THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2013/0016

BETWEEN:

DELTA PETROLEUM (NEVIS) LIMITED

Appellant

and

[1] **OOJJ'S LTD (Doing business as OOJJ's Service Station)**
[2] OTHNEIL HYLIGER

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. John Carrington QC for the Appellant
Ms. Sherry-ann Liburd-Charles for the Respondents

2016: June 9;
October 10.

Civil appeal – Landlord and tenant – Covenant not to derogate from grant – Whether there was a derogation from grant by respondent – Whether respondent's omission amounts to breach of covenant – Whether appellant entitled to terminate lease agreement on basis of breach of fundamental term – Costs

On 1st August 2002, the appellant and first respondent entered into an agreement whereby the appellant was to supply the first respondent with petroleum products for resale. At the expiration of that agreement, the first respondent was indebted to the appellant in the sum of $486,833.84. The parties then entered into a second agreement on 30th May 2008 and under this agreement the first respondent's debt was to be treated as advance payment of rent due from the appellant to the second respondent pursuant to an agreement for lease of the second respondent's premises. A fixed term tenancy of five years (June 2008 - May 2013) commenced when the appellant entered the second respondent's premises at the beginning of July 2008. However, on or about 30th September 2008, the appellant

purported to repudiate the tenancy on the ground that it was unable to conduct its operations on the premises due to the second respondent's derogation from grant, in breach of the terms of the lease, by failing to ensure an adequate supply of electricity to the said premises. The purported repudiation was rejected by the respondents on the ground that there was no legal basis for termination. The respondents subsequently terminated the lease agreement in December 2009. A month after, a lump sum payment of $278,433.84 was made by the second respondent towards the debt. The appellant then filed a claim against the respondents for the outstanding amount due of $241,932.89. In response, the second respondent brought a counterclaim averring that the appellant owed him $208,000.00 in outstanding rent due for the duration of the lease agreement and that this amount, in addition to the lump sum payment, should be set off against the principal debt of $486,833.84 owed to the appellant. At first instance, the learned judge found, amongst other things, that the second respondent had not derogated from grant and that there was no legal basis for the appellant's purported termination of the lease on the ground of a breach of a fundamental term. Additionally, the learned judge found that the second respondent, having been successful on his counterclaim, was entitled to set off the $208,000.00 owed by the appellant for rent against the $486,833.84, which debt is satisfied when the lump sum payment is added, subject to any outstanding amounts owed by way of principal and interest. The appellant was also awarded the sum of $32,698.75 consisting of the outstanding principal and interest. Further, in relation to costs, the learned judge ordered prescribed costs on the quantum awarded to the appellant and prescribed costs on the value of the counterclaim to the second respondent. The appellants, dissatisfied with the decision of the learned judge, appealed.

Held: allowing the appeal in part and ordering costs in the appeal be assessed at 1/6 of the prescribed costs in the court below, that:

1. The covenant not to derogate from grant is prospective in nature. While it embraces any act or omission on the part of the landlord which has the effect of rendering the premises substantially less fit for the purpose, it does not embrace acts or omissions occurring before the lease agreement was entered into. In this case, the second respondent wired the demised premises before and not after the lease was entered into. Consequently, there was no derogation from grant with respect to the pre-lease wiring and/or any continuing consequences this might have had for the tenant.

   Southwark London Borough Council v Mills and others; Baxter v Camden London Borough of Council [1999] 4 All ER 449 applied; Chartered Trust plc v Davies [1997] 2 EGLR 83 applied; William Old International Limited v Arya and another [2009] EWHC 599 (Ch) at para. 36 applied.

2. In order to have validly terminated the lease agreement on the basis of there being a breach of a fundamental term of the agreement, there must have been, at the time of the purported termination, cogent evidence that conclusively established that (i) the adequate supply of electricity was in fact a fundamental term; and (ii) the second respondent failed in his duty to provide an adequate supply of electricity. In this case, the fundamental term relates to the supply of electricity to

the premises, not its adequacy. Since the agreement was not discharged on the ground of a breach of the fundamental term to supply electricity or more generally a breach of the covenant not to derogate from grant, the appellant wrongfully purported to terminate the lease agreement in September 2008. Further, there was no conclusive evidence that unequivocally established that the second respondent caused the fluctuations or that he was under an obligation to rectify the wiring of the demised premises so as to make it fit for its intended purpose. The learned judge was therefore right in holding that the appellant had no legal or fatual basis for the early termination of the lease agreement.

3. In relation to the entitlement to set off, since the appellant wrongfully purported to terminate the lease agreement, its obligation to pay rent continued until December 2009. Accordingly, the learned judge was entitled to set off the sum of $208,400.00 representing unpaid rent against the principal sum of $486,833.84 owed to the appellant.

4. On the question of costs, rule 65.5(1)(2) of the Civil Procedure Rules 2000 provides in part that the "value" of the claim, whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant – (a) by the amount agreed or ordered to be paid. In the case at bar, no money was "ordered to be paid" to the second respondent. The $208,400.00 was an amount that was set off against the debt owed to the appellant. The learned judge therefore had no legal basis for awarding prescribed costs to the second respondent on the counterclaim, which in effect was a set off.

Rule 65.5 (1) of the Civil Procedure Rules 2000 applied; Rule 64.6 (1) of the Civil Procedure Rules 2000 considered.

JUDGMENT

[1] PEREIRA, CJ: This appeal raises the central issue of whether there was a derogation from grant by the respondents, thereby entitling the appellant to terminate a lease agreement. Connected to this issue is a number of sub-issues, including whether the learned judge erred in finding that the second respondent was entitled to set off a certain sum against the debt due to the appellant; and whether the learned judge erred in principle in the exercise of his discretion when awarding costs.

The Background

[2] An agreement was entered into between the appellant and respondents on 1st August 2002 under which the appellant was obliged to supply the first respondent with petroleum products for resale. In keeping with the terms of the agreement, the first respondent was allowed a credit limit of $200,000.00 in relation to payments due to the appellant for the supply of petroleum products, and which the first respondent was obliged to pay off at the end of each month or when the credit limit was reached.

[3] The first respondent exceeded the credit limit and after the expiration of the agreement, acknowledged in writing, on or about 30th May 2008 that it was indebted to the appellant in the sum of $486,833.84.

[4] On 30th May 2008, a second agreement was entered into by the parties under which the first respondent's debt was to be treated as an advance payment of rent due from the appellant to the second respondent pursuant to an agreement for the lease of the second respondent's premises in Basseterre. The second respondent, by way of a promissory note, also agreed to pay its debts in installments of $12,000.00 per month commencing 6th June 2008, the date when the lease was to commence.

[5] A fixed term tenancy of five years (June 2008 – May 2013) commenced when the appellant entered into the premises at the beginning of July 2008. The appellant, however, purported to repudiate the tenancy on or about 30th September 2008 on the ground that it was unable to conduct its operations on the premises due to the second respondent's derogation from grant, in breach of the terms of the lease, by failing to ensure an adequate supply of electricity to said premises.

[6] The appellant averred that, as a consequence of the foregoing, only the sum of $36,000.00 was applied towards the first respondent's debt over the period July–September 2008.

[7] The appellant purported to repudiate the lease in September 2008, but this was not accepted by the respondents, who contended that there was no legal basis for the

purported termination. The respondents subsequently terminated the lease agreement in December 2009.

[8] In January 2011, the second respondent made a lump sum payment of $278,433.84 towards the debt.

[9] On 21st August 2011, the appellant filed a claim against the respondents claiming the sum of $241,932.89 as being the outstanding amount due to the appellant from the respondents pursuant to the agreement entered into on or about 30th May 2008.

[10] In response to the appellant's claim for the alleged outstanding sum, the second respondent brought a counterclaim averring that the appellant owed him $208,000.00 in outstanding rent due for the duration of the lease agreement and that this amount, in addition to the lump sum payment, should be set off against the principal debt of $486,833.84 that was owed to the appellant.

[11] The learned judge was asked to address several issues including:

(1) whether any additional terms should be implied into the lease agreement;

(2) whether the appellant had any legal basis for the termination of the lease agreement;

(3) whether the supply of electricity was a fundamental term of the lease agreement.;

(4) whether the respondent could lawfully terminate the lease agreement (in December 2009);.and

(5) whether the appellant was entitled to any outstanding principal and accrued interest with respect to the debt of $486,833.84.

[12] On the first issue, the learned judge found that, on the basis of AG of Belize and others v Belize Telecom Ltd and another Ltd and another,[1] a term may be implied from the language of an instrument when read in its commercial setting, to give effect to the intent of the parties; that is, to give business efficacy to the agreement. This would especially be the case if, in the absence of such an implied term, the whole transaction would be rendered "inefficacious, futile and absurd", as opined by Lord Salmon in Liverpool City Council v Irwin and another.[2]

[13] The learned judge found that the court could enforce the covenant not to derogate from grant, which, as explained by Sampson Owusu in Commonwealth Caribbean Land Law,[3] provides that if land is let, the landlord must refrain from doing anything in his neighbouring property that would render the demised premises unfit or substantially less fit for the purpose for which it was let. In other words, the landlord would not be allowed to take away with one hand what he has given with the other.

[14] In this case, because the covenant not to derogate from grant was an implied covenant (that is, an obligation on the part of the landlord to refrain from interfering with the supply of electricity), the learned judge found that it was unnecessary to imply a term into the lease agreement to give it business efficacy. It could not be said, according to the learned judge, that if the court did not imply a term as to the supply of electricity, the whole transaction would be rendered "inefficacious, futile and absurd".

[15] On the second issue, the learned judge found that at the time of the appellant's purported termination of the lease agreement, there was no legal basis for a unilateral decision to terminate said agreement. This conclusion was arrived at against the background of there having been several checks to the supply of electricity carried out by three technical personnel, the result of which did not definitively identify the cause of the fluctuations. The true cause was determined ex post facto in February 2010, after the lease had been terminated. In this context, the learned judge was satisfied

[1] [2009] 1 WLR 1988 at p.1994.

[2] [1976] 2 All ER 39 at p. 50.

[3] Sampson Owusu: Commonwealth Caribbean Land Law (Routledge-Cavendish 2006).

that the discovery of the cause of the fluctuations in 2010, that is, the faulty wiring by the second respondent, had no bearing on the question of the appellant's justification for the purported termination in September 2008 as at that time, there was no certainty as to who or what was responsible for the fluctuations. In short, therefore, the learned trial judge concluded that there was no legal basis for the appellant's purported termination of the lease agreement on the ground of a breach of a fundamental term.

[16] On the third issue, the learned judge found that the supply of electricity went to the root of the agreement so as to constitute a fundamental term. However, on the evidence, he did not find that the second respondent did anything to cause the fluctuations so as to interfere with the supply of electricity. Consequently, the lower court ruled that the second respondent had not derogated from grant.

[17] The learned judge also found that there could be no liability even if the demised premises had an inherent defect, as the tenant took the premises subject to the physical condition in which it was at the time of demise. In other words, the learned judge was satisfied that there was no obligation on the second respondent to ensure that the premises was fit for purpose, that is, for the operation of a service station. Rather, the obligation was on the tenant, the appellant, to ensure that the demised premises was fit for the intended use.

[18] On the fourth issue, the learned judge found that the appellant was not entitled to terminate the lease agreement in September 2008, given that there is no legal basis that could justify said termination. As such, the learned judge found that he was satisfied that the lease continued until it was terminated by the second respondent in December 2009. In consequence, the second respondent was entitled to $208,400.00, representing 17 months of unpaid rent, which was ultimately set off against the $486,833.84, which was owed to the appellant, subject to any outstanding balance and accrued interest.

[19] On the fifth issue, the learned judge concluded that the original debt of $486,833.84 attracted a compound interest rate of 5%. Therefore, the lump sum payment of $278,433.84, in addition to the rent of $208,400.00, would not have accounted for the 5% compound interest rate. On application of the 5% interest rate, the learned judge found that the amount of $29,815.83 as principal, and $2882.92 as interest, were due to the appellant (the sum total of $32,698.75).

[20] The learned judge ultimately ordered and declared that:

1. there was no need to imply a term to give business efficacy to the lease agreement between the appellant and the second respondent;

2. the appellant had no legal basis for terminating the lease agreement because:
   (a) There was no obligation on the part of the landlord to ensure that the demised premises was fit for the purpose intended.

   (b) Although there were fluctuations in the electricity supply, it was not shown that the second respondent caused such fluctuations.

   (c) The fluctuations in the electricity supply did not give rise to breach of a fundamental term.

   (d) The tenant could not have surrendered the lease, as a tenant has no right to surrender the lease without the consent of the landlord.

   (e) It was not shown that the second respondent accepted the purported termination by the appellant.

3. The second respondent succeeds on his counterclaim in the result that the second respondent is entitled to set off the $208,400.00 owed by the appellant for rent against the $486,833.84, which debt is satisfied when the lump sum payment of $278,433.84 is added, subject to any outstanding amounts owed by way of principal and interest.

4. The second respondent is entitled to terminate the lease agreement on account of the conclusions reached by the court in relation to the actions of the appellant (as stated in relation to the second issue).

5. The appellant is awarded the sum of $32,698.75, consisting of $29,815.82 as outstanding principal and $2,882.92 as accrued interest.

6. The second respondent has no duty to mitigate since the mitigation principle does not apply to a situation of recovery of arrears of rent.

7. The appellant is entitled to prescribed costs on the quantum awarded and the second respondent is entitled to prescribed costs on the value of his counterclaim.

The Appeal

[21] The appellant advanced nine grounds of appeal against the learned judge's decision of 23rd May 2013. They may, however, be encapsulated into the following three main issues:

(a) Firstly, whether the appellant could lawfully repudiate the lease agreement as at the end of September 2008 on the basis that:

(1) The lessor, the second respondent, had derogated from the grant in failing to correct the electrical wiring issues at the demised premises which caused the fluctuations in the electrical supply, thereby interfering with the appellant's ability, as lessee, to operate the gas station which was the purpose of the lease; and/or

(2) The supply of electricity was a fundamental term as found by the learned judge, and the second respondent's failure to rectify the electrical wiring at the premises, which was subsequently found to be the true cause of the fluctuations, was a breach of that

fundamental term by the second respondent, thereby entitling the appellant to terminate the lease.

(b) Secondly, whether the learned judge, in failing to find that the tenancy was terminated by Delta in September 2008, erred in his finding that the second respondent was entitled to set off the sum of $208,400.00 against the debt due to the appellant.

(c) Thirdly, whether the learned judge erred in principle in the exercise of his discretion in awarding costs on the counterclaim.

We will hereafter address the respective issues raised by the appellant in turn.

The purported repudiation of the lease agreement by the appellant

[22] I am of the view that, on the evidence before him, the learned judge was entitled to find that in the interest of business efficacy, a fundamental term of the agreement was that of the supply of electricity to the demised premises. This finding is justified on the basis of the commercial capacity within which the respective parties themselves acted, as well as the terms and overall context of the lease agreement, which clearly envisaged the use of the demised premises for commercial purposes.

[23] Notwithstanding this, however, it is my view that the learned judge was correct in refusing to imply a term into the agreement, as urged by the appellant, that there be an adequate supply of electricity to the demised premises so as to permit the anticipated operations thereon by the appellant. I consider that the appellant's submission on this point is misplaced, as it wrongfully assumes that the landlord was under an obligation at the time the tenancy agreement was entered into to make the demised premises fit for purpose. To the contrary, the second respondent, as landlord, was simply required to ensure that there was a supply of electricity to the demised premises, as this was fundamental to the very existence of the contract, but not to ensure that the supply of electricity was fit for its intended purpose. In fact, it is the appellant, as tenant, who was under an obligation to see to it that the demised premises, including the supply of

electricity, was fit for the purpose for which the premises were let. Having itself failed to ensure that the supply of electricity was adequate, the appellant cannot now argue that it is the respondents who were responsible for ensuring that the supply of electricity was fit for purpose.

[24] Furthermore, I consider that although it was a fundamental term of the agreement that there be a supply of electricity, this does not invariably mean that the respondents breached this fundamental term; the evidence, as rightly concluded by the learned judge, simply does not support such a conclusion. It is my view that, on the basis of the evidence before the lower court, the learned judge was entitled to find that there was no breach of the fundamental term as to the supply of electricity since, at the time of the purported termination of the lease in September 2008, there was no conclusive evidence that unequivocally established that it was the second respondent who was responsible for the fluctuations or, in any event, that he was under an obligation to correct the fluctuations when complaints were made to him in this regard by the appellant.

[25] More specifically, at the time of the purported termination of the lease by the appellant in September 2008, it could not be conclusively said that it was the wiring of the demised premises, which had been undertaken by the respondent at some earlier point, which was the ultimate cause of the fluctuations. The appellant nonetheless submits that the learned judge erred in finding that Mr. Ed Ventura's report on the state of the electricity supply was inconclusive. Having reviewed the lower court's decision in light of the reports presented by the electrical personnel, including Mr. Ventura, I am satisfied that the learned judge was so entitled to make the findings and reach the conclusions that he did, in view of the fact that Mr. Ventura's report highlighted two possible causes for the fluctuations: hydro or internal. Mr. Basil Woods, who also investigated the supply of electricity at the demised premises, similarly failed to conclusively find that the second respondent was responsible for the fluctuations. The appellant's averment that Mr. Sylvester was satisfied at the time of writing the letter purporting to terminate the lease agreement that it was the second respondent who

was responsible for the fluctuations is misplaced, as it is tantamount to saying that once Mr. Sylvester had been subjectively of the opinion that there was a breach, irrespective of the probative value of the facts before him impugning the landlord, it could unilaterally terminate the lease agreement. In short, it is my view that in order to have validly terminated the lease agreement on the basis of there being a breach of a fundamental term of said agreement, there must have been, at the time of the purported termination, cogent evidence that conclusively established that (i) the adequate supply of electricity was in fact a fundamental term; and (ii) the second respondent failed in his duty to provide an adequate supply of electricity. In view of the fact that the fundamental term as to the supply of electricity did not require the second respondent to provide an adequate supply of electricity, it is clear, as found by the learned judge that the appellant wrongfully purported to terminate the lease agreement in September 2008.

[26] I nonetheless find it particularly interesting that the appellant, in effect, argues that the discovery of the true cause of the fluctuations in February 2010 provides a sufficient justification for the purported termination of the lease agreement in September 2008. The appellant, in its list of authorities, refers to Chitty on Contracts,[4] which cites a number of cases[5] (though not landlord and tenant matters), which establish the general principle of contract law that "if a party refuses to perform a contract, giving a wrong or inadequate reason or no reason at all, he may yet justify this refusal if there were, at the time facts in existence which would have provided a good reason, even if he did not know them at the time of his refusal." What I understand the appellant to be, in effect, contending is that even if it repudiated the lease agreement in September 2008, giving an inadequate reason, it may nonetheless justify said repudiation, given that there were, at the relevant time, facts in existence (the second respondent's faulty wiring of the premises) which would have provided a good reason for such repudiation, although it only became aware of these facts in February 2010. While this argument

[4] Chitty on Contracts Volume 1 General Principles (31st Edition, Sweet & Maxwell 2012) 24-014.
[5] British & Beningtons Ltd v N.W. Cachar Tea Co [1923] A.C. 48, 71; Sheffield v Conrad (1988) 22 Con.L.R. 108; Reinwood Ltd v L Brown & Sons Ltd [2008] EWCA Civ 1090, [2009] B.L.R. 37, at para. 51; Seadrill Management Services Ltd v OAO Gazprom [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543, at para. 265.

is, on its face, attractive, it is my view that even if the appellant had been able to conclusively establish in September 2008 that it was the second respondent's faulty wiring of the demised premises that was the cause of the fluctuations, this would not have provided "good reason" for the purported repudiation of the lease agreement. First, as I have already indicated above, the fundamental term in question relates to the supply of electricity, and not its adequacy. As such, even if the second respondent's faulty wiring was the cause of the fluctuations, this could not be regarded as a "good reason" for repudiation as the second respondent was not under an obligation to ensure that the demised premises were fit for its intended purpose (that is, that the demised premises had an adequate supply of electricity for the purposes of efficiently operating the service station). Second, as will be discussed further below, even if the true cause of the fluctuations (the second respondent's faulty wiring) had been known in September 2008, the appellant's contention that there was conduct amounting to a derogation from grant would not have provided "good reason" for the purported repudiation of the lease agreement.

[27] The appellant has argued that the covenant not to derogate from grant was breached by the second respondent as landlord of the demised premises as a result of (i) the second respondent's wiring of the premises in a way that caused the fluctuations and (ii) the second respondent's failure to correct the problem when complaints were made to him by the appellant.

[28] In relation to the appellant's argument that the second respondent derogated from grant when he wired the demised premises in the manner that he did, I am of the view that this argument is misplaced, and, as rightly found by the learned judge, cannot justify the purported unilateral termination of the lease agreement in September 2008. Although, as found by the learned judge, the covenant not to derogate from grant embraces any act or omission on the part of the landlord which has the effect of rendering the premises substantially less fit for the purpose, it does not embrace acts or omissions occurring before the lease agreement was entered into. This view finds support in the dicta of Lord Millet in Southwark London Borough Council v Mills

and others; Baxter v Camden London Borough of Council,[6] when, in identifying the differences between the covenant to quiet enjoyment and the covenant not to derogate from grant, he said:

> "Once [the] artificial restrictions on the operation of the covenant for quiet enjoyment are removed, there seems to be little if any difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant. The principle is the same in each case: a man may not give with one hand and take away with the other. Whether a particular matter falls within the scope of the covenant for quiet enjoyment depends upon the proper construction of the covenant. As ordinarily drafted, however, the covenant shares two critical features in common with the implied obligation. The first is that they are both prospective in their operation. The obligation undertaken by the grantor and covenantor alike is not to do anything after the date of the grant which will derogate from the grant or substantially interfere with the grantee's enjoyment of the subject matter of the grant: see Anderson v. Oppenheimer (1880) 5 QBD 602. In the present case the tenancy agreement contained a covenant on the part of the council that "the tenant's right … *shall* not be interfered with …" That form of words clearly looks to the future. The second feature that the implied obligation and the covenant for quiet enjoyment have in common is that the grantor's obligations are confined to the subject matter of the grant. Where the covenant is contained in a lease, its subject matter is usually expressed to be the demised premises."[7] (emphasis added)

[29] In relation to the covenant as to quiet enjoyment (which, as highlighted above, shares certain commonalities with the covenant not to derogate from grant), Lord Hoffman in Southwark LBC, opined,

> "It is prospective in its nature: see *Norton on Deeds* (2nd ed. 1928) pp. 612–613. It is a covenant that the tenant's lawful possession *will* not be interfered with by the landlord or anyone claiming under him. The covenant does not apply to things done before the grant of the tenancy, even though they may have continuing consequences for the tenant. Thus in *Anderson v. Oppenheimer* (1880) 5 QBD 602 a pipe in an office building in the City of London burst and water from a cistern installed by the landlord in the roof flooded the premises of the tenant of the ground floor. The Court of Appeal held that although the escape of water was a consequence of the maintenance of the cistern and water supply by the landlord, it was not a breach of the covenant for quiet enjoyment. It did not constitute an act or omission by the landlord or

[6] [1999] 4 All ER 449.
[7] At p. 467

> anyone lawfully claiming through him after the lease had been granted. The water system was there when the tenant took his lease and he had to take the building as he found it. Similarly in *Spoor v. Green* (1874) LR. 9 Exch 99 the plaintiff bought land and built houses upon it. The houses were damaged by subsidence caused by underground mining which had taken place before the sale. The Court of Exchequer held that there was no breach of the covenant for quiet enjoyment which had been given by the vendor."[8] (emphasis added)

[30] The prospective nature of the covenant not to derogate from grant also resonates in the brief, yet pointed, dicta of Nicholls LJ in Johnston & Sons Ltd v. Holland,[9] when he described the covenant as being one that "… operates to restrict the future activities of a grantor …" This approach was recently reaffirmed by Judge Pelling QC in William Old International Limited v Arya and another.[10]

[31] In short, therefore, on the basis of the aforementioned authorities and the undisputed evidence that the second respondent wired the demised premises before, and not after, the lease agreement was entered into, I find that there has been no derogation from grant with respect to the pre-lease wiring and/or any '[…] continuing consequences [this might have] for the tenant.'

[32] A related question is whether the second respondent's alleged failure to rectify the fluctuations after the appellant made several complaints to him about the inadequate supply of electricity amounts to a breach of the covenant not to derogate from grant. In addressing this issue, it is important, from the very outset, to make it clear that not only acts can constitute a derogation from grant; omissions, in principle, can also suffice. This view is shared by the learned authors of Hill and Redman in their text, Law of Landlord and Tenant[11], citing the English Court of Appeal case of Chartered Trust plc v Davies.[12] In Charted Trust, the failure by a landlord of a shopping mall to exercise powers available to him to prevent a tenant from conducting his business in a

[8] At pp.455-456.
[9] [1988] 1 EGLR 264.
[10] [2009] EWHC 599 (Ch) at para. 36.
[11] LexisNexis 1988.
[12] [1997] 2 EGLR 83.

way which caused nuisance to another as to result in the latter going out of business was held to constitute a derogation from grant. The Court in Charted Trust noted that by choosing to do nothing, the landlord thereby made the premises materially less fit for the purpose for which they were let and had, therefore, derogated from the grant, thereby entitling the respondents to repudiate the lease agreement.

[33] The general principle that an omission can amount to a derogation from grant was also accepted in William Old International Limited v Arya and, a case decided upon by the English and Wales High Court, and which cited Chartered Trust for the proposition that 'in order to succeed (whether on derogation from grant or quiet enjoyment or nuisance) on the basis of a landlord's failure to act, the tenant must show that the landlord has a duty to act."[13] More recently, Justice Neuberger in Platt and others v London Underground Ltd[14] appears to have treated the proposition that an omission can amount to a derogation from grant as being axiomatic, when he noted that "in order to determine whether a specific act or omission on the part of the landlord constitutes derogation from grant, it is self-evidently necessary to establish the nature and extent of the grant".

[34] With regard to the nature and extent of the grant, the learned judge in the instant case accepted that the implied covenant not to derogate from grant embraced "any interference with the supply of electricity given the purpose of the tenancy." This finding was not disputed on appeal. Notwithstanding this, however, the related question arises as to whether it can be said that the appellant has shown that "the landlord had a duty to act". The evidence before the lower court was that, at the time at which the appellant purportedly terminated the lease agreement in September 2008, there was no conclusive indication as to the cause of the fluctuations. This raises the all-important question - how, therefore, could the second respondent be under a duty to act, that is, to rectify the fluctuations in the supply of electricity, when he was not

[13] On this point, it is important to note that at paragraph 68 of his judgment, the learned trial judge in the Delta Petroleum (Nevis) Limited case found that the second defendant's evidence on cross examination was that he had such an obligation to ensure that the premises were fit for the operation of a gas station using sterling pumps.

[14] [2001] 2 EGLR 121 at p. 122.

conclusively shown to be responsible for the fluctuations and had not assured the appellant that the demised premises, including the supply of electricity, was fit for purpose, in the first place? I am of the view that although an omission can, in principle, constitute a derogation from grant, on the facts of the instant case, it has not been shown that, at the time of the purported termination of the lease agreement in September 2008, the second respondent caused the fluctuations, or that, in any event, he was under an obligation to rectify the wiring of the demised premises so as to make it fit for its intended purpose.

[35] In view of the above, I consider that the appellant had no legal or factual basis for purporting to terminate the lease agreement in September 2008. In short, because the agreement was not discharged on the ground of a breach of the fundamental term to supply electricity or more generally a breach of the covenant not to derogate from grant, the appellant, as rightly found by the learned judge, wrongfully purported to terminate the lease agreement in September 2008.

The entitlement to set off

[36] Having found that the appellant had no legal or factual basis upon which to terminate the lease agreement in September 2008, the learned judge ruled that the lease agreement continued until the respondents terminated it in December 2009. Therefore, the appellant's obligation to pay rent did not end in September 2008, but continued until December 2009. For this reason, it is clear that the learned judge was entitled to set off the sum of $208,400.00 against the principal sum of $486,833.84 that was owed to the appellant.

The award of costs

[37] The final consideration that I have been asked to address is the argument advanced by the appellant that the learned judge erred in principle in determining costs, given that he failed to give reasons as to why the general rule under rule 64.6(1) of the Civil Prcocedure Rules 2000, (CPR) that the successful party is entitled to his costs should

not be applied. The appellant contends that it was the successful party in light of the fact that the payments made by the second respondent had not extinguished the debt owed to it. More specifically, the appellant avers that the proper order for costs should have been that the appellant was entitled to prescribed costs on its entire claim in the sum of $241,932.89, and the second respondent was entitled to prescribed costs on the counterclaim of $208,400.00. Put another way, it is the appellant's view that "if there was an entitlement to the set off, then the second [respondent] could not be entitled to prescribed costs based on the value of that set off unless the [appellant] was also entitled to prescribed costs based on the entire value of its claim on which it must have succeeded in order for a set off to apply and the appellant still to receive a net award in the judgment."[15] The thrust of the appellant's contention, therefore, is that the learned judge was not entitled to award the second respondent prescribed costs on the value of his counterclaim, while only awarding the appellant costs on the quantum after set off; that is, the sum of $32,698.75.

[38] At the outset, I wish to make it clear that I am in agreement with the appellant that, as a general rule flowing from CPR 64.6(1), if a court decides to award costs, it must order the "unsuccessful party to pay the costs of the successful party." Notwithstanding this, however, as recently opined in the Jamaican case of VRL Operations Limited v National Water Commission and others [16] "the Court may, of course, depart from the general rule, but it remains appropriate to give 'real weight' to the overall success of the winning party: Scholes Windows v Magnet (No.2) [2000] ECDR 266 at paragraph 268." The question to be determined, then, is who is the successful or winning party, as only then is the Court likely to approach costs from the right perspective.[17] The question of who is the successful party 'is a matter for the exercise of common sense', given that 'success', for the purposes of the CPR, is 'not a technical term but a result in real life'.[18] On the basis of the foregoing, I accept that the issue of whether the appellant in the case at bar, Delta Petroleum (Nevis) Limited, was

[15] Paragraph 35of Submissions of the appellant and list of authorities filed 21st April 2016.
[16] [2014] JMSC Civ 84.
[17] Per Longmore LJ in Barnes v Timetalk [2003] EWCA Civ 402
[18] Per Lightman J in BCCI v Ali (No. 4)) 149 NLJ 1222. This case was referred to in paragraph 10 of VRL Operations Limited v National Water Commission and others [2014] JMSC Civ 84.

the successful party is a matter that must be looked at in a realistic and commercially sensible way.[19]

[39] The learned judge in the case at bar had found, and this is not disputed on appeal, that the parties operated in a commercial capacity, which is in itself instructive on the issue of costs in light of the decision of Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd & Another,[20] wherein Mr. Justice Jackson expressed the view that, 'in commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.'

[40] This view finds support in the English and Wales Court of Appeal decision of Burchell v Bullard and others,[21] which ruled that the determination of who is the unsuccessful party in a commercial context is established by identifying "who writes the cheque at the end of the case." The second respondent in the case at bar, however, avers that, on the basis of Fearns **(t/a "Autopaint International")** v Anglo-Dutch Paint and Chemical Co. Ltd and others,[22] he was the successful party because, as found by the learned trial judge, the appellant was indebted to them in the sum of $208,400, and that when this amount was set off against the principal debt of $486,833.84 (which was further reduced by a lump sum payment by the respondent of $278,433.84), only a relatively meager balance of $32,698.75 had to be paid, at least when compared to the larger sum of $241,932.89 that was claimed by the appellant. The crux of the second respondent's submission, therefore, is that Fearns stands for the proposition that where the amount awarded (the balance after set off) represents a relatively insignificant amount when compared to the size of the claim and the very existence of this amount depended on the "adventitious effects of interest rates and exchange movements over the period of the litigation", the party who is awarded the balance should not be regarded as the "winner."

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[19] Per Mann J in Fulman Leisure Holdings v Nicholson Graham and Jones [2006] EWHC 2428 at para. 3.
[20] [2008] EWHC 2280 (TCC).
[21] [2005] EWCA Civ 358.
[22] [2010] EWHC 2366.

[41] I do not, however, agree with the second respondent on this point. In my view, it cannot be said that the balance of $32,698.75 awarded by the learned judge represents a relatively insignificant amount, as this is, in mathematical terms, around 13.5% of the amount ($241,932.89) claimed by the appellant. I am also of the view that the amount arrived at by the lower court, $32,698.75, did not depend on the "adventitious effects of interest rates and exchange rate movements over the period of litigation", since a 5% annual interest rate on the debt was fixed from the very outset and, therefore, cannot be regarded as "adventitious." Accordingly, I find that, given the commercial nature of the relationship between the parties, the appellant, the party receiving the payment of $32,698.75, must be characterized as the successful party, while the respondents, who are required to "write the cheque at the end of the case", are the unsuccessful party. This finding invariably leads to the conclusion that, in accordance with CPR 64.6(1), it was the appellant who, as a general rule, should have been awarded costs.

[42] Having found that the appellant was the successful party, I must now direct my mind to the question of whether the learned judge erred in the manner in which he ultimately made the award of costs. The learned judge, under the heading of "costs", briefly indicated that, 'the court awards prescribed costs to the claimant on the quantum of the award of interest. And the second defendant is awarded costs on the value of his counterclaim.'[23] This order as to costs is not, on the face of it, consistent with the general rule found in CPR 64.6(1) that the successful party must be awarded costs; we have already indicated that, in our view, the appellant was the successful party. While I accept that this general rule could very well be displaced in light of all the circumstances of a case, the discretion of the learned judge in this regard had to be exercised judiciously. Instructive on this point is the fact that nowhere in the judgment does the learned judge indicate his reasons for departing from the general rule. That said, I am prepared to accept that the learned judge had a wide discretion in so far as the award of costs was concerned, and, on the basis of CPR 42.11, could be said to have implicitly chosen to make a separate order as to costs in circumstances where he

[23] Para 142 of lower court judgment.

found that both the claim and counterclaim in the case at bar were successful. In short, although it is regrettable that no reasons were stated for departing from the general rule provided for in CPR 64.6(1), I am satisfied that the learned judge did not arbitrarily exercise his discretion, as he implicitly took into account the fact that he was entitled to make a separate award of costs to both parties in a case involving a successful claim and counterclaim.

[43] Notwithstanding this, however, I cannot help but agree with the appellant that the learned judge did not have a proper legal basis for awarding prescribed costs to the appellant on the quantum of the award of "interest", while awarding the second respondent costs on the value of his counterclaim. I have come to this informed position having reviewed CPR 65.5(1), which provides:

> "(2) The "value" of the claim, whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –
> (a) by the amount agreed or ordered to be paid […]" (emphasis added)

[44] While I am of the view that the learned judge acted consistently with CPR 65.5(1) when he made an award of prescribed costs on the amount "ordered to be paid" to the appellant ($32,698.75), I nonetheless find that he had no legal basis to award prescribed costs to the second respondent on the counterclaim because no money was "ordered to be paid" to the second respondent; the $208,400.00 was simply an amount that was rightfully set off against the debt owed to the appellant. Accordingly, I consider that the learned judge erred when he awarded the second respondent prescribed costs on the counterclaim. In short, no costs should have been awarded to the second respondent, as there was no order from the court regarding money that had to be paid to him.

Conclusion

[45] In light of the foregoing, it is my conclusion that the appellant has not established any basis upon which this court should interfere with the learned judge's decision regarding the allegations of breach of a fundamental term of the lease agreement or

the covenant not to derogate from grant. While I am mindful that this Court could very well substitute its own judgment in place of the factual findings of the learned judge, I nonetheless find, after having reviewed the evidence in light of the learned judge's findings, that there is no proper basis for doing so, as the learned judge cannot be said to have been "plainly wrong." In reaching this conclusion, I note the views endorsed by Lewison LJ in Fage UK Ltd and another v Chobani UK Limited and another[24] regarding the exceptional nature of a decision on appeal to substitute the findings of a trial judge with those of the appellate court.

[46] Furthermore, it is my view that the second respondent was entitled to set off the sum of $208,400.00 against the principal sum of $486,833.84 that was owed to the appellant as a result of rent accruing until the respondents legally terminated the lease agreement in December 2009.

[47] However, on the question of costs, I find that the learned judge erred in awarding prescribed costs to the second respondent on the counterclaim, though he was correct in making an award of prescribed costs to the appellant on the amount that was ordered to be paid ($32, 698.75).

[48] Bearing in mind the fact that the appellant has succeeded on only one of its three main grounds of appeal, costs in the appeal are assessed at 1/6 of the prescribed costs in the court below.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Mario Michel
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal

[24] [2014] EWCA Civ 5.