SURRENDER OF LEASES AND TENANCIES: ISSUES ARISING FROM RCC (NIG.) LTD V. ROCKONOH

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Abstract
In Nigeria, lessees and tenants often abandon properties and keep keys with third parties or even to themselves without the consent of the person having the immediate estate in reversion, in the hope that they have surrendered possession. The law has always been that the consent of the landlord is a major factor in determining the validity of a surrender but the Supreme Court of Nigeria appears to have redefined this position at some point when it held in *RCC v Rockonoh* that a landlord was bound to accept a lease because there was a duty on him to mitigate losses. The major question which this decision has raised is as to what amounts to surrender in law in the light of the Supreme Court decision. In this enquiry, the paper seeks to investigate whether the Supreme Court of Nigeria has eventually changed the position of the law on surrender. The research places reliance on a number of local case laws and English cases though it is trite that some of the English authorities referred to in this work are merely persuasive. The reason for reference to English authorities at some point is because a number of the Nigerian decisions on the issue are backed by English authorities. The paper particularly observes that the Supreme Court in *RCC v Rockonoh* made copious references to several English authorities including the Halsbury Laws of England which may have accounted for its holding. The paper suggests that even though the apex court has the power to overrule itself in appropriate situation, the holding in *RCC v Rockonoh* is not in line with existing law on surrender and it is hoped that the Court will revisit this conundrum in the near future as the principle which it intends to establish places undue responsibility on owners of properties who are now expected to accept surrender anyhow and whenever it is offered. As a long term recommendation, it is suggested that there be some form of legislative harmonisation and codifications of the vagaries in the law.

Key words: Surrender, Lease, Tenant, landlord, Premises, Merger

1.0 INTRODUCTION

Surrender of leases as one of the ways of terminating leases or tenancy agreements is not a very frequent subject of legal discourse and review in property law. Sadly, however, several leasehold interests and landlord/tenant relationships are being severed and terminated abruptly via abandonment of the lease or tenancy without the consent of the lessor or the landlord as a crook way of escaping some liabilities which may have arisen in the course of the lease and which the lessee or tenant is not willing to discharge. Lessees and tenants often abandon properties and keep keys with third parties or even to themselves without informing the owner who has the immediate estate in reversion, hoping to have surrendered same. The law has always been that the consent of the landlord (not just his knowledge) is a major factor in determining the validity of a surrender. However, the Supreme Court of Nigeria appears at some point to have redefined this position

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without necessarily overruling the existing law when it held in *RCC Ltd v. Rockonoh Ltd.*[1] effect of which is that a landlord is bound to accept a surrender of his property because there is a the duty on him to mitigate losses. This paper therefore basically investigates the following questions: whether the landlord can refuse to collect keys because his consent was not first sought and had and treat the tenancy as subsisting, whether the landlord can accept the keys merely for safe keeping without accepting a surrender, and whether the landlord is at any rate bound to accept the surrender of the premises anytime the tenant chooses to offer them. These questions shall be discussed in the light of the recent decision of the Supreme Court in *RCC v Rockonoh.*

2.0 The Legal Concept of Surrender

Surrender is a legal concept in property law. It has several synonyms in ordinary English parlance. Even though the concept has logistic convergence between its ordinary and legal meaning, it is not mere semantics to say that the term 'surrender' has restrictive legal connotation in tenancy law as against what we ordinarily understand as 'abandonment.' A lease or tenancy is usually created for a fixed period of time and as such it is not in doubt whether it can be terminated. It may be brought to an end by forfeiture, merger, enlargement, effluxion of time, frustration, or where an agreement to that effect has been made, by a notice to quit given by either party, or by surrender.[2] Woodfall[3] defines surrender as:

> … the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder, wherein the estate for life or years may merge by mutual agreement… it differs from a release in this respect, that the release operates by the greater estate descending upon the less, whereas a surrender is the falling of a less estate into a greater.

Surrender has also been referred to as "the *return* of an estate to the person who has reversion or remainder, so as to merge the estate into a larger estate."[4] In *Ohochukwu v. AG of Rivers State & Ors*[5] the supreme Court of Nigeria had this to say: "I am guided by the authors of Halsbury's Laws of England fourth Edition Re-issue page 496 paragraph 524 in which the theory of surrender was propounded thus:- "A surrender is a voluntary act of the parties whereby, with the landlord's consent, the tenant surrenders his lease to the landlord so that the lease merges with the reversion and is thus brought to an end. It is defined as being the yielding up of the term to the person who

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1 (2005) 10 NWLR (Pt.934) 615

2 See also *Oteri Holdings Ltd. v. Heritage Banking Co. Ltd* (2020) LPELR-50802(CA) pp.35 – 36 and *Helios Towers (Nig.) Ltd. v. Mundili Investments Ltd.* (2014) LPELR-24608 (CA) pp. 21-22. On surrender, see generally E. Chianu, *Law of Landlord and Tenant* (Benin: Oliz Publisher, 1994) pp. 261-269.

3 Woodfall, *Law of Landlord and Tenants* 27th ed. vol.1 p. 277 quoted in K. H Inwoye, *Rent Conrol and Recovery of Premises Laws in Nigeria (Principles, Cases & Commentaries, Statutes & Forms* (Onitsha: Goodway Printing Press Ltd.,` 2003) pp. 312-312

4 See *Black's Law Dictionary* 8th ed. (USA: West Publishing Co. 1999) p. 1485. The Black's Law Dictionary in the same page distinguishes 'surrender' from 'merger' when it states that a merger bears a very near resemblance, in circumstances and effect, to a surrender; but the analogy does not hold in all cases; thought there is not any case in which merger will take place, unless the right of making and surrender resided in the parties between whom the merger takes place. To a surrender it is requisite that the tenant of the particular estate should relinquish his estate in favour of the tenant of the next vested estate, in remainder or reversion. But merger is confined to the cases in which the Landlord of the estate in reversion or remainder grants that estate to the tenant of the particular estate, or in which the particular tenant grants this estate to him in reversion or reminder, surrender is the act of the parties, and merger in the act of Law.

5 (2012) LPELR-7849(SC), pp. 30 - 31 Paras E – C, Per A. M. Mukhtar, JSC.

has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion. The surrender may be either express, that is, by an act of the parties having the expressed intention of effecting a surrender, or by operation of law, that is as an inference from the acts of the parties. The parties to the surrender must be the owner of the term and the owner of the immediate reversion expectant on the term. Consequently, an undertenant cannot surrender his underlease to the head landlord. A surrender must be of the entire term in the premises; hence a tenancy held jointly cannot be surrendered by one of two joint tenants. A part only of the demised premises may, however, be surrendered."

3.0 Return of Keys by Tenant

For there to be a valid surrender there should be return of the keys by the tenant to the landlord. It is not enough for a tenant to wish to return keys or inform the landlord or owner of the property of his intention to return the keys. Thus, where the tenant keeps the keys to himself and merely vacates the premises such does not amount to surrender in law. Adefarsin J. in *Asoropa v. Orelaja*[6] stated it thus:

> A tenant cannot be regarded as having delivered up possession if he vacates the premises without returning the keys and thereby prevents the landlord from entering into possession.

While surrender is predicated on the return of keys Adefarasin's holding above suggests that failure to return keys must amount to preventing the landlord from entering possession. Key here therefore can mean the physical object with which the tenant opens and locks the property and can also literally mean access. It is a common fact that landlords gain access to their demised property without necessarily having the keys, e.g. where the tenant vacates the property without locking it up. Thus one has to exercise caution in following the holding of Adefarasin J. above. In *Ajax v. Aina,*[7] the trial court held that as long as the tenant refused or neglected to surrender the key to the landlord, he still had constructive possession of the premises let. On appeal, Taylor CJ while stating that the principle was too wide observed that it is possible that the tenant, as a result of negligence or otherwise may misplace or lose the keys and so not in a position to hand them over to the landlord. From the foregoing it can be safely stated that it is sufficient once the tenant has indicated an intention to surrender though without surrendering the keys and the landlord accepts that position, provided the landlord is able to have access to his property. What is important is that the landlord is put back in possession and he consents by actually or constructively resuming possession and not whether he gained access through the keys.

The question that necessarily follows is whether the mere return of keys by the tenant amounts to surrender. In *Conac Optical (Nig.) Ltd. v. Akinyede*,[8] the respondent who was the plaintiff at the trial court commenced this action against the appellant claiming arrears of rent for the 2nd floor apartment occupied by the defendant / appellant under a yearly tenancy agreement. The defendant / appellant desiring to terminate the lease agreement gave to the plaintiff/respondent one month notice instead of the 6 months' notice required by law. The defendant/appellant conceded this

[6] (1976) 5CCHCJ 1405
[7] (1967) LLR 152
[8] (1995) 6NWLR (Pt. 400) p212

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fact but argued that plaintiff/respondent was wrong and it was unreasonable to continue to treat the tenancy as still subsisting especially after the defendant had sent back the keys of the apartment to him through his (plaintiff) clerk. The trial Magistrate Court held that there was evidence that the plaintiff did not consent to the surrendering of the keys and the determination of the tenancy by the defendant. Plaintiff objected to the way and manner the defendant left the keys with his clerk having made it known where to be handed keys. He returned the keys to the defendant through the 2nd plaintiff. The keys were said to be delivered back to the clerk of the defendants Company. There was no dispatch book to show that the clerk received the keys. This supported the defendants' denial that the keys were not returned to them. Though the keys and the cheque for ₦ 1,000.00 were delivered to the plaintiff through his clerk, the plaintiff accepted the cheque and did not accept keys. The trial court held that the defendant has not surrendered the premises as required by law and was still the tenant of the plaintiff.

The High Court, on appeal upheld the decision and on further appeal, the Court of Appeal affirmed this decision holding that the plaintiff /respondent was right in claiming for arrears of rent as the tenancy still subsisted. From the decision in *Conac Optical (Nig.) Ltd v Akinyede*[9] it is very clear that the emphasis of the court was that merely returning of the keys to the landlord alone will not amount to a valid surrender in law. It must be with the consent and knowledge of the landlord. It also suggests that the return is not with the consent of the landlord if the keys are not returned in the manner specified by the landlord.

In *Boyer v. Warbey*[10] Denning L. J**.** evaluated the facts of that case as follows:

> He (the tenant) left the flat on August 30, 1951 and sent the keys to the landlord on 29 September, 1951 but the landlord did not accept a surrender of the tenancy. They tried to re-let the flat and eventually succeeded in doing so as to rent up to the time they re-let. I think they are. As a statutory tenant, the tenant was not entitled to give up possession except on giving not less than three months' notice to quit. He did not give any valid notice. He went out of possession. They (landlords) were not bound to accept possession whenever the tenant chose to offer it.

This English authority though not binding in Nigeria is in line with the tenancy law in Nigeria from the opinion of the courts in the decided Nigerian cases examined above.

4.0 Tenant Abandoning the Premises

Why relying heavily on the Black's Law Dictionary[11] the Supreme Court of Nigeria with full endorsement considered the meaning of the term "abandonment" in *Ndoma-Egba v. Chukwuogor* & Ors.[12] The apex court followed the Black's Law Dictionary's definition of the word 'abandonment' which is "…the surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it... The giving up of a thing absolutely, without reference to any particular person or

[9] *Ibid.*
[10] [1953] 1 QB 234 at pp. 244 -245
[11] *Supra* (n4)
[12] (2004) LPELR-1974(SC)p. 29 per S. O. Uwaifo, JSC (pp 28 – 30, paras E - A)

purpose, as vacating property with the intention of not returning…"[13] This case was not decided on tenancy law but on the Disserted Property (Control and Management) Edith of the South Eastern State[14] promulgated immediately after the Nigerian Civil War in 1970. The issue in that case was whether the properties of the appellant who ran away and left his properties behind as a result of the civil war can be described as having abandoned his properties within the definition of the above Edith. It is therefore clear while the Supreme Court inquired very widely into the definition of the term abandonment. For the purpose of this discourse, the entire assessment of the word 'abandonment' as done by the apex court may not be useful to this work but suffices to say that it connotes "the giving up of a thing absolutely, without reference to any particular person or purpose, as vacating property with the intention of not returning"

Abandonment arises where the tenant quits the demised premises without an *animus revertendi* (an intention to return). This intention may be shown either by proving facts from which such an intention can be presumed, or by direct evidence of the intention by the tenant.[15] Abandonment does not amount to surrender. Where tenant merely abandons possession without showing the intention to surrender the tenancy such abandonment shall not amount to a valid surrender in law. In *Ajax v. Aina*[16] the tenant left the premises on October 1965 but failed to surrender the keys to his landlord. He did not notify the landlord in any manner. The argument for the tenant was that he vacated the premises on the day he vacated possession and was not liable to an order to give up possession which was plaintiff's claim. There was no evidence that the landlord accepted and acted on the alleged surrender. It was held that there could be no effective surrender of premises in law without the knowledge and consent of both parties.

This decision clearly resonates with legal erudition and re-emphasises the issue of consent. It is an elementary principle of contract law that parties to a contract must have a meeting of the mind *(consensus ad idem)*, otherwise there cannot be a legally enforceable contract. This is also supposed to affect the doctrine of surrender as surrender in law amounts to alteration of the legal position of both the landlord and the tenant especially if the surrender is not by operation of law and it is only reasonable that both parties should participate and come to an agreement for there to be an effective surrender in law. In *Boyer v. Warbey*[17] the court held that tenant going out of possession without giving and valid notice to quit does not amount to surrender and he remains a tenant until the landlord re-lets the premises because the tenant may come back the next day. Once the tenant abandons the property without intention to return, the landlord is at liberty to exercise his rights of re-entry without suing for possession and once the landlord re-lets the property or does anything inconsistent with the right of the tenant, the tenancy comes to an end and same creates a situation of surrender by operation of law. In *Oastley v. Herderson*[18] Cockburn, C.J. observed.

> The plaintiff then, by letting the premises to a new tenants, put an end to the defendant's term from that date, for they thereby did an act inconsistent with the continuation of the defendant term… But up to that date they had not done such

[13] Underlined for emphasis
[14] Edith No 10 of 1970
[15] Chianu, *supra* (n2) p.261
[16] *Supra* (n7)
[17] *Supra* (n10)
[18] (1877)2 QBD 575 at 578

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> an act, for they had not virtually taken possession of the premises; and in order to estop the lessors, as to constitute a surrender by operation of law, there must be a taking of possession. I do not say a physical taking of possession, but, at all events, something amounting to a virtual taking of possession. But here was no such taking of possession… The mere attempting to let does not amount to an estoppel…

The argument of the defence that once actual possession has been taken, the surrender must, as a matter of law, relate back to the date of the receipt of the keys citing *Phene v. Popplewell*[19] was jettisoned as incorrect.[20] It is imperative to add that for abandonment to amount to a valid surrender in law, such abandonment must be complete. The tenant must have removed all his belongings to enable the landlord to take possession. In *Old Gates Estates Ltd. v. Alexander*[21] husband and wife occupied a dwelling house as a matrimonial home. Following a dispute, the man left the home, the wife remaining in occupation with the use of his furniture. The husband then purported to surrender the premises to the landlord and gave his wife written notice revoking any authority, which she might have from him to occupy the house without removing his wife and the furniture. Bucknill, L.J. settled the issue as follows:

> The tenant did nothing towards removing the furniture in the flat and so long as it was there he retained possession to that extent. It was not opened to the landlord to let the flat unfurnished while the furniture was there and the tenant could not remove his wife otherwise than by breaking the law and forcibly carrying her out. It is not necessary for this court to decide whether he could lawfully remove his permission for her to live there, but in the absence of circumstances showing that she was in the wrong and had forced him to leave her I should have great doubt whether any revocation of permission to an innocent wife to live in the matrimonial home in which the husband had lived with her and from which he had deserted her would have any valid legal effect. In my judgment, the learned judge was wrong in holding as he did, that the tenant had given up possession. I think he did not. That being so, I think that this appeal should be allowed.

5.0 *RCC Ltd v Rockonoh Ltd*[22]

5.1 Summary of Facts

The respondent who was the plaintiff at the High Court was owner of an estate consisting of several buildings in Enugu some of which were leased to the defendant. There were three lease agreements covering the 24 properties leased made in 1/11/79, 1/9/80 and 1/3/80 respectively. The defendant before September, 1986 attempted to surrender possession of the buildings as required by the tenancy agreements but the plaintiff refused to accept the surrender because the defendant had not effected repairs or renovation on the building as required by the agreements. The defendant through their solicitor wrote the plaintiff in 1984 expressing their intention to surrender possession on or before 20/9/1984 and the plaintiff reminded the defendant of the provisions of the tenancy agreement which must be complied with before surrendering the

[19] 1812 CB (NS) 334; 31LJ (CP) 235
[20] *Op. cit.*
[21] (1949) 2 All ER 822, 824
[22] (2005) 127 LRCN 1312 ;(2005) 10 NWLR (Pt934) 615; (2005) LPELR -2947 (SC)

buildings. The contention of the defendants is that they have carried out the said repairs. Parties also agreed that the tenancy agreements would come to an end on 31/12/1984. The plaintiff refused to accept surrender.

The plaintiff brought this action claiming arrears of rent, *mense* profit and interest. The parties filed and exchanged pleadings and went into trial. The trial Judge in his judgment dismissed its entirety, the claim of the plaintiff holding that 'granting but without holding that the defendant was in in breach of the covenants to repair and internally decorate the premises at the determination of the tenancy, the plaintiff's remedy is an action in damages and not an order of specific performance.' The plaintiff was dissatisfied with the decision and proceeded on appeal to the court of Appeal. The defendant also brought a cross-appeal. The Court of Appeal allowed the appeal and dismissed the cross appeal. On appeal to the Supreme Court by the defendant/appellant, the apex court allowed the appeal setting aside the decision of the lower court and restoring the decision of the trial court holding particularly that:

> If it was on the basis that the defendant had not repaired the properties in order to restore them to their pre-tenancy condition that the plaintiff refused to accept their surrender, surely it was a legitimate deduction to be made by the trial Judge on the basis of simple common sense that if the plaintiff had accepted the surrender when the defendant so offered, there would be no necessity for the plaintiff to treat the defendant as a tenant in possession when it was clear that the defendant had no need any longer of the properties and when all the defendant had were only the keys which the plaintiff refused to accept.[23]

5.2 The implication of the decision

It would appear from this decision that once a tenant has shown willingness not to continue with the tenancy, the landlord will not be at liberty to refuse to accept the keys. Ogundare, J.S.C. while delivering the lead judgment put the law as follows:[24]

> A close perusal of the case made by the parties on their pleadings reveals that the dispute of the parties had boiled to one crucial issue which was whether or not he plaintiff was right to refuse to accept the surrender of the demised properties for no other reason than the defendants had not restored the properties to their pre tenancy position. That issue clearly raises the question whether or not it was reasonable course of action to adopt for a landlord to refuse to accept the keys of the demised properties being surrendered by a tenant and later for the same landlord to make a claim against the tenant not for the cost of repairs to the properties but for rents lost to the landlord over the period he refused to accept the surrender… the remedies ordinarily available to a landlord in plaintiff's situation… do not include refusal to accept a surrender of a demised property.

The major consideration by the trial court and the Supreme Court was the plaintiff's duty to mitigate loss and that the plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong and if he fails to do so, he cannot claim damages

[23] p.1337, para. K-P
[24] *RCC v Rockonoh*, *supra* (n22) pp. 1338-1339

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for any such loss which he ought reasonably to have avoided. If this principle is applied to the question of surrender wholly as the Supreme Court did, it would appear that the requirement of the law that surrender cannot be effective unless it is done with the consent and knowledge of the landlord and same is accepted by the landlord has been eroded. The implication of the decision in *RCC v Rockonoh* is that once the tenant is willing to surrender the tenancy the landlord is put in a duty to accept surrender and he has no right to refuse surrender. He can sue for damages for the breach of any covenant in the tenancy and certainly not to refuse surrender. Ogundare, JSC took it further

> …. rather than accept the surrender of its properties and sue later for damages on the cost of repairs, the plaintiff elected to adopt the option, which left his 24 buildings empty and unoccupied by a tenant for upward of two years. This option taken by the plaintiff is rather startling in the light of evidence… that there were other persons who are willing to become tenant at the material time.[25]

From the facts available to court it was obvious that the issue which particularly weighed heavily on the mind of the trial court and the apex court was that the tenancy was to determine at an agreed date and that tenant had paid her rent till the end of the tenancy. In other words, the tenant had no need of the properties. These consideration overwhelmed the trial court whose decision was approved by the apex court to the effect that even if there was a breach of the covenant to repair the properties, the landlord was bound to accept the keys and later sue for damages citing profusely the duty on a plaintiff to mitigate losses.[26] This decision the decision that the tenant was bound to accept keys, with respect, seems to be too wide and appears to have establish that the landlord is under obligation to accept surrender any time the tenant chooses to offer it.[27] There is no doubt that the decision of the Supreme Court was based on some special facts which the apex court evaluated as follows:

> By the tenancy agreement, the tenancy had come to an end but the plaintiff was only using the weapon of refusal to accept surrender of the keys as a subterfuge to foist on the defendant a contract which had long ceased to exist for the purpose of merely extracting extra money from the defendant/ appellant ploy which the court termed as unconscionable and skewed exploitation.[28]

The court stated further that "it was undisputed before the trial court that the defendant had at the commencement of the suit paid all his rents up to the 31st December, 1984. Further it was not

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[25] *Ibid*, 1342

[26] The duty to mitigate losses is an established duty based on avalanche of case law including *Kosile v Folarin (1989) 3 NWLR (Pt.107) 1* which was cited by the apex court.

[27] Compare the view of Denning, L.J. in *Boyer v. Warbey* , *supra* (n10) p.245 where his Lord Denning stated that the landlord is not bound to accept possession whenever the tenant chooses to offer it.

[28] The question that readily comes to mind is whether any contractual relationship still existed between the landlord and the tenant as at the time the contract ceased to exist by reason of effluxion of time. Certainly, the answer is unambiguous no. This being the case, the issue of surrender of keys or question of plaintiff duty to mitigate the losses of an erring defendant should not have formed any serious basis for holding that the landlord was bound to accept surrender. As at the time the relationship of the landlord and tenant ceased between them, the only duty on the tenant was to return the keys to the landlord which the tenant. A breach of a term in an agreement should only entitled a party who is suffering from the breach to sue and recover damages or to repudiate the contract and does not confer any right on that party to elect to keep the contract alive especially when the contract is for a specific period of time which time has effluxed. This is the import of the decision of the Supreme Court in *RCC v Rockonoh*..

disputed that the plaintiff did not accept the surrender of the properties from the defendant as at December, 31st 1984…" The court's emphasis in the case was on the fact that the tenancy had been determined by the parties by their own agreement such that nothing is left to warrant the refusal of keys. The Supreme Court stated:

> in resolving the question arising from the failure of the plaintiff to accept surrender of the properties, on the ground that the defender appellant breach the covenant to repair the properties … it does thereafter appear to me from the parties pleadings that it was a common ground that the tenancy had come to an end by 31st December,1984 and that all that remained was the yielding of the possession of the premises which was the bone of contention, the issue being whether the house had been properly redecorated, a condition, which according to the plaintiff must be fulfilled before acceptance of possession… if the defendant is still in possession, a distinction has to be drawn between determination of a tenancy. A determination of a tenancy may occur without the possession of the house being yielded up as where the tenant holds over. Therefore, the mere fact that the plaintiff has not taken possession of some of the houses does not necessarily imply that the tenancies had not determined. It is my considered opinion that both parties having agreed that the tenancies had determined on the 31st December, 1984 it was a misconception for the plaintiff counsel to argue that there was no notice to quit… [29]

It is submitted that it would have been safer for the court to have restricted itself to these special facts rather than inadvertently laying down a general rule of law contrary to established case law principles. In the light of the above it cannot be argued in the absence of these special facts in *RCC v Rockonoh* that once the tenant is no longer in need of the premises the landlord is put in a duty to accept surrender at all cost? To argue so is to say there surrender as a way of terminating tenancy or lease is automatic, once the tenant returns the keys, the landlord treat the tenancy as determined. It is unlikely that the Supreme Court would have held the view it held if the tenancy agreements were still subsisting at the time the tenant was coercing the landlord to accept keys. It is submitted that since surrender is a way to determine tenancy or lease, the existing law recognising the element of mutuality between the landlord and the tenant where the tenant chooses to surrender the property is a better law.

6.0 Acceptance of keys without accepting Surrender

Having reviewed the *RCC v Rockonoh,* there still remains nagging question of whether the landlord can accept the keys without accepting surrender. The position of the law is that merely accepting the keys by the landlord does not amount to a surrender. However, as was said earlier, *RCC v Rockonoh* is not an authority for saying that the landlord is under a duty to accept the premises any time the tenant chooses to offer them. The landlord can accept the keys for security purposes and also to have access and sue for arrears of rent from when he accepted the keys till when he is able re-let the properties, provided he must mitigate losses.

[29] Supra (n22) pp. 1328-1329

In *Oastley v. Henderson*[30] a tenant took a lease for seven years in 1868. Later in the year he left for America and returned the keys to the landlords who accepted same. Thereafter, they tried to re-let the property but did not succeed until 1872. In an action to recover arrears of rent up to the date of re-letting, it was held that the surrender took effect from 1872 when they finally re-let the property and not in 1868 when the landlord accepted the key. According to the court "the plaintiffs, the landlords took the keys because he could not help themselves, the defendant being gone, and for all they knew, not likely to return."[31] The facts of this case however can be distinguished from that of *RCC v Rockonoh* where the landlord allowed prospective tenants to pass by without letting out the property for two years after tenant had returned the keys. In Oastley's case the landlord unsuccessfully for four years laboured to re-let the property and such as such showed sufficient act aimed at mitigating the losses created by the tenant's returns of keys. It is desirable that the tenant brings the tenancy to an end by issuing the relevant notices coupled with the return of keys. The court has addressed the desirability of quit notice by tenants to properly terminate tenancies as against merely returning the keys to the landlord where there is still an unexpired term in the tenant's leasehold interest.

In *Nigerian Construction and Holding Co. Ltd v. Owoyele,*[32] the tenancy was from year to year, the tenant abandoned the premises in the ninth month and returned the keys to the landlord. In an action for arrears of rent, the landlord claimed rent from the anniversary of the tenancy to the date of judgment. Achike, JCA addressed the issue very succinctly as follows:

> The relation of landlord and tenant is essentially contractual, accordingly where the tenancy agreement is arbitrarily terminated by the tenant the landlord is entitled to damages for the rent covering the unexpired part of the years tenancy, and depending on the exact date the tenancy was determined, the landlord may additionally claim damages by way of rents payable in lieu of notice. The latter amount will depend on the nature of periodic tenancy under consideration. "Thus, in the instance case, which is a yearly tenancy, the landlord is entitled to rents for the one year period from February 1, 1984 to January 31, 1985 even though the appellant terminated the tenancy agreement in September, 1984. Furthermore, the landlord is entitled ordinarily to six months' notice which would expire around the end of March 1985, and in lieu of such notice the tenant would be condemned to damages for rent due from January to March 1985… Rents paid in lieu of notice represent pre-estimate or liquidated damages that the law considered as adequate damages to the landlord for the breach of the tenancy agreement by the tenant. Since the landlord is under a duty to mitigate damages recoverable by him he would be expected to let the premises to another tenant, if he is opportuned to find one, as soon as the tenancy has terminated and to that extent reduce the rent payable by the tenants for the period of the notice.[33]

[30] Supra (n18)
[31] *Ibid*, p.578
[32] (1988) 4 NWLR (Pt. 90) 588, 603
[33] *Ibid*, 603

Chianu,[34] however observes some inaccuracies in this decision one of which bothers on when should the tenant be deemed to have terminated the tenancy. According to him "the tenant in *Owoyele's* case was liable to pay rent up to 31 January 1986 and not March, 1985 as was held (and that) this proposition is based on the assumption that by the returned of the key the tenant thereby have notice of his intention to quit possession of the premises. He queries that since the length of notice required to be given in this case is six months' notice, the landlord should be entitled only to rent by way of damages for the period of the six months which should end at the anniversary of the term.[35] Chianu also holds the view that "the tenant is not in any way obligated to mitigate the tenant's obligation by letting out the apartment either at all or to the earliest person that comes. The money dues from the tenant is not unliquidated damages for breach of contract, but rent in ascertained sum."[36] Even though this opinion was held before the decision in *RCC v Rockonoh,* it is more in consonance with modern reality.

Thus, where the tenant simply returns the keys, and same are accepted by the landlord the landlord should have the opportunity of changing possession before there can be a surrender. Changing of possession here need not be by way of re-letting alone, it is sufficient if the landlord does anything showing that he has accepted the surrender of the premises. In *Furnivall v. Grove*[37] the landlord received the keys from the tenant and said nothing. A few days later he entered the premises and pulled them down with the object of rebuilding them. It was held that this showed that the landlord assented to the determination of the tenancy and the tenant was no longer liable to pay rent under the tenancy. Similarly, in *Smith v. Roberts*,[38] the landlord sought to effect repairs in the premises subject of a yearly tenancy. The tenant packed out, sent the keys to the landlord and indicated that he considered the tenancy as determined. The landlord's workmen made the house uninhabitable as to warrant the inference that the landlord was already treating the apartment as his own. After repairs, the landlord sued the tenant for rent due. It was held that the tenant was not liable since the above facts showed that the landlord had impliedly accepted the surrender.

7.0 Effect of Surrender

Once a landlord accepts surrender, the tenant is discharged from future obligations. A surrender of lease therefore operates only to release the tenant from obligation taking effect after the date of the surrender while remains liable for past breaches. In this regard, all rents which accrued or become due at the date of the surrender are recoverable. Once there is an effective surrender the tenant is no longer under obligation to pay rent, the only remedy open to the landlord is to sue for damages if there was any breach of the tenancy agreement.[39] In *Walls v Atcheson.*[40] a tenant for a

[34] Chianu, *supra* (n2) 261

[35] The position of the learned author is in consonance with the requirement of the eve of anniversary rule which requires that a notice to quit must not only conform with the prescribed period of time limited by law but must also terminate on the eve of the anniversary of the term. This being the case the notice that could have validly terminated the tenancy in Owoyele's case should have ended in January, 31st 1986 being the eve of the anniversary and not March, 31st 1985. Though the learned author is correct the query does not subtract from the validity of the rule laid down in that case which is to the effect that where a tenant arbitrarily terminates his tenancy the landlord is entitled to damages for the rent covering the unexpired part of the term.

[36] *Ibid*, p. 268

[37] (1860) 141 ER 1259

[38] (1892) 9 TLR 77

[39] See *RCC v Rockonoh,, supra (n22)*

[40] (1826)130 ER 591

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term of one year certain quitted the premises in the middle of the term and the landlord let them to another tenant. Before the tenancy year ended, the premises became vacant again. The court held that the tenant could be liable for any obligation that arose after the surrender.

8.0 CONCLUSION

The vagaries of the law relating to the issue of surrender of leases and tenancies, no doubt, is of real concern especially with respect to the decision in *RCC v Rockonoh*. Though more tenants surrender or abandon possession than issue notice, most landlords in periodic tenancies prefer to accept keys whenever and however they are offered to mitigate losses. Contention on surrender rarely gets to the court room. While the law is settled that once the landlord does anything inconsistent with the subsistence of the tenancy after the tenant has shown his intention to discontinue with the tenancy and the landlord is estopped from reviving his rights as landlord or from treating the tenancy as still existing, it is not clearly settled where the landlord accepts the keys and keeps the premises open. In *RCC v Rockonoh* the apex court said that a landlord cannot refuse to accept keys to mitigate the losses by an erring tenant while the court in another case was of the view that the tenant should not be given this wide privilege to bring the tenancy to an end by merely returning the keys anytime he feels like doing so. In order words, the landlord is not bound to accept possession whenever the tenant chooses to offer them.[41] Further still, some other decision is to the effect that the landlord must have taken possession even if it is just a virtual and not physical possession for the purpose of changing of possession before there can be a valid surrender.[42] This is not forgetting also the decision in *Ajax v. Aina* that there can be no valid surrender in law except that it is with the knowledge and consent of both parties. It is recommended that these divergences on the law relating to the question of surrender be harmonised, if possible by way of legislative codification.

[41] *Boyer v Warbey*, supra (n10)
[42] *Oatley v Henderson* supra n.18)