

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2011/0020

BETWEEN:

RAMSBURY PROPERTIES LIMITED

Appellant

and

OCEAN VIEW CONSTRUCTION LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Louise Esther Blenman

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

Appearances:

Ms. Emily Prentice-Blackett for the Appellant

Ms. Rochelle Duncan for the Respondent

2018: September 20;

2019: January 29.

Re-issued: February 4.

Civil appeal — Breach of lease agreement — Whether learned judge erred in principle by failing to deal with cause of action pleaded — Specific performance — Summary termination — Whether Court should interfere with findings of fact of trial judge — Whether oral agreement made — Parol evidence rule — Implied terms — Whether learned judge erred in implying terms into agreement — Repudiatory breach — Whether appellant repudiated agreement — Damages — Whether appellant entitled to compensatory damages and special damages

The appellant, Ramsbury Properties Limited (“Ramsbury”), entered into a lease agreement with the respondent, Ocean View Construction Limited (“Ocean View”) for the provision of accommodation for workers in premises owned by Ramsbury. The lease was executed on 18th June 2009 and was for a period of seven months at a monthly rental of US\$56,000.00. The workers went into accommodation of the demised premises on or about 20th June 2009. Ocean View wrote Ramsbury informing of its intention to vacate the premises on 17th July 2009, complaining that the workers were denied quiet enjoyment of the property

in contravention of the lease agreement. Ramsbury rejected that it had breached the agreement and warned that it would treat a termination of the lease as a breach of contract entitling it to damages.

The workers vacated the premises and Ramsbury instituted legal proceedings, claiming, inter alia, specific performance of the lease agreement, and damages for breach of contract in the sum of US\$280,000.00 in lieu of specific performance. Ramsbury contended that it had not breached the lease agreement as the lease specified “sleeping accommodation only for 250 workers” and that there was no agreement for the workers to cook and eat on the premises. In response Ocean View alleged, inter alia, that the agreement was subject to both oral and written terms. In addition to the terms of the written lease agreement, the parties agreed that Ramsbury would provide pitch tent facilities with tables and chairs where the workers could have their meals, and for Ramsbury to install appropriate laundry facilities for the workers. Ocean View argued that Ramsbury breached the agreement by failing to carry out any of those obligations.

The learned judge held that Ramsbury had repudiated a fundamental term of the lease and was not entitled to the orders it sought, as it was unreasonable for Ramsbury to insist that the lease provided for sleeping only and excluded consuming any food on the demised premises.

Ramsbury, being dissatisfied with the learned judge’s decision, appealed. Ramsbury’s grounds of appeal raise the following issues: (i) whether the learned judge erred in principle by failing to order specific performance and by failing to deal with the issue of summary termination; (ii) whether the learned judge erred in finding that there was an oral agreement; (iii) whether it was proper for the learned judge to imply terms into the written lease agreement and then find that Ramsbury repudiated the agreement upon application of the implied terms; (iv) whether the learned judge erred in finding that Ramsbury repudiated the lease agreement; (v) whether Ramsbury is entitled to compensatory damages, if it is found that Ocean View repudiated the contract; and (vi) whether Ramsbury was entitled to special damages relating to the re-fitting of the building to accommodate Ocean View’s workers.

Held: dismissing the appeal; awarding prescribed costs to the respondent in the court below and two-thirds on appeal, that:

1. Specific performance is not a cause of action but is an equitable remedy to a cause of action for breach of contract. Therefore, the trial judge’s finding that Ramsbury breached the agreement between the parties, necessarily disengages specific performance and puts that remedy outwith its purview. It follows that Ramsbury would not be entitled to specific performance.
2. The judge’s findings as to Ramsbury’s breach indicate a rejection of its claim that Ocean View summarily terminated the agreement. One party to a contract may, by reason of the other’s breach, be entitled to treat himself as discharged from liability. In a case where a party by his conduct considers himself no longer bound to perform his part of the contract, the other party may accept the repudiation and

bring the contract to an end. Therefore, Ocean View treated itself as discharged from the agreement by virtue of Ramsbury's breach.

Co-operative Insurance Society Ltd v Argyll Stores Holdings Ltd. [1997] UKHL 17 applied.

3. The parole evidence rule states that where a contract is made wholly in writing, evidence is not admissible to add to, vary or contradict the written terms except, for instance, where evidence is admissible to show that the writing was not intended to be the entire contract between the parties. The learned judge evaluated the evidence and explained how he arrived at the finding that there was an oral agreement. It was therefore open to the learned judge on the evidence so to find. It cannot be said that the learned judge was clearly wrong in his findings or reached a conclusion he was not entitled to reach.

Gillespie Bros. & Co v Cheney, Eggar & Co. (1896) 2 QB 59 applied.

4. A term would be implied into a contract only if, on an objective assessment of the terms of the contract, the term to be implied was necessary to give the contract business efficacy or was so obvious that it went without saying. In this case, the lease agreement would lack practical coherence without the implied terms, in that the workers would not be able to perform activities that encompass a necessary part of daily living. The relevant implied terms are a natural corollary of living in the demised premises. Therefore, it cannot be said that the learned judge erred in implying terms into the lease agreement.

Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd. [2015] UKSC 72 applied; **Nasir Ali v Petroleum Company of Trinidad and Tobago** [2017] UKPC 2 applied; **Chartbrook Ltd. v Persimmon Homes Ltd.** [2009] 1 AC 1101 applied; **Arnold v Britton** [2015] UKSC 36 applied; **Holliday v Overton** (1852) 14 Beav. 467 applied; **Mackenzie v Duke of Devonshire** [1896] AC 440. applied; **Ex p. Dawes, Re Moon** (1886) 17 QBD 275 applied.

5. To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The learned judge was correct to find that eating is such a vital aspect of one's existence, that to insist that the workers were not allowed to eat on the demised premises constituted a fundamental departure from an implied term of the lease. Ocean View was deprived of a substantial part of the benefit of the lease to which it was entitled. It would be unfair in the circumstances to hold it to the lease and leave it to a remedy in damages. Damages would not be an adequate remedy taking into account the nature and the circumstances of the breach. It was therefore open to the judge to find that Ramsbury had repudiated a fundamental term of the lease agreement.

Hong Kong Fir Shipping Co. Limited v Kawasaki Kisen Kaisha Limited [1962] 2 QB 26 applied; **Decro-Wall International SA v Practitioners in Marketing Ltd.** [1971] 1 WLR 361 applied; **Telford Homes (Creekside) Limited v Ampurius Nu**

Homes Holding Limited [2013] EWCA Civ 577 considered; **Federal Commerce Ltd v Molena Alpha Inc (The “Nanfri”)** [1979] AC 757 considered; **Latvian Shipping Company and Others v Stocznia Gdanska SA v** [2002] EWCA Civ 889 applied.

6. Special damages must be properly pleaded, particularised and proved. While Ramsbury pleaded and particularised its special damages, it failed to prove the loss suffered. After evaluating the evidence, the learned judge concluded that the assertion that Ramsbury spent the sum claimed as special damages on renovations is untrue. It has not been shown that the judge was clearly wrong or reached a conclusion which he was not entitled to reach on the evidence. In the circumstances, the judge did not err in rejecting the claim for special damages.

JUDGMENT

- [1] **BAPTISTE JA:** This is an appeal against the order of Redhead J [Ag.] dismissing a claim for specific performance and damages brought by Ramsbury Properties Limited (“Ramsbury”) against Ocean View Construction Limited (“Ocean View”). The appeal has its genesis in a dispute between Ramsbury and Ocean View with respect to a lease agreement they entered into to provide accommodation for 250 Mexican migrant workers in premises owned by Ramsbury. The workers were engaged in the reconstruction of the Four Seasons resort in Nevis which had been severely damaged in a hurricane. The lease was executed on 18th June 2009 and was for a period of seven months at a monthly rental of US\$56,000.00. The workers went into accommodation of the demised premises on or about 20th June 2009. Central to the dispute was whether the workers were permitted to have their meals and launder their clothes on the premises.
- [2] On 13th July 2009, Ocean View’s solicitors wrote Ramsbury informing of its intention to vacate the premises on 17th July 2009. Ocean View complained that the workers were denied quiet enjoyment of the property in contravention of the lease agreement. Since taking possession, they have been forbidden from cooking and eating on the rented premises; the air condition is inadequate and no provision has been made for the further installation of clothes dryers or, alternate drying lines provided.

- [3] In reply, Ramsbury rejected that it had breached the agreement. It emphasised that the lease specified “sleeping accommodation only for 250 workers” and denied that it had agreed for the workers to cook and eat on the premises. On the contrary, Ramsbury stated that Mr. Hinojosa, the signatory for Ocean View, advised that all meals would be catered for the workers at Coconut Grove restaurant and delivered to the workers’ job site at the Four Seasons Resort. Ramsbury also denied any agreement that it would install a clothes dryer or provide alternate drying lines, stating that it was advised that Ocean View would make its own arrangement in that regard. Ramsbury warned that it would treat a termination of the lease as a breach of contract entitling it to damages. The workers vacated the premises and Ramsbury instituted legal proceedings, claiming, inter alia, specific performance of the lease agreement, and damages for breach of contract in the sum of US\$280,000.00 in lieu of specific performance, damages for breach of contract in addition to specific performance as well as interest, special damages and costs.
- [4] Ocean View filed an amended defence and amended counterclaim. Ocean View alleged, inter alia, that the agreement was subject to both oral and written terms. In addition to what is recorded on the lease agreement, the parties agreed that Ramsbury would provide pitch tent facilities with tables and chairs where the workers could have their meals. Further, Ramsbury agreed to install appropriate laundry facilities for the workers. Ramsbury did not carry out any of these obligations, in clear breach of contract. Ramsbury also failed to provide space for the workers to hang their laundry and to provide quiet enjoyment of the property. Ocean View sought a declaration that Ramsbury breached the terms of the oral agreement and as well as the terms of the written agreement and also sought a refund of the security deposit.
- [5] Redhead J [Ag.] noted that the dispute between the parties centered mainly on the inability of the workers to eat their meals and launder their clothes on the demised premises. He accepted the evidence of Mr. Hinojosa – a director of Ocean View,

that on or about 26th June 2009 he received a call from Mr. Cozier – a director of Ramsbury, forbidding the workers from hanging their laundry outside and consuming any food on the premises. Redhead J [Ag.] also stated that Ramsbury's counsel insisted on the clause in the lease which provided for "sleeping accommodation only". Redhead J [Ag.] also rejected Mr. Cozier's evidence that Mr. Hinojosa led him to believe that the workers would not be washing on the property, but that other arrangements would be made to cater for their laundry needs.

- [6] Redhead J [Ag.] held that it was unreasonable for Ramsbury to insist that the lease agreement provided for sleeping only and that excludes consuming any food on the demised premises. Eating is such a vital aspect of one's existence that to insist that the workers were not allowed to eat on the demised premises, constituted a fundamental departure from an implied term of the lease. There was an agreement that Ramsbury would provide tents for the workers so that they could have their meals under them. Ramsbury reneged on this because on Ramsbury's reasoning, it was an industrial site. Ramsbury had repudiated a fundamental term of the lease and was not entitled to the orders it sought. Thus, Ramsbury's appeal against the order of Redhead J [Ag.].

Parties' submissions on first issue - Specific Performance and Summary Termination

- [7] Ramsbury crystallised its grounds of appeal into seven issues. The first issue is whether Redhead J [Ag.] erred in principle by failing to deal with the cause(s) of action pleaded by Ramsbury.
- [8] Ms. Prentice-Blackett submits that Ocean View summarily terminated the fixed-term lease; this constituted in law an end to its performance of the contract, thus breaching the contract to its (Ramsbury's) detriment. Ramsbury sued for specific performance of the contract or for damages in lieu. However, Redhead J [Ag.] failed to address the issue of summary termination of a binding lease and failed to

address the fact that Ocean View's complaints had (before the attorney's letter) never been raised with Ramsbury. Ms. Prentice-Blackett contends that Ocean View's attorney's letter gave an unreasonable four day notice period for the termination of a seven month lease contract that was partly performed. Further, the judge failed to address the issue of specific performance pleaded by Ramsbury.

[9] Ms. Prentice-Blackett submits that in failing to order specific performance, the learned judge erred in principle by failing to deal with the cause of action it pleaded and that the appeal should be allowed on that point. Ms. Prentice-Blackett submits that the learned judge overstepped his mandate and therefore the generous ambit of his discretion when he failed to consider the issue of specific performance that was before him.

[10] In relation to the point of summary termination of a binding lease, Ms. Duncan, Ocean View's counsel, argues the trial judge rightly held that there was a breach of contract on Ramsbury's part in that it disturbed the quiet enjoyment of the workers. Ms. Duncan contends that this finding clearly indicates that the judge had rejected Ramsbury's claim that there was summary termination on its part. In the circumstances, Ms. Duncan submits that Ramsbury would not have been entitled to specific performance or damages in lieu of specific performance. Ms. Duncan contends that it is erroneous to say that Redhead J [Ag.] failed to consider Ramsbury's pleadings at trial. The judge made his findings that Ramsbury was not entitled to the relief sought only after the issues were fully ventilated.

Analysis: Specific Performance and Summary Termination

[11] An examination of the judgment shows that Ramsbury's complaint that Redhead J [Ag.] failed to consider its pleadings or its pleaded case is unjustified. At paragraph 12, Redhead J [Ag.] set out the relief Ramsbury claimed; summarised the allegations in the statement of claim at paragraphs 10 to 13; examined the

allegations in the defence including that there were many oral agreements which were not reflected in the written agreement; and referred to and set out his understanding of the lease. Redhead J [Ag.] referred to the witness statement of Dwight Cozier, and also examined some of the e-mail correspondence between the parties and set out his understanding of the issues at paragraph 47. Redhead J [Ag.] made his findings that Ramsbury was not entitled to the relief sought only after the issues were fully ventilated.

[12] With respect to specific performance, the following observations are pertinent. An order for specific performance is an order that an obligation in a contract be enforced by means of a mandatory injunction to that effect.¹ Specific performance is a discretionary remedy; its grant or refusal remains a matter for the judge. The power to award specific performance is part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the common law remedies are inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy: Lord Hoffman in **Co-operative Insurance Society Ltd v Argyll Stores Holdings Ltd**.² Specific performance is not a cause of action; it is an equitable remedy to a cause of action for breach of contract. Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right.

[13] Given that specific performance is not a cause of action but is an equitable remedy to a cause of action for breach of contract, Redhead J's [Ag.] finding that Ramsbury breached the agreement between the parties, necessarily disengages specific performance and puts that remedy outwith its purview. It follows that Ramsbury would not be entitled to specific performance. In the circumstances, the contention that Redhead J [Ag.] erred in failing to consider specific

¹ Snell's Equity 33rd Edn., para. 18:017.

² [1997] UKHL 17.

performance or somehow erroneously exercised his discretion in not granting that remedy is clearly unmeritorious.

- [14] In relation to the issue of summary termination of the lease, Ms. Duncan submits that Redhead J's [Ag.] finding that there was a breach of contract on Ramsbury's part in that it disturbed the quiet enjoyment of Ocean View's workers indicates that he rejected Ramsbury's claim of summary termination by Ocean View. In my view, Redhead J's findings as to Ramsbury's breach of the agreement indicate a rejection of Ramsbury's claim that Ocean View summarily terminated the agreement. The law is that, one party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from liability. In a case where a party by his conduct considers himself no longer bound to perform his part of the contract, the other party may accept the repudiation and bring the contract to an end. Ocean View treated itself as discharged from the agreement by virtue of Ramsbury's breach.

Oral Agreement

- [15] The second issue advanced by Ramsbury is whether Redhead J [Ag.] properly weighed the facts in evidence before the court. Redhead J [Ag.] found that a lot of the negotiations leading up to the signing of the lease were conducted by email correspondence between the parties and that it was correct to examine some of the email correspondence between them in order to determine the oral terms not contained in the written agreement.
- [16] Ms. Prentice-Blackett argues that in considering some of the evidence, the learned judge obviously missed crucial parts of the unexamined evidence that would have led him to a different conclusion had they been examined and taken into account. Ms. Prentice-Blackett contends that there was no correspondence in the email evidence giving rise to an oral agreement which led the judge to conclude that Ramsbury had intended to supply Ocean View with tents for eating, or with washing machines, or that Ramsbury repudiated the lease when

it failed to supply these to Ocean View. Ms. Prentice-Blackett states that this is borne out by the evidence of Mr. Hinojosa in cross-examination when he failed to identify an email in which he requested any of these things from Ramsbury, contrary to his witness statement. Ms. Prentice-Blackett argues that Redhead J [Ag.] embarked upon an unorthodox approach when he held at paragraph 21 of his judgment that: “I am of the view that this is such a contract, partly oral and partly written” prior to his examination of all the email evidence and prior to considering Ramsbury’s evidence.

[17] Redhead J [Ag.] referred to Ocean View’s allegation that there were many oral agreements which were not reflected in the written lease. Redhead J [Ag.] concluded that a lot of negotiations leading to the signing of the lease were conducted by email correspondence. The learned judge proceeded to examine some of the emails to determine the terms of the oral agreement. Having examined the email evidence referred to by the learned judge, I conclude that they do not establish a basis for concluding that there was an oral agreement. That, however, is not decisive of the matter. As Lewison LJ stated in **Fage UK Ltd and another v Chobani UK and another**:³ “[i]n making his decisions, the trial judge will have regard to the whole sea of evidence presented to him, whereas an appellate court will only be island-hopping”.

[18] In paragraph 19 of his judgment, Redhead J [Ag.] stated that the resolution of the issues in the case required a thorough analysis of the lease as well as the behavior of the parties to the lease agreement. Redhead J [Ag.] referred to the general proposition of law that one party to an agreement cannot use parol evidence to contradict a written agreement. Where the parties have embodied the terms of their contract in a written document, the general rule is, “verbal evidence is not allowed to be given so as to add to or subtract from, or in any manner to vary or qualify the written contract”.

³ [2014] EWCA Civ 5 at para.114.

- [19] Redhead J [Ag.] noted an exception to the general rule that one party to an agreement cannot use parol evidence to contradict a written agreement, that is, where the written document does not record the entire agreement between the parties, such as where the agreement is partly verbal and partly written and contains an oral term that is not recorded in the agreement, but was intended by the parties to continue in force concurrently with its written terms. Redhead J [Ag.] then stated that he was of the view that this is such a contract, partly oral and partly written.
- [20] What is the parol evidence rule? The parol evidence rule states that where a contract is made wholly in writing, evidence is not admissible to add to, vary or contradict the written terms. There are numerous exceptions to the rule. The relevant one here is evidence is admissible to show that the writing was not intended to be the entire contract between the parties. It has been said that this exception to the rule, on the face of it, seems to be almost destructive of the rule itself. There is a presumption that the writing was intended to contain all the contractual terms. The party alleging that the written contract does not represent the full contract has to counter a presumption that it does.⁴
- [21] At paragraph 60 of his judgment, Redhead J [Ag.] referred to Mr. Hinojosa's insistence that there was an oral agreement with Mr. Cozier that meals would be consumed on the premises. In his witness statement, Mr. Hinojosa said Mr. Cozier called him on or about 26th June 2009 forbidding the workers from hanging their laundry outside and consuming any food on the rented premises. Mr. Hinojosa also said that prior to signing the lease agreement he and Mr. Cozier had meetings and telephone conversations and had agreed that the workers' meal which would be prepared at a separate facility, would be served at least for breakfast and dinner. Lunch would be served at the job site.

⁴ See: Gillespie Bros. & Co. v Cheney, Eggar & Co. (1896) 2 QB 59.

[22] Redhead J [Ag.] referred to Mr. Hinojosa's evidence that he expressed shock when he received the telephone call from Mr. Cozier and asked Mr. Cozier if that were the case, why did he rent the place to Ocean View as a housing facility and why did he have apartments on the top floor of the building? Mr. Cozier responded angrily saying that all of this was untrue and if it were so, why isn't it reflected in the lease agreement? Mr. Hinojosa insisted that the agreement was to have meals for the workers prepared at Coconut Cove Restaurant and transported to the workers.

[23] Redhead J [Ag.] accepted Mr. Hinojosa's evidence that Ocean View rented Coconut Grove's kitchen to prepare the meals for its workers. Redhead J [Ag.] stated that he was of the opinion that Ramsbury knew that it was in the contemplation of Ocean View that the food would be transported to the premises occupied by the workers. Redhead J [Ag.] found that meals for the workers being delivered to the premises and the workers eating their meals there were in Mr. Hinojosa's contemplation and must have been in Mr. Cozier's knowledge in view of the negotiation with Pinney's Beach Hotel where in the e-mail to Mr. Hinojosa, Mr. Cozier indicated that part of the condition negotiated was "meals would be transported to the living site daily."

[24] In the circumstances, Redhead J [Ag.] concluded that there was an agreement that Ramsbury would provide tents for the workers so that they could have their meals under them. Ramsbury reneged on the agreement because it reasoned that it was an industrial site. Redhead J [Ag.] evaluated the evidence and explained how he arrived at the finding that there was an oral agreement. It was open to him on the evidence so to find. I would not impeach that finding.

Factual Findings

[25] The third issue alleges that Redhead J [Ag.] erred in failing to take into proper account that the fundamental facts of the lease engages the circumstances under which the Court of Appeal is permitted to disturb the judge's findings of

fact. The law is well settled as to the circumstances in which an appellate court will overturn factual findings of a trial judge. It cannot be said that Redhead J [Ag.] was clearly wrong in his findings or reached a conclusion he was not entitled to reach.

Implied Terms

[26] The fourth issue raised is whether it was proper for Redhead J [Ag.] to imply terms into the written fixed term lease agreement and then find that Ramsbury repudiated the agreement upon application of the implied terms. Ms. Prentice-Blackett posits that Redhead J [Ag.] was wrong to imply terms into the lease agreement. Ms. Prentice-Blackett argues that if the parties had contemplated that the workers would have meals brought to them and consumed, that would have been included in the agreement. Ms. Prentice-Blackett submits that in accepting the view that the contract was partly oral and partly written and that Ramsbury had repudiated its terms, Redhead J [Ag.] erred in summarily implying terms into the contract without considering the criteria advanced in **Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.**⁵

[27] Ms. Duncan posits that a term will be implied if it is essential to give effect to the reasonable expectations of the parties.⁶ In that light, Ms. Duncan submits that it was a reasonable expectation that the workers would be able to do laundry and have meals at the demised premises, as these are activities necessary for living.

[28] I now turn to the law governing implied terms. In English domestic law, there are two broad classes of implied terms. The first class, sometimes called, terms implied as a matter of fact, consists of terms implied from the circumstances, in order to give effect to the intention of the parties to the

⁵ [2015] UKSC 72.

⁶ Per Lord Steyn in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408.

contract. The policy of the common law is not to imply such terms lightly, and that is why the principles have been formulated in terms of necessity or business efficacy or “it goes without saying”. The second class consists of terms implied by law, which are implied into classes of contractual relationships as a necessary incident of the relationship concerned. An example would be the obligation of confidentiality in banking contracts or in arbitration agreements.⁷ This appeal is not concerned with the second class of implied terms.

[29] In **Marks and Spencer plc v BNP Paribas Securities Services Trust Co** the United Kingdom Supreme Court confirmed that a term would be implied into a detailed contract only if, on an objective assessment of the terms of the contract, the term to be implied was necessary to give the contract business efficacy or was so obvious that it went without saying. The Court also held that the express terms of the contract must be interpreted before one can consider any question of implication.

[30] In **Nasir Ali v Petroleum Company of Trinidad and Tobago**,⁸ Lord Hughes stated at paragraph 7 that:

“It is enough to reiterate that the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesis, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, “oh, of course”) and / or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre - condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed

⁷ See Lord Collins in *Vizcaya Partners Limited v Picard* [2016] UKPC 5 at para. 57.

⁸ [2017] UKPC 2.

implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”

While the principle is well understood, Lord Hughes recognised that the content of any term to be implied must be tailored to the necessity of the particular case.⁹

[31] The court has to interpret the express terms of the contract. In so doing, the court is to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”.¹⁰ The court does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of: (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time of execution of the document, and (commercial common sense, but disregarding subjective evidence of any party’s intentions.¹¹

The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader and that meaning is most obviously to be gleaned from the language of the provision. When it comes to considering the centrally relevant words to be interpreted, the less clear they are, the more ready the court can properly be to depart from their natural meaning. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks they should have agreed. When interpreting a contractual provision, one can only take into account facts and circumstances

⁹ *supra*, n.8 at para. 9.

¹⁰ Per Lord Hoffman in *Chartbrook Ltd. v Persimmon Homes Ltd* [2009] 1 AC 1101 at para. 14.

¹¹ See: *Arnold v Britton* [2015] UKSC 36 at para.15.

which existed at the time that the contract was made, and which were known or reasonably available to both parties.¹²

- [32] With respect to the interpretation of the lease, Redhead J [Ag.] noted that Ramsbury throughout stressed the words: “for the purpose of providing sleeping accommodation **only** for 250 workers for a period of seven months.” Redhead J [Ag.] observed that these words are in the preamble of the lease. They are not under what is agreed, which does not contain the word “only.” I take Redhead J [Ag.] to be saying that the word “only” appears in the preamble and not in the habendum. Redhead J [Ag.] set out the preamble in full and his understanding of the lease. He stated:

“In my considered opinion, what the parties to the lease agreement agreed to was, that the lessor would provide ‘8000 square feet within the building for the purpose of sleeping accommodation for 250 workers for a term of seven (7) months beginning 18th day of June 2009 at a consideration of US\$56,000.00 per month.”

- [33] I am in accord with Redhead J’s [Ag.] understanding of the lease agreement. It clearly comports with the habendum clause. The centrally important words are “...for the purpose of sleeping accommodation for 250 workers”; they appear in the habendum. The interpretative dispute arises from the presence of the word “only” in the preamble as well as in the proviso. The preamble states in part: “The lessee is desirous of leasing the building ... for the purpose of providing sleeping accommodation **only** for 250 workers...”. The proviso says: “... there shall be 250 workers arriving for sleeping accommodation **only**...” The habendum states: “... for the purpose of sleeping accommodation for 250 workers ...”; there is no “only”.

- [34] In my judgment, the words in the operative part of the lease are clear; “sleeping accommodation for 250 workers”. That being the case, they cannot be

¹² Per Lord Neuberger in *Arnold v Briton* [2015] UKSC 36 at paras.17-22.

“controlled, cut down or qualified by the recitals” or other parts of the lease. Where the recital and the operative part are both clear but are inconsistent with each other, the operative part is to be preferred. Authorities of some vintage support that legal proposition and they commend themselves to me. Thus, in **Holliday v Overton**,¹³ Sir John Romilly MR said: “it is impossible by a recital to cut down the plain effect of the operative part of a deed”. In **Mackenzie v Duke of Devonshire**,¹⁴ Lord Davey said: “I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down or qualified by a recital or narrative of intention.” In **Ex p. Dawes, Re Moon**,¹⁵ Lord Esher MR said “If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred”. From the guidance given by the authorities, Ramsbury’s insistence on “for the purpose of providing sleeping accommodation only” is clearly misconceived.

[35] Having interpreted the express term of the lease, at paragraph 83 of his judgment, Redhead J [Ag.] held that it was unreasonable for Ramsbury to insist that the lease agreement provided for sleeping only and that excludes consuming any food on the demised premises. Redhead J [Ag.] further held that eating is such a vital aspect of one’s existence that to insist that the workers were not allowed to eat on the demised premises, constituted a fundamental departure from an implied term of the lease.

[36] Paying regard to the governing principles relating to implied terms, it cannot be said that Redhead J [Ag.] erred in implying terms into the lease agreement. There is much substance in Ms. Duncan’s submission that the lease agreement would lack practical coherence without the implied terms, in that the workers would not be able to perform activities that encompass a necessary part of daily living. The relevant implied terms are a natural corollary of living in the demised

¹³ (1852) 14 Beav. 467.

¹⁴ [1896] AC 400.

¹⁵ (1886) 17 QBD 275.

premises. Implying the terms into the contract would not amount to a rewriting of the lease agreement. In addition, the lease contains no conflicting terms to that of the implied terms. It is so obvious that it goes without saying, that a lease agreement providing for accommodation would contemplate having meals and laundering clothes on the demised premises, in the absence of a clear provision to the contrary. Though not included in the lease agreement, it is expected that the workers would make use of these activities on the demised premises as part of everyday living. The implied terms included the opportunity for the workers to launder their clothes and have their meals on the demised premises. It is so obvious that it goes without saying. The man or woman traversing the Elquemedo Willett Park in Charlestown, would find no difficulty in acclaiming “oh, of course!”. The learned judge did not err in implying terms into the lease agreement.

Repudiation

[37] The fifth issue arising is whether Redhead J [Ag.] misdirected himself in finding as a matter of law that Ramsbury repudiated the fixed term lease agreement. Ms. Prentice-Blackett submits that the judge misdirected himself in finding that Ramsbury had repudiated the contract by breaching implied terms because the issue of repudiation was not put before the court by any of the parties. In addition, although the issue of breach of an implied oral contract was pleaded by Ocean View, this pleading did not demonstrate that such breach was sufficiently serious to amount to Ramsbury’s repudiation of the contract.

[38] Ms. Prentice-Blackett laments that Ramsbury was not made aware of the issues raised in Ocean View’s letter of 13th July 2009, before that time, and it was only given four days’ notice of intention to terminate the fixed term lease. Ms. Prentice-Blackett also argues that communication with Mr. Cozier (a director of the company) was not communication with Ramsbury. Ms. Prentice-Blackett contends that the issues set out in the letter could easily have been addressed if they were real and the contract continued. Ms. Prentice-Blackett posits that it is

clear that the issues were not sufficient to frustrate the contract and Redhead J [Ag.] did not consider this before wrongly concluding that Ramsbury had repudiated the contract.

[39] Ms. Prentice-Blackett relies on the case of **Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings**¹⁶ where the Court of Appeal stated: first, the task of the court is to look at the position as at the date of the purported termination of the contract. Secondly, in looking at the position at that date, the court must take into account any step taken by the guilty party to remedy accrued breaches of contract. Thirdly, the court must also take account of likely future events, judged by reference to objective facts as at the date of purported termination. Ms. Prentice-Blackett contends that Redhead J [Ag.] failed to consider the foregoing position in the law before concluding that Ramsbury had repudiated the contract. Ms. Prentice-Blackett submits that on the evidence and the law, Ocean View had repudiated the contract by returning the keys to the property, accompanied by a letter from its attorney. Ramsbury had no choice but to accept the repudiation when it accepted the return of the property keys. It is therefore entitled to damages and costs.

[40] Ms. Duncan argues that based on the circumstances of the case, the test for repudiation has been sufficiently satisfied in that, the occurrence of the event (i.e. Mr. Cozier denying the workers the ability to eat and launder clothes at the demised premises) deprived Ocean View of substantially the whole benefit of the contract. Were the implied terms to be denied inclusion in the contract, the workers would be denied the basic living conditions and the contract frustrated.

[41] Ms. Duncan contends that the matter of implied terms could only have been reasonably raised after the breach. It would not have been brought to Ramsbury's attention had the breach not occurred, thus explaining why it was first mentioned in Ocean View's defence in the court below. In response to

¹⁶ [2013] EWCA Civ 577.

Ramsbury's position that had the issues been real, they would have been addressed, Ms. Prentice-Blackett points out that the matter of laundering of clothes was addressed by Mr. Cozier when he indicated that the workers could not do laundry at the demised premises. Ms. Prentice-Blackett submits that the innocent party is entitled to accept repudiation and treat himself as discharged by reason of the other party's breach.

- [42] Ms. Duncan points out that Ramsbury was written to indicating a breach of contract and Ocean View's right to accept repudiation because of discharge by breach. Ramsbury's attorney responded, not by insisting that Ocean View continue with the original contract, neither did it opt to remedy the breach. Therefore, Ms. Prentice-Blackett submits that Ocean View was entitled to treat the contract as discharged. Additionally, the implied terms relevant to the matter, were a natural corollary to the performance of the contract as being able to do laundry and eat; they go to the root of a contract for living accommodation.

The Law on Repudiation

- [43] It is useful at this stage to set out the law relating to repudiation. A repudiatory breach of contract does not automatically discharge the parties from further performance but gives the innocent party the right to treat it as having that effect. Repudiation has been described as a drastic conclusion which should only be held to arise in clear cases of refusal, in a matter going to the root of the contract, to perform contractual obligations.¹⁷ Whether a breach or threatened breach gives a right to terminate involves a multi-factorial assessment involving the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach and the consequences of the breach for the injured party. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to

¹⁷ Per Lord Wilberforce in *Woodar Investment Development Ltd. v Wimpey Construction UK Limited* (1980) 1 WLR 277 at p. 283.

damages, the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract.¹⁸

[44] In **Hong Kong Fir Shipping Co. Limited v Kawasaki Kisen Kaisha Limited**,¹⁹ the ship was delayed at various ports due to the incompetence of its crew and the defects in the ship; the charterers were held not justified in terminating the charter. The judge, upon considering all the circumstances found that they were not deprived of substantially the whole of the benefit. The first question Diplock LJ posed was how to decide whether the occurrence of an event discharged the parties to a contract from further performance of their obligations where the contract itself was silent. To that, at page 72, he provided this test :

“Does the occurrence of the event deprive the party, who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

The test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of further performance of his own undertakings.”

[45] In **Decro-Wall International SA v Practitioners in Marketing Ltd.**,²⁰ at page 380, Buckley LJ said:

“To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract ... Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages ...?

[46] In **Telford Homes (Creekside) Limited v Ampurius Nu Homes Holding Limited**,²¹ Lewison LJ mentioned the apparent tension between Lord Diplock’s

¹⁸ See: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 at para. 54.

¹⁹ [1962] 2 QB 26.

²⁰ [1971] 1 WLR 361.

²¹ [2013] EWCA Civ 577 at para. 49.

test of deprivation of “substantially the whole benefit” and Buckley LJ’s test of “a substantial part of the benefit”. In **Federal Commerce Ltd v Molena Alpha Inc (The “Nanfri”)**,²² Lord Wilberforce expressed the view that the difference in expression between the two formulations does not reflect a divergence of principle but arises from and is related to the particular contract under consideration. They represent applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract.

[47] Lewison LJ, in **Telford Homes**, expressed the view at paragraphs 51 and 52 that whichever test is adopted, the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract. The next thing to be considered is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party’s outstanding obligations?

[48] This was a lease to provide accommodation for 250 workers for a period of seven months. It would be expected that as part of everyday living, the workers would be able to do the basics of eating and doing their laundry on the premises. At the time of repudiation, the workers were denied the ability to eat and launder on the premises. Ramsbury’s position was that the lease provided for accommodation only, thus excluded eating and doing laundry. There was no indication that Ramsbury would resile from that position, as clearly illustrated in its response to the letter from Ocean View’s solicitor. As Redhead J [Ag.] stated, and I agree, eating is such a vital aspect of one’s existence, that to insist that the workers were not allowed to eat on the demised premises

²² [1979] AC 757 at p. 779.

constituted a fundamental departure from an implied term of the lease. In my judgment, Ocean View was deprived of a substantial part of the benefit of the lease to which it was entitled. It would be unfair in the circumstances, to hold it to the lease and leave it to a remedy in damages. Damages would not be an adequate remedy taking into account the nature and circumstances of the breach. It was open to the judge to find that Ramsbury had repudiated a fundamental term of the lease agreement.

[49] Ramsbury argues as to the shortness of the period (four days) in respect of repudiation. In **Latvian Shipping Company and Others v Stocznia Gdanska SA**,²³ Rix LJ stated:

“...there is a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory , breach, a thing ‘writ in water’ until acceptance can be overtaken by another event which prejudices the innocent party’s right under the contract – such as frustration or even his own breach. He also runs the risk that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract.”

Ocean View had to decide whether to accept the repudiation or affirm the agreement. If it did nothing for too long, it faced the risk of being treated as having affirmed the contract. Ocean View could also face other risks attendant upon dilatoriness on its part, disentitling it to elect to accept Ramsbury’s repudiation as terminating the lease. Given the circumstances Ocean View faced, inclusive of Ramsbury’s response to its letter, the short period of the lease and the purpose of the lease, it would be difficult to be faulted for the shortness of time with respect to repudiation.

²³ [2002] EWCA Civ 889.

Grounds 6 and 7 - Entitlement to Damages

- [50] The issue raised in grounds 6 and 7 concerns damages: whether Ramsbury was entitled to compensatory damages, if it is found that Ocean View repudiated the contract (ground 6), and whether Ramsbury was entitled to special damages (ground 7). In view of the conclusion the Court has reached with respect to repudiation, the issue raised in grounds 6 and 7 becomes academic. Critically, Ramsbury repudiated the lease agreement and as such there is no basis upon which it could claim damages. As damages can only be awarded to a party not in breach, Ramsbury would not be entitled to damages of any sort.
- [51] In deference to the parties' submissions on special damages, I will address that issue. Ramsbury claimed special damages of \$163, 213.67 relating to the re-fitting of the building to accommodate Ocean View's workers. Redhead J [Ag.] denied that claim. Ms. Prentice-Blackett contends that Redhead J [Ag.] was wrong in holding that Ramsbury was not entitled to special damages.
- [52] Redhead J [Ag.] found that Ramsbury entered into an agreement with Ocean View to accommodate the workers. The building was virtually a shell. In order to accommodate the workers, Ramsbury was required to refit the building. This, without any agreement to the contrary, must have been done at Ramsbury's expense. Many of the items of expenditure produced in support of items of particular damage were shown to have nothing to do with the renovation of the building occupied by the workers. Redhead J [Ag.] noted that in cross-examination, Mr. Cozier stated that he was not claiming some of the expenditure listed in some of the documents, and queried the reason for putting those documents into evidence. Redhead J [Ag.] expressed the view that they were not put in in error, being led to that conclusion by the fact that so many of the documents had absolutely no connection with Ocean View. Redhead J [Ag.] concluded: "I am therefore forced to the conclusion that the assertion that the claimant [Ramsbury] spent \$163, 213.67 on renovations, is

untrue". Redhead J [Ag.] also referred to certain recommendations made by the Ministry of Health with respect to the building and noted that Ramsbury claimed the cost of the improvements against Ocean View. In rejecting the claim, Redhead J [Ag.] stated that Ramsbury was responsible for providing a safe and habitable place for Ocean View's workers.

[53] Ms. Prentice-Blackett takes issue with Redhead J's [Ag] finding that the re-fitting, without agreement to the contrary must have been done at Ramsbury's expense, stating that there was no evidence to support that finding. She states that the substantial evidence was that Ocean View had requested the specific alterations made by Ramsbury. Ms. Prentice-Blackett also contends that the judge erred in paragraph 49 of his judgment in holding that all 26 invoices put in by Ramsbury had nothing to do with the renovation of the premises to accommodate the workers. She argues that the judge was wrong to have disregarded the entire invoice and should only have disregarded the cement to be delivered to Pinney's Beach Hotel, which was specifically identified. Ms. Prentice-Blackett also contends that the judge improperly construed an invoice relating to when items were delivered to the premises and failed to consider the evidence in relation to another invoice.

[54] Ms. Duncan states that it is trite law that a landlord is responsible for providing an habitable property to his tenant. Further, Mr. Cozier indicated that the property was not residential, but commercial. Mr. Cozier also assured Mr. Hinojosa that he would modify the premises so that it suited the workers' need and therefore imposed upon himself a duty to so do. Ms. Duncan further submits that the expenses Ramsbury incurred in making the premises habitable were expenses that it was wholly responsible for, particularly because Mr. Cozier himself said he would make modifications to the premises.

[55] The basic principle with respect to special damage is that it has to be properly pleaded, particularised and proved. Special damage was pleaded and

particularised. Ramsbury failed on proof. After evaluating the evidence, Redhead J [Ag.] concluded that the assertion that Ramsbury spent the sum claimed as special damages on renovations is untrue. This is a finding of fact based upon his evaluation of the evidence. Redhead J [Ag.] appeared to have credibility issues with respect to the claim. He referred to Mr. Cozier's admission in cross-examination, that he was not claiming some of the expenditure listed in some of the documents. Redhead J [Ag.] asked, what was the purpose of putting them in evidence? He rejected the notion that they were put in in error, pointing out that so many of the documents had no connection with Ocean View. An appellate court should be slow to overturn the factual findings of a trial judge in those circumstances.

- [56] Quite apart from that, the parties entered into an agreement whereby Ramsbury would provide accommodation for 250 workers in a building it owned. The building was a virtual shell. Ramsbury had undertaken to make improvements and renovations to the demised premises and therefore is liable for the cost in that regard. There is no basis to disturb the learned judge's finding that: (i) Ramsbury was required to refit the building in order to accommodate the workers; and (ii) this, without any agreement to the contrary, must have been done at Ramsbury expense. The suggestions Mr. Hinojosa made as to modifications were in furtherance of making the premises habitable and comfortable for the workers. The suggestion that Ocean View had requested the specific alterations Ramsbury made does not affect the judge's conclusion. Redhead J's [Ag.] finding involved an evaluation of facts. It has not been shown that he was clearly wrong or reached a conclusion which he was not entitled to reach on the evidence. In the circumstances, for the reasons I have given, Redhead J [Ag.] did not err in rejecting the claim for special damages.

Conclusion

[57] I would order that the appeal is dismissed with prescribed costs to the respondent in the court below and two-thirds on appeal.

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

By the Court

Chief Registrar