

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 8044/12

In the matter between :

Calicom Trading 54 (Pty) Ltd	First Applicant
Protea Mall Body Corporate	Second Applicant

and

Gowrie Mews Investments CC	Respondent
Remo's Coffee Shop	Party seeking leave to intervene

Judgment

Lopes J

[1] This is a vindicatory application in which the applicants seek an order for the ejectment of the respondent from an exterior area measuring approximately 20m² situated in the sectional scheme Protea Mall situated at Lighthouse Road in Umhlanga Rocks, north of Durban. In this judgment I shall refer to the first applicant as 'Calicom', the second applicant as 'the body corporate', the respondent interchangeably as 'the respondent' or 'LM Grill' depending on the

context, and the intervening party as 'Remo's'.

Background :

[2] The history of the matter may be summarised as follows :

- a) Calicom is the owner of all the sectional title units contained in the Protea Mall and the body corporate is the body corporate constituted for the Protea Mall in terms of the Sectional Titles Act, 1986;
- b) the Protea Mall is a busy commercial centre on the corner of Chartwell Drive and Lighthouse Road in Umhlanga Rocks;
- c) for at least the last 18 years the business of a restaurant has been conducted, under various guises, from the premises situated at Shops 5/6 of the Protea Mall;
- d) the current tenant of those shops is the respondent, which carries on the business of a restaurant under the name and style 'LM Grill', pursuant to an agreement of lease concluded between Calicom and the respondent on the 26th March 2010;
- e) on the eastern side of LM Grill and immediately adjacent to it are shops 4, 3, 2 and 1 in the Protea Mall, which are occupied by Remo's which runs a restaurant from the premises under the name and style 'Remo's Coffee Shop' pursuant to an agreement of lease concluded between Calicom and Remo's on the 14th December 2011;
- f) shops 1, 2, 3, 4 and 5/6 all face northwards onto Lighthouse Road. Originally the fronts of all these shops formed a straight line, and were

set back from the pavement on Lighthouse Road. Prior to the respondent acquiring the business of LM Grill, shops 5/6 were extended so that the north-facing front of LM Grill was extended to the edge of the Lighthouse Road pavement. The eastern side of shops 5/6 then formed an 'L' shaped courtyard in front of Remo's and that is the area in contention ('the courtyard').

- g) the dispute between the parties is that LM Grill claims that it and its predecessors have always had the right to use, and have in fact used, the courtyard as outside seating for their diners, whilst Calicom maintain that LM Grill has no right to use the courtyard and seeks the ejectment of LM Grill from the courtyard;
- h) when Remo's concluded their agreement of lease with Calicom, Remo's carried out extensive renovations to the premises of shops 1, 2, 3 and 4 and began to enclose the area between the fronts of those shops and the pavement edge of Lighthouse Road. As those renovations included converting the courtyard, effectively excluding the respondent from occupying it, the respondent successfully brought a spoliation application to restore its possession of the courtyard.

[3] These vindictory proceedings were thereafter initiated by way of an application for the ejectment of LM Grill from the courtyard. The application was opposed and affidavits were delivered. Remo's brought an application for leave to intervene in the vindictory application. It has been agreed between the

parties that :

- a) Remo's will be allowed to intervene as a respondent;
- b) neither Remo's nor LM Grill will seek any order of costs against the other in these proceedings;
- c) Remo's does not, as an applicant, seek the ejectment of LM Grill from the courtyard, but appears in order to place, what it regards as relevant considerations, before the Court.

Order sought :

[4] The matter was referred for the hearing of oral evidence pursuant to an order granted by this court on the 21st August 2012 and in terms of which I am required to determine :

- a) whether the courtyard area referred to in Clause 21(c) of the lease agreement concluded between Calicom and LM Grill refers to the contested area (and which I refer to in this judgment as 'the courtyard') or to the U-shaped courtyard or piazza described by Calicom as the central courtyard of the Protea Mall (which I refer to in this judgment as 'the central courtyard');
- b) if the reference to 'the courtyard' in Clause 21(c) of the LM Grill lease does not refer to the courtyard, whether the lease agreement falls to be rectified;
- c) failing rectification, whether an agreement was expressly, tacitly or by conduct concluded between Calicom and LM Grill entitling it to use the

courtyard as part of its restaurant;

- d) if LM Grill has a right to occupy the courtyard area pursuant to one of the two bases set out above, whether that right endured for the duration of the lease, and whether Calicom had the right to terminate that right separately from the lease agreement, and if so on what grounds;
- e) in the event of all of the above failing, whether Calicom represented expressly or by conduct to LM Grill that it was given permission to use the contested area as part of its business for the duration of the lease, whether LM Grill acted upon that representation by incurring expenses and acting to its prejudice such as to give rise to an estoppel preventing Calicom from withdrawing its apparent permission, and obtaining the ejectment of LM Grill from the contested area for the duration of the lease;
- f) the use to which LM Grill and its predecessors in occupation had put the contested area.

[5] It was common cause between the parties that I was to take into account the evidence contained in the affidavits in the spoliation application, the vindicatory application and the application for leave to intervene brought by Remo's, and the oral evidence heard before me in arriving at a decision on the matters placed before me. I have also read and had regard to a Rule 37 bundle containing extensive answers by the representatives of LM Grill to queries raised

by the other parties. This included details of the defence of LM Grill to the vindicatory application.

The oral evidence hearing :

[6] At the outset of the oral evidence hearing it was agreed between the parties that LM Grill would start its case without conceding any onus or obligation to do so.

[7] The first witness was Ivin Chutergun Rattan ('Rattan') who had deposed to the answering affidavit in the vindicatory application and the replying affidavit in the spoliation application on behalf of LM Grill. Rattan testified that :

- a) he was the sole member of the respondent, Gowrie Mews Investments CC, the owner of LM Grill. He had purchased the business of the restaurant from one Praveen Govinthu ('Govinthu') pursuant to a purchase and sale agreement concluded on the 27th May 2010, although the effective date of the agreement was recorded by the parties to it as being the 15th August 2009;
- b) the agreement of sale makes no reference whatsoever to the extent of the premises upon which LM Grill operated prior to its purchase by Rattan. Rattan pointed out, however, that in the notice given in terms of s 34 of the Insolvency Act, 1926 and which was published on the 2nd June 2009 in a local newspaper, reference is made to the fact that Govinthu intends to dispose of the business carried on as 'LM GRILL

- UMHLANGA ROCKS at shop 5+ 6 and existing Patio Protea Mall, Lighthouse Road, Umhlanga Rocks ...'. (Although it was the obligation of Govinthu to publish the notice, Rattan did so, presumably to protect himself);
- c) Rattan told the court that he had agreed with Govinthu that he would pay for the renovations of the restaurant, that Govinthu would then continue to run the restaurant for a month to ensure a smooth takeover, and Rattan would run it thereafter;
 - d) basically the restaurant was gutted and rebuilt from scratch with the exterior walls being re-tiled. At the same time the courtyard was re-tiled and a low wall around the courtyard removed and replaced. At some stage the re-built walls around the courtyard had to be reduced in height, with one portion of the wall having to be removed because it constituted an obstruction to pedestrian traffic wanting to access the neighbouring premises in Shop 4, which was then operating as a liquor store under the name and style 'Lighthouse Liquors';
 - e) during the reconstruction process the landlord was aware of the work as it was progressing at all times particularly because it was necessary to deal with complaints of noise and the removal of construction rubble;
 - f) when the renovations were complete the courtyard was used as part of LM Grill's premises;
 - g) the courtyard is used as a seating area with a number of tables and

chairs being placed on it for use by restaurant patrons. The tables and chairs are, for security reasons, placed inside the restaurant at night when the business is not operating;

- h) as was evident from photographs produced in evidence, on the exterior eastern wall of LM Grill were two loudspeakers used to provide music for the outside area;
- i) during the construction work one Mrs Bell, described by Rattan as the centre manager, visited the building works from time to time;
- j) three entrances to the LM Grill were constructed or replaced – double doors facing onto the Lighthouse Road pavement on the northern side of the restaurant, an entrance on the western side which facilitated patrons coming from the nearby Protea Hotel, and an entrance on the eastern side adjacent to the premises of Lighthouse Liquors and at the end of a walkway running across the front of Shops 1, 2, 3 and 4 and providing an entrance to LM Grill. This was the main entrance to the restaurant behind which there was a reception desk, reservations book, etc.

[8] Under cross-examination, Rattan conceded that he had never met Mrs Bell personally and all negotiations with her were via the manageress of LM Grill. When he had purchased the business of LM Grill, the courtyard had been described to him by Govinthu as a 'smoking area'. The word 'patio' which appears in the Insolvency Act notice was his word and not that of Govinthu.

Rattan conceded that he never thought of the disputed area as 'a courtyard'.

[9] With regard to the negotiations conducted with Calicom for the conclusion of the lease agreement, Rattan conceded that he had never (up until he gave evidence) read the written lease, nor had Mr Bell, the director of Calicom who signed the lease, ever discussed the courtyard with him. Rattan's only reliance for believing that the LM Grill premises included the use of the courtyard came from Govinthu.

[10] Rattan conceded he had only ever met Mr Bell twice – once during a settlement meeting, and once whilst negotiating the lease agreement, when Govinthu told Mr Bell that Rattan would be taking over the business of LM Grill. The only discussion between them related to possible business coming the way of LM Grill from patrons of the Protea Hotel situated at the centre.

[11] Rattan testified that during the 2009 renovations the then existing low sandstone-type wall around the courtyard was demolished, and that the new wall which was erected, fitted into the decor of the new exterior of LM Grill.

[12] After the 2009 renovations, the then tenant of Shop 4, Nicholas Adrian Orphen ('Orphen') who ran the business of Lighthouse Liquors from Shop 4 (a bottle store) complained to Calicom and LM Grill that the re-built wall and umbrellas obscured his premises. As a result Rattan caused the wall to be

considerably lowered, and a portion of the wall running between the pavement margin of Lighthouse Road directly towards the premises of Shop 4 (effectively forming an 'L' shape around the courtyard) was demolished. The discussions surrounding this had been conducted by one Nishani Deeplall, the manageress of LM Grill. Rattan had not personally been involved in these discussions.

[13] Much debate ensued in the cross-examination of Rattan regarding the fact that LM Grill regarded the eastern door leading out onto the courtyard as its main entrance. This was despite the fact that two doors fronted onto the Lighthouse Road pavement containing stickers advertising the restaurant, the credit cards which it accepted, etc. Photographs which formed Exhibit 'A' also showed a 'Specials' board outside these doors. Rattan, however, was adamant that the main entrance was the eastern doorway. It was common cause that there was also an entrance on the western side of LM Grill, mostly used by pedestrians from the nearby Protea Hotel.

[14] Rattan was adamant that the use of the courtyard was exclusively the right of LM Grill.

[15] The respondent's next witness was Ronnie Etty a waiter employed by LM Grill. He had worked on the premises for the past 18 years. During that time it had been conducted as a restaurant with various names. The remainder of his evidence may be summarised as follows :

- a) the courtyard area had been used for customers, both for eating and drinking for approximately seven years prior to the restaurant being taken over by Govinthu;
- b) Govinthu had sold the restaurant to a Dr Premchund who had run the restaurant for approximately a year before handing it back to Govinthu. During that time there had been no changes in the use of the courtyard;
- c) Etty was the person depicted in a photograph (Exhibit A, page 73), which was taken in 2009 showing the premises prior to the renovations carried out by Rattan. It shows the sandstone-type wall which surrounded the courtyard at that stage. Etty's evidence was that that wall had been up there for five years since approximately 2004. He testified that that sandstone-type wall had been built by Govinthu;
- d) Etty told the court that he regarded Mrs Bell as the owner of the property. She would come around on an almost daily basis to check that everything was clean. He could not recall whether she had had anything to do with the knocking down of the reconstructed wall following the complaints by Orphen.
- e) Etty said that tables and chairs, etc which were used in the courtyard were put inside the premises of LM Grill at night and put out again at approximately 11am when LM Grill opened for business. He remembered that there had been problems with the umbrellas obscuring the premises at Shop number 4 – Lighthouse Liquors – and

that they would only put the umbrellas up before 4.30 in the afternoon if a customer specifically requested it;

- f) under cross-examination Etty conceded that when Orphen had had problems with the blocking of the view of his premises he had spoken to the manageress, Debbie and the waiters;
- g) Etty confirmed that the premises of LM Grill had been extended to the edge of the pavement and enclosed. At that stage the premises were leased by Govinthu together with Shops 1, 2, 3 and 4;
- h) Etty confirmed that the complaints regarding the obscuring of the Lighthouse Liquors sign had started when Govinthu sold that business and Orphen took it over in approximately 2008. He also confirmed that Orphen had complained about the reconstructed wall put up by Rattan which then had to be reduced because it was too high, and because customers could not easily access the bottle store.

[16] The next witness for the respondent was Nishani Deeplall ('Deeplall') who had been employed as a manageress of LM Grill since September 2009. She was employed together with another manageress Debbie, and they worked shifts. Significant aspects of her evidence were :

- a) that she knew Mrs Bell as the building manager who came around three to four times a month, supervising maintenance and upkeep of the building;
- b) the courtyard area had been used as seating since she had arrived in

September of 2009 and Mrs Bell had seen this on many occasions;

- c) she had witnessed the reconstructed wall being lowered and the L shaped portion being removed completely from around the courtyard;
- d) she was never told that LM Grill had no right to put tables and chairs in the courtyard, although she conceded that the umbrellas could only be opened after 5pm, or if guests wanted them opened before then, but that the umbrellas would have to closed thereafter;
- e) Deeplal confirmed that Rattan had referred to the courtyard as 'a smoking area'. She conceded that the agreement concluded with Orphen regarding the opening of umbrellas had not involved the centre management;
- f) under cross-examination Deeplal said that the arrangement with Orphen concerning the umbrellas had been concluded between Loshnie the bottle store manageress, and Debbie the other manageress at LM Grill.

[17] At that stage the case for the respondent was closed.

[18] Terence Ackroyd Bell ('Bell') then testified that he was a director of Calicom and the controlling director of the body corporate. The offices of Calicom were at his home at Rydal Place in La Lucia. He conducted the administration of the Protea Mall together with his wife from that office. There was an office on the ninth floor of Protea Hotel at the Protea centre which was

used for meetings with tenants, etc. Calicom was the owner of all the sectional title units comprising Protea Mall. The relevant parts of Bell's evidence may be summarised as follows :

- a) although Calicom acquired the Protea Mall in 2004, he could not remember whether at that stage there was a wall around the courtyard;
- b) negotiations with tenants who were not 'national tenants' (large operations who conducted business throughout the country) would be on the basis of a letter setting out the terms which Calicom required. Calicom would not negotiate the terms with any tenants other than 'national tenants';
- c) he had no recollection of seeing the lease agreement concluded with LM Grill (although he admits having signed it) and had no recollection of any meeting with Rattan, stating that if there had been such a meeting it would have been at the insistence of Govinthu;
- d) he admitted that on the 2nd February 2010 he had written a letter to Rattan complaining about non-compliance with the lease agreement including removing the umbrellas in the courtyard which were obstructing the view of the bottle store, at that stage being run by Orphen;
- e) the reference to Clause 21 (c) of the lease agreement concluded with LM Grill ('Use of the courtyard is subject to the authority of the LANDLORD.') was a reference to the central courtyard which leads to the entrance of the Protea Hotel and is not the area in dispute between

the parties to this application. That clause was normally contained in all leases concluded with tenants whether or not their premises fronted onto the central courtyard;

- f) prior to Remo's having done so, no-one had sought permission to use the courtyard as a seating area for serving meals;
- g) Bell had been aware of the issue which had arisen between Orphen and Govinthu regarding the use of the courtyard. Calicom had played no role in that dispute. He had never seen meals being served in the courtyard although he conceded only driving past that area of the mall once in every two weeks. Bell testified that had only eaten once in the LM Grill, as he tended not to frequent tenant restaurants, because he did not view it as being conducive to good staff relations;
- h) in cross-examination Bell conceded that he ran a lot of buildings and had only a vague recollection of the events in question. Any meeting which he would have had with Rattan at the instance of Govinthu would have been a social meeting;
- i) Bell may have known that Govinthu was selling the business. Bell accepted that it must have been up to him to decide whether Rattan was an acceptable tenant. He conceded that it could have happened that they had met in his offices at the Protea Hotel;
- j) Bell was adamant that he would not have been interested in the terms and conditions of the agreement concerning the business which Rattan was purchasing. His only interest would have been in Rattan as a

tenant. He only knew about the advert which had been placed by Rattan in terms of s 34 of the Insolvency Act, once he had seen the papers. He had not seen it before. He was unable to comment on the suggestion that the notice described what Rattan believed he was purchasing;

- k) Bell told the court that he had no interest in the interior alterations to the restaurant, and would only have become involved if the exterior had been altered. He had no independent recollection of having authorised a two month rental moratorium when building operations were going on;
- l) Bell was adamant that he did not allow the construction of a wall around the courtyard and he was not aware of the adjustment that had taken place to its height. Although he conceded that at the time of the renovations he had given directions that the area next to the LM Grill wall had to be level along the courtyard area, he had never seen the steps outside the eastern doors of LM Grill;
- m) he disputed that Etty was correct in saying that tables had been used in the courtyard for approximately 18 years. Although the sandstone-type walls may have been built around the courtyard in 2004, he would never have considered allowing that;
- n) he conceded that his wife Mrs Bell, was employed by a management company which operated as an agent of Calicom. She was expected to walk around the Protea Mall and check on cleaning and

maintenance staff. He did not wander around the Protea Mall, because he was fairly busy;

- o) he conceded that it was possible that Mrs Bell had inspected the wall which was rebuilt by Rattan in 2009, and had regulated the height adjustment of the wall;
- p) Bell could not deny that LM Grill had made use of the courtyard, placing tables there and serving diners there since 2009. He conceded having written the letter dated the 2nd February 2010 to Rattan shortly before the conclusion of the lease. That letter had expressed his annoyance at Rattan's failure to comply with the requirements for signing the lease. With regard to the reference to the removal of umbrellas in item 3 of that letter, he had known that they had existed there together with tables and chairs, although he said that they were there at some stages and not at others;
- q) in response to the suggestion that the area had been used since September or November of 2009 as an eating area and that Rattan had purchased the business on that basis, Bell stated that he was not aware of those facts, and had he known that they were serving food from the courtyard he would have reacted to that and not allowed the serving of food to continue;
- r) Bell stated that Remo's, as the tenant for Shops 1, 2, 3 and 4 would be entitled to use the area in front of those premises as far as they extended to the boundary of Calicom's property, which was the

pavement edge in Lighthouse Road . He said that this would have to be done by written arrangement, and although he was unable to point to any writing regarding Remo's, he maintained that such writing should exist;

- s) in cross-examination by Ms *Annandale* SC for Remo's, Bell conceded that Govinthu had previously operated a trading store from Shops 1, 2, 3 and 4 which had been later reduced to Shops 1 to 3 with a bottle store being operated by him from Shop 4. He then stated that he was not sure whether Govinthu was concurrently a tenant in all four premises;
- t) Bell was adamant that unless a dispute between tenants actually involved Calicom, he tried to stay out of such disputes. He knew that the courtyard was being used, but did not know that it was being used for food and would have reacted if anyone had complained. He conceded that there had been many complaints made by Orphen regarding the courtyard and the use of chairs and tables. He had regarded his letter of the 2nd February 2010 to Rattan as a final warning from the landlord;
- u) Bell referred to the fact that the municipality had originally paved the pavements along Lighthouse Road and the courtyard had been paved in precisely the same material. The municipality had then put up a public bench and telephone exchange and postbox on the premises owned by Calicom. He had had to get this sorted out to enable the

tenants to be able to use the area;

- v) on his instructions, Calicom's attorneys had eventually addressed a letter to LM Grill, withdrawing any permission which it may have perceived it had to use the courtyard.
- w) in response to questions by the court Bell conceded that he was concerned not to allow anyone to use tables in the courtyard for eating. However in response to the question whether he had been aware that they were being used for that purpose he had stated 'I gather so';
- x) Bell conceded that the courtyard could have been used for eating and drinking for years and he may not have known about it. Bell stated that the complaints he had received were not about eating, but about the tables and chairs being left there and the presence of umbrellas which obscured the view of Lighthouse Liquors.

[19] The next witness for the plaintiff was Karen Bell ('Mrs Bell') an employee of Focus Administration which had its offices at the home shared by her and Bell. She was employed as a bookkeeper who sent out rent invoices and checked on the cleaners and painters at the Protea Mall. No particular building or area was her responsibility.

[20] Mrs Bell was a particularly reluctant witness and when asked :

- a) how she introduced herself to tenants, she said that she would never have had to do so because everyone knew who she was;

- b) why she went to the Protea Mall, Mrs Bell said that she does everything at home and delivers it to the ninth floor at Protea Mall;
- c) when asked if a tenant wanted to speak to her, what they would do, Mrs Bell replied that they do not speak to her and have to email her;
- d) what occasion she would have had to give instructions to tenants, she replied that she did not have too many occasions to do so. If there was a problem, she would invite tenants to write a letter.

[21] When it was put to her that there was evidence that she had gone regularly to the Protea Mall, she maintained that she had gone to deliver documents to the ninth floor and to check on the painters and cleaners. Mrs Bell had no recollection of when the sandstone-type wall had been put up or taken down. She also had no idea when the stairs on the eastern side of LM Grill were built.

[22] In reply to the suggestion under cross-examination that she had acted as if she were the owner of the Protea Mall (according to witnesses) she said that was probably because people had seen her talking to cleaners and painters. She conceded having gone to the Protea Mall in the last eight months and eventually conceded that she had previously gone there on a daily basis just before lunch. She would invariably go to a room where the cleaners worked. She did not circulate throughout the mall. She denied having any involvement in resolving the problem with tables and chairs and umbrellas in the courtyard.

[23] Mrs Bell said that she may have seen the steps leading from the sliding double doors but had never seen the speakers used to play music in the courtyard. She was aware of the renovation works which were being done, and any complaint which she received in writing from Orphen, she had passed onto Bell. She did not regard the building operations which took place as her concern, and did not regard herself as checking on the tenants. In her view the courtyard was simply used for the storage of tables and chairs which, everytime she went past, were piled up outside the bottle store against the windows.

[24] The plaintiff then closed its case.

[25] The first witness for Remo's was Orphen who purchased and operated the business described as Lighthouse Liquors in Shop 4 in Protea Mall from the 1st January 2008. He had purchased it from one Neil Venter and thereafter sold the business in 2010 shortly before the start of the World Cup. Apparently Venter had purchased the business from Govinthu and had run it for approximately a year.

[26] When Orphen purchased the business, the courtyard had contained the sandstone-type wall running in an L shape along the front of the pavement edge and then turning in towards his premises. He thought that was part of the complex. Patrons wishing to access the business had to walk past the wall to get

into the bottle store. He conceded that although tables, chairs and umbrellas had been in place in the courtyard, the umbrellas were not normally open. He had had a problem with the courtyard being used because it was right in front of his shop, and he wished to have his business identified as a business separate and distinct from LM Grill. Because he was new and needed to learn the business and had no knowledge of how matters worked, he had initially not complained. Venter had told him that there was a loose arrangement that LM Grill could use the area provided there were no umbrellas and no chairs in the passages immediately outside Shops 1, 2, 3 and 4.

[27] The bottle store was run by one Loshnie who controlled a staff of six. She was supervised by a manageress who moved between the three bottle stores owned by Orphen and his associates. Because he had had a woman working on her own in charge of the shop, he had installed cameras but was happy to have other people from LM Grill milling around in front of the store. He regarded this as an additional security measure.

[28] Problems however arose when the umbrellas were up and the LM Grill staff ignored his requests to take them down. He recalled the sandstone-type wall being demolished in 2009 and the new wall being erected. It was higher than the sandstone-type wall and made the area feel completely enclosed. Because the cladding was the same as LM Grill it looked like a continuation of LM Grill and blocked his premises.

[29] After his complaints were reduced to writing, the wall along the pavement was reduced in height considerably and the 'L' shaped section removed. At some stage there was a suggestion by someone at LM Grill that a roof would be put over the courtyard, but he made it clear that he would object to that procedure. From time to time he had sat in the chairs outside the area.

[30] The dispute arose over the umbrellas because they were being put up during trading hours and would block his signage. He complained to the manageress at LM Grill. He disputed that he accommodated LM Grill by allowing them to have umbrellas up during the day if patrons wished it.

[31] Orphen ended up having an argument with Govinthu over these issues, and Govinthu threatened him by saying that his liquor licence would be taken away if he continued with his complaints. Once the rebuilt wall had been reduced, Orphen was of the view that a working arrangement had been reached, and he stopped complaining. Three months later, after Govinthu had sold the business, the issue of umbrellas was an ongoing problem, and on the 2nd November 2009 Orphen addressed a letter to LM Grill threatening to charge them rental for the use of the courtyard, failing which steps would be taken against LM Grill by the landlord, including a claim for compensation for loss of income suffered by Orphen's business. An accommodation was reached, partly because of the threats from Govinthu, and partly because Rattan's brother

supplied alcohol to Orphen's business, which Orphen considered would become a problem for him. He conceded that until he had copied the landlord with the letter of the 2nd November 2009 which he addressed to LM Grill, the landlord may have been under the impression that everything was in order.

[32] Orphen denied that waiters usually operated in the courtyard area. He would drive past every day and attend the premises approximately once a week. Pursuant to his objection to the tables, chairs and umbrellas and LM Grill treating the courtyard area as its own, he believed that Bell had come there to look at the area. He had said that he had phoned Bell about five times concerning the problems. He did not know how much Bell knew, but he said he would have thanked him for getting the wall lowered and continued to complain about the umbrellas. He had only once ever seen people eating in the courtyard.

[33] The case for Remo's was then closed.

[34] I now deal with the questions I am required to answer as they were set out in the order of Govender AJ dated the 21st August 2012.

Whether Clause 21(c) of the lease referred to the courtyard :

[35] By the end of all the evidence it was clear that in almost all the leases concluded between Calicom and the tenants in the Protea Mall, Clause 21 (c) (as

I have set it out above) was recorded.

[36] In interpreting this and other aspects of the lease I regard myself as having to read it in context, having regard to the purpose of the provision and the background to the preparation and production of the documents.

See *NJMPF v Endumeni Municipality* 2012 (4) SA 593 (SCA)

[37] The language of Clause 21(c) is unhelpful in determining what was intended by the reference to 'the courtyard area' because there is no description in the lease which would enable one to identify it. All that the lease agreement refers to in its description of the premises is 'PREMISES 5/6 PROTEA MALL, LIGHTHOUSE ROAD, UMHLANGA'. It was common cause that the physical description of Shops 5 and 6 did not include the courtyard. The suggestion was rather that the courtyard formed part of the business by virtue of its incorporation in Clause 21(c) of the lease agreement.

[38] Bell testified that every lease agreement concluded with a tenant at the Protea Mall contained that clause. It was a reference to the central courtyard leading to the Protea Hotel. It is common cause that the central courtyard is not the disputed area, and a photograph of it formed Annexure TAB3(a) to the affidavit of Bell in the vindicatory application. It is clear from that photograph that there is a very large courtyard area, with a fountain centrepiece with a further area with palm trees, which does not front onto Shops 1, 2,3, 4 and 5/6 and has

nothing to do with the courtyard in dispute in this application.

[39] This was confirmed by Bell in his founding affidavit in the spoliation application at paragraphs 6 and 20. According to Bell, tenants are allowed to use the central courtyard with the permission of the landlord. As foreshadowed in condition 21 (c) of the lease tenants could apply to use the area, and the clause was inserted into all lease agreements some years ago when one of Calicom's other tenants insisted on placing chairs in the central courtyard. Significantly, that clause was not included in the original lease concluded between Calicom and Govinthu on the 29th November 2006. In his replying affidavit in the vindicatory application Bell indicates that the central courtyard could be used by tenants to conduct promotions.

[40] In my view it is relevant to look at the reasons advanced by the witnesses of LM Grill for their collective impression that the courtyard referred to in Clause 21(c) of the lease was the courtyard in question.

[41] In the spoliation application, Deeplal deposed to the founding affidavit. In paragraph 11 of that affidavit she states :

'When the lease was concluded it was expressly agreed and recorded as a special condition that the courtyard area would continue to be used as it had been used in the past on the basis that it formed part of the business that was being operated but "subject to the authority" of the landlord, presumably as to noise, décor and so on.'

[42] Given the reference to the authority of the landlord, Deeplal was clearly referring to Clause 21. In the oral evidence hearing however, she made no reference whatsoever to having concluded, or having been involved in the negotiations for the conclusion of, the lease. Indeed, on her own evidence she would not have had authority to do so because she did not even have authority to ask the centre management for instructions about the umbrellas.

[43] In his replying affidavit in the spoliation application at paragraph 4, Rattan stated :

‘When the lease was concluded I understood that this is the area that was referred to as the courtyard in the last special condition of the lease. There is no other courtyard that is relevant to the applicant’s business. The interior courtyard is inside the mall and the restaurant has no access to it. I have always understood that the courtyard referred to in the lease was the small courtyard outside the Applicant’s premises which was being used by the business when the Applicant bought it ...’

[44] In his opposing affidavit in the vindicatory application, Rattan stated in sub-paragraph 4(e) :

‘When the lease was concluded I understood Clause 21(c) of the lease to refer to this courtyard in the last special condition of the lease which provided that its use was subject to the authority of the First Applicant ... There was implicit agreement that it had been used and would continue to be used in this way when Respondent purchased the business and made changes to the premises with the First Applicant’s consent.’

[45] These latter statements were included among the various arguments put

forward by Rattan as to why he was entitled to use the courtyard.

[46] However, when Rattan gave evidence at the hearing he repeatedly stated that he had never read the lease and never discussed it with Bell. His belief as to what LM Grill was entitled to use was based solely on what he had been told by Govinthu. In his evidence he stated that up until the day he testified he had not looked at the lease.

[47] In those circumstances it is difficult to understand how Rattan can ever contend that Clause 21(c) was a reference to the courtyard immediately adjacent to LM Grill. His view in his affidavits that that was so could only have been derived from what Govinthu told him, or, from an interpretation placed on the lease by others – apparently ignorant of the fact that the clause formed part of the leases of all the other tenants in the Protea Mall.

[48] Suffice it to say that upon a conspectus of all the evidence, common sense dictates that the courtyard area referred to in Clause 21(c) did not refer to the courtyard adjacent to LM Grill, and was not understood by Rattan, as the party who concluded the lease agreement, that it did so.

Rectification

[49] The second question which I am to decide is if the 'courtyard' referred to in

Clause 21(c) does not refer to the contested area, whether the lease falls to be rectified, presumably to include the courtyard as part of the area leased by LM Grill.

[50] Insofar as rectification has as its object to have a written agreement conform to the common intention of the parties, the party claiming rectification bears the onus of establishing it. The requirements which must be alleged and proved are the following :

- a) an agreement between the parties which was reduced to writing;
- b) that the written document did not correctly reflect the common intention of the parties as it existed when the agreement was reduced to writing;
- c) an intention by both parties to reduce the agreement to writing;
- d) a mistake in drafting the document which may have been the result of either a bona fide mutual error or an intentional act on the part of the other party;
- e) the wording of the agreement as rectified. In this regard it is insufficient to set out the general import of the common intention.

[51] It is relevant to this application that rectification may be relied upon as a defence without having to claim rectification.

See Propfokus 49 (Pty) Ltd and others v Wenhandel 4 (Pty) Ltd [2007] 3 All SA 18 (SCA)

[52] It is common cause that there was a lease agreement between the parties which was reduced to writing. The main issue is whether that document reflected the common intention of the parties. If not, the common continuing intention of the parties has to have been established by LM Grill.

[53] It is clear from the evidence of Bell that it was never the intention of Calicom to include the courtyard as part of the premises leased to LM Grill. That much is made clear both from the annexure to the lease agreement and the description of the premises as well as the conclusion I have come to regarding Clause 21(c) of the lease agreement.

[54] What then of the evidence established by LM Grill? On the evidence of Rattan he never read the lease agreement, and never discussed it with Bell. The only other representative of LM Grill, Deeplal, did not claim to have read the lease agreement nor have any first hand knowledge of it.

[55] In those circumstances it is difficult to envisage how it could have been suggested by the witnesses of LM Grill that it was the intention of Calicom to include the courtyard in the lease agreement. The only basis on which Rattan held the subjective belief that the courtyard was included as part of the area leased by him was on the say-so of Govinthu. Govinthu deposed to a confirmatory affidavit to what was stated by Rattan in opposing the vindicatory application. In that affidavit Rattan only suggests that the seating 'was allowed

by the Applicants, being the Landlords herein ...' Insofar as it may have been considered relevant he does not go so far as to suggest that that allowance was by way of incorporation in the lease which Govinthu concluded with Calicom. It is clear that Clause 21(c) was not included in Govinthu's lease.

[56] In addition, there has been no evidence before me of a mistake in drafting the lease agreement which may have been the result of a bona fide mutual error or an intentional act on the part of Calicom. Indeed the very contrary is suggested by both Rattan and Deeplal inasmuch as they aver that Clause 21(c) was a reference to the courtyard. Having made that allegation it is difficult to understand how they can now suggest that a further clause should have been incorporated referring to the courtyard.

[57] With regard to the existence of an antecedent contract leading to the common error, the evidence of Rattan precludes such a finding. On his evidence his subjective belief that the courtyard was included, came from Govinthu. It is important to note that the common continuing intention of the parties which LM Grill wishes to have rectified, is the one held by them when they concluded the agreement.

[58] Even reliance on an alleged representation by the landlord by allowing the courtyard to be used by Govinthu and previous tenants cannot be extended to establish that that was the intention of Calicom that the courtyard was in fact

included in the lease. This is because the evidence of Bell is expressly against that conclusion.

[59] In the circumstances the claim for rectification must fail.

An express/tacit/by conduct agreement entitling LM Grill to use the courtyard :

[60] For the reasons set forth above, I am of the view that there is no basis upon which it can be suggested that there was an express agreement between the parties that LM Grill could use the courtyard.

[61] What remains under this heading to be considered then is whether a tacit agreement was concluded by virtue of the parties' conduct. As I understand it, the basis for proving a tacit agreement is that LM Grill would be required to establish that, upon a proper inference to be drawn from the proved facts, the parties agreed to the courtyard forming part of the leased premises.

[62] In *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 292 B, Corbett JA stated :

'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.'

[63] This formulation of tacit contracts in general was later described by Corbett in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 164 I as the traditional statement of the principle. He pointed out that that general formulation had been questioned on the basis that it would indicate a higher standard of proof than that of a preponderance of probabilities when drawing inferences from the proven facts. He suggested that it was possible that his previous statement required re-formulation. At page 165 B - F, Corbett JA continued :

'In this connection it is stated that a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence ... It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract ... By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged.'

See also *Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland Revenue* 1987 (3) SA 345 (A) at 357 H – I.

[64] In assessing the evidence of Rattan it is important to consider that his state of mind was induced solely by the representations made to him by Govinthu. In this regard it is significant to consider how Govinthu's use of the courtyard came about. It is common cause that at some stage Govinthu was the lessee of Shops 1, 2, 3, 4 and 5/6. His use of the courtyard in those circumstances is not surprising. As he was the only tenant of all those shops he

was the only person who could reasonably have suggested that he be allowed to use the courtyard. In those circumstances it is not surprising that Etty's evidence was that the courtyard had previously been used by LM Grill during Govinthu's tenancy. That, however, changed when Orphen objected to the use of the courtyard because of the nuisance which it caused to his business.

[65] Rattan's belief, however, as expressed in his evidence, was that his use of the courtyard was subject to the authority of the landlord. The suggestion that that authority was limited to the manner in which the area was used, was something which only appeared in the opposing affidavit of Rattan in the vindicatory application. It formed no part of the evidence which he gave during the oral evidence hearing. The evidence of Bell was that Calicom retained the authority to use the central courtyard area, and in my view the only reasonable interpretation of Clause 21(c) of the lease is that the landlord had the authority to grant or withdraw permission to use the area. If Rattan believed that that was the courtyard which was being referred to, he also had to have believed that the landlord could withdraw its consent to LM Grill continuing to use it, which it has done.

[66] Given the direct and contrary evidence of Bell with regard to Calicom consenting to the use of the courtyard as part of the premises of LM Grill, I do not see how it can be suggested that a tacit agreement was concluded between the parties to include its use in the lease. It was clear from the evidence that there

was no consensus ad idem in this regard.

[67] In addition, and as this argument is not part of the claim for rectification, the suggestion of an implied acceptance of the agreement based on the conduct of Calicom is contradicted by the non-variation clause (Clause 14 of Calicom's terms and conditions to the lease).

The duration of permission to use the courtyard :

[68] In view of the findings which I have made above this issue falls away.

Estoppel :

[69] Any party wishing to rely on an estoppel must plead it and prove its essentials. Those essentials are :

- a) the representation of a certain factual position by words or conduct;
- b) that the party claiming estoppel acted on the correctness of the facts as represented;
- c) the party claiming estoppel so acted to its detriment;
- d) the representation was made negligently;
- e) the person who made the representation could bind the defendant by means of that representation.

[70] With regard to the representation, Mr *Pillemer* SC who appeared for LM Grill, referred at length to the fact that Calicom had stood by and allowed Govinthu and his predecessors to use the courtyard. Indeed, even after Rattan took over the operation of LM Grill, such use by LM Grill continued until the conclusion of the lease agreement in respect of Shops 1, 2, 3 and 4 with Remo's, when the use by LM Grill of the courtyard clashed with the desire of Remo's to use that area. It is however necessary that a representation relied upon must be clear and unequivocal, and that the person relying upon the representation did so in a reasonable way.

See *Southern Life Association Ltd v Beyleveld* NO 1989(1) SA 496 (A) at 503 I

[71] The evidence of Rattan however, is clear. He did not rely on a representation (by conduct or otherwise) made by Calicom. He relied on what Govinthu told him. The additional question here is whether Bell should reasonably have expected that Rattan might be misled by his failure to more closely monitor and control the courtyard, and by allowing its use as an extension of the LM Grill restaurant.

See *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004(6) SA 491 (SCA) at 495 B - C

[72] It is true that both Mr and Mrs Bell were extremely vague on the use to which the courtyard was actually put, and seemed reluctant to concede that it was used as an extension of LM Grill. Indeed Bell stated that had he known it

was being used to serve meals, he would have put a stop to that practice.

[73] Given the contents of the lease agreement it is clear that Bell had little reason to suppose that Rattan would rely on the previous conduct of Calicom and be misled as to the incorporation of the courtyard in the lease agreement. There is therefore no causal connection between the representations made by the conduct of Bell and the conclusions arrived at by Rattan.

[74] The alterations to the courtyard were carried out in 2009 prior to the signing of the lease by Rattan. He must have realised at that stage that LM Grill did not have the exclusive right to use the courtyard. This is because when the height of the wall was challenged by Orphen, Rattan immediately agreed to it being lowered and the 'L' shaped section removed entirely. That approach is inconsistent with the suggestion that Rattan believed that he was entitled to use the courtyard as part of the leased area. Had he believed this he would have enforced his rights and told Orphen that he had no business to interfere with his alteration of the courtyard area. Instead he not only reduced the height of the wall and removed one section, he agreed to continue to lower the umbrellas during working hours in order to facilitate Orphen. This is not the conduct of someone who reasonably believed that he was entitled to use the courtyard area as of right. In those circumstances there can be no question of Calicom being estopped from preventing the use of the courtyard by LM Grill.

Quasi-mutual consent :

[75] Mr Pillemer has submitted that the doctrine of quasi-mutual consent finds application here in the agreement concluded between Calicom and LM Grill. In order to rely on the doctrine of quasi-mutual consent it is necessary for Rattan to establish that a reasonable person in his position would have been ignorant of the fact that the courtyard was not included as part of the leased premises. A reasonable person in the position of Rattan would at least have read the lease agreement, and, if in any doubt, asked about the meaning and extent to Clause 21(c), as this was the only reference to a 'courtyard', albeit subject to the authority of the landlord. The nature and exercise of the authority of the landlord was another matter which would have exercised the mind of a reasonable tenant in establishing precisely what area he was entitled to occupy. That he did not make enquiries, and that he was entirely ignorant of the position disqualifies him, in my view, from availing himself of the doctrine.

The use to which the courtyard was put :

[76] Insofar as it is necessary for me to comment on this issue, it is dealt with in my judgment above. As I have already found, the use to which the courtyard was put by LM Grill and its predecessors gives it no entitlement to continue to do so, because no basis in law has been established to give it such a right.

[77] Finally, in my assessment of the merits of the vindicatory application and insofar as the incidence of the onus is concerned it is common cause :

- a) that the courtyard is owned by Calicom;
- b) that LM Grill is in possession of the courtyard, such possession having been restored to it by the judgment of Gorven J in the spoliation application;
- c) LM Grill relies upon the consent of Calicom for its right to occupy the courtyard. That right is not conceded by Calicom, and in the circumstances it is incumbent upon LM Grill to allege and prove that right of occupation.

LM Grill has not established any legal basis upon which it can claim occupation of the courtyard.

See : *Woerman & Schutte NNO v Masondo and Others* 2002 (1) SA 811 (SCA).

[78] In all the circumstances I grant the following order :

- a) the respondent is directed to vacate, within two days of the date of this order, the exterior area measuring approximately 20m² located on the eastern side of the premises currently leased by the respondent from the first applicant and described as premises 5/6, Protea Mall, Lighthouse Road, Umhlanga;
- b) in the event of the respondent failing to vacate the premises within the time period referred to above, the sheriff of this court is authorised and

directed to eject the respondent from the premises;

- c) the respondent is to pay the applicants' costs of the vindicatory application, including the costs of the oral evidence hearing.

Date of hearing : 6th September 2012

Date of judgment : 18th September 2012

Counsel for the Applicants : A D Collingwood (instructed by Johnston & Partners)

Counsel for the Respondent : M Pillemer SC (instructed by Maharaj Attorneys)

Counsel for the Intervening Party : A M Annandale SC with L Olsen (instructed by R M Strauss Inc)