

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

ANTIGUA AND BARBUDA

ANUHCVP2025/0007

BETWEEN:

DEWS PRO BUILDERS LIMITED

Appellant

and

CHRISTOPHER K. MARTIN

Respondent

Before:

	The Hon. Mr. Gerard St. C. Farara	Justice of Appeal
	[Ag]	
	The Hon. Mde. Gertel Thom	Justice of Appeal
[Ag]		
	The Hon. Mr. Brian Cottle	Justice of Appeal
	[Ag]	

Appearances:

Mr. Justin Simon KC with him Ms. Shannon Potter for the Appellant
Ms. Andrea Smithen-Henry for the Respondent

2025: November 27;
2026: March 11.

Civil appeal – Breach of contract – Implied contract – Pleadings – Whether learned judge determined claim on cause of action not pleaded

The respondent in this appeal, Mr. Christopher K. Martin was a director and Chief Executive Officer (CEO) of the appellant. On 18th February 2021, following discussions between the parties with a view of terminating their relationship, the respondent tendered his resignation as a director and as CEO. On 19th February 2021, the parties entered into an agreement to facilitate the redemption of the respondent's 2500 shares in the appellant ("the February 19th 2021 Agreement"). Pursuant to clause 5 of the said agreement, the

appellant agreed to pay the respondent EC\$4,272,272.50 for his shares. The sum was paid over the course of four (4) months.

On 21st June 2021, the appellant paid the respondent the final sum being EC\$2,182,417.00 less EC\$89,854.98 which the appellant alleged represented salary payment made to the respondent in error during the period February to June 2021.

The respondent instituted proceedings against the appellant in which he alleged that he was only paid the sum of EC\$4,182,417.52 and claimed payment of the sum of EC\$89,854.98 being the sum due and owing to him pursuant to the February 19th 2021 Agreement.

The appellant in its defence acknowledged that the agreed sum to be paid for the shares was EC\$4,272,272.50 and that EC\$22,500.00 of the respondent's EC\$24,795.95 monthly salary was paid to his bank account by standing order. However, as a result of an error, the standing order in relation to the payment of salary was not revoked until 21st June 2021 and consequently, the respondent was paid the sum of \$89,854.98 between February-June 2021. The appellant claimed that the stated sum ought to be repaid by the respondent with interest or alternatively, that the sum should be set off against the respondent's claim for EC\$89,854.98. The respondent contended that between this period he remained employed by the appellant and was therefore entitled to the stated sum.

The learned judge reviewed the February 19th 2021 Agreement in particular clause 7 (i) and ultimately concluded that the respondent could not unilaterally determine that the payments made to the appellant between February-June 2021 were to be deducted from the final settlement in circumstances where the respondent actually provided services to the company during the relevant period, having failed to so inform the respondent. The learned judge therefore held that the appellant had breached the agreement, dismissed the counter claim and ordered the appellant to pay the respondent the sum of EC\$89,854.98 plus interest and costs.

Dissatisfied with the decision of the learned judge, the appellant appealed on five grounds. At the hearing of the appeal however, learned counsel for the appellant submitted that the central issue is whether the learned judge determined the claim on an issue which was not raised in the claimant's pleaded case in circumstances where the evidence of the claimant contradicted the pleaded case.

Held: dismissing the appeal with costs to the respondent, to be assessed by a judge of the High Court if not agreed within twenty-one days, that:

1. It is settled law that parties to litigation are bound by their pleadings. The court is equally bound by the parties' pleadings. It is not the duty of the court to enter into an inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. This principle is based on fairness which requires the court to determine only issues raised by the parties and not issues which in the court's opinion should have been raised.

George W. Benett Bryson's & Co. Ltd v George Purcell ANUHCVP2011/0023 (delivered 28th February 2018, unreported) applied; **Frederick Henry v Marie Ketra Albert** SLUHCVP2023/0012 (delivered 20th August 2024, unreported) applied.

2. An examination of the respondent's pleaded case shows that his claim for payment of the sum of EC\$89,854.98 was based on the February 19th 2021 Agreement. In his response to the counterclaim, the respondent's pleading was that he was employed with the appellant during the period of February-June 2021 by agreement between himself and the appellant. There was no pleading of an implied contract. His witness statement stated clearly there was an agreement for him to continue as the CEO of the appellant. The implied contract only arose upon cross examination of the respondent. Mr. Simon KC's approach towards this evidence of an implied contract in his closing submissions was not that an implied contract was not pleaded, but rather that the evidence adduced by the respondent did not amount to an implied contract of employment. Not only was the pleading point not raised in the court below by the appellant, it was not included as a ground of appeal nor in the appellant's written submissions before the Court. Both parties having based their submissions before the learned judge on whether there was an implied contract of employment, and there being no ground of appeal that implied contract was not pleaded, it would not be fair to determine the appeal on the basis that implied contract was not pleaded, when the appellant had the opportunity to so argue before the learned judge and elected not to do so, but rather to base his case on an insufficiency of evidence to ground an implied contract. Having opted to take that route, the appellant ought not to be allowed to resile from it at this late stage.

JUDGMENT

- [1] **THOM JA [AG.]:** This appeal concerns a dispute in relation to breach of contract. The appellant Dews Pro Builders Ltd is a company incorporated in Antigua and Barbuda.

BACKGROUND

- [2] The respondent Mr. Christopher K. Martin was a director of the appellant and he also served as the Chief Executive Officer (CEO) of the appellant.

- [3] Early in 2021, the parties held discussions with a view to terminating their relationship. Following these discussions, on 18th February 2021, the respondent tendered his resignation as a director and CEO, and the parties entered into an agreement to facilitate the redemption of the respondent's 2500 shares in the appellant. Pursuant to clause 5 of the share Redemption Agreement ("the February 19th 2021 Agreement") the appellant agreed to pay the respondent EC\$4,272,272.50 for his shares. The agreed sum was not paid at once due to financial difficulties by the appellant. The payment was made over a period of approximately four (4) months.
- [4] On 21st June 2021, the appellant paid the respondent the final sum being EC\$2,182,417 less \$89,854.98 which the appellant alleged represented salary payments made to the respondent in error during the period February to June 2021 since the respondent had resigned his position as CEO of the appellant effective 18th February 2021.
- [5] On 8th December 2021 the respondent instituted proceedings against the appellant in which he alleged that he was only paid the sum of EC\$4,182,417.52 which meant EC\$89,854.98 was outstanding. The respondent claimed among other things:
- (a) Payment of the sum of \$89,854.98 being the sum due and owing to him pursuant to the February 19th 2021 Agreement;
 - (b) damages for breach of contract; and
 - (c) costs.
- [6] In his statement of claim the respondent contended that pursuant to the February 19th 2021 Agreement the appellant agreed to pay him \$4,272,272.50 for his shares. He was only paid \$4,182,417.52. An amount of \$89,854.98 was therefore owed to him.

[7] The appellant in its defence acknowledged that the agreed sum to be paid for the respondent's shares was EC\$4,272,272.50. The appellant also acknowledged that the respondent was its Chief Executive Officer and was paid a salary of \$24,795.95 per month, of which \$22,500.00 was paid to his bank account by standing order.

[8] The appellant further contended that while the respondent tendered his resignation on 18th February 2021 and the resignation took effect immediately, through an error, the standing order in relation to the payment of salary to the appellant was however not revoked until 21st June 2021. Consequently, between February 2021-June 2021 a total of \$89,854.98 was paid to the respondent.

[9] The appellant claimed that the sum of \$89,854.98 should be repaid by the respondent with interest. Alternatively, the sum should be set off against the respondent's claim for \$89,854.98.

[10] The respondent in his reply contended that from February 2021 to June 2021, he remained employed by the appellant and was therefore entitled to collect his salary. The \$89,854.98 was not paid to him in error.

[11] The learned judge having heard the evidence, determined the issue to be tried at paragraph 28 of the judgment as follows:

"28. The defendant has not alleged that the agreement of 19th February 2021 is not binding on the parties. Therefore, the issue for determination is whether the defendant can set off the sum of EC\$89,854.84 from the sum of EC\$4,272,272.50 owed to the claimant pursuant to the agreement between the parties dated 19th February 2021?"

[12] The learned judge reviewed the February 19th 2021 Agreement in particular clause 7 (i) which reads as follows:

"Completion of the sale and purchase of the Shares shall take place at the offices of the Buyers Attorneys at 10am on Friday 19th February 2021 (or at such later date as may be agreed between the Seller and the Buyer..."

[13] The learned judge found that pursuant to clause 7 (i) payment in full should have been made to the respondent on 19th February 2021. However, the uncontradicted evidence was that payment was not made on 19th February 2021 because the loan from a financial institution was not finalized.

[14] The learned judge determined as follows at paragraph 34:

“In this case it is obvious that despite his resignation Mr. Martin continued to provide services to the defendant. As both parties agreed, he continued to be a signatory to the defendant’s accounts, approved payments to suppliers and liaised with customers. At no point during this period did the directors of the defendant seek to restrict Mr. Martin in the performance of these duties. There is also no evidence that during this period they informed other employees or customers that Mr. Martin was no longer authorized to transact business on the company’s behalf.”

[15] The learned judge also found that the respondent remained a member of the Management WhatsApp group between February 2021 and June 2021 (at paragraph 35). The learned judge also found (at paragraph 36) that none of the directors informed the respondent that the payments were not salary but rather payments towards the purchase price of his shares.

[16] The learned judge concluded (at paragraph 38) as follows:

“I therefore find as a fact that the defendant never informed the claimant that any payments he received between 19th February and 21st June 2021 would be considered payments towards the purchase price of his shares rather than salary. Having failed to do so, the defendant cannot unilaterally determine that these payments were to be deducted from the final settlement in circumstances where the claimant actually provided services to the company during the relevant period.”

[17] The learned judge also found that the appellant had breached the agreement (at paragraph 39). He dismissed the counter claim and ordered the appellant to pay the respondent the sum of \$89,854.98 plus interest and costs.

Grounds of Appeal and Submissions of the Appellant

[18] The appellant being dissatisfied with the decision of the learned judge appealed the decision. The appellant outlined five grounds of appeal as follows:

- (1) The learned trial judge failed to take into consideration critical inconsistencies in the claimant's evidence which were revealed under cross-examination where he admitted that he had held no discussions with the defendant nor was there any agreement reached between the parties that he was to continue his employment following his resignation, contrary to the assertions made in his witness statement.
- (2) The learned trial judge failed to recognize or accept that the claimant's letter of resignation dated 18th February 2021 from his employment with and as a director of the defendant with immediate effect was final and was never subsequently revoked or stayed.
- (3) The learned trial judge wrongfully implied a contract of employment between the parties subsequent to the claimant's resignation given all the circumstances surrounding the claimant's receipt of a portion of his salary between 19th February 2021 and 21st June 2021, the absence of clear and unrefutably [sic] evidence of mutual intent by the parties to create an employment contract, and the minimal duties he voluntarily continued to perform following his resignation, and his absence from the State during that period.
- (4) The learned trial judge erred in holding that the completion of the sale and purchase of the claimant's shares did not take place as provided in the Agreement dated 19th February 2021 when he said the agreement provided in clause 7(i) for an extension of the completion date as may be agreed between the parties and the parties had agreed to a later completion date without any conditions and certainly no extended employment of the claimant.
- (5) The learned trial judge erred in law in dismissing the defendant's counterclaim in respect of the sum \$89,854.98 which the claimant received from the defendant subsequent to the claimant's resignation as

an employee and director and to which the claimant had no legal entitlement.

[19] At the hearing of the appeal Mr. Justin Simon KC, learned counsel for the appellant, submitted that the central issue in the appeal is whether the learned judge determined the claim on an issue which was not raised in the claimant's pleaded case in circumstances where the evidence of the claimant contradicted the pleaded case.

[20] Mr. Simon KC submitted that the pleaded case of the respondent was that the \$89,854.98 was paid to him based on an agreement with the appellant for him to continue in employment in spite of his resignation because the full sum due for the shares were not paid to him in accordance with the Agreement. At no time did the respondent plead an implied contract.

[21] Mr. Simon KC submitted that the respondent's pleading and his witness statement are inconsistent with his oral testimony at the trial when he was cross-examined. The respondent's pleaded case and his evidence in his witness statement in particular paragraphs 7, 8, 9, 12, 15, and 16-18 is that there was an agreement for him to continue in the employment of the appellant until the full payment for the shares was made to him pursuant to the February 19th 2021 Agreement. At no time did the respondent plead or mention in his witness statement that there was an implied contract between himself and the appellant by which he was to continue to be employed by the appellant and paid his salary. It is useful to outline these paragraphs. They read as follows:

"(7) I therefore received payment in tranches. As a result, I agreed with the Company that the final tranche payment for the Shares could be deferred until the loan facility was disbursed and in the interim, it was agreed that I would continue to work with and for the Company to assist in the handing over of matters given my detailed knowledge and involvement in the Company's affairs as Chief Executive Officer, to include the Company's client portfolio and customer and supplier databases, for which I would be remunerated per my regular salary.

(8) However, by that stage and as stated above, I had already handed in my resignation letter to the Company dated 18th February, 2021 which said that I resigned as director and employee with immediate effect....My resignation letter had been tendered in compliance with Clause 7 (ii) (b) and (d) of the Agreement.

(9) Thus notwithstanding the resignation letter, my resignation as director and employee of the company did not take effect on 18th February 2021 as I continued on in these roles and remained with the Company until the end of June, 2021. I aided with the transition during this 4 and a half-month period, particularly in relation to dealing with a smooth handover in respect of supplier, customer and banking relationships, for which I had been the principal point of contact for the Company.

(12) In the circumstances it cannot be doubted or denied that I continued to function as a director and employee of the Company until the end of June, 2021 in spite of my letter of resignation dated 18th February, 2021. In fact, the agreement between the company and I that I would stay on until the loan facility for the redemption of the Shares was received, is reflective in an email dated 10th June, 2021 from Christopher Williams on behalf of the Company to myself ... where he stated:

“Good morning Mr. Martin, attached please find the Certificate of Good Standing, the original of which was delivered to the Bank on Tuesday June 8th, 2021.

As mentioned previously, this item was the last outstanding document requested by the Bank, for which the delay was in no way our fault.

In delivering the Certificate we have completely satisfied all of the Conditions Precedent for the loan, and I’ve also been assured that they are currently working on disbursing funds in very short order.

As is customary and prudent in these matters, we have updated access privileges to all of the Company’s platforms in order to ensure a seamless process of transition.

Let me take this opportunity to thank you for your contribution over the years to Dews Pro Builders Limited and I sincerely wish you every success in your future endeavors.”

(15). In light of the above chain of events and the clear agreement and common understanding and intention between the Company and I that I would remain in the roles of both director and employee until I was paid for the Shares via bank loan, my strong position is that the Company owes me the sum of \$89,854.98 as the balance due and owing for the Shares. In failing to pay me this balance, the Company is in breach of the clear terms of the Agreement.

(16) Further, I do not accept and I wholeheartedly refute that I owe the Company any money as it has alleged in its Counterclaim. The salary

payments from February, 2021 to June, 2021 were rightfully paid to me as I continued to work for the Company during that period as I have outlined above. I was to be compensated for the significant work that I carried out for the Company - as had been the agreed position between the Company and me. Indeed, I acted diligently and in good faith during this entire period, sincerely believing that the Company would abide by our arrangement. However, with hindsight, I see that I was mistaken.

(17) The Company's position that I owe them for the almost 4-months' salary is simply untrue. Its allegation that it forgot to cancel or revoke the standing order to pay me my salary is so incredible that it is unbelievable and false. Why would I, a prudent businessman, continue to do all the work I did for the Company (as outlined above) without compensation for the same and certainly without agreeing to be remunerated before carrying out the work? Why also, would I have simply accepted delayed payment for the Shares, without more?

(18) On reflection, I find it quite amusing that the amicable and respectful correspondences with the Company suddenly and abruptly came to an end once the Company obtained the loan and short paid me for the Shares. As borne out by the discussions in the Management WhatsApp Group and the email correspondences passing between myself and the Company from February to June, 2021..., it was all good and well and professional between us when I was needed to approve transfers, ensure staff were paid, process cheques and continue supplier and customer relations for the Company for 120 days after the date of my resignation letter; but once the bank loan was disbursed, I was not to be paid for all of my hard work for the Company? That position is entirely unacceptable to me and it is certainly not in accordance with our agreement."

[22] Mr. Simon submitted that this evidence was in conflict with his evidence under cross-examination¹:

"Q. With whom did you have that agreement?

A. With the The company.

Q. Yes. A company is a ...how should I put it? A company is not a human being.

A. Yes.

Q. Good. So who in the company did you have that discussion with?

A. Well, with... I did not have a... a discussion.

Q. You did not have a discussion?

A. No. I did not have a discussion...

Q. Okay

A. ...because My Lord...

¹ At pages 89-90 of the Hearing Bundle.

Q. So you had no discussion with anyone in the company.
A. No.
Q. So if you had no discussion, how could there be an agreement that you would continue to work with and for the company?
A. My Lord, the proceeds did not arrive at that particular date, so I... I continued my duties as the director and CEO of the company.
And further:
Q. Okay. You considered those amounts you received as salary. Yes?
A. Yes, My Lord.
Q. Notwithstanding that there was no agreement that your employment was continuing.
A. My... Your Lord, the agreement was in...well, I could say it was implied because the company could not function without my involvement.
Q. So the agreement...
A. Yes.
Q. ...was implied.
A. It was implied. My Lord, it could not function without my involvement."

[23] Mr. Simon submitted that the respondent's pleading was based on an express agreement. An implied agreement was not pleaded as an alternative. The evidence in his witness statement outlined above also supported his pleaded case of an express agreement. It was only under cross-examination that the respondent testified that the agreement was implied.

[24] Mr. Simon KC further submitted that the respondent's pleading not having included a plea of implied agreement, it was not open to the learned judge to make the finding that there was an implied agreement that the respondent would continue as an employee after 19th February 2021 and therefore entitled to salary for the period February-June 2021.

[25] Mr. Simon KC also submitted that had the respondent pleaded that there was an implied agreement, the appellant would have adduced evidence at the trial of the expansive nature of the duties of the respondent when he served as the CEO of the appellant.

[26] The appellant did not have the opportunity to address the issue of whether the duties performed amounted to the duties required to ground an implied agreement.

The terms of the implied agreement were not outlined in the pleadings. There was also no evidence of the terms of the agreement. The learned judge therefore could not properly assess the evidence of the witnesses and come to the conclusion which he did when the evidence was not comprehensive. Mr. Simon KC relied on the decisions of this Court in **George W. Benett Bryson's & Co. Ltd v George Purcell**²; and **Frederick Henry v Marie Ketra Albert**³.

Respondent's Submissions

- [27] Ms. Henry, learned counsel for the respondent, referred the Court to the pleading of the respondent in his defence to the counterclaim at paragraph 3(c) and (d) and submitted that when the sub-paragraphs are read as a whole, they show that the respondent pleaded an agreement.
- [28] Ms. Henry submitted that the first time the pleading issue is raised is in Mr. Simon KC's oral submission before this Court. He did not raise the issue before the learned judge in the lower court. Further it is not included in any of his five grounds of appeal. It would therefore be unfair for the appellant to be permitted to rely on the submission.

Discussion

- [29] It is a well settled principle of law that the parties to litigation are bound by their pleadings. This principle was applied in both of the authorities referred to by Mr. Simon KC.
- [30] In **George Bennett Bryon v George Purcell** the Court relied on the following passage in the case **RHB Bank BHD V Kwan Chew Holdings SDN**:

² ANUHCVP2011/0023 (delivered 28th February 2018, unreported).

³ SLUHCVP2023/0012 (delivered 20th August 2024, unreported).

“...it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.”⁴

[31] The Court also relied on the following statement of Sir Jack Jacobs in “Current Legal Problems. The Present Importance of Pleadings”⁵ at pages 174-175:

“As the parties are adversaries it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without the leave of the Court. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce on any claim or defence not made by the parties. To do so would be to enter upon the realms of speculation.”

[32] Applying this principle, the Court found in **George Bennett Bryson**:

“...In our opinion, the learned judge overstepped his mandate in crafting and ruling on an issue not pleaded by Mr. Purcell nor addressed by the parties, namely breach of contract, and using it as the basis upon which to grant Mr. Purcell's claim, thereby essentially assisting him in an impermissible manner. The learned trial judge, no matter how well-intentioned, went well beyond the grounds raised by Mr. Purcell and responded to by Bryson's Shipping and thereby determined the claim based on matters that were not properly before him...”⁶

[33] This principle was also applied in **Frederick Henry v Marie Ketra Albert** where this Court stated:

⁴ Paragraph 39 of the judgment.

⁵ Current Legal Problems (1960) Volume 13 Issue (1) 171.

⁶ Paragraph 40 of the judgment.

“It is common ground that the respondent did not plead or rely on Article 372 of the Civil Code in her claim in the Court below. Likewise, there was no mention of the Article 372 in the pleadings nor in the closing submissions of either party. Moreover, there was no pleading that the improvements had been carried out in ‘good faith’ or that the said improvements were necessary, each of which are key elements which must be pleaded in order to found any remedy, primary or alternative, for an order of compensation or reimbursement under Article 372. Consequently, in the face of no pleaded case for reimbursement of the costs of improvements whether under Article 372 or otherwise, the learned judge, however well intended, assisted the respondent in an impermissible manner when he embarked upon a consideration of Article 372 and made the order for reimbursement of the costs of the improvements in favor of the respondent...”⁷

- [34] The principle is based on fairness. The Court must always act fairly. Fairness requires a court to determine only those issues raised by the parties and not issues which in the court’s opinion should have been raised.
- [35] An examination of the pleaded case of the respondent shows that his claim for payment of the sum of \$89,854.98 was based on the February 19th 2021 Agreement. Secondly in his response to the counterclaim that the said sum was mistakenly paid to him as salary, his pleading was that he was employed with the appellant during the period February-June 2021 by agreement between himself and the appellant. There was no pleading of an implied contract. His witness statement stated clearly there was an agreement for him to continue as the CEO of the appellant. It was only under intense cross-examination by Mr. Simon KC that the respondent admitted that there was no agreement with the appellant for him to continue, but rather it was implied.
- [36] Mr. Simon KC’s approach towards this evidence of an implied contract in his closing submissions was not that an implied contract was not pleaded, but rather that the evidence adduced by the respondent did not amount to an implied contract of employment. Indeed Mr. Simon KC acknowledged this fact.

⁷ Paragraph 1 of the Holding of the Judgment.

- [37] The respondent's closing submissions also addressed the issue of implied contract in particular in paragraphs 25-26, where Ms. Henry outlined in detail the various duties performed by the respondent during the period February- June 2021, which the appellant's sole witness Mr. Williams agreed were performed by the respondent and which were duties which he had performed prior to his resignation. Ms. Henry acknowledged that the respondent did not perform all of the duties of CEO during the period. However she contended that the appellant at no time informed the respondent not to perform the duties. This continued for approximately four (4) months. At no time during the period did the appellant inform the respondent that the payments were part of the agreed sum for the shares. The appellant allowed the state of affairs to continue as before the respondent's resignation.
- [38] In my view not only did the appellant not raise the pleading point in the court below, but as Ms. Henry submitted, it was not included as a ground of appeal, nor was it included in Mr. Simon KC's written submissions before this Court. Further no application was made by the appellant to amend its notice of appeal. It was at the eleventh (11th) hour, on the morning of the hearing of the appeal that Mr. Simon KC submitted the **George Bennett Byron** and **Fredrick Henry** authorities and raised the issue in his oral submissions. In both of these cases the pleading issue was a ground of appeal.
- [39] As stated earlier, the principle is grounded in fairness. Both parties having based their submissions before the learned judge on whether there was an implied contract of employment, and there being no ground of appeal that implied contract was not pleaded, it would not be fair to determine the appeal on the basis that implied contract was not pleaded, when the appellant had the opportunity to so argue before the learned judge and elected not to do so, but rather to base his case on an insufficiency of evidence to ground an implied contract. Having opted to take that route, the appellant ought not to be allowed to resile from it at this late stage.

[40] Mr. Simon KC did not seek to argue any of the grounds outlined in his grounds of appeal or refer to his written submissions. In my view rightly so, since they were all unmeritorious. I agree with the respondents' written submissions in response.

[41] In conclusion, for the reasons stated above, I will dismiss the appeal with costs to the respondent, to be assessed by a Judge of the High Court if not agreed within twenty-one days.

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

I concur.
Brian Cottle
Justice of Appeal [Ag.]

By the Court

Chief Registrar

