covenants, conditions and agreements. The respondent's position is that the option to renew clause is a condition of the lease. Thus, in so far as section 29 of NRCD 175 covers breaches of conditions, the appellants were under an obligation to notify the respondent about the said breach. The

respondent further argued that Section 29 (3) applies regardless of a contrary provision of a lease, therefore the appellants could not absolve themselves of their obligations under Section 29.

The main bone of contention under this ground of appeal is whether the option to renew clause constituted a condition of the lease?

According to Black's Law Dictionary (Eleventh Edition), a condition is defined as:

> **"A stipulation or prerequisite in a contract, will, or other instrument, constituting the essence of the instrument. If a court construes a contractual term to be a condition, then its untruth or breach will entitle the party to whom it is made to be discharged from all liabilities under the contract."**

Also, DA ROCHA and LODOH in their book **GHANA LAND LAW AND CONVEYANCING, 2ND EDITION,** at page 72 define a condition as:

> **"an obligation imposed on the tenant on which the continuance of the lease depends".**

A condition is therefore a term of a contract that is so vital that it goes to the root of the transaction. It spells out the obligations of both parties for which nonfulfillment may result in liabilities accruing to the defaulting party. So, will an option to renew clause pass as a condition of a pre-existing lease?

In **HALSBURY'S LAWS OF ENGLAND VOLUME 27, FOURTH EDITION,** paragraph113 headed "**Option to renew a lease**", it was stated as follows:

> "**A lease which creates a tenancy for a term of years may confer on the tenant an option to take a lease for a further term. Such an option constitutes an offerwhich the landlord is contractually precluded fromwithdrawing so long as the option remains exercisable……."**

It is clear from the discussions above that a renewal clause otherwise known as an option to renewcannot constitute a condition of the agreement but merely an offer for a

new agreement. Under the law of contract, an offer is an expression of a willingness to contract on specified terms made with the intention that it is to be binding once accepted by the person to whom it is addressed.

Option to renew clauses provide a mechanism for the creation of a new agreement. Where an option to renew clause is included in an agreement, the original lease will determine at the end of its term and the renewal will involve the creation of a new lease based on similar, same or different terms as the original lease.

The effect of the renewal is to recreate the legal relationship and to replace the old lease with a new one. Therefore, renewal clauses play a vital role in lease agreements and have the effect of contemplating longer term performance obligations of the parties. They also serve the purpose of preserving the parties' rights along with extending the tenure of the lease with minimal disruption.

The Courts have over the years interpreted renewal clauses as offers which have to be accepted before binding the parties. This accords with the principle of sanctity of contractsand honoring the obligations of parties to a contract.

The Court of Appeal in discussing an option to renew clause through Apaloo CJ stated in **ACQUAH V OMAN GHANA TRUST HOLDINGS LTD. [1984-86] 1 GLR 157-171** stated as follows:

> **"But one would normally expect a reputable company whose lease has expired and who failed to avail themselves of an opportunity of exercising an option to renew, to keep faith with their landlord and peacefully yield possession of the demised premises and not oblige him to commence needless litigation to recover what is justly due to him".**

Also, in the case of **UNION TRADING CO. LTD. V KARAM AND ANOTHER [1975] 1 GLR 212,** the High Court held that:

> **"the mere acceptance of rents after the expiration of the sub-lease could not, in the circumstances of the case, justify an inference that**

the option of renewal was exercised by the first defendant and that a new contractual tenancy had been created between the parties. Dicta of Scott and Mac Kinnon L.JJ in Morrison v. Jacobs [1945] 2 All E. R. 430 at pp. 431 and 432, C.A respectively applied".

It is evident from the above authoritiesthat renewal rights must be rooted and expressly provided for in the contract for it to be enforceable. Furthermore, the contract will usually provide the procedure for the exercise of the option. Noncompliance with the procedure entitles the lessor to recover possession of the lease. Thus, the option may be lost where a party does not satisfy the conditions attached to its exercise.

In describing the effect of condition precedents, the United States Supreme Court in the case **of DAVIS V GRAY 16 Wall (83 US 203, 229-230)** stated:-

"There is wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained."

Additionally, in **HALSBURY'S LAWS OF ENGLAND VOLUME 27, FOURTH EDITION**paragraph 116 headed "Conditions of options", it has been explained that:

"if the terms of the option require that the tenant is to have paid all arrears of rent and performed the covenants on his part, the payment and performance are a condition precedent to the exercise of that option and must be fulfilled at the date of the determination of the term for the exercise of the option to be effective".

In this appeal, givingthree months written notice of intention to renew was a pre-requisite to exercising the option. Non-compliance with the procedure for exercising the option renders the lapse of the option. Where a party fails to exercise his right to renew the lease, there can be no new lease and this does not affect the existing lease. Where a party fails to comply with the required procedure for the renewal of a lease, he is deemed to be in possession of the property only for the period assigned in the existing lease and nothing more. Also, where a party is required to give prior notice for renewal and he fails to do so, the lessor is not required to give a notice of re-entry because it is not a breach of the lease.

It is clear from the definition of condition advanced by the various authorities and legal text writers abovethat because the renewal clause did not affect the continuance of the existing lease, the failure of the respondent to exercise his renewal right had no effect on the existing lease. To this end, the appellants was under no obligation to notify the respondent of a breach. In any case, non-notification could have occurred because the existing lease is deemed to have expired. Further, failure to exercise the renewal right is an implied notice that the lessee was no longer interested in the property.

In the results the Court of Appeal fell into grave error when opined that failure to give notice to exercise the option to renew clause in a lease was a breach of a condition which should be remedied under section 29 of NRCD 175. The Appeal, therefore, succeeds and is allowed for the above reasons.

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(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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