IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: **OWUSU(MS), J.S.C. (PRESIDING)**
DOTSE, J.S.C.
YEBOAH, J.S.C.
BONNIE, J.S.C.
GBADEGBE, J.S.C.

CIVIL APPEAL
NO.J4/50/2013

15TH MAY 2014

CONTINENTAL TERMINAL LIMITED -- PLAINTIFF/APPELLANT /APPELLANT

VRS.

1.GHANA PORTS AND HARBOURS AUTHORITY -- DEFENDANTS/ RESPONDENTS /RESPONDENTS

2. JAMES BEN GAISE

3. RICHARD DEIH

JUDGMENT

GBADEGBE JSC:

The instant appeal arises from an agreement between the parties herein where by the defendant-respondent-appellant (hereinafter conveniently referred to simply as the defendant) let and the plaintiff (also hereinafter conveniently simply referred to as the plaintiff) obtainedthe leasehold of a property belonging to the defendant on terms and conditions that included payment of rent and the development of the land within a specified period. It appears from the evidence that the covenant relating to the development of the land and payment of rent were recurrently breached by the plaintiff. On 10 August 2009, the defendant served a demand notice that is in evidence as Exhibit 11 on the plaintiff regarding the payment of rent that had been due and owing under the leasehold agreementand remainedunpaid. By Exhibit 11, the plaintiff was required to make payment of the outstanding rentby 31 August 2009 but before the date stipulated for payment, the defendant issued another letter -exhibit 14 dated 26 August 2009 that referred to the breaches to pay rent and develop the property in terms of the leasehold agreement. It was also indicated by the defendant to the plaintiff by exhibit 14that in view of the said breaches,it had decided to re-enter the land. It appears from the evidence that sequentially, when the plaintiff apparently in compliance with the demand contained inExhibit 11offered the amount due, the payment was rejected by the defendant's authorised representative who explained to the agent of the plaintiff that he had been instructed not to accept the payment. Following the defendant's refusal to accept the payment of the arrears of rent, the plaintiff made several frantic efforts to enable the payment to be accepted but all its efforts were rebuffed. Faced with the said state of affairs that looked quite troubling, the plaintiff took out the writ of summons herein before the High Court, Tema claiming the following reliefs:

1. **Declaration that Defendant's refusal to accept payment of rent arrears by the plaintiff is in breach of section 29 of the Conveyancing Act, 1973 (NRCD 175)**
2. **Relief against forfeiture upon such terms as may be just and equitable**

3. **An injunction restraining the defendants from re-entering or re-possessing the demised premises**.

In the trial court, the plaintiff's claim was refused and the defendant succeeded on its counterclaim for recovery of possession. An appeal therefrom by the plaintiff to the Court of Appeal resulted in the reversal of the decision of the High Court for which reason the defendant has appealed to this court. In the notice of appeal that initiated this re-hearing several grounds of appeal were filed and indeed argued. A close perusal of the record of appeal and the submissions filed by the parties discloses as indeed, the learned justices of the Court of Appeal rightly observed that the primary issue or question to which we must turn our attention is whether the defendant had re-entered the demised property such as to have the effect of the exercise by the defendant of the statutory right of forfeiture?

The defendant bases its right to forfeit the ground on a re-entry but a careful consideration of the record of appeal, however does not provide any evidence of such entry that will suffice the requirements of**section 29 (1) of the Conveyancing Act, NRCD 175**. This fact is also borne out by the concession made at the Bar by learned counsel for the parties on the last adjourned date-26 March 2014 on which date they were directed by the court to specifically address it on the issue of re-entry. In my view, the very frank concession made by both counsel in the matter has rendered any doubt that existed previously as to the existence or otherwise of the defendant's re-entry one beyond argument. In the circumstances, as there was no re-entry by the

defendant that will satisfy the law, it seems that the plaintiff's action which essentially sought a relief against forfeiture was not well grounded and accordingly must fail

The right of forfeiture and the relief against forfeiture being statutory remediesprovidedin **sections 29 and 30 of the Conveyancing Act, NRCD 175**, the failure by the plaintiff to tender any evidence to prove such an entry is fatal to its claim for relief against forfeiture which by law must be subsequent to a re-entry by the landlord by means of either an actual entry upon the land or by an action that makes an unequivocal demand for possession of the demised property. I think it is clear from the words by which **section 29 (1) of the Act** is expressed that a mere notice by the landlord of a breach or breaches is not sufficient to bring about the exercise by him of the statutory right of forfeiture.The said section provides:

"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-

The lessor serves on the lessee a notice:

(1) 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 non-payment of rent) to make reasonable compensation in money, to the satisfaction of the lessor, for the breach." See: **Jacques v Harrison** (1884) 12 QBD 165.Consequently**,** the defendant cannot be said to have

taken any step that has the effect of proceeding to forfeit the lease such as to entitle the lessee (plaintiff) to seek relief under **section 30(1)of the Conveyancing Act, NRCD 175** as its relief 2 purports to demand from the court.**Section 30 (1**) that creates the statutory right to relief against forfeiture reads thus:

"Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under a provision in a lease…….. the lessee of the property…… may in the lessor's action or in an action brought by that person for that purpose, apply to the court for relief."

See: Barton, Thompson & Co Ltd v Stapling Machines Co [1966] 2 All ER222, 224.

In his judgment in the **Barton case** (supra), **Pennyquick J** made an observation that I accept as a correct statement of the law in regard to the exercise by a lessee of the right to seek relief against forfeiture which though turning on the construction of **section 146(2) of the Law of Property Act, 1925**is expressed substantially in the same words as**section 30 (1) of NRCD 175**as follows:.

"I **must say at the outset that I am by no means persuaded that it is open to a tenant to claim relief from forfeiture before the lessor has either commenced proceedings for possession or taken possession. Relief against forfeiture is an equitable protection against the enforcement by the lessor of his legal rights. It is appropriate when the lessor has commenced proceedings for possession. It is also available within certain limits after the lessor has taken possession but it does not appear appropriate in advance of proceedings for possession or actual possession."**

As the two provisions are expressed in the same words, I think it is right that the above pronouncement is given effect in our jurisdiction in regard to **section 30 (1) of the Conveyancing Act**. Indeed,**Apau J (as** he then was**)** applied the principle enunciated in the Barton case in the case of **Asante v K**

Compu Services Ltd [2001-2002] 1 GLR 562 when in the course of his judgment at page 568 he delivered himself as follows:

"**Section 30 (1) of NRCD 175 has to be complied with before section 30 (2) is considered. The fact is that a landlord can enforce a right of re-entry peacefully without resort to a court action or otherwise. So clearly what section 30 (1) of NRCD 175 is saying is that a tenant or a lessee who wants to avail himself of the right or opportunity can only do so or apply for such relief in only two ways;(1) in the landlord or lessor's action for forfeiture (if there is any pending); or (ii) in an action initiated by the lessee himself for that purpose."**

Besides the question of re-entry, I am of the considered opinion that exhibit 14 does not satisfy the requirements of **section 29(1) of the Conveyancing Act**as it did not give the tenant the opportunity to remedy breaches of the covenants and or conditions under the lease. In fact, it appears from the tenor of exhibit 14 that the defendant wrongly thought that it could re-enter the property contemporaneously with the service of the notice. Such an act defeats the purpose of the requirement to give notice under the law, which is not merely academic but at the heart of the right of re-entry and in appropriate instances the failure by the landlord to provide the tenant with a reasonable opportunity to remedy the breaches has been held to be sufficient to invalidate the notice. See: Horsey Estate Ltd v Steiger [1899] 2 QB 79. It is important to observe that the requirement of notice serves the purpose of the court holding the parties to their bargain except in cases where having regard to the circumstances of the case it would be inequitable so to do. The requirement of notice enables the tenant to consider his position under the lease and to remedy the breaches hence the service of notice on the tenant and a default thereunderareessential pre-requisites to the exercise by the landlord of his right to re-enter the land. Butas said earlier regarding the absence of a re-entry on the part of the defendant, I do not think that any useful purpose would be served for the purpose of our determination of the issues raised in this

case by embarking upon any consideration of the nature of notice that will suffice under section 29(1) of the Conveyancing Act.

I now turn to consider the claim numbered as relief 1 of the writ of summons herein. As the defendant did not take any step warranted by the provisions of **section 29of the Conveyancing Act,** the claim based on a refusal by the defendant toaccept the arrears of rent from the plaintiff as demanded by exhibit 11,though unjustified, does not come within the intendment of **section 29**as amounting to re-entry or forfeiture. That act, in my thinking can only operate against the lessor if in future a complaint is made against the lessee in relation to non-payment of the rent which was tendered but not accepted and cannot justify a claim for declaration that the defendant's refusal to accept payment of the rent arrears by the plaintiff is in breach of **section 29 of theConveyancing Act, 1973 (NRCD 175**). See: **Wilson v Rosenthal** (1906)22 TLR 233.There is, in my thinking, no fetter on a landlord to refuse to accept rent from a tenant whose continuing default to pay rents creates a continuing recurring cause offorfeiture and where there has been a demand in relation to rents which have accrued previous to the demand, it does not operate to preclude the landlord from taking advantage of subsequent continuation of the breach. See: **Penton v Barnett** [1898] 1 QB 276

On the question ofdamages awarded to the plaintiff by the learned judges of the Court of Appeal, as the defendant was not proved beyond the bare assertion made in the pleadings that it re-enteredthe demised property for the purpose of bringing the lease to an end, the awardwas in error and must be set aside. The question of re-entry is a matter of law and the claim by the defendant for recovery of possession of the demised property is a clear indication that as the date of the action it was not in possession of the land in dispute and is decisive of the allegation in regard to its re-entry upon the disputed property.

This leads me to the question of the counterclaim filed by the defendant by which it sought recovery of possession of the demised land from the plaintiff. The question that the said claim raises in relation to the appeal herein is

whether it being a separate claim it can have the effect of a re-entry as the authorities have held in several cases in regard to the issue of a writ by a landlord for possession. See: **Cohen v Donegal Tweed Co Ltd** (1935) 79 Sol Jo 592.But as said earlier, for such a claim to have the effect of re-entry, the cause of forfeiture must be complete- the landlord must have satisfied all the essential preliminary requisites for forfeiture as spelt out in section **29 of the Conveyancing Act.** From the evidence at our disposal, the defendant did not satisfy the said conditions and accordingly the claim is incompetent.

Further to this, a clear reading of **section 30(1) of theConveyancing Act(NRCD 175)** reveals that the action of the landlord must precede the tenant's right to relief and as such a counterclaim that is made in an action by a tenant in respect of an alleged re-entry that is unproved at the trialcannot confer on the landlord the right to bring an action for possession that will satisfy **section 29 of the Conveyancing Act**. It is observed that, while the right of re-entry is prospective in nature, the relief against forfeiture is retrospective. Accordingly, to accede to the contentions pressed upon us by the defendant that the counterclaim herein has the effect of a re-entry would not only beundermining the clear principles on which the two statutory rights are based but amount to a failure to appreciate the essential difference between them. That clearly is an invitation to which I refuse to yield it being an urging that may be likened to the common expression "putting the horse before the cart" or to employ the words of cricketers putting "the leg before the wicket".

For the above reasons, the appeal herein that relates to the award of damages against the defendant succeeds and the cross-appeal that seeks its enhancement fails. Subject to this variation, the appeal is dismissed.Consequently, there will be an order dismissing the plaintiff's claim as well as the counter claim of the defendant.

.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

BAFFOE-BONNIE JSC;-

The simple version of the facts as captured by the trial court was that, the plaintiff/appl/respondent/ cross-appl hereafter, plaintiffs, entered into negotiations with the 1st defendant/resp/appl/cross resp, hereafter defendant,for a tract of land to develop at the Tema harbor. It was part of the offer that the development of the land would commence immediately and the project completed within three years. Rent was also agreed upon and the agreement reduced into writing. The rent payment was supposed to be periodic in advance. The plaintiff did not make good his promise to make periodic rental payments despite the constant written reminders by the defendant. After six written demand notices had gone unanswered the defendant sent a sixth one dated 10th August 2009 which read as follows;

"Dear sir/madam

RENT DEMAND NOTICE: TENANT NO PL 0109

We forward to you attached second half-year(July-December 2009) rent bill of Seventeen Thousand US Dollars(US$17,000.00) on the above plot leased to your company.

Your total indebtedness, including arrears of ninety Two Thousand Sixty US Dollars(US$92,060.00) is in the sum of One Hundred and Nine Thousand Sixty US Dollars(US$109,060.00)

All bills are to be settled by either bankers draft or cash at the Tema port Administration Block by 31st August 2009. Any conversion from Dollars to Cedis must be approved by the financial manager, Tema port.

This letter super cedes the previous one dated 10th August, 2009.

Yours faithfully

SIGNED

On the 28th of August 2008, the plaintiff forwarded a bankers draft of 106,060 US Dollars and cash of 3,000 US Dollars being, the full payment of ground rent up to 31st December, 2009.

Even though the 3rddefendant who was the agent of the defendant initially received the payment he nonetheless returned it on the grounds that he had been instructed not to receive the money.

Based on an earlier letter written on 26th of August 2009, and allegedly sent to the plaintiff, the defendant purported to re-enter the demised property for breach of covenant.

The plaintiff sued at the High Court claiming

1 Declarationthat Defendant's refusal to accept payment of rent arrears by the plaintiff is in breach of section 29 of the ConveyancingAct, 1973 (NRCD 175)

2 Relief against forfeiture upon such terms as may be just and equitable

3 An injunction restraining the defendants from re-entering or re-possessing the demised premises.

At the end of the trial the trial judgefound that the plaintiff had breached the covenant contained in the first defendant's offer letter and the lease agreement to pay the rent of $34,000 half yearly in advance and this entitled the first defendant to re-enter the demised land. The judge also found that the plaintiff was in breach of the covenant to commence development of the land within one year from the date of right of entry and to complete within 3 years as stated in the lease. The judge recounted the conditions precedent for re-entry as found in Section 29 of the Conveyancing Act 1973 NRCD 175 and concluded that some of the provisions were not mandatory and that the 1st defendant had satisfied the conditions for the exercise of re-entry and is therefore entitled to recover possession of the land. The judge also considered the failure of the plaintiff to pay rent and construct or develop the premises and held that the plaintiff was not entitled to a relief against forfeiture.

Dissatisfied with the judgment the plaintiff filed a notice of appeal on the grounds

1. *The trial judge did not adequately consider the plaintiff/appellant's case*
2. *The judgment was against the weight of evidence.*

In their judgment the Court of Appealconcluded that the defendant had re-entered the demised property and so the determination of the appeal largely depended on the lawfulness or otherwise of the said re-entry under section 29 (1) of the Conveyancing Act of 1973 NRCD 175. After reviewing the evidence and submissions by counsel the Court of Appeal held as follows:

1. ***The law is that if a landlord with knowledge of a tenant's breach of a covenant to pay rent, makes or continues to make fresh demand notices for payment of rent, the landlord is deemed to have waived the right to re-entry under the previous notice……If the first defendant had waited for the period set out in exhibit 11 to expire without payment, then the 1st defendant could properly have re-entered as required under section 29 of the act***
2. ***It is true that the plaintiffs breached the covenant to construct but section 29 of the act required that before the 1st defendant re-enters on that ground she should notify the lessee and give himreasonable time to rectify the breach but the 1st defendant failed to give such notice. The re-entry by the1st defendant for failure to pay rent and commence and complete the buildings fail as the 1st defendant did not comply with the mandatory provisions containedin section 29 of the act.***
3. ***After the defendants had refused to accept the rentthe plaintiff attempted to pay, the plaintiff should have at least paid the rent into court after suing out the writ of summons. As at the time of judgment the plaintiff was still in possession of the rent.Such conduct cannot attract relief against forfeiture and the trial judge was right in dismissing the claim for relief against forfeiture.***
4. ***The plaintiff(also) testified that she spentGH359,565.00 on clearing the site of bushes, grading filling of the site and erecting signposts along the boundary line. We would consider this in the award of general damages for unlawful entry. We thus award the plaintiff/appellantgeneral damages of GHC 200,000 with costs of GHC 5,000 against the 1st defendant/appellant.***

Against this judgment the defendant filed a notice of appeal with the following grounds of appeal;

GROUNDS OF APPEAL

a. *The Appeal court misdirected itself on the facts when it found that refusal by the 1st defendant/respondent/appellant to accept rent tendered before the 31st August, 2009 contradicted the terms of the notice of 18th August, 2009 and thus the right of re-entry exercised by the 1st defendant/respondent/appellant was unlawful.*

b. *The Appeal Court misdirected itself on the facts when it found that the 1st defendant/respondent/appellant's demand notice requiring the plaintiff/appellant/respondent to pay outstanding rent arrears of US$109,000 within 2-weeks was unreasonable.*

c. *The Court misdirected itself in law when it held that the 1st defendant/respondent/ appellant exercised its right of re-entry unlawfully upon failure by the plaintiff/appellant/respondent to pay rent and commence and complete the building.*

d. *The Court further misdirected itself in law when it held that the 1st defendant/respondent/appellant breached the provisions of Section 29 of Conveyancing Act, 1973 (NRCD 175) when it refused to accept payment of rent arrears by the plaintiff/appellant/respondent.*

e. *The Court of Appeal misdirected itself in law when it held that a landlord is deemed to have waived his right of re-entry if the landlord with knowledge of a tenant's breach of a covenant to pay rent, makes or continues to make fresh demand notices for the payment of rent.*

f. *The Court of Appeal misdirected itself in law when it held that the plaintiff/appellant/respondent was entitled to general damages in the sum of GH¢200,000.00*

g. *The Court of Appeal misdirected itself in law when it awarded costs of GH¢5,000.00 to the plaintiff/appellant/respondent.*

h. *The judgment of the Court of Appeal is against the weight of evidence.*

i. *Additional grounds of appeal will be filed upon receipt of the record of appeal.*

Inspite of the long list of grounds of appeal, like the Court of Appeal, I am of the view that the determination of this appeal turns on whether there was re-entry and if there was whether the procedure laid down in Section 29 of the Conveyancing Act NRCD 175 of 1973 was duly followed.So, just as the defendant did it, the grounds ABCD will all be subsumed under ground C of the grounds of appeal which reads as follows

*3 **''The court misdirected itself in law when it held that the 1st defendant exercised its right of re-entry unlawfully upon failure by plaintiff to pay rent and commence and complete the building"***

The appellant has strenuously argued that the purported re-entry by the appellant was lawful and was justified in law. Counsel spent so much time and space (from pgs 12 to 22) of his statement of case recounting evidence on record to show that indeed the plaintiff had breached the covenant to commence and complete the project within a specified period. There was also considerable time spent to show that the rent was in arrears and that by his own statements and admissions the plaintiff was finding it difficult to marshal financial forces to undertake the project.

In my thinking the question that we have to determine in the matter herein is whether the defendant had re-entered the demised lands such as to have the effect of a forfeiture of the demised property to the plaintiffs? As the right of forfeiture is provided by statute in section 29 of the Conveyancing Act, NRCD 175, it is important that we commence our determination by considering whether the provisions contained in section 29were complied with by the defendant before the action herein was commenced

I must say that having scoured the whole proceedings I came across no evidence of physical re-entry of the demised premises to even warrant the institution of this action. So our initial reaction was to throw out the whole action as being premature simpliciter. However, pursuant to Rule 6(8) of the Supreme Court

Rules CI 16, both counsel were requested to address the court on whether or not there had been re-entry. In his submission plaintiff's counsel virtually conceded that there had not been any physical re-entry and that their action had been based on the threat posed by exhibit 14.

While conceding that there had not been any physical re-entry before the action was initiated by the plaintiff, defence counsel has submitted that the defence and counterclaim filed by them qualify as proceedings under section 29 of the Act. In the defence and counterclaim filed by the defendant he had counterclaimed for

a) Recovery of possession of the disputed land.

This is what counsel said;

"1st Appellant counter claimed against the respondent for the following reliefs:

a. Recovery possession of the disputed land;
b. Damages for breach of contract and
c. Costs.

It is trite learning that a counterclaim constitutes a fresh action. It is submitted that, quite apart from the direct right of re-entry which is the subject matter of the present suit, when the 1st appellant counterclaimed for recovery of the possession, the effect of that in law is to exercise the right of re-entry. Thus, a counterclaim for recovery of possession would mean that 1st appellant had elected to treat its obligations under the lease as having lapsed, and that, no subsequent offer to pay rent or other act would operate to resurrect the lease so as to deprive 1st appellant of its right to enforce the clause for re-entry in the lease agreement.

It was held in MENSAH v. COFIE [1991] 1 GLR 254 thus;

> *'…when once a landlord unequivocally and finally elected to treat a lease as void, as for instance where he served a writ for recovery of the land… no subsequent receipt of rent or other act would amount to waiver so as to deprive him of his right to enforce the clause for re-entry'*
>
> *The learned authors of THE LAW OF REAL PROPERTY, Sir Megarry and H.W.R. Wade, Stevens & Son's Limited, 1984, page 672 opined:*

'A writ that unequivocally claims a right to recover possession…operates as a re-entry in law and so brings about forfeiture as soon as it is served on the tenant'

From the above legal proposition, it is the appellant's contention that having counterclaimed against respondent for recovery of possession, it had exercised its right of re-entry'

A close perusal of the admitted evidence contained in the record of appeal before us compels me to the decision that the letter dated 26 August 2009, Exhibit 14 only expressed an intention to forfeit the lease and no further evidence was forthcoming to prove that the defendant subsequently re-entered the land. Having regard to the case put up by the parties in the action herein such an actual entry is important to bring a lessor within the scope of the expression in section 29 (1) as follows:

"***29(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;***

Further to the above, as the defendant did not serve the requisite statutory notice in compliance with section 29 of the Conveyancing Act 1973(NRCD 175), he cannot be said to have taken any step that would have the effect of proceeding to forfeit the lease to entitle the lessee to relief under section 30 of the Act as claimed by the plaintiff in relief 2 of the endorsement to the writ of summons herein.

See**: Barton, Thompson 4 Co Ltd v Stapling Machines** Co [1966] 2 All ER222at 224.

Section 30 (1) of NRCD 175 provides as follows;

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

In his judgment in the Barton case (supra) Pennyquick J made an observation in regard to the exercise by a lessee of demised property to relief against forfeiture that I accept as a correct statement of the law as follows:

"I must say at the outset that I am by no means persuaded that it is open to a tenant to claim relief from forfeiture before the lessor has either commenced proceedings for possession or taken possession. Relief against forfeiture is an equitable protection against the enforcement by the lessor of his legal rights. It is appropriate when the lessor has commenced proceedings for possession. It is also available within certain limits after the lessor has taken possession but it does not appear appropriate in advance of proceedings for possession or actual possession"

Regarding the claim contained in relief 1 of the writ of summons herein, as the defendant did not take any step warranted by the provisions of section 29 to which reference has been made in this judgment, the claim of the plaintiff relating to it is misconceived. The refusal by a lessor to take rents from a lessee upon whom a demand notice was served does not come within the intendment of section 29 regarding re-entry or forfeiture. That act, in my thinking can only operate against the lessor if in future a complaint is made against the lessee in relation to non-payment of the rent which was tendered but not accepted and cannot justify a claim for declaration that the defendant's refusal to accept payment of the rent arrears by the plaintiff is in breach of section 29 of the Conveyancing Act, 1973 (NRCD 175). See: **Wilson v Rosenthal** (1906) 22 TLR 233.

On the question of damages awarded to the plaintiff by the learned judges of the Court of Appeal, as the defendant was not proved, beyond the bare assertion made in the pleadings, to have re-entered the demised property for the purpose of bringing the lease to an end, the award was in error and must be set aside. The question of re-entry is a matter of law and the claim by the defendant for recovery of possession of the demised property is a clear indication that as the date of the action it was not in possession of the land in dispute and is decisive of the allegation in regard to its re-entry upon the disputed property.

For the above reasons I am of the view that the plaintiff's action is premature and so same is dismissed

COUNTERCLAIM

In **Halsbury's Laws of England, Lexis Nexis, Butterworths, 4th Edition, 2006 Reissue, Vol. 27(1) paragraph 609** headed "What amounts to re-entry", it was stated as follows,

"The terms of the proviso for re-entry that if the landlord elects to determine the lease for forfeiture, he must do so by re-entry; which the landlord may effect by either physically entering the premises with the intention of determining the tenancyor by the issue and service of proceedings for the recovery of possession of the premises….. Actual entry is not necessary to take advantage of the forfeiture. When the cause of forfeiture becomes complete, the landlord may bring a claim to recover possession, and the bringing of a claim to recover possession is equivalent to actual re-entry."

So though there was no evidence of physical re-entry, based on their counterclaim it is right to assume that there was re-entry and therefore I agree with their Lordships at the Court of Appeal that the whole case is centered around the lawfulness or otherwise of thisre-entry.

For a better appreciation of the judgment of Their Lordships of the Court of Appeal let us put certain matters in perspective. There are certain findings of fact made by the trial judge which have not been controverted by either party,

1 The parties entered into a lease agreement after negotiations and an offer letter.

2 The plaintiff was to pay a specified amount of money periodically in advance as rent

3 The plaintiff was to commence development of the property within one year and complete same within 3 years.

4 Breach of either of these covenants was a ground for re-entry.

5 The plaintiff breached the covenant to pay rent periodically in advance to the extent that as at the time of this action he was in arrears of 109,000 dollars

6 Plaintiff breached the covenant to commence and complete the project within 3 years.

7. The defendant sent several demand notices in respect of the rent due and owing

8 All the Demand notices recounted the amount outstanding including arrears and called on the plaintiff to pay by a specified date. And all of them except one ended as follows "please be informed that the authority shall not hesitate in taking the necessary measures to recover all rent owed it." The only different letter ended as follows "The authority shall not hesitate in taking the necessary measure to recover the ground rent including re-entry. This letter was dated 9th May, 2008.

9The last demand notice was dated 18thof August 2009 and gave two weeks' notice ending 31st August for the plaintiff to pay his just debts.

10 The defendant wrote a letter dated26th August 2009(within the notice period), tendered as exhibit14, informing the plaintiff that it had re-entered the demised premises on the grounds that the plaintiff had breached the covenant to start and complete the project within the covenanted period and also the covenant to pay rent periodically in advance.

Even though the plaintiff denied receiving this letter exhibit 14, the trial judge disbelieved him and found that the letter had indeed been received by the plaintiff. This is what she said;

"The 1st defendant also contends that it sent a letter to the plaintiff dated 26th August, 2009 informing the plaintiff that it had re-entered the land. However the plaintiff claims it never received the said letter EXh 14. I am wondering how come plaintiff suddenly went to pay the outstanding balance on the rent on 28th August, 2009. The evidence is that the plaintiff had received all other communications sent by the 1st defendant with the exception of exhibit 14. I find that it is more likely than not that plaintiff did receive exhibit14.

All these are findings of fact made by the trial judge whichan appellate court are very reluctant to disturb.***See the case of KPAKPOV BROWN[2001-2002]SCGLR876***

With these findings of fact as the background let me now examinesection 29 of the Conveyancing Act as it relates to the right of re-entry and how exercised.Section 29 of the Conveyancing Act reads;

29(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 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.

29(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.

Contrary to the finding by the trial judge that these provisions are not mandatory, it is clear from a reading of these elaborate provisions of section 29 that these preconditions for re-entry are mandatory and take effect despite any agreement to the contrary in the lease. It requires a lessor who wants to exercise his right of re-entry to do the following;

1) Serve a notice on the lessor drawinghis attention to the particular breachhe lessor is complaining of

2) In the said notice, the lessor must request the lessee to remedy the breach provided that the said breach is capable of remedy

3) The lessor must require that the lessee should make reasonable compensation in money for occasioning the breach, except that this last requirement is not necessary if the breach is in respect of non-payment of rent.

4)The lessee, afterservice of the said notice, apart from failing to remedy the breach within a reasonable time, should also fail to make

reasonable compensationin money to the lessee in respect of a beach not involving the payment of rent.

From the evidenceon record the defendant sent several letters mainly demand notices and exhibit 14 on the re-entry. For purposes of clarity let me quote in detail two of such letters.

Exhibit7 written on the 19thMay reads as follows:

Dear sir/madam

RENT DEMAND NOTICE--- TENANT NO PLO 1O9

The Management of Ghana Ports and Harbours Authority, Tema has notice(sic) with much concern your failure to settle your rent arrears of Fifty-One Thousand US Dollars($51,000.00) on the occupation of the above plot.The 2008 half year ground rent of Seventeen Thousand US Dollars (US$17,000.00) for the above property is due for payment.
You are kindly advised to make payment of all rent arrears including current bill totaling Sixty-Eight Thousand US Dollars($68,000.00) by Friday, 30th May, 2008
The Authority shall not hesitate in taking the necessary measures to recover the ground rent owed to it, including re-entry.
Signed

After several of such demand notices had been sent the defendant sent exhibit 11 which reads as follows

"Dear sir/madam
RENT DEMAND NOTICE: TENANT NO PL 0109
We forward to you attached second half-year(July-December 2009) rent bill of Seventeen Thousand US Dollars(US$17,000.00) on the above plot leased to your company.
Your total indebtedness, including arrears of ninety Two Thousand Sixty US Dollars(US$92,060.00) is in the sum of One Hundred and Nine Thousand Sixty US Dollars(US$109,060.00)

All bills are to be settled by either bankers draft or cash at the Tema Port Administration Block by 31st August 2009. Any conversion from Dollars to Cedis must be approved by the Financial Manager, Tema Port.
This letter super cedes the previous one dated 10th august, 2009.
Yours faithfully
Signed"

It can be seen from the various letters that apart from exhibit 11 which mentioned re-entry as an option for non-payment of rent none of the remaining letters mentioned re-entry. And even in the case of the last demand notice dated 18th August 2009, it did not even have the usual threat to *"take appropriate measures to recover all rent."*It can also be seen that per paragraph3 the plaintiff was requested to pay his indebtedness by 31st August 2009.Yet on the 28th of August 2009, when the plaintiff made the effort to pay their indebtedness in full, the defendants refused to accept because they had re-entered the demised property based on Exhibit 14 written on 26th August 2009. The letter reads;

Dear Sir/Madam
RE- ENTRY- SITE FOR DEVELOPMENT OF A DISTRIBUTION CENTRE
We refer to your application No CTL/L/05/1/001 dated 2nd November 2005 for the leaseof port land for the development of a Distribution Centre

RE: ENTRY-SITE FOR DEVELOPMENT OF A DISTRIBUTION CENTRE

We refer to your application № CTL/L/05/1/001 dated 2nd November 2005 for the lease of port land for the development of a Distribution Centre.

We also refer to our offer letter № CEEM/HQ/CT/V.1/87 dated 9th February 2006 which offered you a plot of land of an approximate area of 8.4 acres and your letter of acceptance № CTL/W/L/02/06/02 dated 22nd February 2006.

We further refer to the Lease Agreement between Continental Terminals Ltd and GPHA dated 7th September 2007.

Under the clause 1B of the offer, you were to commence development of the plot by the Date of the Agreement or the Date of Right of Entry was granted. By clause 1F of the offer you were also to complete development within a period of three (3) years from the date of offer.

You have also failed to settle your ground rent. You are in arrears of US$109,060.00 contrary to clauses 1 and 2(a) of the Lease Agreement.

By clause 5(a) of the Lease Agreement you are not to be in arrears for more than three months whether formally demanded or not.

Authority has therefore decided to re-enter the plot allocated to you for development of a Distribution Centre with effect from the date of this letter.

Please be advised accordingly.

SGND

N.P.GALLEY

DIRECTOR-GENERAL

As the Court of Appeal found, the plaintiff had indeed breached the covenants in the lease which had made it possible for the defendant to exercise his right of re-entry. There is no dispute about this. What the Court of appeal said which I agree with is that section 29 had laid down specific procedure to go through to exercise this right of re-entry which is guaranteed under the lease agreement. But the defendant did not follow the procedure as laid down under the act. As regards the rent payment the defendant himself by his 18th August letter gave the plaintiff up to 31st August to pay. And even then, strangely, that letter alone never mentioned any threat to take an action to recover the rent or re-enter. It was a bare demand notice. So how come that the defendant purported to re-enter the demised property within the period of the notice? With regard to the breach of the covenant to commence and complete the project within 3years, nothing had been written about it in any letter. No such breach had been brought to the plaintiffs notice with a request to remedy same and/or payment of compensation

to remedy same as required by section 29 (1)a) i and ii of the Conveyancing Act.

In the case of **FLETCHER V NOAKES 1897 1 CH DIV 271** this is what was said

"The notice to be served by a lessor on his lessee, under section14, subsection 1 of the Conveyancing Act, 1881, "specifyingthe particular breach of covenantcomplained of," to entitle the lessor to enforce by action a right of re-entry for the breach, must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought. A mere general notice of a breach of a specified covenant is not sufficient"

Per North J. *"In my opinion, the notice which the plaintiff has given to the defendant is not sufficiently specific. Sect 14 says that it is to be a notice* ***"specifying the breach complained of."*** *I do not think that is met by a notice which simply says,* ***"You have broken the covenant for repairing."*** *The plaintiff has not condescended upon any details, and, in my opinion, the notice is not sufficient under sec. 14"*

See also the cases of;

JOLLY V BROWN AND OTHERS,(1912) 2 KB 109and SCALA HOUSE&DISTRICT PROPERTY CO. LTD V FORBES AND OTHERS (1974) 1 QB 575, both of which cited with approval the opinion of North J in the Fletcher V Noakes case.

The principle has always been that,

"whenan enactmenthadprescribed a special procedure by which something was to be done, it was that procedure alone that was to be followed."

Boyefiov NTHC Properties Ltd [1997-98] 1 GLR 768

This was the essence of the judgment of the Court of Appeal and I agree with it. It is my holding that even though the plaintiff breached the covenants to pay periodic rents and also develop the property within a stipulated period, the defendant also failed to follow the mandatory procedure requisite for re-entry as laid down in the law. His re-entry was unlawful and the court so declares.

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

COUNSEL

EMEAFA HARDCASTLE (MRS) ESQ. WITH HER RAPHAEL KUMI AND SLOVO TIA FOR THE DEFENDANTS /RESPONDENTS /APPELLANTS.

OSARFO BUABENG ESQ. FOR THE PLAINTIFF/APPELLANT/ RESPONDENT.