AGIP (SIERRA LEONE) LTD v EDMASK & PARAMOUNT CHIEF OF KAKUA CHIEFDOM & CHIEFDOM COUNCIL

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Civil Appeal 10 of 1972, Hon Mr Justice COB Cole CJ, Hon Mr Justice Forster JSC, The Hon Mr Justice Livesey Luke JSC, Hon Mr Justice Davies JA, Hon Mr Justice Tejan JA, 1973

[1] Landlord & Tenant – Relief against forfeiture – Waiver – Tenant's failure to register lease – Whether acceptance of rents by landlord constituted waiver of breach – Conditional acceptance of rent does not prevent waiver – Order for possession of land should be made instead of damages – Provinces Land Act (Cap 122) s 9

[2] Landlord & Tenant – Lease – Termination – No condition that failure to register lease made lease void and gave landlord right to re-enter – Issue of writ seeking possession the correct course to terminate lease

[3] Landlord & Tenant – Wrongful termination of lease – Damages – Trespass – Inducing breach of contract – Breach of covenant for quiet enjoyment

[4] Tort – Inducing breach of contract – Lease – Ingredients – Breach of contract necessary – No liability where contract lawfully terminated – Payment of "shake-hand" and survey of land with knowledge of pre-existing lease amounted to evidence of inconsistent dealing by contract breaker

On 16 May 1962 the second respondents, the Paramount Chief of Kakua Chiefdom and the Chiefdom Council ("the Tribal Authority"), leased land in the Bo District to the first respondent, Abess Ali Edmask ("Abess"). Under the terms of the lease and s 9 of the Provinces Land Act (Cap 122) the lease was voidable at the option of either party if it was not registered within 60 days of execution at the office of the Registrar-General. Although the lease was not registered until 27 November 1962, the Tribal Authority allowed the first respondent to take possession of the land and received rent for the years 1962 and 1963. On 20 January 1964, the Tribal Authority gave notice to Abess that it was voiding the lease and re-entering the land on the basis that the lease had not been registered within 60 days of its execution. On 31 January 1964, the Tribal Authority leased land to the appellant ("Agip") which included area leased to Abess, and this lease was duly registered within 60 days. Abess took action against the Tribal Authority and Agip claiming damages for trespass, inducing breach of contract and breach of covenant for quiet enjoyment.

The trial judge held in favour of Abess, finding that the lease had not been legally avoided and that the failure to register the lease which entitled the lease to be voided was waived by the Tribal Authority's receipt of rents due under the lease. The trial judge awarded damages in lieu of possession, damages for inducing a breach of contract and damages under several other heads. On appeal, the Court of Appeal held that the trial judge was wrong to find that the lease was valid and had not been terminated according to law, and that Abess was therefore not entitled to possession or damages in lieu. However, the Court of Appeal agreed with the trial judge that Agip had induced a breach of contract between Abess and the Tribal Authority and awarded exemplary and special damages. Agip appealed to the Supreme Court against this decision and Abess also cross-appealed for recovery of possession on the basis that the trial judge was correct in finding that the lease had not been validly terminated.

Held, **per totam curiam, setting aside the Court of Appeal's decision and affirming the decision of the trial judge, but substituting the order for damages with an order for recovery of possession:**

Per Cole CJ:

1. The Tribal Authority's acceptance of rent while knowing that Abess had failed to register the lease effected a waiver of the breach as a matter of law. The intent or motive with which the rents were accepted by the Tribal Authority was not relevant. *Matthews v Smallwood* [1910] 1 Ch 777 and *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048 applied.

2. There were no special circumstances, namely miscarriage of justice or violation of any principle of law or procedure that would justify overturning the concurrent findings by the trial judge and the Court of Appeal on the facts that the appellant had induced a breach of contract. *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508 applied.

3. As the lease was valid and subsisting at all times, Abess was entitled to possession of the land in priority to the appellant. The trial judge therefore erred in awarding damages in lieu of an order for recovery of possession.

4. On the question of damages, the Court of Appeal ought not to have awarded special damages, as it was never pleaded or raised as an issue. The Court of Appeal's award of Le30,000 in respect of inducement for breach of contract was excessive, and the trial judge's award of Le5,000 was sufficient. In all the circumstances, the trial judge's award of Le20,000 as damages for trespass was excessive and should be reduced to Le10,000.

Per Forster JSC:

5. Where money was paid and received as rent under a lease, a mere protest that it was accepted conditionally and without prejudice to the right to insist on a prior forfeiture, did not prevent a waiver of the forfeiture. *Davenport v The Queen* (1877-78) LR 3 App Cas 115 referred to.

Per Livesey Luke JSC:

6. Neither s 9 of the Provinces Land Act (Cap 122) nor clause 4 of the Abess lease made the lease determinable on the failure of the lessee to meet his contractual duties. Therefore, there was no condition created which allowed the landlord a right of re-entry upon the tenant's breach.

7. The right to avoid a lease is exercised by the person having the right doing some unequivocal act which indicates the intention to avail himself of the option conferred on him to avoid the lease. The unequivocal act in a case where the party avoiding the lease does not have a right of re-entry (such as the present) is the issue and service of a writ of summons for recovery of possession. *Canas Property Co Ltd v K L Television Services Ltd* [1970] 2 All ER 795; [1970] 2 QB 433 applied.

8. A breach of contract is a necessary ingredient of an action for damages for inducing a breach of contract. If a contract is lawfully terminated, there can be no liability in an action for damages for inducing a breach of contract. *Allen v Flood* [1898] AC 1 and *DC Thompson & Co Ltd v Deakin & Ors* [1952] 2 All ER 361 applied. *Emerald Construction Co Ltd v Lowthian & Or*s [1966] 1 All ER 1013 distinguished.

9. The evidence of inducement by the appellant was the fact that, after they had knowledge of the Abess lease, they paid "shake-hand" to the Paramount Chief and they went on the land and surveyed it. This amounted to inconsistent dealing with knowledge of the existence of the contract. Inconsistent dealing with a contract breaker by a third party, begun or continued after the third party has notice of the contract, constitutes the tort of inducing a breach of contract. All the ingredients of the tort of inducing a breach of contract were present in this case. *DC Thompson & Co Ltd v Deakin & Ors* [1952] 2 All ER 361applied.

10. In all the circumstances, the award of damages for trespass of Le2,500 would be fair, reasonable and adequate compensation to Abess.

Per Tejan JA:

11. The fact that the appellant had expended money on the land did not deprive Abess of its right to possession of the land. *Ramsden v Dyson* (1866) LR 1 HL 129 applied.

Cases referred to

Allen v Flood [1898] AC 1
Bonham-Carter v Hyde Park Hotel [1948] 64 TLR 177
Canas Property Co Ltd v K L Television Services Ltd [1970] 2 All ER 795; [1970] 2 QB 433
Central Estates (Belgravia) Ltd v Woolgar (No 2) [1972] 1 WLR 1048
Creery v Summersell and Flowerdew & Co Ltd [1949] Ch 751

Croft v Lumley (1858) 6 HL Cas 672
Davenport v The Queen (1877-78) LR 3 App Cas 115
DC Thompson & Co Ltd v Deakin & Ors [1952] 2 All ER 361
Edward Ramia Ltd v African Woods Ltd [1960] 1 All ER 627
*Emerald Construction Co Ltd v Lowthian & Or*s [1966] 1 All ER 1013
Jones v Carter (1846) 15 M&WM 718
MacFoy v United Africa Company Ltd [1962] AC 152
Matthews v Smallwood [1910] 1 Ch 777
Ramsden v Dyson (1866) LR 1 HL 129
Segal Securities Ltd v Thoseby (1963) 1 QB 887
Stool of Abinabina v Chief Kojo Enyimadu [1953] AC 207
Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy [1946] AC 508
United Australia Ltd v Barclays Bank Ltd [1941] AC 1
Windmill Investments (London) Ltd v Milano Restaurant Ltd (1962) 2 QB 373
Yachuk & Anor v Oliver Blais Co Ltd [1949] AC 386

Legislation referred to
Agricultural Reserves Act 1863 s 8 [Aust]
Conveyancing and Law of Property Act 1881 s 14 [UK]
Gold Coast Concessions Ordinance ss 12, 13(11) [Ghana]
Imperial Statutes (Law of Property) Adoption Act (Cap 18)
Interpretation Act 1961 ss 3, 11
Leasing Act 1866 s 8 (Australia)
Law Reform (Miscellaneous Provisions) Act (Cap 19) s 4
Provinces Act (Cap 60) s 2(1)
Provinces Land Act (Cap 122) ss 2, 3, 4, 9

Other sources referred to
Cheshire's Modern Law of Real Property [6th Ed] p183; [11th Ed] pp 424, 425
Woodfall on Landlord and Tenant [27th Ed] at p 877

Appeal
This was an appeal against the majority decision of the Court of Appeal and the trial judge which found that the appellant had induced the second respondents to breach its lease agreement with the first respondent. The first respondent also cross appealed to recover possession of the land which it had leased. The facts appear sufficiently in the judgments of Cole CJ and Livesey-Luke JSC.

Mr George Gelaga-King for the appellant.
Mr Eugene Cotran for the first respondent and Mr Davies for the second respondents.

COLE CJ: My Lords, the portion of land in dispute in this appeal is situated at Bo in the Kakua Chiefdom in what was in the old days the Protectorate, but now, the provinces of Sierra Leone. The site was of great commercial value or at least had great potential commercial value. I shall hereafter refer to it as "the land". Being situated in the Provinces the land was and is still subject to the provisions of the Provinces Land Act (Cap 122) of our laws. I shall hereafter refer to it as "the Act". By s 2 thereof, the Act should be read and construed as one with the Provinces Act (Cap 60). I have mentioned this because of the fact that both the appellant and the first respondent are non-natives. The expression "non-native" is defined in s 3 of the Interpretation Act 1961 (No 46 of 1961, which is the Act relevant to this appeal) to mean "any person other than a native".

The same Interpretation Act by that same section defines "a native" as being:

"any person who is a member of a race, tribe or community settled in Sierra Leone (or the territories adjacent thereto) other than a race, tribe or community—

(a) which is of European or Asiatic origin; or

(b) whose principal place of settlement is in the Western Area".

The Provinces Act (Cap 60) does not define the expression "non-native", but it does define the expression "native". That definition which is contained in s 2(1) thereof states that—

> "native" means any member of the aboriginal races or tribes of African ordinarily resident within the Provinces or within the territories adjacent thereto outside Sierra Leone".

Under the Act all land in the provinces is vested in the Tribal Authorities who hold such land for and on behalf of the native communities concerned. "Tribal Authority" is defined to mean:

> "the Paramount Chief, the Chiefs, the councillors, and men of note, or sub-chiefs and their councillors, and men of note".

The second respondents fall within this definition.

By s 3 of the Act a non-native cannot occupy land in the Provinces unless he first obtains the consent of the Tribal Authority as well as the approval of the District Commissioner to his occupation of such land. As a matter of law, no non-native can occupy land in the Provinces except under and in accordance with the Act. Let me here and now state that it is my considered view that from the whole tenor of the Act the legislature intended to confer just as great a benefit on non-natives who wish to hold land in the Provinces as on the Tribal Authorities who, as I have already stated, hold such lands on trust for the native communities. On a proper construction of the Act, I hold the view that non-natives holding land of the Tribal Authorities under and by virtue of the Act are meant to have their tenancies not only regulated but also made secure. At the same time the Act protects Tribal Authorities against unlimited squatting.

By a lease dated 16 May 1962, the second respondents leased to the first respondent:

> "All that piece or parcel of land situate at Bo in the Kakua Chiefdom of the Bo District of the Protectorate of Sierra Leone the boundary whereof commencing at a Property Beacon marked AA1 which beacon is 130 ft on a bearing of 150 degrees 45 minutes to Property Beacon marked AA2; thence on a distance of 87.0 ft on a bearing 240 degrees 45 minutes is Property Beacon marked AA3; thence on a distance of 130.0 ft on a bearing 328 degree 06 minutes to Property Beacon marked AA4; thence on a distance of 93.0 ft with a bearing of 60 degrees 40 minutes to Property Beacon marked AA1, which is the point of commencement thus enclosing the area of 0.2685 acre of the same several dimensions little more or less as the same premises or more particular delineated and shown edged RED on the Cadastral plan No. LS/471/58 attached, which piece or parcel of land for great clearness and so as not to restrict or enlarge the description hereinbefore contained is delineated on the plan attached here to and thereon coloured RED together with the buildings and other fixture and fittings now the room and specified in the schedule hereto, TO HOLD the said premises hereby unto the format from the 16th of May 1962, for the term of the seventy five years yielding the paying therefore during the said term the yearly rent of Le65.00 (Le130) in the manner hereinafter set forth".

I shall hereafter refer to it as "the lease". The lease is Exhibit B. No question arises here that the lease was not obtained with the prior consent of the Tribal Authority and the prior approval of the District Commissioner. Although the term demised is said to be seventy-five years, yet by virtue of s 4 of the Act the first respondent's tenancy could not exceed a term of fifty years. I do not think that the term stated in the lease by exceeding the statutory term in any way affects the validity of the lease and I so hold. In any case this point was never at any stage raised nor was it ever made on issue.

It was amongst other things mutually agreed between the parties to the lease that if the lease was not registered within sixty days of its execution in the office of the Registrar-General in Freetown then the lease was voidable at the option of either party.

Section 9 of the Act provides as follows:

"Every deed creating a tenancy of land shall be voidable by either party, unless it—

(a) is executed in the presence of two witnesses by the lessor before the District Commissioner of the district in which the land is situated; and is executed in the presence of two witnesses by the lessee or his attorney or his agent before a Magistrate; and

(b) has endorsed upon it certificates of execution in their presence signed respectively by the District Commissioner and the Magistrate before when it was executed; and

(c) provides that the lessee shall not sublet or assign him interest thereunder except with the consent of the Tribal Authority with approval in writing of the District Commissioner, provided that such consent shall not be unreasonable withheld; and

(d) contains stipulations with regard to all the matters set out in rule 3 of the Schedule to this Act; and

(e) is registered within sixty days in the office of the Registrar-General".

It should at once be noted that what both the Act and the lease confer is the right of avoidance of the lease in certain specified circumstances. It is quite clear that the Act does not make a lease void ab initio or invalid if the provisions of Section 9 of the Act are not complied with.

To go back to the facts. The lease, though executed on 16 May 1962, was due to some technical reasons concerning the plan to be attached to the lease, not registered within sixty days as required by s 9(e) of the Act nor did it comply with s 9(a). The lease was in fact registered on or about 27 November 1962. According to Exhibit J which is dated 28 December 1962, the District Officer acknowledged receipt of a registered copy of the lease. At that date he must or ought to have been aware that certain provisions of s 9 of the Act had not been complied with. It is my considered view that knowledge of the District Officer (formerly District Commissioner) of any non-compliance with the provisions of the Act was in the circumstance also knowledge of the second respondents. I am of the opinion that the whole structure not only of the Act but also of the Provinces Act (Cap 60) (with which, as I have already pointed out, it should be read as one) shows that the District Officer (formerly District Commissioner) is legally the main pivot on which the whole of the administration of the districts in the Provinces and all that went with them revolves.

With this knowledge of non-compliance by the first respondent not only did the second respondents allow the first respondent to take possession of the land and to spend considerable sums of money on its improvement but it also received rents in respect of the land in the years 1962 and 1963. I am satisfied on the evidence that the second respondents did receive the full rent stipulated in the lease for the years 1962 and 1963 in spite of the fact that the commencement date of the lease was 16 May 1962.

By Exhibit V2 dated 20 January 1964, the second respondents wrote to the first respondent as follows:

"NOTICE OF RE-ENTRY

TO ABESS ALLIE Lebanese Trader and Ex Diamond Dealer of Bo Kakua Chiefdom Bo District, South Western Province Sierra Leone

OR

His Attorney NAYEF ABESS of 22 Kissy Street, Freetown OR

Other interested persons.

WE the undersigned chief and members of the Tribal Authority Kakua Chiefdom for and on behalf of the Paramount Chief and Tribal authority for the said Kakua Chiefdom Bo District give you notice as follows:

The lease dated the 16th day of May, 1962 registered as No 168 in value 50 at Page 5 in the Register of Leases kept in the Registrar General's office in Freetown and made between the Paramount Chief and Tribal Authority of Kakua Chiefdom aforesaid of the one part and YOURSELF of the other part under which you hold a piece plot or parcel of land situate lying and being at the angle of Bo Bye Pass and Fanton Roads in Bo Town Kakua Chiefdom aforesaid contains a proviso as follows:

"Provided always that if this indenture is not registered within SIXTY days of its execution in the office of the Registrar-General in Freetown then the said deed shall be voidable at the option of either party to the same".

You have failed to register the said lease within sixty days of its execution and have so committed a breach of the said Proviso or condition contained in the said lease.

You have also failed to execute the aforesaid lease.

In view of the matters stated above we the said lessor have decided to avoid and determine the said lease and have therefore this day exercised our right to re-entry on the land in respect of which the said lease was made and henceforth the said lease shall determine.

Dated the 20th day of January 1964.

(Sgd) Abu Baimba III Paramount Chief Kakua Chiefdom. (Sgd) Mr Mokuwa 1st Speaker Kakua Chiefdom. (Sgd) Lahai Magao 2nd Speaker Kakua Chiefdom. Approved (Sgd) DK Jenkins District Officer".

Exhibit V2 was issued after the second respondent had received rents although the lease had not been avoided and was therefore valid and subsisting. Mr Gelaga-King concedes that at least up to 20 January 1964 (the date of Exhibit V2) the lease was still valid. I shall deal with what I consider to be the legal effect of this at a later stage. Proceeding on with the facts, on that same date, i.e., 20 January 1964 the first respondent by letter bearing that date, Exhibit H, forwarded to the District Commissioner, Bo, a cheque covering payment of rent for the land as well as three others. The cheque was returned. No reason was given for its return.

In the meantime, the appellant had come into the picture because I find that by a letter dated 28 January 1964, Exhibit V1, the District Commissioner was forwarding to the appellant for information and for record purposes a copy of Exhibit V2. Also, on 31 January 1964, the second respondents by Exhibit W leased certain lands at Bo in the Kakua Chiefdom to the appellant. Those lands included the area leased to the first respondent. From the evidence it is clear that the appellant had been involved in the land long before January 1964. It is interesting to note that this lease to the appellants, Exhibit W, contains a provision regarding registration similar to that contained in Exhibit B. I find the District Commissioner on 30 June 1964 writing Exhibit T to the appellant in these terms:

"Dear Sir,

LEASE OF LAND TO AGIP (S.L.) LTD

I have to refer to the above subject and to forward herewith original and copy for lease duly registered for your retention.

2. Please acknowledge receipt."

It is reasonable to conclude that the District Commissioner registered or caused to be registered the lease granted to the appellant. Why then did he not register or cause to be registered the lease to the first respondent?

In pursuance of Exhibit W the appellant took possession of the area called for by Exhibit W which, as I have said, included the land in question as well as all the improvements which the appellants found thereon.

The first respondent then consulted a solicitor and on 13 July 1966 the first respondent commenced legal proceedings in the High Court.

Although the lease Exhibit B which was the subject matter of the action and of the appeal was granted to Abess Allie we find the writ of summons was issued in the name of "Abess Allie Mohamed Edmask by his Attorney Adnan Nayef Abess Al Allie" as plaintiff. The relevant Power of Attorney was put in evidence at the trial. It was Exhibit A and was made at Beirut on the 19 April 1966. On perusal thereof it would be seen that the person appointing Adnan Nayef Abess Al Allie as his Attorney was not Abess Allie as described in Exhibit B as the lease but one Abess Allie Mohamed Edmask. Learned counsel for the appellant tried to make the point before us that the Abess Allie described in Exhibit B as the lessee could not be one and the same person as Abess Allie Mohamed Edmask referred to in the Power of Attorney and in whose name the action was brought. In effect he was saying that the first respondent had no locus standi in this matter. We stopped him from pursuing

the point as we felt it was too belated. The action as well as the trial had proceeded on the footing that Allie Abess and Abess Allie Mohamed Edmask were one and the same person. The position appeared to have remained the same before the Court of Appeal. That disposes of the point.

By his amended statement of claim the first respondent claimed against the appellant's and the second respondents' possession of the land. As against the appellant he claimed damages for trespass to the land for inducing a breach of contract between the second respondents and himself. He also claimed against the second respondents damages for breach of covenant for quiet enjoyment.

There was not at time any claim for special damages.

The learned trial judge after reviewing the evidence found:

(i) that the lease between the first and second respondents was a valid subsisting lease which had not been avoided or terminated according to law;

(ii) that the failure to register the lease entitling the second respondents to claim that the lease was voidable was waived by the second respondents' receipt of rents due under and in terms of the said lease.

The learned trial judge then proceeded to make the following awards:

(i) damages for breach of covenant for quiet enjoyment: Le2,500.00;

(ii) refund of expenses during negotiations, shake hand and refund of two years rent: Le6,260.00;

(iii) damages for trespass: Le20,000.00;

(iv) damages for inducing a breach of contract: Le5,000.00;

(v) damages in lieu of recovery of possession: Le9,000.00.

Against this judgment the appellant appealed to the Court of Appeal. That court (Sir Samuel Bankole Jones P, GF Dove-Edwin and JB Marcus-Jones JJA) held that the learned trial judge was wrong in law in coming to the conclusion that the lease was a valid subsisting lease which had not been avoided or terminated according to law. Accordingly, they held that the first respondent was not entitled to possession or damages in lieu thereof. By a majority decision of two to one (Dove-Edwin JA, as he then was, dissenting) that court agreed with the findings of fact by the learned trial judge that the appellant induced a breach of contract between the first and second respondents "albeit a voidable one". The Court of Appeal awarded exemplary damages of Le30,000 thereby varying the award under this head of the High Court. The Court of Appeal also awarded special damages of Le15,390 which again was a variation of the damages awarded by the learned trial judge. Dove-Edwin JA, naturally, in view of his opinion, awarded no damages but allowed the appeal. It is against the judgment of the learned trial judge as well as that of the majority decision of the Court of Appeal that this appeal arises.

There is also a cross-appeal by the first respondent as to recovery of possession. It is the contention of the first respondent in this regard that if the proposition that the lease was not avoided or terminated according to law as the learned trial judge found, was right in law, then the first respondent was entitled to an order for recovery of possession.

It is therefore of the essence of this appeal that one of the first questions that should be disposed of is whether the lease, Exhibit B, was properly terminated or avoided according to law.

In this regard it should be remembered that s 9 of the Act confers a right that a lease can be avoided at the option of either party in certain circumstances. It follows therefore that until a lease made under the provisions of the Act is avoided in accordance with law, such a lease remains valid and subsisting.

The Imperial Statutes (Law of Property) Adoption Act (Cap 18) of our Laws came into force on 1 January 1933. It was an Act passed to adopt and apply to Sierra Leone certain statutes of the British Parliament relating to real and personal property, and to make provisions for amending the

law of real and personal property. This Act applied to the then Colony of Sierra Leone, amongst others, certain sections of the Conveyancing and Law of Property Act 1881. One of the sections so applied is s 14 which imposes restrictions on, and relief against, forfeiture of leases. The lease in question was made in May 1962. It is clearly stated in s 11 of the Interpretation Act 1961 (No 46 of 1961) as follows:

> "11. No Act passed before 1 July 1953 shall apply to the Provinces unless it is so provided by the Act itself or is extended thereto by an Act".

Since the Imperial Statutes (Law of Property) Adoption Act (Cap 18) at the material time did not apply to the Provinces, the provisions of s 14 thereof cannot be relied upon. I do hope the authorities will look into this matter within the near future because in the present constitutional set-up such a situation would appear highly discriminatory.

The next point I think that should be considered is the question of waiver. Where a person entitled to anything expressly and in terms gives it up, it is said to be express waiver. It is implied when the person entitled to anything does acquiesce in something else which is inconsistent with that to which he is so entitled. One of the main questions in this appeal therefore is whether there was waiver in law. I hold the view that the second respondents' acceptance of rent with knowledge of the breaches complained of in exhibits V2 effected in law a waiver. I consider the propositions of law set out with approval in this regard in the case of *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048 as sound and I would adopt and apply them. At pages 1051 and 1052 Lord Denning MR, said, inter alia:

> "The cases on waiver are collected in the notes to *Dumper's* case (1603) 78 Eng Rep 1042 in *Smith's Leading Cases*, 13th Ed (1929), pp 39-44. Those notes show that the demand and acceptance of rent has a very different effect according to how the question arises. If it is sought to say there is a new tenancy by acceptance of rent, for instance, after a notice to quit has expired the question always is, as Lord Mansfield said: "*Quo animo* the rent was received and what the real intention of both parties was". See *Doe d Cheny v Batten* (1775) 1 Cowp 243, 245 and *Clarke v Grant* [1950] 1 KB 104. But if it is sought to say that an existing lease continues in existence by waiver of forfeiture, then the intention of the parties does not matter. It is sufficient if there is an unequivocal act done by the landlord which recognises the existence of the lease after having knowledge of the ground of forfeiture. The law was well stated by Parker J in *Matthews v Smallwood* [1910] 1 Ch 777, 786, which was accepted by this court in *Oak Property Co Ltd v Chapman* [1947] 1 KB 886, 896:
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> > 'It is also, I think reasonably clear upon the case that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decided and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do without prejudice to my right to re-enter, which I intend to reserve'. That is a position which he is not entitled to take up. If, knowing of the breach he does distrain or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything".
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> I know that Harman J in *Creery v Summersell and Flowerdew & Co Ltd* (1949) 1 Ch 751, said that in waiver of forfeiture 'the question remains quo animo was the act done'. But that statement was explained by Megaw J in *Windmill Investments (London) Ltd v Milano Restaurant Ltd* (1962) 2 QB 373. He said at p 376, that it meant only that 'It is a question of fact whether the money tendered is tendered as, and accepted as rent … Once it is decided as a fact that the money was tendered and accepted as rent, the question of its consequences as a waiver is a matter of law'.
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> Similarly, Sachs J in *Segal Securities Ltd v Thoseby* (1963) 1 QB 887 said, at page 898: 'It is thus a matter of law that once rent is accepted a waiver results. The question of quo animo it is accepted in forfeiture cases is irrelevant in relation to such acceptance'.

So we have simply to ask: was this rent demanded and accepted by the landlord's agents with knowledge of the breach? It does not matter that they did not intend to waive. The very fact that they accepted the rent with the knowledge constitutes the waiver'."

Cairns LJ, at page 1056, puts it this way:

"I agree that the demand for and acceptance of rent by the landlords did effect a waiver of the forfeiture. It is clear on the authorities that an unequivocal act is required to bring about a waiver. When money is demanded as rent after the landlord knows of the facts giving rise to the forfeiture and is paid as rent and accepted as rent, and then the law regards the demand and acceptance as an unequivocal act. I regard this proposition as established by *Matthews v Smallwood* [1910] 1 Ch 777, approved in this court in *Oak Property Co Ltd v Chapman* [1947] 1 KB 886 and I consider that if the decision of Harman J in *Creery v Summersell and Flowerdew & Co Ltd* (1949) 1 Ch 751 can be supported, it must be on the basis suggested by Megaw J in *Windmill Investments (London) Ltd v Milano Restaurant Ltd* (1962) 2 QB 373. This being so, the state of mind of the landlord is irrelevant; and if he acts through an agent who has actual or ostensible authority to demand and receive the rent, it does not seem to me that the state of mind of the agent can be enquired into".

That being the legal position, in my view, when the second respondents accepted rents, as is clearly shown by Exhibits C1 and C2 and D, with knowledge of the breaches complained of, as Exhibit J indicates, they waived any and all such breaches. Here the rents were paid and accepted whilst there was in existence a valid subsisting lease.

The question of quo animo the rents were accepted does not therefore arise. The learned trial judge in my view came to the correct conclusion in this regard. To hold otherwise would, in my view, be repugnant to natural justice, equity and good conscience. Nor do I seriously think that such a finding is incompatible either directly or by necessary implication with the Imperial Statutes (Law of Property) Adoption Act to which I have already referred or any other Act applying to the Provinces. It should not be forgotten that the Act more or less (with the emphasis on more) by s 9 imported, without limitations as to the circumstances in which waiver can be exercised, certain English legal and equitable notions into the land law of the Provinces. In construing the Act therefore this indisputable fact has clearly to be borne in mine. I am satisfied that my construction does not run contrary to the Act.

Before I deal with the consequences that flow from my finding in regard to the legal position I would at this stage like to dispose of what I consider to be another very important issue in this appeal, namely, whether there was inducement on the part of the appellant of the breach of contract contained in Exhibit B. In this connection I am of the view that the propositions of law and practice laid down in the case of *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508 relating to concurrent findings of fact contain good sense and I have no reason to depart from or modify or vary them. These propositions, by way of reminder, are stated in these words:

"From a review of previous decisions of the Judicial Committee of the Privy Council the following propositions are derived as to the present practice of the Board to decline to review the evidence for a third time where there are concurrent judgments of two courts on a pure question of fact, and as to the nature of the special circumstances which will justify a departure from the practice:

(1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore, a dissent by a member of the appellant court does not obviate the practice.

(3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law of procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to effect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases which involve question of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.

(8) That the practice relates to the findings of the courts below, which are generally stated in the order of the court, but may be stated as findings on the issues before the court in the judgments, provided that they are directly related to the final decision of the court".

In the present appeal I find no special circumstances, namely, any miscarriage of justice or any violation of some principle of law or procedure nor do I consider it a case of an unusual nature on this particular question, to justify a departure from this well-established practice. There is evidence in support of the concurrent findings of both the trial court and the Court of Appeal on the issue of inducement. I would not disturb these concurrent findings. As regards the issue of damages I shall give due consideration to it later.

Having stated these propositions of law I now come to the question of the remedies sought. I shall deal with the first which is recovery of possession. It having been established that the lease was and is still valid and subsisting the first respondent had and still has a legal estate in the land prior in time to that created to the appellant. The appellant took subject to that legal estate. The first respondent is in those circumstances entitled to possession of the land. The first respondent has shown in law a better title to that of the appellant. Furthermore, because of the concurrent finding of fact, supported by law, that the appellant induced a breach of contract, which finding, as I have stated, I will not disturb, the appellant cannot invoke equity to its aid. He who comes to equity must come with clean hands. The learned trial judge therefore erred in awarding damages in lieu of an order for recovery of possession. The first respondent was entitled to possession of the strength of his title. I would therefore award the first respondent his claim for recovery of possession of the land the area of which I have already set out in the course of this judgment. I would vary the judgment accordingly and set aside the damages awarded.

I now turn to the question of damages. In this connection it is my opinion that where an appellate court finds that an award is either erroneous or excessive, or based on wrong principles of law, or because of any other good and sufficient reasons such award ought to be varied or set aside, that court should and must interfere. Ofcourse where an appellate court varies an award such a variation must be based on its own estimate of a proper award.

With regard to special damages I hold the view that the Court of Appeal went astray in awarding this item.

It was never pleaded as it should have been done and the fact that no objection was raised does not in any view cure this defect. Furthermore, it was never an issue raised before the Court of Appeal. In these circumstances I would disallow this item awarded by the Court of Appeal.

As regards the award of Le30,000 in respect of inducement by the Court of Appeal, I do feel that it is most excessive. The learned trial judge's award of Le5,000 is in my view exemplary enough. I would set aside the award of Le30,000 made by the Court of Appeal and restore the trial judge's award, in this regard, of Le5,000.

The learned trial judge awarded a return by the second respondents of the customary shake-hand of Le6,000 as well as the two years rent of Le260. In view of the fact that I would order recovery of possession of the land I would disallow those two items and the learned trial judge's judgment is hereby varied accordingly.

I now come to the award of the trial judge of Le20,000 as damages for trespass. He did not give any reason why he awarded such an enormous amount. Maybe he was greatly influenced by the fact that recovery of possession was not being ordered. Since I am of the view that the first respondent is in law entitled to recovery of possession, this award needs some reconsideration.

I agree that the trespass here is a continuing trespass and that the first respondent has been now kept away from the use of the land for over nine years. I also take into consideration the fact that because of the provisions of the lease granted by the second respondents to the appellant, Exhibit W, as well as the oral evidence before the learned trial judge, the character of the land has substantially been changed. I am aware that in order to perform the covenants stipulated in the lease, Exhibit B, the first respondent would, because of the order for possession, have to expend money in reconstructing the land. I also take into consideration the point of law that the object of an award of damages is to put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. I have also considered the proposition that the appellant's conduct has been calculated to make a profit for itself and that in such a case it is the object of the law to teach the appellant that tort does not pay. This, in my view, is certainly not a case where this court can say to the first respondent "you are technically right, but morally wrong". Taking all the circumstances into consideration, however, I would reduce the award of Le20,000 to Le10,000. The learned trial judge's award in the regard is hereby varied accordingly.

With regard to the question of interest missed under s 4 of the Law Reform (Miscellaneous Provisions) Act (Cap 19), it is my considered view that it is a matter which should have been raised before the court of trial. I do not think we can at this stage properly interfere.

In my judgment the final results of this appeal should therefore be as follows:

The judgment of the Court of Appeal is hereby reversed and set aside. The cross appeal succeeds.

The judgment of the High Court is upheld and affirmed subject to the following:

The order of the learned trial judge awarding the first respondent damages in lieu of an order for recovery of possession is hereby set aside and an order for recovery of possession of the land in favour of the first respondent against the appellant and the second respondents substituted therefore for the residue of a term of fifty years from the 16 May 1962.

I would add that if the sum of Le9,000 awarded by the High Court has been paid it should be refunded.

The order of the learned trial judge ordering the return by the second respondents to the first respondent of the customary shake-hand of Le6,000 as well as the two years rent paid of Le260 is hereby set aside and, if already paid, should be refunded.

The order of the learned trial Judge awarding Le20,000 for damages for trespass is hereby varied to Le10,000. The difference, if already paid, should be refunded.

FORSTER JSC: My Lords, the facts of this case are set out in the judgment of my brother the Honourable Chief Justice which I have had the advantage of reading and I need not repeat them. I agree with him that the appeal should be allowed. I also agree with him that the cross-appeal

succeeds, but wish to add something about one issue which, in my opinion, is of great interest and importance in the case; that is the doctrine of waiver.

Lord Atkin, in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29 and 30, said:

> "It is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights … if a man is entitled to one of two inconsistent rights, it is fitting that when, with full knowledge, he has done an unequivocal act, showing that he has chosen the one, he cannot afterwards pursue the other which, after the first choice, is by reason of the inconsistency no longer his to choose".

Thus, a lessor who has brought ejectment proceedings by way of forfeiture for breach of covenant cannot afterwards sue for rent: see *Jones v Carter* (1846) 15 M & WM 718. Anything, therefore, which exhausts or extinguishes one of the causes of action, destroys the other also.

Counsel on both sides referred us to the case of *Segal Securities Ltd v Thoseby* (1963) 1 QB 887, on different points, but the relevance of this case in the appeal before us, in my opinion, is confined to limiting the effect of the waiver to breaches occurring prior to the issuing of the Notice, Exhibit V2, dated 20 January 1964, inter alia, that:

> "the demand for rent, by letter dated 25 June 1962, although written 'without prejudice', operated as a waiver of any right of forfeiture for the defendant's breach of the covenant up to the tine when the Notice of 8 June 1962 was issued, but did not operate as a waiver of the later breach continuing between July 6, when the time set for the notice expired, and 7 August 1962, when the writ was issued …".

The breaches complained of in Exhibit V2, took place before 28 November 1962, the day after the Lease, Exhibit B, was registered. Rent for both 1962 and 1963 under the said lease was tendered and received by the second respondents on 7 March 1963 as evidenced by Exhibits C1 and C2 respectively.

The case of *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048, not cited or referred to by any counsel before us, has been considered and applied quite correctly, in the judgment of my brother, the Honourable Chief Justice. I wish to mention another case, much older and one which, I think, merits more than cursory reference here. It is the case of *Davenport v The Queen* (1877-78) LR 3 App Cas 115. It went up on appeal from the Supreme Court of Queensland to the Judicial Committee of the Privy Council in 1877. In that case, the appellant predecessor in title became lessee of crown lands under the Agricultural Reserves Act 1863 and the Leasing Act 1866, but failed to cultivate and improve his allotment as required by the former Act. Section 8 of the Agricultural Reserves Act 1863 provided that:

> "if any person selecting lands in Agricultural Reserve shall fail to occupy and improve the same, as required by s 7 of this Act, then the right and interest of such selector to the land shall cease and determine."

Section 8 of the Leasing Act 1866 also states:

> "Land in Agricultural Reserves, if taken up on lease, shall be subject to the same conditions as to cultivation, etc. as if they were selected by purchase."

After becoming aware of the non-improvement, the Government received rent for the allotment, but a notice was issued to the effect that 'Rent which may be received upon selections as may have been forfeited by operation of law shall be deemed to have been received conditionally, and without prejudice to the right of the Government to deal with the same according to the provisions contained in the Agricultural Reserves Act 1863, on that behalf'. In an action brought to recover the land, it was held, (reversing the judgment of the court below) that, notwithstanding the notice, the receipt of rent operated as a waiver of the forfeiture. In disposing of the *Davenport* case, the Judicial Committee considered and applied the case of *Croft v Lumley* (1858) 6 HL Cas 672, cited to us, incidentally, by counsel for first respondent. In that case, the facts were much more favourable to the contention that there was no waiver than in the *Davenport* case. The tenant there

tendered and paid rent due on the lease after the landlord had declared that he would not receive it as rent under the existing lease, but merely in compensation for the occupation of the land. The opinion of all the judges except one, was that the receipt of the money under these circumstances operated as a waiver. One of the learned judges, Williams J, gave his opinion thus:

> "It was established as early as *Pennant's Case* (1596) 3 Co Rep 64a, that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to the affirmance of the lease, and a dispensation of the forfeiture. In the present case, the facts, I think, amount to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of the opinion the protest was altogether inoperative as he had no right at all to take the money unless he took it as rent: he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them".

In the *Davenport* case, as already stated, the rent was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. The Judicial Committee said that it was not necessary for it to invoke this opinion of Williams J to its full extent in the case before them, but it was enough for them to say that where money was paid and received as rent under a lease, a mere protest that it was accepted conditionally, and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

I join the Honourable Chief Justice in his hopeful pleas for a more uniform system of land ownership in our unified sovereign independent state of Sierra Leone, and finally, I am in agreement with the order proposed by him. The first respondent's legal title to the land was never extinguished and the findings of the learned trial judge that the appellant both trespassed on that land and induced the second respondents to terminate Exhibit B, for which finding, in my opinion, there was abundant evidence, make it inequitable, to say the least, for any other than an order for recovery of possession to be made in favour of the first respondent. It may be that the first respondent will find himself saddled with a White Elephant or a Trojan Horse, but be what it may, *quicquid plantatur solo*, *solo cedit*.

DAVIES JA: I have had the advantage of reading the judgment of His Lordship the Chief Justice C.O.B. Cole, with whose reasoning and conclusions I agree. I, however, wish to add a few words of my own.

Negotiations for the lease began as long ago as 1961. The lease (Ex B) was not executed until 16 May 1962. On 14 December the first respondent forwarded to the District Officer Bo, a copy of the duly registered lease and this was acknowledged by the District Officer one DK Jenkins, by letter dated 28 December 1962 (Ex J). Sometime in 1964, the second respondents sought to determine the lease (Ex B) on the ground that it has not been registered within the prescribed period of 60 days. The first respondent by his solicitor, Mr JER Candappa, wrote to the District Officer as follows (Ex Z dated 13 February 1964):

> *"Dear Sir,*
>
> *Your letter L/3/263 dated 25 January 1964, addressed to Mrs. Abess Allie c/o Abess Brothers and Sons Limited, Freetown together with what has been called a notice of Re-entry addressed among others, to Mr Naïf Abess has been handed to me for reply.*
>
> *Perusing both the Notice of Re-entry and the lease, I find that the registration for the Lease dated 16 May 1962, in face took place on 27 November 1962, technically in breach of section 9(e) of the Provinces Land Act, Chapter 122 but under the following circumstances.*
>
> *The plan attached to the Deed which the Tribal Authority signed and therefore is an intrinsic and necessary part of the Deed itself, was a plan which does not bear the counter signature of the Director of Surveys and Lands as is required by section 15 of Ordinance 14 of 1960 amending section 25(1) of the Registration of Instruments Ordinance Cap. 256. When this deed was presented for registration, it was rejected on this score and the plans were sent to the Director of Surveys and*

Lands for the counter signature. This took time hence the delay in registration, due to an unforeseen and supervening impossibility. You will agree that if the document had been prepared by a solicitor instead of in the office of the Tribal Authority, this would not have arisen. The document having been prepared by the Tribal Authority I do not see how they could complain on this score.

As for the failure of Abess Allie to sign the lease the Tribal Authority is no doubt aware that although the Agreement for the lease had been entered into and payments including shake hand had been received by the Tribal Authority it was physically impossible to get Mr Abess Allie to sign the lease as at the time the lease became available for signature, Mr Abess Allie had been deported from Sierra Leone, leaving Mr Naif Abess as His Attorney.

In law, this would not be a defect making the lease void or even voidable because the lease itself was drawn up in pursuance of an agreement for which payment had been received.

That such an agreement was not only entered into but acted upon is clear from the fact that throughout the material period since before and after execution of the lease and up to date and including the whole of 1964, payments of rent due on the lease have been received by the Tribal Authority via the appropriate receiving authority. In these circumstances, the Tribal Authority is bound in equity by the covenant.

I trust this matter could be settled without re-course to law.

Yours faithfully

(Sgd.) J.E.R. Candappa."

By this time, the second respondents had entered into negotiations with the appellant for the lease of the said land. On 28 January 1964, the District Officer, Bo wrote to the appellant (Ex V1 II dated 28 January 1964) in the manner following:

"Gentlemen,

I am requested by the Kakua Tribal Authority to forward to you for your information and for record purposes the attached notice of the Tribal Authority of re-entry in respect of the piece of land held under lease made to Abess Allie, now in Lebanon.

I am, Gentleman,

Your obedient servant

(Sgd.) D.K. Jenkins Ag. District Officer"

Three days after the District Officer's letter to the, appellant, i.e. on 31 January 1964, the second respondents demised the same piece or parcel of land with title over to the appellants.

There is no doubt, as Marcus-Jones JSC observed in his judgment, that the appellants are a wealthy petrol company with large financial backing. Had they not intervened, the second respondents would never have sought to avoid the lease (Ex B). I am beginning to wonder why it became necessary to forward to the appellants for information or for record purposes a copy of the "Notice of the Tribal Authority for re-entry in respect of the piece of land held under lease made to Abess Allie, now in Lebanon." The only reason which presents itself to me very forcibly is that it was in pursuance of a pending deal between the appellant and the second respondents aided by the District Officer. In his judgment already referred to, the learned Chief Justice said, "the District Officer (formerly District Commissioner) is legally the main pivot on which the whole of the administration of the Provinces and all that went with it revolves." I agree with the learned Chief Justice absolutely. I should have though that what a prudent District Officer would have done after the receipt of Mr Candappa's letter (Ex Z) was to refer the matter to the Law Officers for legal advice. This he never did. All he offered to be concerned about was to send a copy of the Notice of Re-entry to the appellant as if to say "We have cleared the way. We may now complete the deal". As I have already stated, three days after the letter forwarding the notice of Re-entry, the land was demised to the appellant.

The learned trial judge in his judgment found as follows:

"I am satisfied that the plaintiff (i.e. the first respondent in this court) had adduced sufficient evidence to support para 7 of the Statement of Claim:

(a) that the lease between the plaintiff and the second defendants was a valid subsisting lease which had not been avoided according to law;

(b) that the alleged failure to register entitling the second defendants to claim that the lease was voidable was waived by the second defendants by receipt of rent due under and in terms of the lease."

I agree with the findings of the learned trial judge. It has been established that the lease was and is still valid and subsisting and that the first respondent had and still has a legal estate in the land prior to that created in favour of the appellants. The appellants took subject to that prior legal estate. In the circumstances, the first respondent is entitled to possession of the land.

LIVESEY LUKE JSC: By virtue of the Provinces Land Act (Cap 122) of the Laws of Sierra Leone, Chiefdom Councils in the Provinces, may with the consent of the District Commissioner, grant leases of land in their Chiefdoms to "non-natives" for periods of up to 50 years under the terms and conditions laid down in the Act.

On 16 May 1962, the Paramount Chief and the Chiefdom Councillors of Kakua Chiefdom, Bo District, (the second respondents in this appeal) granted a lease of land situated at Bye Pass Road, Bo to Abess Allie (the first respondent in this appeal for a period of 75 years (hereafter referred to as the Abess lease). The Abess lease was by deed and was executed by the Paramount Chief and the principal men of the Chiefdom. The consent of the District Commissioner was duly endorsed thereon. But the lease was not executed. On 27 November 1962, the Abess lease was registered at the office of the Registrar General, Freetown. By notice dated 20 January1964 and served on the agents of Abess Allie, Kaku Chiefdom purported to avoid and determine the Abess lease in exercise of powers under the proviso to clause 4 of the Abess lease, on the grounds that Abess Allie had failed to execute the lease and had failed to register it within 60 days from the date of execution. Prior to the service of the notice, the lessee executed some works on the land.

On 31 January 1964 the Paramount Chief and the Chiefdom Councillors of the said Chiefdom, with the consent of the District Commissioner, granted a lease of the said land together with another small piece of land to Agip (Sierra Leone) Limited (the appellant in the appeal) for the term of 21 years (hereafter referred to as the Agip lease). The Agip lease was by deed and was executed by the Paramount Chief and Principal men of the Chiefdom and the consent of the District Commissioner was endorsed thereon. The lease was registered in the office of the Registrar-General, Freetown on 19 February 1964.

The parties will be referred to hereafter as "Kakua Chiefdom", "Abess" and "Agip."

Thereafter Agip proceeded to construct a petrol filling station on the land. On 28 May 1965, while the construction was in progress, the agent of Abess wrote Agip informing them that they were trespassing on Abass land. But Agip continued with the construction. On 13 July 1966, Abess issued a writ of summons against Agip and the Kakua Chiefdom claiming damages for trespass against Agip and damages for breach of covenant for quiet enjoyment against Kakua Chiefdom. An order for amendment of the writ was made on 6 May 1968. In the amended writ Abess claimed recovery of possession of the land, damages for trespass to land and damages for inducing a breach of contract against Agip and damages for breach of covenant for quiet enjoyment against Kakua Chiefdom.

The action was tried by Browne-Marke J. According to the pleadings, the main issues at the trial were whether Kakua Chiefdom had properly and validly avoided the Abess lease; whether Kakua Chiefdom had waived their right to avoid the Abess lease by acceptance of rent and whether Agip had induced a breach by Kakua Chiefdom of the Abess lease.

Browne-Marke J reserved judgment on 1 May 1969 and after an inexplicable delay of some 14 months gave judgment on 16 June 1970 for Abess. On the issue of the avoidance of the lease, Browne-Marke J held that the Abess lease was a valid lease and that it had not been avoided or terminated.

On the issue of waiver, he held that the right to avoid the Abess lease had been waived by Kakua Chiefdom by the receipt of rent. On the issue of inducement of a breach of contract, he held that Agip had induced a breach of the Abess lease by Kakua Chiefdom. The learned judge accordingly made the following order: damages for breach of covenant for quiet enjoyment Le2500; refund of expenses during negotiations and shake hand Le6,000; refund of two years rent Le.260; damages for trespass by Agip Le20,000; damages for inducing breach of contact Le. 5,000; damages in lieu of recovery of possession Le9,000.

Agip appealed to the Court of Appeal against the decision, complaining against the findings of trespass and inducement and the measure of damages awarded. Kakua Chiefdom also appealed complaining against the finding of breach of covenant for quiet enjoyment and the order for refund of Le6,000 expense. Abess also cross-appealed, complaining against the failure of the judge to order recovery of possession and the measure of damages awarded.

Thus, all the parties to the action were in one way or another dissatisfied with the decision of Browne-Marke J. The appeal was heard by the Court of Appeal consisting of Sir Samuel Bankole Jones P, Dove- Edwin JA and Marcus-Jones JA on 1 March 1971 and subsequent days. Judgment was delivered on 30 July 1971 varying the order of Browne-Mark J. (Dove-Edwin JA dissenting). In the majority judgment delivered by Marcus-Jones JA it was held that the Abess lease had been properly avoided and terminated and that the right of Kakua Chiefdom to avoid the Abess lease had not been waived by acceptance of rent. The majority of the Court of Appeal also held that Agip had induced a breach of contract by Kakua Chiefdom. The Court (majority) refused on order for possession and varied the award of damages to the extent: damages for inducing a breach of contract: Le30,000, Special Damages: Le15,390.

No damages were awarded for breach of contract or breach of covenant for quiet enjoyment. This is not surprising in view of the finding of the majority that Kakua Chiefdom had not committed a breach of contract by terminating the Abess lease.

Dove-Edwin JA agreed with the majority that the Abess lease had been properly avoided and terminated and that Kakua Chiefdom had not waived their right to avoid the Abess lease. He however disagreed with the majority on the question of inducing a breach of contract. He held that Agip had not committed any inducement of breach of contract. He accordingly allowed the appeal, set aside the judgment of Browne-Marke J and dismissed Abess's claim.

The main issues in the appeal are:

(i) whether Kakua Chiefdom had lawfully avoided the Abess lease;

(ii) whether the right to avoid a lease conferred by s of Cap 122 can be waived;

(iii) if the right to avoid existed, whether in fact Kakua Chiefdom had waived their right to avoid the Abess lease;

(iv) whether Agip had induced a breach by Kakua Chiefdom of the Abess lease;

(v) whether possession of the land should be granted to Abess;

(vi) whether the damages awarded were excessive or inadequate.

The right to avoid a lease is conferred by s 9 of Cap. 122. The section reads:

"9. Every deed creating a tenancy of land shall be voidable by either party, unless it—

(a) is executed in the presence of two witnesses by the lessor before the District Commissioner of the district in which the land is situated; and is executed, in the presence of two witnesses, by the lessee or his attorney or his agent before a Magistrate; and

(b) has endorsed upon it certificates of execution in their presence signed respectively by the District Commissioner and the Magistrate before whom it was executed; and

(c) provides that the lessee shall not sublet or assign his interest thereunder except with the consent of the Tribal Authority with the approval in writing of the District Commissioner, provided that such consent shall not be unreasonably with-held; and

(d) contains stipulations with regard to all the maters set out in rule 3 to the schedule to this Ordinance; and

(e) is registered within 60 days in the office of the Registrar-General."

The proviso to clause 4 of the Abess lease also conferred a right of avoidance in those terms:

"Provided always that if this indenture is not registered within sixty days of its execution in the office of the Registrar General in Freetown then the said deed shall be avoidable at the option of either party to the same."

The question arises, how is the right to avoid thus conferred exercisable? The answer would depend on, first whether or not s 9 of the Act or the proviso to clause 4 created a condition, secondly whether or not the section or the proviso conferred a right of re-entry. The importance of the distinction is this: breach of a covenant by a tenant does not entitle the lessor to resume possession by re-entry upon the premises, unless an express stipulation to that effect is contained in the lease. On the other hand, a stipulation which is framed, not as a mere covenant, but as a condition, carries with it at common law a right of re-entry if the condition is broken.

A condition is defined at p 424 of *Cheshire's Modern Law of Real Property* [11th Ed] as follows:

"A clause which shows clear intention on the part of the landlord, not merely that the tenant shall be personally liable if he fails in his contractual duties, but that the lease shall determine in the event of such a failure."

In my opinion, none of the sub-sections of s 9, nor the proviso to clause 4 of the lease make the lease determinable on the failure of the lessee in his contractual duties. In my judgment therefore neither s 9 nor the proviso to clause 4 create a condition.

Turning now to the right of re-entry, it is perfectly clear that what s 9 confers is a right to avoid and not a right to re-enter. Also, it is quite clear that the proviso to clause 4 does not confer a right of re-entry.

The position therefore is that neither s 9 of the Act nor the proviso to clause 4 constitutes a condition or confers the right of re-entry. Consequently, Kakua Chiefdom did not have a right to re-entry on the land.

In my opinion, since the proviso to clause 4 is not a condition and does not confer a right of re-entry, its inclusion in the Abess lease does not in any way add to or subtract from the right of avoidance conferred on both parties by s 9 of the Act. The parties would still have had the right to avoid under s 9 of the Act for non-registration, within 60 days even if the proviso to clause 4 had been omitted. In my judgment therefore the proviso to clause 4 is surplusage.

The question then arises, how is the right to avoid conferred by s 9 of the Act exercisable? Kakua Chiefdom purported to exercise the right by service of a notice on Abess. The notice was headed "Notice of Re-entry" and it stated inter alia:

"4. In view of the matters stated above, we the said lessors have decided to avoid and determine the said lease and have therefore this day exercised our right of re-entry on the land in respect of which the said lease was made and henceforth the said lease shall determine."

It was contended on behalf of Abess that notice was not sufficient to avoid the lease. Mr Cotran submitted that the proper mode of exercising the right of avoidance by a lessor was for the lessor to give the lessee reasonable notice followed by an action of ejectment. He cited no authority for this proposition. Mr Gelaga King submitted that all that a lessor must do to avoid a lease is to do some act evidencing his intention to determine the lease and that the act must be a final and positive act which cannot be retracted. Mr Davies submitted that a lessor could avoid the lease by re-entry or by leasing to some other person. He relied on a passage in *Cheshire's Modern Law of Real Property* [11th Ed], p 425 which reads:

> "However clearly the proviso may state that the lease shall be void on breach of condition, it has been held in a long series of decisions that its only effect is to render the lease voidable. It is at the option of the landlord whether the tenancy shall be determined or not, and it is only if he does some act which shows his intention to end it that the lease will be avoided. Thus, an actual entry by the landlord or the grant of a lease to a now tenant works as forfeiture, but the usual practice at the present day is to sue for the recovery of possession instead of making a re-entry, etc."

It seems to me that this statement of the law is applicable to cases where there is a proviso conferring a right of re-entry, as clearly indicated in the opening words of the passage. It does not apply where the lesser does not have the right of re-entry.

In my judgment the right to avoid a lease is exercised by the person having the right doing some unequivocal act indicating the intention to avail himself of the option conferred on him to avoid the lease. But the unequivocal act would depend on whether or not a right of re-entry exists.

The position with regard to leases where there is a right of re-entry was stated by Parke B. in *Jones v Carter* (1846) 15 M&W 718. He said at p 724:

> "In like manner, the lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and if once rendered void, it could not again be set up. An entry, or ejectment in which entry is admitted, would be necessary in the case of a chattel interest, where the terms of the lease provided that it should be avoided by re- entry."

Thus, if a party has a right of re-entry, he may exercise his right of avoidance by re-entry, by granting a lease to a new tenant or by action for ejectment. But if a party does not have a right of re-entry it would be unlawful for him to exercise his right of avoidance by re-entry or by granting a lease to new tenant.

In my judgment the unequivocal act in a case where the party avoiding the lease does not have a right of re-entry is the issue and service of a writ of summons for recovery of possession: see *Canas Property Co Ltd v K L Television Services Ltd* [1970] 2 All ER 795; [1970] 2 QB 433; [1970] *2* WLR 1133.

In my judgment therefore the purported determination of the Abess lease by Kakua Chiefdom was unlawful and constituted a breach of contract and of the covenant for quiet enjoyment.

The next question is whether Kakua Chiefdom still had the right to avoid the lease when they purported to exercise it. The case of Abess is that Kakua Chiefdom had waived their right to avoid the lease by acceptance of rent after knowledge of the cause of avoidance and whether such acceptance of rent amounted to waiver in law.

The undisputed evidence is that on or before 28 December 1962 the District Commissioner Bo had received the registered Abess lease. Indeed, he acknowledge receipt of it by letter dated 28 December 1962. It is also not disputed that the District Commissioner was the agent for Kakua Chiefdom. So it must be accepted that Kakua Chiefdom received the registered Abess lease on or before 28 December 1962. On that date they knew or out to have known of the defects in the registered Abess Lease of which they later complained i.e., late registration and non-execution by the lessee or his attorney. Yet with that knowledge Kakua Chiefdom, according to the evidence, took no steps to avoid the lease for several months. In the meantime, on 7 March 1963, Abess paid rent for two years to the Accountant General, Bo. Admittedly, according to clause 2(5) of the Abess lease the rent should be paid "into the office of the District Commissioner." But the payment of rent to the Accountant General instead of "into the office of the District Commissioner" was not complained of by Kakua Chiefdom, nor was it made an issue in this case. Indeed, payment of rent to the Accountant General instead of "into the office of the District Commissioner" was not mentioned in the notice of 20 January 1964 as one of the grounds on which Kakua Chiefdom purported to determine the lease. So nothing turns on the payment of rent of the Accountant General. According to the evidence, the

District Commissioner made an entry of the receipt of the rent paid by Abess in the Kakua Chiefdom lease decree book kept by him. In my opinion the entry in the decree book by the District Commissioner clearly evidenced a receipt and acceptance by the District Commissioner, did it constitute acceptance by the Kakua Chiefdom? The answer to this question is provided by clause 2(5) of the Abess lease which stipulates inter alia: "The receipt of the District Commissioner shall be sufficient discharge for the payment of such rent."

The District Commissioner was thus the agent for the receipt of rent for and on behalf of Kakua Chiefdom, and it follows that acceptance of rent by him is equivalent to acceptance of rent by the Kakua Chiefdom. I therefore hold that Kakua Chiefdom accepted rent from Abess in March 1963.

What then is the legal effect of the acceptance of rent by Kakua Chiefdom with knowledge of the cause of avoidance?

In my opinion it is well-settled that acceptance by a landlord of rent accrued due after the cause of forfeiture (or avoidance) with knowledge of the cause of forfeiture (or avoidance) constitutes a waiver of the right of forfeiture (or avoidance). A comprehensive and what has been accepted as an authoritative statement of the principles governing this field of law is to be found in the judgment of Parker J in *Matthews v Smallwood* [1910] 1 Ch 777. He said at p786:

> "Waiver of a right of re-entry can only arise where the lessor, with knowledge of the facts upon which his right of re-entry arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act which recognises or appears to recognise the continued existence of the lease, unless at the time when the act was done, he had knowledge of the facts under which, or from which, his right of entry arises. Therefore, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place. It is also, I think reasonably clear upon the cases that whether the act coupled with the knowledge constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say: 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain but I tell you all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is the position which he is not entitled to take up. If knowing of the breach he does distrain, or does receive rent, then by law he waives, and nothing he can say by way of protest against the law will avail him anything.
>
> Logically therefore, a person who relies upon waiver ought to show, first an act unequivocally recognizing the subsistence of the lease, and secondly, the knowledge of the circumstances from which the right of re-entry arises at the time that act is performed."

I would not have considered it necessary to refer to any other authority on this point, but for a submission made by Mr Gelaga King to the effect that the important question always is "quo animo was the act done? In the case of payment of rent "Quo animo was the rent accepted." The question of quo animo has been considered by the English courts in a number of cases. The principle laid down in these cases is that the intention or motive of the landlord in doing the act relied on a waver is irrelevant. Thus in *Segal Securities Ltd v Thoseby* (1963) 1 QB 887 at p 898 Sachs J said:

> "It is thus a matter of law that once rent is accepted a waiver results. The question of quo animo it is accepted in forfeiture cases is irrelevant in relation to such acceptance."

In the recent case of *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048 Lord Denning MR said at p 1052:

> "So we have simply to ask: was this rent demanded and accepted by the landlord's agent with knowledge of the breach? It does not matter that they did not intend to waive. The very fact that they accepted the rent with the knowledge constitutes the waiver."
>
> And he continued in the same page:

> "I know that the judge found that the agents had no intention to waive and finds also that the tenant knew they had no intention to waive. That seems to make no difference. The law says that if the agent stated in terms "we do not intend to waive", it would not have availed them, if an express statement does not avail a landlord, nor does an implied one."

Buckley LJ also said at p1054:

> "In my judgment, the effect of an act relied on as constituting a waiver of a right to forfeit a lease must be considered objectively, without regard to the motive or intention of the landlord or the understanding or belief of the tenant."

Applying the above-stated principles, I hold that the intention or motive with which the District Commissioner accepted the rent paid by Abess and the understanding or belief with which Abess paid the rent are irrelevant. In my judgment, the rent having been accepted with knowledge of the cause of evidence, the right of Kakua Chiefdom to avoid the lease was waived and the lease was thereby confirmed and ratified. Therefore the right to avoid the lease under s 9 of Cap 122 was non-existent on 20 January 1964 when Kakua Chiefdom purported to exercise it. In the circumstances, I hold that the purported avoidance of the lease by Kakua Chiefdom was unlawful and consequently constituted a breach of contract and of the covenant for quiet enjoyment.

It was in the forefront of Mr Gelaga King's and Mr Davies' arguments that the provisions of s 9 of Cap 122 are mandatory and for the public good and as such they cannot be waived. Reliance was placed on the decision of the Privy Council in *Edward Ramia Ltd v African Woods Ltd* [1960] 1 All ER 627 where it was held that a concession of timber rights to land in Ashanti, Gold Coast under the Gold Coast Concessions Ordinance was invalid because the words s 12 and s 13(11) of the Ordinance were clearly imperative, being designed to protect the grantor in the public interest, and there could be no waiver of any of the conditions laid down in s 12. Section 12 of the ordinance lays down certain conditions which an applicant for a concession should comply with and certain steps which certain officials should take and then s 13(11) provides—

> "13. No concession shall be certified as valid …
>
> (11) Unless, in the case of a concession granted in respect of an area of land of which either the whole or the greater part is situated in Ashanti, the concession has been obtained in accordance with the provisions of s 12."

Delivering the judgment of the West African Court of Appeal, Sir Hanley Cossey P said inter alia:

> "It is true that there are no negative words in the sections referred to but the affirmative words are absolute, explicit and peremptory and when you find in an ordinance only one particular mode of effecting the object, one train of formalities to be observed, the regulative provisions which the section prescribes are essential and imperative. To render the purpose of s 12 unmistakable, s12(4) provides that the terms of the agreement can only be embodied in a concession after they have been agreed upon before the official named. The policy of the law clearly insists upon strict observance of the steps already alluded to before there can be a concession. Section 12 and s 13(11) are so clearly designed to protect the grantor in the public interest that in my opinion the learned judge erred in holding that a waiver is possible of any of the conditions of s 12 and that the grantors had waived them. To accede to this proposition would be to entirely ignore the intention of the legislature for the public good and to defeat one of the main purposes of the Concessions Ordinance".

The Privy Council agreed with this statement of the law.

In my opinion the provisions of ss 12 and 13 of the Gold Coast Ordinance are quite different from the provisions of s 9 of Cap 122. The Gold Coast Ordinance provides that if certain conditions are not complied with, or if certain steps are not taken, the concession shall be invalid, whilst s 9 of Cap 122 provides that if certain things are not done or certain provisions are not included in the lease, the lease shall be "voidable by either party." Section 9 of Cap 122 confers on either party the right to avoid the lease at his option, and if neither party chooses to exercise the right of avoiding the lease,

it remains a valid lease. In my opinion, if the right to avoid is left to the option of either party, that right, being a right which neither party is obliged to exercise, could be waived by non-exercise of it or by other means. Quite clearly it could not be said in relation to s 9 of Cap 122 that "the policy that the law clearly insists upon is strict observation of the step already alluded to before there can be a concession."

In my judgment the provisions of s 9 of Cap 122 are not mandatory and strict observance of them cannot be insisted upon. I therefore find the submission of Messrs Gelaga King and Davies untenable and I hold that the rights conferred by s 9 of Cap 122 can be waived.

I now turn to the question of inducing breach of contract. I have already held that Kakua Chiefdom committed a breach of contract by purporting to determine the Abess lease. But it was contended on behalf of Abess that there need be no breach of contract for the plaintiff to be entitled to succeed in an action for damages for inducing a breach of contract. The Court of Appeal (majority) seems to have accepted this contention, because having held that Kakua Chiefdom had not committed a breach of contract by determining the Abess lease, they proceeded to hold that Agip had committed the tort of including a breach of contract. The contract, the breach of which Agip was found to have included, was the Abess lease, which the Appeal Court (majority) held had not been breached. The question then arises, does a plaintiff in an action for damages for inducing a breach of contract have to prove a breach of contract in order to succeed?

In my judgment the necessary ingredients of the tort of inducing a breach of contract are:

(i) knowledge (actual or constructive) of the existence of the contract by the defendant and intention to induce its breach;

(ii) that the defendant induced the breach of contract;

(iii) breach of the contract by the person induced;

(iv) that the breach of contract was the necessary consequence of the inducement;

(v) that the plaintiff has suffered damage or at least that damage can be inferred from the circumstances.

Jenkins LJ stated the ingredients of the tort in his judgment in *DC Thompson & Co Ltd v Deakin & Ors* [1952] 2 All ER 361. He said at p 379:

> "But while admitting this form of actionable interference in principle, I would hold it strictly confined to cases where it is clearly shown, first, that the person charged with actionable interference knows of the existence of the contract and intended to procure its breach; secondly, that the person so charged did definitely and unequivocally persuade, induce or procure the employees concerned to breach their contracts of employment with the intent I have mentioned; thirdly, that the employees so persuaded, induced or procured did in fact breach their contract of employment; fourthly, that breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment."

That was a case dealing with breach of contract of service, but in my opinion, the principles therein stated apply to inducing the breach of contracts generally. Mr Cotran urged us to accept the idea of "liability, breach or no breach," relying on the dictum of Lord Denning MR in *Emerald Construction Co Ltd v Lowthian & Or*s [1966] 1 All ER 1013. Lord Denning said at p 1017:

> "Some would go further and hold that it is unlawful for a third person deliberately and directly to interfere with the execution of a contract, even though he does not cause any breach. The point was left open by Lord Reid in JT *Stratford & Sons Ltd v Lindley* [1965] AC 269. It is unnecessary to pursue this today. Suffice to that the intention of the defendants was to get this contract terminated at all events, breach or no breach, they were prima facie in the wrong."

Mr Cotran submitted that even if the contract is lawfully terminated, if the other elements of the test are present, the person "interfering" with the contract is liable. I think that the dangers inherent in the acceptance of such a proposition are considerable. It would kill lawful competition in business.

I think that the answer to Mr Cotran's submission was provided by the House of Lords as long ago as 1897 in *Allen v Flood* [1898] AC 1. Lord Macnaghten said at p 151:

> "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other in entitled to do or to abstain from during at his own will and pleasure, whatever his real motive may be, has a remedy against a third person, who by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it would be inquired into was without justification or excuse. The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty and amounts to an interference with legal rights."

Lord Shand said at p167:

"The employer's act in dispensing with the services of the plaintiff at the end of any day was a lawful act on their part. The defendant induced them only to do what they were entitled to do, and in the absence of any fraud or other unlawful means used to bring this about the action fails."

And Lord Davey said at p 172:

"To persuade a person to do or abstain from doing what that person is entitled at his own will to do or abstain from doing is lawful and in some cases meritorious, although the result of advice may be damage to another."

And Lord James said at p 179:

"Every man's business is liable to be 'interfered with' by the action of another, and yet no action lies for such interference. Competition represents 'interference', and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly 'interfere with' it. If, too, this language is to be held to represent a legal definition of liability, very grave consequences would follow."

In my judgment therefore a breach of contract is a necessary ingredient of an action for damages for inducing a breach of contract. So if a contract is lawfully terminated there can be no liability in an action for damages for inducing a breach of that contract.

It seems to me that a distinction should be drawn between cases in which a breach of contract has actually occurred, where the action is for damages for inducing a breach of contract, and cases in which a breach has not occurred but is merely threatened, and the action is for a *quia timet* injunction. In my opinion, in the first class of cases, it will be necessary for the plaintiff to prove an actual breach of contract for the simple reason that a breach has not taken place, the purpose of the action being to prevent a breach taking place.

It is important to note that in *Emerald Construction Co Ltd v Lowthian & Or*s [1966] 1 All ER 1013, supra, the court was concerned with the question whether or not an interlocutory injunction should be granted to restrain the defendants from procuring a breach of contract. In the present case, the plaintiff (Abess) pleaded actual breach of contract in the amended statement of claim. He must therefore, in my opinion, prove that an actual breach of contract resulted from the inducement by Agip. I have already held that Kakua Chiefdom committed a breach of contract by determining the Abess lease.

On the issue of inducement, Mr Cotran submitted that there were concurrent findings of fact by the High Court and the Court of Appeal and consequently the findings of the two courts should be accepted and the evidence ought not to be reviewed a third time. He relied on *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508, already referred to by the Honourable Chief Justice, which was a decision of the Privy Council. The learned trial judge found that Agip knew that the land was under lease to Abess and then he went on to say "I hold that the plaintiff had proved his claim for damages for inducing a breach of contract with the plaintiff by the second defendant."

The learned judge did not make any finding as to what acts of Agip amounted to inducement. In *Devi's* case, Lord Thankerton in stating the exceptions to the general rule said inter alia at p 521:

> "The question whether there is evidence on which the courts could arrive at their finding is a question of law."

It seems to me therefore that in the absence of any finding by the trial judge as to what evidence amounted to inducement, I am entitled to review the evidence for the purpose of determining whether in fact there was any evidence to support that finding.

In my opinion the evidence of inducement by Agip is the fact that they paid "shake-hand" to the Paramount Chief after they had known of the Abess lease, and the fact that they went on the land and surveyed it in November, 1963 after they had knowledge of Abess lease. This evidence, in my opinion, amounted to inconsistent dealing with knowledge of the existence of the contract. It is well settled that inconsistent dealing with a contract breaker by a third party begun or continued, after the third party has notice of the contract constitutes the tort of inducing a breach of contract. In *DC Thompson & Co Ltd v Deakin & Ors* [1952] 2 All ER 361, supra at p 378 Jenkins LJ stated the principle in these words:

> "But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract he has committed an actionable interference: see for example, *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504 where the necessary knowledge was held not to have been brought home to the third party; and *British Motor Trade Association v Salvadori* [1949] Ch 556. The inconsistent dealing between the third party and the contract breaker may, indeed, be commenced without knowledge by the third party for the contract thus broken, but, if it is continued after the third party has notice of the contract, an actionable interference has been committed by him."

In view of the foregoing, I hold that there was evidence before the trial judge on which to base a finding of inducement of breach of the Abess lease by Agip. In my judgment all the ingredients of the tort of inducing a breach of contract were present in this case and I see no good reason to disturb the judgment of the trial judge against Agip in this regard.

Abess claimed recovery of possession in the amended writ. But the trial judge refused an order for possession and granted instead damages in lieu of possession. He based his order on equitable principles, because at the end of his judgment he said:

> "This is a case in which I consider it equitable to grant damages against the defendants in lieu of recovery of possession, etc."

The Court of Appeal also refused an order for recovery of possession.

Unfortunately neither the trial judge nor the court of Appeal stated on which equitable principle or principles he or they relied in refusing an order for possession. I am aware that the superior courts have a general equitable jurisdiction. But it seems to me that it is in exceptional cases that the court exercises that jurisdiction. I find no exceptional circumstances in this case and none has been urged in this court. In cases where a trespasser has built and expended money on the land of another the courts have applied the principles stated by Lord Cranworth LC in *Ramsden v Dyson* (1866) LR 1 HL 129. He said at p.140.

> "If a stranger begins to builds on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him mistaken, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active, and to state my adverse title and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

> But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity, which would prevent me claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

It seems to me that the important questions in such a situation are: (i) has the trespasser expended money on the land under the mistaken belief that the land was his; (ii) has the landowner "stood by" i.e., knowing of the trespasser's mistaken belief, permitted or encouraged the trespasser to build either directly or by abstaining from asserting his legal right?

Without going into the question of mistaken belief, there is undisputed evidence that Abess wrote to Agip on 28 May 1965 informing them that they were building on Abess land. Agip ignored this warning and completed the building. It cannot be said, in my judgment, that Abess "stood by" while Agip built on the land.

In my opinion, having taken the risk to continue building after they had been warned, Agip must suffer the consequence of their folly and they are not, in such circumstances, entitled to the protection of equity.

On the question of damages, I agree with the learned Chief Justice that the award by the learned trial judge of Le20,000 as damages for trespass was excessive and ought to be reduced. The learned Chief Justice also mentioned the trial judge probably took into consideration the fact that recovery of possession was not being ordered. It is also probable that the trial judge took into consideration the highly speculative claims amounting to Le84,423,240 made by Abess which were itemized in a document headed "Cost and Expenses of land of Abess" (Ex F). Possession of the land "with all that goes with it" in being granted to Abess. A petrol filling station built at a cost of over Le37,000 is one of the things that goes with the land to Abess. Even if Abess has to demolish the petrol filling station, he would still take the installations and fittings on the land. Taking all the circumstances into consideration, I think that the figure of Le10,000 awarded by the learned Chief Justice is excessive. In my opinion an award of Le2,500 would be fair, reasonable and adequate compensation to Abess, and I would award that amount.

In all other respects, I agree with the order proposed by the Honourable Chief Justice. For the reason given by the learned Chief Justice and those I have myself expressed I would allow the appeal and the cross-appeal to the extent stated by the Honourable Chief Justice, subject to what I have said on the question of damages for trespass.

TEJAN JA: The facts in this case have been fully stated in the judgment of the Honourable Chief Justice and they need not be repeated in detail. The appeal in this case concerns land in Bo in the Kakua Chiefdom, Southern Province of Sierra Leone. The land was leased by the second respondents to the first respondent on 16 May 1962 under the provisions of the Provinces Land Act (Cap 122). Under the provisions of s 3 of Cap 122, provincial land cannot be occupied by a non-native unless he has first obtained the consent of the Tribal Authority and the approval of the District Officer.

Paragraph 4 of the lease created in favour of the first respondent (and which is exhibit B) contains a provision by mutual agreement that the lease was to be voidable if it was not registered within sixty days of its execution in the office of the Registrar General in Freetown. Section 9 of Cap 122 provides that "every deed creating a tenancy of land shall be voidable by either party, unless "it is executed in the presence of two witnesses by the lessor before the District Officer of the District in which the land is situated; and is executed, in the presence of two witnesses, by the lessee or his attorney or his agent before a Magistrate; and is registered within sixty days in the office of the Registrar General."

The proviso contained in paragraph 4 of exhibit B and s 9 of Cap 122 do not make a lease void if the provisions of s 9 are not complied with. They only create the right of election to void and determine a lease.

Exhibit B, the lease, was executed on 16 May 1962. Owing to some technical defects in the plan, the registration of the lease was refused, and accordingly the plan had to be submitted to the Director of Surveys and Lands for his signature. As explained by Mr Candappa in Exhibit Z, this procedure took some time with the ultimate result that the lease could not be registered within sixty days as required by s 9 of Cap 122. The lease was registered on 27 November 1962, and the District Officer acknowledged receipt of the copy registered lease by Exhibit "J", a letter dated 28 December 1962. Assuming that the second respondents had no knowledge of the breaches, the District Officer, who was responsible for the administration of the Province particularly in respect of provincial land, as can be seen from the powers conferred on him by the Provinces Land Act, must be taken to have known of the breaches on receipt of the copy registered lease at the latest on 28 December 1962. The District Officer, no doubt, was and still is the recognised agent or representative of the Tribal Authority with regard to provincial land, and the general rule is that the knowledge of an agent is the knowledge of the principal. Accordingly, the Tribal Authority must have had imputed knowledge of the breaches on 28 December 1962. The second respondents, having knowledge of the breaches, permitted the first respondent to take possession of the land and to spend money on it. The second respondents then went further to accept rents as evidenced by Exhibits C1 and C2. No oral evidence was given as to what period the acceptance of rents covered but a document was tendered in evidence. This document which is Exhibit "J", a letter written by Mr Candappa to the Acting District Commissioner states in paragraph 6 as follows:

> "That such an agreement was not only entered into but acted upon is clear from the fact that throughout the "material period since before and after execution of the lease and up to the date and including the whole of 1964, payment of rent due on the lease has been received by the Tribal Authority via the appropriate authority."

I am satisfied that on 7 March 1963, the Tribal Authority accepted rents for 1963 and 1964.

On the facts, I have no doubt that the lease Exhibit B was a subsisting lease on 20 January 1964, the day on which the second respondents served a notice of re-entry on the first respondent. The proviso contained in paragraph 4 of the lease Exhibit B was quoted in the notice of re-entry which is Exhibits V. The proviso is as follows:

> "Provided always that if this indenture is not registered within sixty days of its execution in the office of the Registrar General in Freetown then the said deed shall be voidable at the option of either party to the same".

Paragraphs 2, 3, and 4 of the notice of re-entry read as follows:

> "You have failed to register the said lease within sixty days of its execution and have so committed a breach of the said proviso or condition contained in the said lease.
>
> You have also failed to execute the aforesaid lease.
>
> In view of the matters stated above, we the said Lessor have decided to "avoid and determine the said lease and have therefore this day exercised our right to re-enter on the land in respect of which the said lease shall determine".

Section 9 of Cap 122 also stipulates that a lease created under the Provinces Land Act shall be voidable by either party if the lease is not executed by the lessee, and if it is not registered within sixty days in the office of the Registrar General.

I have said earlier that these provisions do not make a lease void. Instead they merely render the lease voidable if certain requirements are not complied with. In the circumstances any breach of the provisions can be waived. I think it is necessary to draw a distinction between the words "void and voidable". I agree with Lord Denning, when, in distinguishing the two words in the case of *MacFoy v United Africa Company Ltd* [1962] AC 152 he said:

> "The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to

> have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived".

Section 9 of Cap 122 provides for a voidable lease and so is the proviso contained in paragraph (a) of the lease (Exhibit B). It therefore follows that the covenants contained in s 9 are capable of being waived.

There are many ways of avoiding and determining a lease. The second respondents elected to avoid and determine the lease by re-entry. Paragraph 2 of the lease contains certain covenants on the part of the first respondent with the following proviso:

> "Provided always that if any part of the rent hereby reserved shall be in arrear for twenty-one days (whether demanded or not) and if any covenant or stipulation on the tenant's part herein contained shall not be performed or observed and a written statement to the effect has been deposited with the District Officer then and in any of the said cases, it shall be lawful for the Tribal Authority at any time thereafter to re-enter upon any part of the demised premises in the name of the whole and thereupon this demise shall determine".

The expressions "herein contained" and "then and in any event" on their true construction apply only to covenants contained in paragraph 2 of the lease (Exhibit B). They do not apply to either s 9 of Cap 122 or the proviso contained in paragraph 4 of the lease (Exhibit B) under which the lease was avoided and determined by re-entry by the second respondents. The second respondents would have been entitled to avoid and determine the lease by re-entry if there had been an express stipulation to that effect. *Cheshire on Modern Real Property* [6th Ed] at p183 clearly says that a breach of covenant by a tenant does not entitle the lessor to resume possession by a re-entry upon the premises, unless an express stipulation to that effect is contained in the lease.

Woodfall on Landlord and Tenant [27th Ed] at p 877 also says that a lease may be determined by entry or ejectment for a forfeiture incurred either by (1) breach of a condition in the lease or (2) for a breach of any covenant in case (and in case only) the lease contains a condition or a proviso for re-entry for a breach of such covenant.

Section 9 of Cap 122 contain covenants and not conditions. A right of re-entry cannot be implied in a covenant but can be implied in a condition since a condition carries with it at common law a right of re- entry if the condition is broken. The present practice, even in the case of conditions, is to sue for recovery of possession. This practice will, however, give the tenant the opportunity of applying to the court for a relief against forfeiture. It is unfortunate that s 14 of the Conveyancing Act 1881, is inapplicable to the Provinces by virtue of the Imperial Statutes (Law of Property) Adoption Act (Cap 18). Under s 14 a landlord is allowed neither to re-enter nor to bring an action for recovery of possession of the premises until he has served on the tenant a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring him to remedy it and in any case requiring him to make compensation in money.

Section 8 of Cap 122 contains merely covenants without a proviso for re-entry, and I think, that the second respondents cannot avoid and determine the lease (Exhibit B) by means of re-entry, and by doing so, I hold that the re-entry was unlawful.

Section 9 of Cap 122 provides that the lease shall be voidable by either party unless certain stipulations are complied with. This, however, confers a right on the second respondents to avoid and determine the lease (Exhibit B) for non-observance of any of the stipulations. According to s 9 of Cap 122, the first respondent was required to execute the lease and to register it within sixty days of its execution otherwise the lease would be voidable. The lease was made on 16 May 1962, and registered on 27 November 1962, the late registration being due to some technical defect in the plan. When the lease was registered, a copy was sent to the District Officer, who on 28 December 1962, acknowledged receipt of the lease. The District Officer then knew of the breaches complained of. His knowledge as representative and agent of the second respondents was also knowledge of the second respondents. On 7 March 1963, the second respondents accepted rents for the leased land for

1964 and 1965. The question is, was the acceptance of rents a waiver of their right to avoid and determine the lease.

In waiver, the landlord should be aware of the commission of the act of forfeiture by the tenant, and he should do some positive act which is a recognition of the tenancy. In this case the second respondents had knowledge of the breaches now complained of no later than the 28 December 1962. With this knowledge they accepted rents as evidenced by Exhibits C1 and C2. The common law rule is that acceptance of rent accrued due after the landlord's knowledge of the tenant's breach is regarded as inconsistent with an election to avoid the lease and consistent only with its recognition. The act of acceptance of rent is an unequivocal act that will disentitle the landlord to avoid the tenancy even if he qualifies his acceptance. The common law rule has been consistently followed by several English authorities. In *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751, after the lessor had become aware of facts entitling him to forfeit, his clerk, in ignorance of the facts, sent a routine demand for rent. Harman J held that had been no waiver, saying that the question in such a case is quo animo the demand is made and that such question is rather one of fact than of law. This was an exceptional case on special facts and does not affect the general principle that the law will, where the lessor or his duly authorized agent has with knowledge done some unequivocal act, presume an intention to waive the forfeiture whatever the lessor's actual intention may be: see also *Segal Securities Ltd v Thoseby* (1963) 1 QB 887.

Waiver was also dealt with by Megaw J in the case *Windmill Investments (London) Ltd v Milano Restaurant Ltd* (1962) 2 QB 373. After reviewing the facts in this case, His Lordship held that (1) the plaintiff's knowledge at the latest by the end of February 1959 was sufficient in law to constitute knowledge of the breach; and (2) the plaintiff's subsequent acceptance of rent was a waiver of the breach.

Before coming to this conclusion, Megaw J referred to some authorities with regard to waiver. He said:

> "I was at one time during the argument oppressed with the difficulty that there appeared some authority for the proposition that the question whether or not an acceptance of rent amounts to a waiver. Parker J in *Matthews v Smallwood* [1910] 1 Ch 777 at 786 clearly says that it is a question of law, a question, as he puts it, which the law decides. On the other hand, in *Croft v Lumley* (1858) 6 HL Cas 672, Lord Wensleydale (who, with Lord Cranworth decided the appeal in the House of Lords, after hearing the advice of the judges) in an obiter dictum said, by way of postscript of to his speech which he had already delivered: what I stated upon this subject was to guard against the supposition that I entirely concurred in the argument used by the learned judges who thought that there was a waiver. It seems to be a matter of fact, rather than that I should have come to the conclusion that the money was received as rent, or that that was the effect that ought to be ultimately ascribed to the transaction".
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> Again, in *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751, Harman J said:
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> "The opinions, however, of the judges in *Croft v Lumley* (1858) 6 HL Cas 672, show that it is not the demand nor even the receipt of rent which will of themselves waive a forfeiture. These acts are merely evidence to show that the lessor has elected not to avoid the lease. The question remains quo animo was the act done. No doubt the lessor must be held responsible for the consequences of his acts, and the question is rather one of fact than of law, as Lord Wensleydale pointed at the end of the hearing of *Croft v Lumley*. The explanation is that it is a question of fact whether the money tendered is tendered as, and accepted as, rent, as distinct, for example, from money tendered and accepted as damages for trespass. That is a question of fact. Once it is decided as a fact that the money was tendered and accepted as rent, the question of its consequence as a waiver is a matter of law".

Again, in the case of *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048 Lord Denning after the reviewing the facts and relevant authorities said, "So we have simply to ask: "Was this rent demanded and accepted by the landlord's agent with knowledge of the breach? It does

not matter that they did not intend to waive. The very act that they accepted the rent with knowledge constitutes the waiver".

Considering the legal propositions with regard to waiver, and I accept these propositions as being very sound, I hold that the second respondents, having accepted rents after knowledge of the breaches, waived their right of re-entry if they had any. The lease was a valid subsisting lease and the question of quo animo does not arise, and I agree with the learned trial judge that the lease between the first respondent and the second respondents was a valid subsisting lease which had not been avoided or terminated according to law, and that the breaches complained of had been waived by the second respondents by receipt of rent due and in terms of the said lease.

The first respondent cross-appealed and asked for a variation of the order for damages in lieu of possession. I have found that the lease (Exhibit B) was and is still valid and subsisting, and in such a case the first respondent had and still has a legal estate in the land prior to that created to the appellants. The appellant then took subject to the legal estate. I am quite aware that the appellant had expended money on the land; there is sufficient evidence given by their own witnesses Jacob Kojo Jokoto and Papa Bakolo that the appellant ought to have known that the land belonged to somebody. Instead they disregarded this fact and expended money on the land and built a petrol station on it. The fact that the appellant had expended money on the land in my view, should not deprive the first respondent of possession of the land. In the words of Lord Cranworth in the case of *Ramsden v Dyson* (1866) LR 1 HL 129 at p 141, "if a person builds on the land of another knowing him to be the owner thereof there is no principle of equity which would prevent the owner from claiming the land with the benefit of all the expenditure on it". I think the learned trial judge ought not to have given damages in lieu of possession. I would therefore make an order for recovery of possession of the land by the first respondent, that is, the area of land leased to him.

The appellant also appealed against the findings of the learned trial judge and the Court of Appeal that the appellant induced the second respondents to breach their contract with the first respondent. The first respondent, or the other hand, submitted that since there were concurrent findings of fact, he was entitled to judgment, relying on the principles laid down in *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508. The principles laid down in his case were followed in the cases of *Yachuk & Anor v Oliver Blais Co Ltd* [1949] AC 386 and in the *Stool of Abinabina v Chief Kojo Enyimadu* [1953] AC 207.

I have read the entire evidence at the hearing, and in my opinion, it would be hopeless to contend that there was not sufficient evidence to support the findings. The learned trial judge might not have given all the reasons on which he arrived at his finding, but the evidence taken as a whole, in my view, fully substantiates the conclusion at which both the trial judge and the majority of the Court of Appeal arrived at the findings. In the circumstances, I would not disturb the concurrent findings of fact. Since it has now been established that the appellants induced the breach of contract, equity cannot under the circumstances render any assistance to them. The maxim is, "he who comes to equity must come with clean hands".

I cannot usefully add anything to the judgment of the Honourable Chief Justice with regard to damages. I entirely agree with his finding. But I have this to say with regard to special damages awarded by the learned trial judge and the majority of the Court of Appeal. The Honourable Chief Justice has rightly said in his judgment that special damages ought not to have been awarded because they were not pleaded. Sometimes plaintiffs confuse general damages with special damages. General damages are damages which the law will presume to be the direct natural or probable consequence of the act complained of. Special damages, on the other hand, are damages which the law will not infer from the nature of the act. They do not follow in the ordinary course, and therefore they must be claimed specifically and proved strictly.

In this case, the plaintiff put in evidence a document showing his expenses incurred. This is not sufficient. Lord Goddard in the case of *Bonham-Carter v Hyde Park Hotel* [1948] 64 TLR 177 makes the position clear. He said that, "plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak,

throw them at the head of the court, saying, "This is what I have lost; I ask you to give these damages".

Reported by Anthony P Kinnear