and he had not received the alleged notice referred to in para. 4 of the statement of defence.

The next witness, Ibrahim Basma, said that he had gone on two occasions to the defendant on the instructions of the plaintiff to collect the rent for 1963–1964 and on each occasion a representative of the defendant company in Freetown had promised to remit the rent then due but had not done so.

In the absence of any contrary evidence by the defendant I accept the evidence of these two witnesses.

There will be judgment for the plaintiff for £800 representing rent for 1963–64. As the defendant has given up possession of the premises to the plaintiff I allow £200 by way of general damages. The defendant company will pay the costs of this action. Costs to be taxed.

Judgment for the plaintiff.

MACFOY *v.* UNITED AFRICA COMPANY OF SIERRA LEONE, LIMITED

MACFOY *v.* UNITED AFRICA COMPANY OF SIERRA LEONE, LIMITED and MOBIL OIL OF SIERRA LEONE, LIMITED

COURT OF APPEAL (Ames, Ag. P., Dove-Edwin, J.A. and Cole, J.):
March 16th, 1964
(Civil App. No. 16/1963)

[1] **Civil Procedure — parties — defendants — breach of covenant against underletting—tenant is proper defendant:** Where a third party is in occupation of premises in breach of a covenant against underletting, the tenant is the proper defendant in an action to recover possession (page 10, lines 34–40).

[2] **Civil Procedure — joinder of parties — breach of covenant against underletting—occupier can be joined as co-defendant:** Although the tenant is the proper defendant in an action to recover possession for breach of a covenant against underletting, the person in occupation can be joined as co-defendant (page 10, lines 34–40).

[3] **Companies—subsidiary companies—property—use by one subsidiary of another's premises—mere permission to use does not amount to assignment or underletting:** Where one subsidiary company is

merely permitted to use premises demised to another, this will not necessarily amount to a breach of covenant against assignment (page 9, lines 34–41).

[4] Companies — subsidiary companies — property — capacity to grant tenancies—no power to grant where covenant against assignment: The fact that two companies are subsidiaries of a parent company does not entitle one to let the other into possession of premises demised to the first in breach of covenant against assignment or underletting (page 9, lines 5–31).

[5] Landlord and Tenant—assignment—breach of covenant—mere permission to use does not amount to breach: A tenant who has covenanted not to part with possession of the demised premises does not commit a breach of a covenant against assignment or underletting by merely permitting another to use the premises, so long as the tenant retains the legal possession himself (page 10, lines 1–5).

[6] Landlord and Tenant — assignment — breach of covenant — use by one subsidiary company of another's premises—mere permission to use not amounting to breach: See [3] above.

[7] Landlord and Tenant—companies—subsidiary companies—no power to grant tenancy where covenant against assignment or underletting: See [4] above.

[8] Landlord and Tenant — possession — re-entry — proceedings as an exercise of right of re-entry: Where a tenant has assigned his term in breach of covenant and disappeared, proceedings brought against the assignee may be a sufficient declaration to determine the tenancy under a forfeiture clause (page 11, lines 3–11).

[9] Landlord and Tenant—underletting—breach of covenant—mere permission to use not amounting to breach: See [5] above.

[10] Landlord and Tenant — underletting—breach of covenant—occupation of third party as prima facie evidence of breach: Where a right of re-entry has been reserved on breach of covenant against underletting, occupation by a third party apparently as tenant is *prima facie* evidence of breach and the tenant can be sued for breach (page 10, lines 34–38).

[11] Landlord and Tenant—underletting—breach of covenant—occupier can be joined as co-defendant: See [2] above.

[12] Landlord and Tenant—underletting—breach of covenant—recovery against third-party in possession: Where an action for recovery of possession against a tenant in breach of a covenant against underletting results in forfeiture, the third party in possession can also be required to quit (page 10, line 34—page 11, line 2).

[13] Landlord and Tenant—underletting—breach of covenant—tenant is proper defendant: See [1] above.

[14] **Tort—damages—injury to reversionary interests in land—grounds for recovery by reversioner:** A reversioner can only recover damages where the injury is permanent in the sense of continuing to affect the property when he comes into possession and he is not entitled to damages for temporary injury on the ground that it affects the present saleable value of the reversion (page 12, lines 28–33).

[15] **Tort—trespass—trespass to land—injury to reversionary interests in land—grounds for recovery of damages by reversioner:** See [14] above.

The appellant brought an action against the first respondent in the Supreme Court for an order for the possession of premises and mesne profits and against the first and second respondent for damages for irreparable injury to his reversion.

The premises in respect of which the actions arose were used as a petrol filling station which was in the charge of the appellant. He had been put in charge by the respondents and sold petrol on a commission basis. Subsequently, the business arrangement between the parties came to an end and the premises ceased to be used, much of the apparatus being dismantled and removed. The appellant owned the freehold of the premises which he had demised to lessees who were a property holding company subsidiary to the U.A.C. group, by two leases for 21 years and 15 years respectively. The leases contained the usual covenants and in addition the 21 year lease contained covenants that the lessee would build a petrol filling station and shop at its own expense, yielding up the premises at the end of the term, and that the lessee would not assign, underlet or part with possession without the lessor's consent. The 15 year lease again contained a covenant to build a petrol pumping station and keep the same in good repair and tenantable condition, with a covenant not to assign or sublet the premises without consent. The lessee in fact made no use of the premises which were used by the respondents whose senior administrator had been appointed agent of the lessee under power of attorney.

The appellant claimed that the leases had been assigned to the respondents who were in breach of the covenants since the petrol station had been dismantled and removed. At the end of the appellant's case the second respondents were dismissed from the consolidated suits. The Supreme Court held that the claim for possession failed since no assignment had taken place between the lessees and the respondents and in any case the appellant had obtained forfeiture of the leases in another action. On the claim

for irreparable damage to the reversion, the Supreme Court allowed four items out of six and ordered that an enquiry be made by the Master as to the cost of repairing the injury complained of.

On appeal the appellant again contended that an assignment had taken place since the respondents were in possession. The lessees and respondents were both subsidiaries of a parent company and the respondents' senior administrator was the lessees' agent. The appellant further contended that he was entitled to succeed on all the items for irreparable injury to the reversion. The respondents opposed all these contentions.

Cases referred to:

(1) *Chaplin* v. *Smith,* [1926] 1 K.B. 198; (1925), 134 L.T. 393, followed.

(2) *Commissioners of Works* v. *Hull,* [1922] 1 K.B. 205; [1921] All E.R. Rep. 508, distinguished.

(3) *Doe ex dem. Hindly* v. *Rickarby* (1803), 5 Esp. 4; 170 E.R. 718, distinguished.

(4) *Rust* v. *Victoria Graving Dock Co.* (1887), 36 Ch. D. 113; 56 L.T. 216, followed.

Wright for the appellant;
Harding for the respondent.

AMES, Ag. P.:

In Civil Case No. 425/61, one of these two consolidated suits, the appellant sued the respondents as trespassers and claimed (a) an order for possession of two adjoining pieces of land on the Kissy Bypass Road at Freetown (which I will call "the premises"); (b) mesne profits at £100 a month for each piece from a date in 1957 to the date of the writ; and (c) mesne profits at £200 a month for each piece from the latter date until delivery of possession. In the other suit, Civil Case No. 434/61, he claimed—"damages for irreparable injury to [his] reversion of the premises," consisting of six different items totalling £5,050.

The appellant failed in his claim for possession and mesne profits and succeeded as to four of the items of injury to his reversion, and an order was made for an enquiry to be held by the Master as to the cost of repairing the injury complained of in those four items.

This appeal is against the whole of that judgment, including that part referring to the injury to his reversion, because the

appellant contends that he should have succeeded on all six items. The appeal is opposed by the respondents, but it should be noted that they have made no cross-appeal against that part of the judgment in favour of the appellant on his claim for injury to his reversion, although Mr. Harding, for the respondents, argued that the learned trial judge was wrong to give judgment for the appellant even on the four items.

Mobil Oil of Sierra Leone, Ltd. were dismissed from the consolidated suits by a judgment given on May 2nd, 1963 at the close of the case for the appellant.

The premises were used as a petrol filling station, one part for filling cars and lorries and the other for filling drums. The appellant was in charge of it, having been put in charge by the respondents, and he sold petrol to the purchasers "on a commission basis." That came to an end in November 1958 and the premises ceased to be used and some of the apparatus was removed.

The appellant owns the freehold and the reversion to the leases of the premises; but the respondents are not the lessees. The lessees are an incorporated company, entitled at the dates of the leases, the Gold Coast Central Properties Co., Ltd. There were two leases, one for each of the adjoining pieces of land, the one for 21 years from August 1st, 1956 and the other for 15 years from March 1st, 1955. Each contained the usual covenants, and also some which must be mentioned in detail.

That of 1956 for 21 years contained covenants by the lessees to pull down existing buildings and pay £810 compensation therefor and—"to erect and maintain upon the demised premises at their cost a petrol filling station" and to erect a "shop" and—"to yield up the demised premises at the termination of the tenancy together with all and every appurtenance thereto belonging." That of 1955 for 15 years contained a covenant—"to erect a building on the said land as a petrol pumping station and to keep the same in good repair and tenantable condition." The 1956 lease contained a covenant—"not to assign, underlet or part with possession of the demised premises or any part thereof" without the lessor's consent and the 1955 lease had a covenant—"not to assign or sublet" the premises without consent.

These, then, were the covenants entered into by the lessees in 1956 and 1955. In February, 1957, the lessees changed their name to the Central Properties (Ghana), Ltd. and in August 1957 that company went into voluntary liquidation—and it is apparently still

in voluntary liquidation. No order has been made vesting the legal property in the demised premises in the liquidator.

According to the evidence of the liquidator, the company is—"a property holding company and a subsidiary of the U.A.C." It is not clear to me whether he meant the U.A.C. of Sierra Leone, Ltd. who are the respondents, or the U.A.C., Ltd. of the United Kingdom. The learned judge mentioned "Unilever" in his judgment although nowhere in the evidence is Unilever mentioned. Perhaps that is what he took the liquidator to mean. This mention of Unilever was referred to in the first ground of appeal, but in my opinion it is of no importance and matters not.

What matters is that the lessees, at first under their former name, and then under their changed name, held the premises as lessees but made no use of them, and that it was the respondents who used them, and—"the senior administrator of the United Africa Co. group in Sierra Leone" has been the agent of the lessees under power of attorney. The appellant said in evidence: ". . . [T]he U.A.C. are the agents of the Gold Coast Properties, and the U.A.C. put me in control of the place to sell Mobil Oil products." He does not distinguish the company from its "senior administrator." The documentary evidence shows that prior to August 1957 (the date of the voluntary liquidation) the appellant's dealings about rent due from the lessees under the two leases were with the officers of the respondents.

The learned judge's reason for giving judgment for the respondents on the claim (in Civil Case No. 425/61) for possession and mesne profits was that there had been no assignment of the lease by the lessees to the respondents. He said:

> "By some arrangement the United Africa Co., Sierra Leone, were put into occupation of the said lands and there is no evidence before me that the said lands had been assigned by the said company to the United Africa Co., Sierra Leone. The question arises . . . whether such conduct by the [lessees] amounts to an assignment . . . without consent so as to lead to a forfeiture. . . .
>
> A company in liquidation . . . continues to be liable on its covenants. But in these actions the [lessees were] not joined, the reason no doubt being that the plaintiff by another action has obtained forfeiture of the said leases. . . . [T]he mere letting of the United Africa Co., Sierra Leone, into occupation of the said premises, with them and the Gold Coast

Properties Ltd. having been proved to be subsidiaries of the parent Company, Unilever, does not amount to an assignment, as possession still vested in the Gold Coast Properties, Ltd., albeit constructive possession. . . ."

Three of the grounds of appeal refer to this part of the judgment. They are:

"(a) The learned trial judge was wrong in law in holding that the fact that the Gold Coast Properties Co., Ltd. were found to be subsidiaries of a parent company Unilevers entitled them to let the defendants the United Africa Co. of Sierra Leone, Ltd. into occupation of land in respect of which there subsist covenants against parting with possession or assigning.

(b) The learned trial judge was wrong in law in that having rightly found that a lease had been made between the appellant B. L. Macfoy and Gold Coast Properties Co., Ltd. he failed to apply the first great principle of company law, namely that a company is a separate legal entity or legal person apart from its members.

(c) The learned trial judge erred in law and failed to apply the principle contained in para. (b) above in holding that the mere fact that there was some evidence that Gold Coast Properties Co., Ltd. appointed personally and in his own name the person who is the administrative head of another company, entitled such other company to be let into possession of lands leased to Gold Coast Properties Co. Ltd. 'by some arrangement.'"

I have already said that there was no mention of Unilever in the evidence. In so far as the learned judge meant that the respondents were lawfully in occupation because of the supposed common parent company, I respectfully disagree and I agree with Mr. Wright's argument on this particular point. Nevertheless I agree with the general conclusion of the learned judge that the appellant's claim failed.

The respondents have at times been loosely referred to as the agents of the lessees, even now and then by Mr. Harding. The actual agent and attorney was the senior administrator (their general manager). I see no reason why the lessees through their agent and attorney should not allow the respondents to use the premises, although the respondents are the agent's own company, provided that the lessees do not "assign or sublet" the premises, or in the case of the 1956 lease "part with possession of it."

In *Chaplin* v. *Smith* (1), it was held that a lessee who has covenanted not to part with possession of the premises does not commit a breach of covenant by merely permitting another person to have the use of the premises, so long as the lessee retains the legal possession himself. In the instant case the learned judge found that there had been no assignment, and that the lessees retained the constructive possession. The evidence was that at one time the lessees contemplated assigning the leases and asked the appellant's consent, but afterwards withdrew the request. The appellant himself said: "I was trading in the premises selling petrol and fuel oil with the lessee's consent. From March 1957 I carried on trade and paid the proceeds of sale to U.A.C."

The learned judge's reference to the appellants having obtained forfeiture of the leases "by another action" is now out of date. He was referring to Civil Case No. 420/61, *Macfoy* v. *Gold Coast Properties, Ltd.* A copy of that case was put in evidence. The judgment was in effect an order for forfeiture, although in its terms it was an order for rescission of the leases for the remainder of their terms made under s.252(5) of the Companies Act (*cap.* 249). That decision has since been set aside by this Court of Appeal. So the situation is that the leases have not been rescinded, that there has been no forfeiture ordered or effected, and that the respondents are not the lessees, and that the lessees are not before the court, and that the premises are not now in use.

Mr. Wright cited two cases on which he mainly relied for his argument on this part of the appeal (and he did the same in the court below) but with respect I did not think that either of them really applies to the circumstances here.

He argued that the decision in *Doe ex dem. Hindly* v. *Rickarby* (3) shows that because the respondents were making use of the premises as if they were the tenants so far as it appears outwardly, the respondents can be called upon to explain their presence. I agree that they could be: but when it comes to action in court it is the lessees who should be sued. That case decided that where there is a right of re-entry on assigning or underletting, and someone else is in occupation apparently as a tenant (and not as a servant or by grace and favour; which would not be a breach of covenant), it is *prima facie* evidence of underletting and the lessee can be sued. The lessee, not the person in occupation (although he could be joined, no doubt) is the necessary defendant. If the action results in the

forfeiture of the lease, the person in occupation can also be required to quit.

The other case was *Commissioners of Works* v. *Hull* (2). There the lessee had covenanted not to assign without written permission. Nevertheless he did assign without permission, and having done so he disappeared. The lessor sued the assignee for ejectment. It was held that the proceedings were a sufficient indication by the lessor of his intention to exercise his option to forfeit the tenancy for breach of covenant not to assign and that the tenancy of the original lessee and consequently that of the assignee was thereby determined. Mr. Wright's argument was that by starting the instant case in the court below, the appellant indicated his option to forfeit the leases. But there is a finding of fact that there has been no assignment by the lessees. I do not think that that finding is such as cannot be supported having regard to the evidence, as stated in ground of appeal (g). It might be added that the lessees have not disappeared, as had the lessee in the case cited.

Ground of appeal (f) is:

> "(f) The learned trial judge was wrong in law in holding impliedly that although there is a statutory provision prohibiting the appointment of a body corporate as liquidator yet a body corporate could be appointed agent of a liquidator."

I do not think that it is to be implied from the judgment that the learned judge did so hold. On the contrary, where he does mention agency he clearly stated that the Gold Coast Properties, Ltd. appointed the administrative head of the United Africa Co., Sierra Leone, Ltd. to be their agent. That of course refers to the time before the resolution for voluntary winding-up. The learned judge had no occasion to mention agency thereafter: but I see nothing to suggest that he supposed that the respondents were thereafter the agents. The liquidator himself said in evidence: "After the resolution, the method of appointing the agent continued. It was the appointment of a person. . . ."

I now come to the other part of the claim, about "irreparable injury" to the appellant's reversion, and this can be more briefly dealt with. The lessees covenanted to construct a petrol filling station and a petrol pumping station on the premises and they did construct them. They covenanted also to keep them in repair and to yield them up in good condition. These are covenants of the lessees and not of the respondents. The learned judge found as a fact:

". . . [T]he premises are in a state of disrepair, occasioned by the acts of the defendant company, U.A.C.

I accept the plaintiff's account that U.A.C. have dismantled some of the installations and pulled down part of the buildings. These amount to damage to plaintiff's reversion and for which he can sue the tortfeasor. As the evidence is inadequate for me to arrive at the cost of repairing the damage to the reversion I direct that an enquiry be held before the Master on the following" (namely the four items).

The grounds of appeal as to this are:

"(d) Having regard to the covenants in the 'A' lease and the 'B' lease respectively which the learned judge quoted but did not consider or adequately consider, the learned trial judge erred in law in coming to the conclusion that the plaintiff was only entitled to recover from the defendants the heads of damages the learned trial judge awarded,"

and also that the decision on this part of the claim, as to the two items disallowed, was also such as cannot be supported having regard to the evidence (ground (g)).

The items which the learned judge allowed were the costs of repairing (1) two damaged buildings, (2) the raised base in the drum filling section and (3) the driveway. The items which he disallowed were (1) cleaning underground tanks and (2) replacing four electrically operated pumps. I find it difficult to see how any of these items, either allowed or disallowed, are "irreparable injuries" to the reversion. Failure to keep premises in the state of repair covenanted for is to be distinguished from injury to the reversion.

In *Rust* v. *Victoria Graving Dock Co.* (4) it was decided that a reversioner can only recover damages where the injury to the property is permanent so that it will continue to affect it when the reversioner comes into possession and he is not entitled to damages in respect of temporary injury on the ground that it affects the present saleable value of the reversion.

The very nature of the claim here—the cost of repairing, of cleaning and of replacing—shows that it is but temporary damage. The terms of the leases can continue until 1977 and 1970. It may be that action could be taken because of breaches of the covenants to keep in repair: but the respondents are not the covenantors, and the covenants not such as to make liable for a breach anyone in occupation with the lessees' consent. If the respondents are tortfeasors, as the learned judge held, any liability on their part for

temporary and repairable injury would be a liability to the lessees. I would not have allowed even the four items.

I have already said that there is no cross-appeal by the respondents and this was pointed out by the court to Mr. Harding during his argument. He made no application of any sort to us. Consequently, we have not heard any argument as to whether we could and, if so, should make any order as to the four items which were allowed, and I do not consider that question.

There is another ground of appeal, with leave, about the order as to costs. It is: "(e) The learned trial judge's order as to costs was wrong as palpably the said order was made without exercise of discretion or on wholly wrong principles." The learned judge's reasons were: "The judgment is therefore limited to the claim for damage to the reversion and as the plaintiff has lost in the main issue, there will be no order as to costs." This suggests to me that the learned judge exercised his discretion in a proper and judicial manner. The appellant failed in more than that in which he succeeded.

I would dismiss the appeal.

DOVE-EDWIN, J.A. and COLE, J. concurred.

Appeal dismissed.

KPOMEH, BOANDA and JONJO *v.* REGINA

COURT OF APPEAL (Ames, Ag. P., Bankole Jones, C.J. and Dove-Edwin, J.A.): March 19th, 1964
(Cr. App. Nos. 1/64, 2/64 and 3/64)

[1] **Criminal Law—degrees of complicity—knowledge of offence—knowledge without participation or counselling not enough:** Mere knowlege of a murder without actual participation or counselling is not enough to support a conviction for murder (page 15, lines 22–24).

[2] **Criminal Law—murder—degrees of complicity—knowledge of murder—knowledge without participation or counselling not enough:** See [1] above.

The appellants were charged in the Supreme Court with murder.

The child of one of the appellants was murdered for the purpose of making a *borfima* for the benefit of the appellants and to cure the illness of the appellant Jonjo.