IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

BEFORE HIS LORDSHIP: THE HON. JUSTICE PETER O. AFFEN

THURSDAY, FEBRUARY 14, 2019

SUIT NO. FCT/HC/CV/3083/2017

BETWEEN:

MR MAIDUGU IBRAHIM … … … PLAINITFF

AND

1. SHARON PROPERTIES LIMITED
2. MRS R. U. OSULA-MKU ATU } **… … DEFENDANTS**

J U D G M E N T

THIS LITIGATION is an offshoot of a botched lease of an office space situate at Suite 8, Jeriel Plaza, Wuse 2, Abuja between the 1st Defendant [as landlord] and the Plaintiff [as tenant] sometime in June 2015. Everything seemed well initially but things fell apart subsequently when the Federal Capital Development Authority (FCDA) demolished Jeriel Plaza on or about 3/8/15. The Plaintiff alleged that he made full payment for the office as agreed but had not taken possession before the demolition, and is entitled to recover same from the Defendants as money had and received for a consideration that has wholly failed. He has therefore taken out the present action against the Defendants, jointly and severally, claiming the reliefs endorsed in the amended statement of claim dated 29/3/18 [which relates back to 6/10/17 when the original writ of summons and accompanying statement of claim were filed] as follows:

> "1. A DECLARATION that the demolition of Jeriel Plaza by the Federal Capital Development Authority (FCDA) was as a result of the wilful acts and negligence of the 1st and 2nd Defendants who built on the

said property without a requisite approval from the Federal Capital Development Authority (FCDA).

2. AN ORDER directing the 1st and 2nd Defendants to pay the Plaintiff the sum of ₦1,450,000.00 (One Million Four Hundred and Fifty Thousand Naira) only being the balance of the amount owed to the Plaintiff by the 1st and 2nd Defendants.

3. General damages of ₦5,000,000.00 (Five Million Naira) only.

4. The sum of ₦500,000.00 (Five Hundred Thousand Naira) only being the costs of this action."

The Defendants filed an amended statement of defence dated 24/4/18 wherein they joined issues with the Plaintiff, insisting that the Plaintiff took possession of the property one week after making payment on 25/6/15 as provided in the commencement clause of the Offer of Lease. At the plenary trial, the Plaintiff testified for himself as sole witness, whilst the Defendants equally fielded one witness.

Testifying as PW1, the Plaintiff [*Maidugu Ibrahim*] adopted his statement on oath dated 29/3/18 and tendered Exhibits P1^{A} – P1^{E}. He deposed that the 1st Defendant was the landlord/owner of Suite 8, Jeriel Plaza at No. 50, Plot 2, Blantyre Street, Wuse 2, Abuja; that he was offered a lease of the said office space for a term of two (2) years at a rent of ₦5,450,000.00 on 23/6/15; that as requested by the 2nd Defendant who is the Managing Director of the 1st Defendant, he transferred the agreed sum into Zenith Bank Account No. 1013683523 belonging to one *Siswi Grey Innocent* on 25/6/15 in full and final payment for the lease and was issued with a receipt dated 25/6/15; that after making payment but whilst he was yet to take possession, the Federal Capital Development Authority (FCDA) which is the agency responsible for the development, planning and supervision of lands allocated within Federal Capital Territory demolished the plaza on 3/8/15 much to his

consternation; that he was told upon enquiry from FCDA that the property was demolished because the Defendants developed same without obtaining requisite approvals in violation of extant laws; that after the demolition, the Defendants wrote a letter of apology to him on 7/8/15 stating that his interest would be looked into adequately; that he informed the Defendants that he intended to use office space as a barbing salon and beauty centre but they wilfully and surreptitiously leased the property to him even though they knew at all material times that the property did not meet FCDA's standards; that he made several efforts right from the date of demolition to recover the full amount paid to the Defendants, whereupon they refunded N4m to him but have deliberately refused, failed and neglected to refund the balance of ₦1,450,000, and proceeded to write him a letter dated 5/4/17 stating that the balance will not be paid; and that the Defendants' refusal to refund the said balance has occasioned financial crisis to him and his entire family. The Plaintiff further deposed that based on market survey he carried out before leasing the property at ₦5,450,000, he would have made ₦7m per month/ ₦84m per annum]; that the Defendants had full knowledge of the planned demolition yet they wilfully and negligently leased same to him in the belief that they can negotiate with FCDA to shelve the demolition; and that owing to the frustration he suffered in recovering the balance of the rent he paid to Defendants after the demolition, he engaged the services of *Messrs Ojukwu Chikaosolu* & Co. and paid the sum of ₦500,000 only as legal fees.

Under cross examination by *Adeola Adedipe, Esq.* of counsel for the Defendants, the Plaintiff [PW1] stated that he holds a Masters Degree in Disaster Management; that the information given to him at FCDA as deposed in his statement on oath was not in writing; that he does not know whether or not the demolished plaza has been rebuilt but would not be surprised to hear that it has not been rebuilt till date because the verbal information he got was that the land is not meant for that purpose. The Plaintiff conceded that he was

paid N4m with an apology letter but insisted that he is entitled to a full refund notwithstanding that there are no new tenants. He insisted that he did not lease the property through any agent because he saw an advert whilst passing through the property and contacted the Defendants directly.

At the close of the Plaintiff's case, the Defendants' sole witness, *Emmanuel Agbator* [DW] adopted his statement on oath dated 24/4/18 wherein he deposed that he is the Assistant Chief Operating Officer of the 1st Defendant; that the Plaintiff took possession one week after making payment for the lease on 25/6/15 in line with the commencement clause in the Offer for Lease which contains the relevant charges wherewith the Plaintiff was billed, including details of the charges that are refundable; that the Plaintiff became entitled to a refund of ₦4m by virtue of the Rent Clause in the Offer for Lease because the Defendants' property was demolished by FCDA and the same has already been refunded to him; that the Offer for Lease succinctly states the breakdown of the sum of ₦5,450,000 payable by the Plaintiff to the Defendants, and the extent to which a refund can be realised; that the Plaintiff is not entitled to any additional refund, and the Defendants are not responsible for any purported financial crisis allegedly suffered by the Plaintiff on account of the purported non-refund or non-payment of the sums claimed; that the Defendants have fulfilled their side of the terms of lease and are not liable for any costs to the Plaintiff; that the terms in the Offer Letter of 23/6/15 gives a breakdown of the amount payable by the Plaintiff as agreed, including the extent of refund, to wit: (a) the VAT of 5% which is non-refundable, (b) agency/legal fee of ₦600,000 which is equally non-refundable, (c) ₦50,000 as fixed Annual Insurance Premium deposit paid on occupier liability by the Plaintiff without refund, (d) a one-off fixed Caution Deposit of ₦100,000.00 on entry, which is not refundable; and (e) facilities for service charge already put in place before the demolition, which are not refundable; that some of the items listed in the Offer Letter constitute the

alleged claim of ₦1,450,000, which are non-refundable; that the demolition of the property was not due to any negligence on the part of the Defendants, who are themselves victims of the system; that the 1st and 2nd Defendants acted in good faith by refunding the sum of ₦4m (which represents the actual rent sum) to the Plaintiff in spite of the huge financial losses they have suffered as a result of the demolition; and that the Plaintiff is not entitled to the claims set out in the statement of claim.

Under cross examination by *Chikaosolu Ojukwu, Esq.* of counsel for the Plaintiff, the DW1 maintained that he knew the 2nd Defendant, *Mrs Osula-Mku Atu*]; that his duties as Assistant Chief Operating Officer of the 1st Defendant entails assisting the Chief Operating Officer in the day-to-day running of the company i.e. generating tenants and ensuring cordial relationship and support. He rejected the suggestion that he is not in-charge unless specific functions are assigned to him by the Chief Operating Officer, insisting that there are specific responsibilities attached to his office which he discharges in conjunction with that of the Chief Operating Officer. He stated that he is aware that the property was demolished by the FCDA because they claimed there was no approval by Development Control; that the demolition is wrongful because approval was granted; and that he has the approval with him but could not give details of the approval because he is not quite schooled in engineering matters. He could not recall in detail the subject of the approval and was also not so sure of the person/entity to whom the approval was addressed, but thinks it must have been addressed to Sharon Properties Ltd. The DW1 stated that he would need to consult the Accounts Department to ascertain if VAT has been remitted to the Federal Inland Revenue Service (FIRS) in respect of this transaction; that Insurance Premium refers to Occupier's Liability Insurance Premium [as opposed to insurance against hazards on the property] and that it covers liability for damage done to visitors/clients of tenants in the premises. He conceded that there was no reference to occupier's liability in the offer

letter [Exhibit P1A] but explained that Caution Deposit is a fund deposited by the tenant which is refundable at the end of the tenancy if there is no incidence of damage to, or poor handling of, the property. The DW1 conceded that he was unable to assess the property to ascertain whether the Plaintiff damaged or handled it poorly because of the demolition; but insisted that the Plaintiff is not entitled to refund of caution deposit notwithstanding that no assessment was made against him. He could not remember the name of the particular agent involved in the transaction, insisting that several agents were introducing prospective tenants at the same time. The DW1 conceded that the Plaintiff did not execute any tenancy agreement and none is in his possession; and that the reason for service charge is contained in the column titled "services" at page 1 of Letter of Offer [Exhibit P1A] but they did not render services for up to twelve (12) months.

At the close of plenary trial, the parties filed and exchanged final addresses as enjoined by Order 33 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018 ("CPR"), which addresses were adopted by the respective counsel for the parties in open court on 19/11/18. The Defendants' final address and reply on points of law are dated 24/10/18 and 19/11/18 respectively; whilst the Plaintiff's final address is dated 14/11/18. The sole issue formulated on behalf of the Plaintiff is: "**Whether the Plaintiff is not entitled to judgment on the reliefs sought"** whilst the Defendants identified two (2) issues for determination as follows:

1. *On the state of pleadings and evidence led in this case, whether the Plaintiff has successfully discharged the burden of proof placed on him, in order to be entitled to Relief One sought in the Amended Writ of Summons.*

2. *Having regard to the solemn doctrine of pacta sunt servanda, whether the Plaintiff will be entitled to Relief 2 sought in the Amended Writ of Summons, when the condition precedent to its activation under the*

Exemption Clause contained in the duly accepted Offer for Lease has not been shown to have crystallised or be in existence.

Upon a careful and insightful consideration of the issues formulated by the parties as reproduced above, it seems to me that the Plaintiff's sole issue is all-encompassing and subsumes the two (2) issues formulated on behalf of the Defendants. I will therefore adopt the Plaintiff's sole issue in resolving this matter, the facts of which are straightforward and by no means complex or convoluted.

The reliefs sought and the evidence led by or on behalf of the parties are set out hereinbefore. The law is well settled, if not elementary, that anyone who desires the court to give judgment as to any legal right or liability must prove those facts. Evidence is the basis of justice, and the rule of evidence is that he who asserts the positive must prove. See ***OKAFOR v EZENWA [2003] 47 WRN 1 at 11*** *–per Uwaifo JSC,* ***VULCAN GASES LIMITED v GESELLSCHAFT [2001] 26 WRN 1 at 59, ABIODUN v ADEHIN (1962) 2 SCNLR 305*** and ***MOROHUNFOLA v KWARATECH [1990] 4 NWLR (PT. 145) 506.*** The burden of proof rests upon him who affirms and not upon him who denies, since by the nature of things he who denies a fact cannot produce any proof. See ***AROMOLARAN v. KUPOLUYI [1994] 2 NWLR (PT. 325) 221, ARASE v. ARASE (1981) 5 SC 33 at 37, ELEMO v. OMOLADE (1968) NMLR 259, OSAWARU v. EZEIRUKA (1978) 6-7 SC 135 at 145, UMEOJIAKO v. EZENAMUO (1990) 1 SCNJ 181 at 189*** and ***UGBO v. ABURIME [1993] 2 NWLR (PT. 273) 101.*** In a civil action such as the present, the o*nus probandi* lies on the party who will fail if no evidence were adduced on either side. See ***ss. 131-138, Evidence Act 2011.***

In the case at hand, the undisputed facts are that the 1st Defendant herein [*Sharon Properties Limited*] offered to lease to the Plaintiff an office space measuring approximately 21m^2 and appurtenances thereto at Suite 8, Jeriel

Plaza, No. 50 (Plot 2) Blantyre Street, Wuse II, Abuja for a term of two years. The Plaintiff accepted the terms of offer as contained in the letter dated 23/6/15 [Exhibit P1] and paid [vide Exhibit P1B] the agreed sum of ₦5,450,000, the receipt whereof the 1st Defendant acknowledged as shown in the Official Receipt dated 25/6/15 [Exhibit P1C]. As things panned out, Jeriel Plaza was demolished by FCDA on or about 3/8/15 for reasons that are not of immediate relevance in the resolution of this matter. The 1st Defendant subsequently refunded the sum of ₦4m to the Plaintiff but retained the balance, insisting in its letter of 5/4/17 that the shortfall of ₦1,450,000 from the ₦5,450,000 paid *"in respect of the botched lease transaction represented fees on statutory payments made in the course of processing the said lease contractual relationship between Sharon Properties Limited and your good self";* and that the refund of ₦4m *"was a demonstration of our good will and integrity, considering the fact that Sharon Properties Limited invested monies in the renovation of the demolished properties".* The Plaintiff could not see its way clear that the 1st Defendant could validly retain any part of the payment made by him, hence this action.

Now, there is some disagreement as to whether or not the Plaintiff entered into possession of the office space for which he made payment to the 1st Defendant prior to the demolition of Jeriel Plaza. Whereas the Plaintiff maintained on the one hand that he never took possession at all material times, the Defendants insist that he did so within one week of payment in accordance with the terms of offer in Exhibit P1A. The general law is that a lease is required to be by deed in order to create a legal estate, but the formality of deed or writing does not apply to a lease which takes effect on possession for a term not exceeding three years. See ***OKOYE v NWULU [2001] 11 NWLR (PT. 224) 367***. The essence of a tenancy relationship is not so much about the tenant taking possession as it is about the landlord '*delivering or yielding*' exclusive possession to the tenant, and whether there is a complete

agreement between the parties on essential terms and any other terms deemed important by them. See ***EKPANYA v AKPAN [1989] 2 NWLR (PT. 101) 86 at 90*** and ***TIVERTON ESTATES LIMITED v WEARWELL LIMITED (1974)1 All E.R. 209 at 219.*** Of course, it goes without saying that a tenant cannot take possession of premises without the landlord [or his authorised agent] first delivering or yielding possession to him. No lease was created by deed in the instant case, and it occurs to me that mere payment of money without more does not constitute proof that a prospective tenant entered into possession. A landlord (such as the 1st Defendant herein) who asserts that a tenant entered into possession upon payment of money has the burden of proving that exclusive possession was yielded or delivered to the tenant, which is of the essence in a tenancy. He is not at liberty to merely allege that the tenant took possession without demonstrating this by credible evidence. If this were not so, a landlord could conveniently withhold or retain possession of premises after collecting money from a prospective tenant and still be in a position to insist that the tenant has taken possession by the mere fact of payment and receipt of money.

At any event, whereas the commencement clause in the offer for lease [Exhibit P1A] states in one breadth that the "c*ommencement of tenancy shall be one week from the date of payment*", it states in another breadth that "*PLEASE NOTE that Tenant(s) must sign Tenancy Agreement and collect Occupation Permit before renovating or occupying any Suite in the Plaza*". The DW1 conceded under cross examination that 'the Plaintiff did not sign any tenancy agreement and he does not have any tenancy agreement in his possession'. There is also no shred of evidence to show that the Plaintiff collected any occupation permit from the 1st Defendant. In the absence of these essential preconditions that must be in place before the Plaintiff could enter into occupation of the Plaza and/or any positive evidence showing that the Plaintiff actually entered into possession, I cannot but find and hold that the Plaintiff did not enter into

possession of the office space for which he made payment to the 1st Defendant at all material times.

Fundamentally, the contention of the Defendants, as I understand it, is not that the balance of ₦1,450,000 was retained by them as 'rent' for the period the Plaintiff was allegedly in possession of the office space. No. Rather, their contention is that the said sum "*represented fees on statutory payments made in the course of processing the said lease*….". In this regard, I note that a breakdown of the total consideration payable by the Plaintiff is set out in Clause 9 of the Offer of Lease [Exhibit P1A] as follows:

9. TOTAL CONSIDERATION:

1.	Rent per annum at N2,000,000.00 x 2 (years)	= 4,000,000.00
2.	Service charge per annum	= 500,000.00
3.	Agency fee at 10% of rent	= 400,000.00
4.	Legal fee at 5% of rent	= 200,000.00
5.	VAT at 10% of rent	= 400,000.00
6.	Insurance Premium	= 50,000.00
7.	Caution Deposit	= 100,000.00
	TOTAL	**= 5,450,000.00**

The Plaintiff was required to pay these various sums by bank draft to the 1st Defendant, save for Agency and Legal Fees which were to be paid to *Messrs Jezreel Grace Villas & Apartments Limited*. What this means is that agency and legal fees were meant for the benefit of a third party. But the evidence adduced before me reveals that the Plaintiff paid the entire sum of ₦5,450,000 through bank transfer on 25/6/15 to the 1st Defendant who acknowledged receipt by issuing Exhibit P1C. The sum of N4m representing rent for two years, which has already been refunded by the 1st Defendant is not in contention in these proceedings. But we shall find out *anon* whether the refund was done merely in demonstration of the 1st Defendant's 'goodwill and integrity' [as stated in Exhibit P1D], or in furtherance of their legal obligation

to the Plaintiff. The relevant enquiry therefore is as to whether the 1st Defendant could validly retain any part of the payment made by the Plaintiff under any guise whatsoever in the peculiar facts and circumstances that have come to light in these proceedings.

It is hornbook law that parties have the freedom of contract and are bound by the terms of their agreement: they must be held to their bargain. This is encapsulated in the Latinism, *pacta sunt servanda* which literally means '*agreements must be kept*'. See ***E. N. NWAKA v SPDC [2003] 3 MJSC 136 at 146-147, CHUKWUMAH v SPDC [1993] 4 NWLR (PT. 289) 512, UNION BANK OF NIGERIA v OZIGI [1994] 3 NWLR (PT. 333) 385, ALLIED TRADING CO. LTD v G.B.N. LINE [1985] 2 NWLR (PT. 5) 74*** and ***JADESIMI v EGBE [2003] 36 WRN 79 at 102***. It is not the preoccupation of the court to make a contract for the parties or rewrite the one they have made. See ***AGNOTECH v MIA & SONS LTD (2000) 12 SC (PT. II) 1*** and ***OWONIBOYS TECHNICAL SERVICES LTD v UNION BANK OF NIGERIA LTD [2003] 15 NWLR (PT. 844) 545***. Insofar as the conditions for the formation of a contract are fulfilled by the parties thereto, they will be bound by it. See ***BABA v NIGERIA CIVIL AVIATION TRAINING CENTRE [1991] 5 NWLR (PT. 192) 388, OYENUGA v PROVISIONAL COUNCIL OF UNIVERSITY OF IFE (1965) NMLR 9, KOIKI v MAGNUSSON [1999] 8 NWLR (PT. 615) 492*** and ***UNION BANK OF NIGERIA LIMITED v SAX NIGERIA LIMITED [1994] 8 NWLR (PT. 361) 124 at 165.***

But, as stated hereinbefore, whereas the Plaintiff made payment to the 1st Defendant for a two-year lease on 25/6/15, the plaza was demolished by FCDA on 3/8/15. The obvious legal implication is that the lease agreement between the parties became effectively frustrated by the demolition. Whilst the law is quick to hold contracting parties to their bargain, the law equally recognises that the due performance of contractual obligations may be affected by supervening circumstances beyond the control of the contracting

parties or one of them, in which case the law will not hold the parties to their bargain. This is so because the law does not compel the doing of the impossible, *lex non cogit ad impossibilia*; and that is the basis and import of the doctrine of frustration, which was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from the injustice that would result from the enforcement of a contract in its literal terms after a significant change in circumstances has occurred. See ***NATIONAL CARRIERS LTD v. PANALPINA (NORTHERN) LTD (1981) 1 ALL ER 161 at 176*** and ***J LAURITZEN AS v WIJSMULLER BV, THE SUPER SERVANT TWO (1990) 1 LLOYD'S REP 1 at 8.*** Frustration of contract entails the premature determination of an agreement between parties lawfully entered into and in the course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. See ***MAZIN ENGINEERING LTD v TOWER ALUMINUM (NIG) LTD [1993] 5 NWLR (PT. 295) 526, N.B.C.I. v STANDARD (NIG) ENGINEERING CO. LTD [2002] 8 NWLR (PT. 768) 104*** and ***UNION BANK OF NIGERIA PLC v OMNIPRODUCTS (NIG.) LTD [2006] 15 NWLR (PT. 1003) 660.*** Under the doctrine of frustration, a contract may be discharged if after its formation, events occur making its performance illegal, impossible or commercially sterile. See ***DAUDA v LAGOS BUILDING INVESTMENT LTD & ORS (2010) LPELR-4024 (CA).*** A subsequent change in the law or in the legal position affecting the contract is a well-recognised ground of frustration. See ***Chitty on Contract, 24th Edn. (Vol. 2) para. 23-021.*** The initial reluctance to extend the application of the doctrine of frustration to contracts relating to land on the basis of the so-called 'estate theory' has since given way, and it is now firmly established that it applies to leases [see ***ARAKA v***

MONIER CONST. CO. NIG. (1978) 6-7 SC 7and ***NATIONAL CARRIERS LTD v PANALPINA (NORTHERN) LTD supra***], as well as contracts for sale of land. See ***CAPITAL QUALITY HOMES LTD v COLWYN CONSTRUCTION LTS (1975) 9 O. R. (2nd) 617, 61 DLR (3rd) 385 (CA)*** and ***VICTORIA WOOD DEVT. INC v ONDREY (1978) 22 O.R. (2nd) (CA)*** cited in ***Sagay: Nigerian Law of Contract, 2nd Edn., (Ibadan: Spectrum Books Ltd., 2000), pp. 604.*** The doctrine will apply if the frustrating event prevented the vendor from transferring any estate whatsoever to the purchaser [see ***Chitty on Contract, 24th Edn. (Vol. 2) para. 23-055***]; and where the contract entitles the purchaser to vacant possession, the contract cannot be enforced if the vendor is prevented from giving possession. See ***COOK v TAYLOR [1942] Ch. 349.***

It is obvious therefore that notwithstanding that the Plaintiff made the payments stipulated in Exhibit P1A, it has become impossible for the 1st Defendant to perform its part of the bargain [i.e. continue to make the plaza available for the Plaintiff's use and occupation for two years]; and the Plaintiff cannot validly insist on the enforcement or performance of the lease, just as the 1st Defendant cannot validly retain the payments made by the Plaintiff in consideration of the lease that cannot be maintained. The law is well settled that where the performance of a contract is frustrated by supervening events, it would be inherently unjust and contrary to the dictates of justice to allow the party who was unable to perform his part of the bargain to retain payments made in consideration of his performance. By ***s. 4(2)*** of the ***Law Reform (Contracts) Act, Cap. 517, Laws of FCT,*** any sum of money paid by, or payable to, any party in pursuance of a frustrated contract prior to the time the parties were so discharged from their obligations under the contract shall, in the case of sums so paid, be recoverable as money received by him for the use of the party who made the payment; and in the case of sums so payable, cease to be so payable, subject to just allowance being made by the court in an appropriate case for expenses incurred before

the time of discharge. But the court has no power to increase the sum to be recovered by the claimant or the amount of expenses incurred by the defendant to allow for the time value of money notwithstanding that the money may have been paid or the expenses incurred long before the date of frustration. The cause of action accrues on that date and the sum recoverable can be no greater than the sum actually paid though the defendant may have had the use of the money over many years and indeed may have profited from its use. See ***Goff & Jones: The Law of Restitution (8th Edn.), p. 498 paras. 20-064.*** The recipient of money is evidently unjustly enriched where money has been paid under a contract which is or becomes ineffective, hence the law of unjust enrichment looks to the future performance and not the bare promise of the relevant consideration. See ***BALTIC SHIPPING CO v DILLON (1993) 176 CLR 344 at 376.*** It is thus firmly established that money paid under a contract that was thereafter frustrated is wholly recoverable if the consideration for the payment has wholly failed. See ***FIBROSA v FAIRBAIN [1943] AC 32*** and ***U.B.A. PLC v BTL INDUSTRIES LTD [2006] NWLR (PT.1013) 61*** *–per Onu, JSC*. The test of failure of consideration is whether the claimant received any part of the performance or consideration he bargained for. See ***Goff & Jones: The Law of Restitution (8th Edn.), p. 488 para. 19-005.***

In the instant case, I have already held that the Plaintiff did not enter into possession of the office space at all material times prior to the demolition, which makes it clear beyond peradventure that he did not receive any part of the consideration he bargained for. There is therefore no basis upon which the Defendants could lawfully retain or detain any part of the moneys paid by the Plaintiff under the guise of "*fees on statutory payments made in the course of processing the botched lease transaction*"; for, upon the failure of the consideration for which the payment was made in the first place, the Defendants' right to retain the money so paid must simultaneously fail. See ***FIBROSA v FAIBAIRN supra at 65*** *–per Lord Wright*. Especially is this so when

one considers the various heads of payment made by the Plaintiff and detained by the Defendants. For instance, how can the Defendants validly retain the sum of ₦500,000 paid by the Plaintiff as service charge when there is no property upon which any services could be rendered? As a matter of fact, the DW1 conceded under cross-examination that the Defendants did not render any services to the Plaintiff for up to 12 months. Ditto for the caution deposit of ₦100,000 which is refundable if there is no incidental damage to or poor handling of the property at the end of the tenancy, whereas the DW1 stated under cross examination that the demolition prevented him from assessing the property to ascertain whether or not the Plaintiff damaged or handled it poorly. The Defendants did not place any material before the court to show that any so-called statutory fees were paid over to third parties in respect of the botched lease transaction: there is no receipt of payment of premium to any insurance company, or evidence of transmission of value added tax (VAT) to the FIRS. There is also no scintilla of evidence to show that agency/legal fees were paid over to *Grace Villas & Apartments Limited* as provided in Exhibit P1A. Indeed, the admission by DW1 that no tenancy agreement was executed by the parties points compellingly to the fact that there is no legal or factual basis for the Defendants to retain any payment made by the plaintiff towards legal fee; even as the DW1 could not recall the agent allegedly involved in this particular transaction and the Plaintiff's testimony to the effect that he saw an advert whilst passing through the property and contacted the Defendants directly without going through any agent was neither controverted nor discredited. Apart from *Grace Villas & Apartments Limited* not being a legal practitioner entitled to payment of legal fee, the case of ***JIDE TAIWO & CO v DANBARE TRAVEL AGENCIES LIMITED [2001] 14 WRN 52 at 69*** donates the proposition that agency fee cannot be retained where the underlying transaction has failed.

It is strenuously agitated on behalf of the Defendants that there is an exemption clause at the last page of the Offer for Lease [Exhibit P1A] which absolves the Defendants of any direct liability to refund to a tenant all fees and/or charges enumerated in the preceding paragraphs thereof until the occurrence of certain events, namely the arrival of a new tenant, save for VAT which is not refundable under any circumstance, placing reliance on ***UBN LTD v NWAOKOLO [1995] 6 NWLR (PT. 127) 127 at 154*** *–per Onu, JSC* [on the proposition that the words employed by parties in their agreement should as much as possible be construed and given their ordinary meaning], ***PM LTD v THE M. C. DANCING SISTERS (2012) 4 NWLR (PT. 1289) 169 at 197D*** *–per Rhodes Vivour, JSC,* ***EAGLE SUPERPACK NIG. LTD v ACB PLC (2006) LPELR-980 SC*** and ***MAX-CLEAN BECAL VENTURES LTD & ANOR v. ABUJA ENVIRONMENTAL PROTECTION BOARD (2016) LPELR-41204 (CA) at 13 –****per Mustapha, JCA* [on the effect of an exemption clause in the eye of the law].

With great respect, the above contention is fundamentally flawed. The 'validity' clause in Exhibit P1A upon which the Defendants have relied provides thus: "*This offer is valid for one (1) week. PLEASE NOTE THAT THERE SHALL BE NO REFUND, UNTIL THE SUITE PAID FOR HAS BEEN LEASED TO A NEW TENANT, BUT THE VAT PAID ON THE RENT IS NON-REFUNDABLE*". Quite clearly, this clause presupposes or takes for granted the existence of a suite paid for by a tenant which can subsequently be leased to a new tenant. It certainly did not envisage a scenario whereby the plaza or building housing the suite paid for by a tenant has been demolished and is no longer available to be leased to a new tenant [as in the instant case]. Also, aside from the fact that there is no shred of evidence before me showing that the Defendants had already paid over to FIRS the VAT on the rent paid by the Plaintiff before the demolition took place, a tenant would be liable to pay VAT on rent if and only if the property leased to him is available for him to take possession of. At any rate, the DW1 could not produce any proof when pressed by learned

counsel for the Plaintiff under cross examination as to whether there is any document showing that VAT was remitted to FIRS in respect of this transaction. What then is the legal or factual basis upon which the Defendants could retain these payments? I have not been fortunate to find any.

The argument forcefully pressed on behalf of the Defendants equally overlooks the legal incidents that attend a contract that has been frustrated by supervening circumstances, which gives rise to an action for money had and received. As stated hereinbefore, it is firmly established that money paid under a contract that was thereafter frustrated is wholly recoverable if the consideration for the payment has wholly failed. The common law employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment aided by various methods of technical equity which are equally available to a claimant. See ***FIBROSA v FAIRBAIN supra at 64*** *–per Lord Wright.* The negligence of the defendant is not a necessary element of liability in an action for money had and received, which is founded upon what is generally described as quasi-contract: it is an equitable remedy for which the action lies for the recovery of money had and received under circumstances where any notion of an actual contract is excluded, such as where money is paid by mistake, or upon a failure of consideration, or for money got by imposition [express or implied], or extortion, or oppression; or where an undue advantage is taken of a person's situation, contrary to the laws made for the protection of persons under those circumstances. The essential ingredients are that money due to the claimant was paid to the defendant who has been unjustly enriched by such payment and it would be unconscientious and c*ontra aequie et bonun* for the defendant to retain the payment as against the claimant. See ***OZIMS v ANORUO [1991] 3 NWLR (Pt. 181) 571*** *–per Oguntade, JCA (as he then was)* and ***AEROFLOT SOVIET AIRLINES v UBA LTD [1986] 1 NSCC 698***. The relationship between the parties is not looked upon as a contractual one

giving rise to an obligation to repay, but as an obligation imposed by the court under circumstances it considers just and reasonable having regard to the relationship of the parties on equitable grounds. In different words, it is an obligation to repay constituted by the act of the law distinct from any consent or intention of the parties or privity of contract. See ***ODUWOBI & ORS v BARCLAYS BANK D.C.O. (1962) 1 S.C.N.L.R. 226, (1962) 1 ALL NLR 141 at 144-145.***

In the case at hand, it certainly would be incongruous to say the least, for the 1st Defendant who has been relieved of its obligations under the lease by reason of the occurrence of a supervening frustrating event [i.e. the demolition of Jeriel Plaza by FCDA] to seek to enforce alleged contractual rights under the very same frustrated transaction under the guise of *pacta sunt servanda* by seeking to defer or subordinate the Claimant's entitlement to recover payments to the imaginary letting out of the now non-existent office space to a new tenant. It simply does not add up for me! There is no gainsaying that the consideration for which the Plaintiff paid ₦5,450,000 was not realised, and I entertain no ounce of reluctance whatsoever in adjudging him entitled to recover the entire sum paid by him [inclusive of the balance of ₦1,450,000] from the 1st Defendant for the lease of an office space at Jeriel Plaza, Wuse II Abuja [which has since been demolished by FCDA] as money had and received for a consideration that has wholly failed. See ***MOBIL v COKER (1971) NMLR 53, NWOLISAH v PASCHAL NWABUFOH [2004] NWLR (PT. 879) 507*** and ***ONYEBANJI v FOWOWE [2008] ALL FWLR (PT. 410) 786 at 796 - 797 (CA).***

The Plaintiff equally claims a declaration that the demolition of Jeriel Plaza was in consequence of the Defendants' wilful acts and negligence in building the said property without first seeking and obtaining requisite building approval from the FCDA; as well as ₦5m as general damages. But it does not

seem to me that the Plaintiff is entitled to these heads of claim. A declaration is a solemn affirmation of a right or status by a court, which is not granted not on the basis of admission or the weakness of the defence without hearing evidence and being satisfied with such evidence. Rather, a declaration is only made on the strength of the case of the party claiming to be entitled. See ***BELLO v EWEKA (1981) 1 SC 101 at 102, OBAWOLE v WILLIAMS [1996] 10 NWLR (PT. 477) 146, AKANIWO v NSIRIM [2008] 9 NWLR (PT.1093) 439*** and ***CPC v INEC (2012) 2-3 SC 1.*** The right or status declared must be clear, precise and leave no one in doubt [see ***ATTORNEY GENERAL, LAGOS v ATTORNEY GENERAL, FEDERATION & ORS [2003] 7 MJSC 1 at 64***], even as the making of a declaration is entirely discretionary and in the exercise of the court's equitable jurisdiction. See ***TEMILE & ORS v AWANI [2001] 5 MJSC 32 at 52*** and ***MATANMI v DADA [2013] 7 NWLR (PT. 1353) 319 at 343.*** Aside from the fact that a declaration is being sought in respect of alleged acts on the part of the Defendants that are both 'wilful and negligent' at the same time which seems to me incongruous for being mutually exclusive, the Plaintiff did not adduce any credible evidence upon which the declaration can be anchored. The Plaintiff's deposition that he was told upon enquiry at FCDA that the property was demolished because the Defendants developed the property without requisite approval in violation of extant laws constitutes inadmissible hearsay that cannot be acted upon by a court of law. Also, it has been held that 'where a court of law comes to the conclusion that a contract has been frustrated, the defendant cannot be found liable in the contract and the issue of breach flowing into damages no more arises'. See ***N.C.B.I. v STANDARD (NIG) ENG. COMPANY LTD [2002] 8 NWLR (PT. 768) 104 at 131*** *–per Niki Tobi, JCA (as he then was)* and ***Corbin on Contracts [Discharge by Frustration of Purpose, by Prof. Joseph M. Perrillo, (ed.)], (Matthew Bender & Company Inc., 2017), pp. 14 -77***.

The claim for ₦500,000 is equally problematic, as it is in substance a claim for solicitors' fee. Exhibit P1E is a Bill of Charges dated 19/7/17 issued by *Ojukwu Chikaosolu &* Co showing that the Plaintiff has paid ₦350,000 out of the agreed professional fee of ₦500,000 leaving a balance of ₦150,000. It is therefore obvious that what the Claimant seeks to recover under the guise of costs of this action are the fees charged by [and payable to] his solicitor. Unfortunately however, a claim for solicitor's fee is not one that can readily be granted under the present state of Nigeria law. In ***GUINNESS NIGERIA PLC v NWOKE [2000] NWLR (PT. 689) 135 at 150,*** the Court of Appeal (per *Ibiyeye, JCA*) held that a claim for solicitor's fee is outlandish and should not be allowed because not only did it not arise as a result of damage suffered in the course of any transaction between the parties, it is unethical and an affront to public policy to pass on the burden of solicitor's fees to the adverse party. See also ***NWANJI v COASTAL SERVICES LIMITED [2004] 36 WRN 1 at 14-15***, wherein his Lordship *Uwaifo, JSC* citing ***IHEKWOABA v ACB LIMITED [1998] 10 NWLR (PT. 571) 590 at 610 – 611*** stated that damages as an aspect of solicitor's fee is not one that lends itself to support in this country as there is no system of costs taxation to get a realistic figure and costs are awarded arbitrarily and certainly usually minimally. Needless to say that the above decisions are forcefully binding on me under the inflexible doctrine of *stare decisis,* and I am bound to kowtow. I therefore entertain no reluctance in disallowing this head of claim without further assurance.

In the ultimate analysis and for the avoidance of doubt, it will be and is hereby ordered as follows:

1. The 1st Defendant shall forthwith refund and pay over to the Plaintiff the sum of ₦1,450,000,000 (One Million Four Hundred and Fifty Thousand Naira) being the balance of ₦5,450,000,000 paid to the 1st Defendant for the lease of office space at Suite 8 Jeriel Plaza, No. 50 (Plot 2)

Blantyre Street, Wuse 2, Abuja which was demolished by the Federal Capital Development Authority (FCDA) on 3/8/15. This sum shall attract post-judgement interest at the rate of 10% per annum with effect from today until the entire sum is fully liquidated

2. The claims for declaration, general damages and solicitor's fee [disguised as a claim for costs] fail and are hereby dismissed.

3. I assess the 'actual' costs of this action at ₦100,000.00 in favour of the Plaintiff against the Defendant.

PETER O. AFFEN
Honourable Judge

Counsel:

Chikaosolu Ojukwu, Esq. (with him***: Ebere Ahanonu (Mrs), O. K. Nzenwa, Esq.*** and ***Victor O. Amilo, Esq.***) for the Plaintiff.

Adeola Adedipe, Esq. (with him: ***Emmanuella Senlong, Esq. and Miss O. O. Agbaje, Doyinsola Alege (Miss), Adedolapo Alege (Miss)*** and ***F. A. Shehu, Esq.***) for the Defendants.