IN THE SUPREME COURTS OF SIERRA LEONE

Coram:

The Hon.Mr.Justice S.M.F. Kutubu	CJ.
The Hon.Mr.Justice S.Beccles Davies	JSC
The Hon.Mr.Justice S.C.E.Warne	JSC
The Hon.Mr.Justice M.O.Adophy	JA
The Hon.Mrs.Justice V.A.D.Wright	JA

SC.CIV.APP.No.4/88.

ROKEL RESOURCES (S.L.)Ltd. - APPELLANTS

VS.

BITTANOL INTERNATIONAL TRADING COMPANY AND ASSOCIATES - RESPONDENTS

J.B. Jenkins-Johnston Esq., for the Appellants
Berthan Macaulay Jr. Esq for Respondent

JUDGMENT DELIVERED THIS 31 DAY OF ~~May 2004~~ 2005

Warne, J.S.C.:- This is an appeal against the Judgment of the Court of Appeal delivered on the 2nd day of June, 1988. It was a majority judgment in a Court made up of Navo, Thompson-Davis and Gelaga King JJA., Thompson-Davis JA. dissenting. Gelaga King JA gave the principal judgment supported by Navo JA.

There are ten grounds of appeal namely:

1. That Court of Appeal was not duly or properly constituted on the 2nd June, 1988 when the Judgment was delivered contrary to the express provisions of section 107(2) of the Constitution of Sierra Leone No.12 of 1978, in that only two (2) Justices of Appeal were present and read judgments.

2. That the Respondents herein having filed their Notice and grounds of

Appeal on the 3rd of April, 1987, the Court of Appeal erred in Law and acted contrary to the letter and spirit of the express provisions of Rules 9 and 11 of Court of Appeal Rules Public Notice No.29 of 1985;

(a) by allowing the Respondents to abandon six (6) out of seven (7) grounds of appeal and substituting in their place two (2) completely fresh grounds of appeal not hitherto included in the original Notice of Appeal some ten (10) months after the date of the decision appealed against, which was tantamount to bringing a fresh appeal months out of time; and

(b) by entertaining arguments from Counsel on those grounds of appeal, and

© by basing the substance of their decision on those grounds of appeal.

3. That when the Learned Justice of Appeal said and so held without more that:

"The Chiefdom ~~Counsel~~ Council is the effective and only Lessor and only they can grant a lease to a non-native, as long as the District Officer endorses his consent thereon, and the relevant provisions of the Act are complied with the ~~Lessor~~ Lease is perfectly valid", the Learned Justices of Appeal erred in law in that they failed to apply

section 76(1) of the Courts Act No.31 of 1965 ~~(1965)~~ or to observe section 125~~(2)~~ of the Constitution Act No.12 of 1978.

4. That arriving at their conclusion that since the lease was by Deed , it is trite in law to say that no extrinsic evidence of the intention of the party to the Deed, from his Declaration whether at the time of executing it, or before or after that time is admissible in their absence of fraud" and "Agreement EX"A" and the plans put in evidence for themselves, and admit no extrinsic evidence for their construction"

the Learned Presiding Justices misdirected themselves on the law of the exclusion of extrinsic evidence to contradict, vary or add to documents by failing to have regard to the facts of the case to the equitable and other legal exceptions to the above rule.

5. That in their ~~constitution~~ of Cap.122 of the Laws of Sierra Leone, the Learned Justices of Appeal did not construe section 1 thereof properly or at all, and in the event gave the statute an application which is based wholly on English jurispundence on the Laws of trusts and infringes the applicable customary law.

6. That in all the circumstances, to hold "Bitco" had a better right of possession and ~~straining~~ from a better title, because their lease was prior in time to Rokel's instrument and that Bitco had, and still has a legal estate in the land prior in time to that created by Rokel, is an error in law in that it pre-supposes and wrongly so that Cap.256, provides for registration not merely of instruments but of title.

7. That the award of damages of Le6,732,000.00 was wrong in Law since there was no sufficient basis to found such a claim

8. That when the Learned Presiding Justices said with reference to "Ex.T" "undoubtedly" the judge did so in error" as the document clearly contravened or did not comply with Section 3 of the Evidence Documentary Act Cap.26 he erred in law in rejecting the said document in that he ignored or failed to observe the provisions of section 3(2) of the Act Cap.26 or that the said "Ex.T" was addressed to the Director of Mines whose representative in court was called upon to produce the same.

9. That the Learned Justice of Appeal having correctly stated the Law of trespass then proceeded to mis-apply the same to the facts of the instant case, to contradict themselves and to ignore settled decisions of higher courts binding on them contrary to the principle of Stare Decisis, thereby arriving at an erroneous conclusion on the issue of trespass.

10. That the Learned Justices of Appeal having held that, "..... Be that as it may I do not in any case attach much weight to the map/plan in Bitco's lease since I would have some difficulty in identifying the land from it alone" ERRED IN LAW, and decided

against the weight of the evidence when they subsequently found that ....."..... it follows from the foregoing that the land was properly leased to Bitco by the Chiefdom Council and that the land leased can be identified from the deed with sufficient certainty....."

For ease of reference, the Respondents are (hereinafter called the plaintiffs) and the ~~defendants~~ Appellants are hereinafter called the Defendants). The facts of the case are, the Defendants were attracted to prospect for gold in the Kafe Simiria in the Tonkolili District in the Northern Province of Sierra Leone.

As a result, they took certain preliminary steps to that end. After they had been assured that certain areas in the Chiefdom had rich gold deposits they proceeded to negotiate with the Paramount Chief and the Chiefdom Councilors and landowners for a lease of a parcel of land in the Chiefdom. The negotiations being successful, a lease was prepared which was signed by Paramount Chief and representatives of the Chiefdom Councillors. The lease was dated 31st December, 1984 and registered in the Office of the Registrar-General. ~~Among the clauses~~ Included deed in the lease were a plan and a schedule delineating the land conveyed to the defendants.

In arguing the grounds of appeal, Mr. Jenkins-Johnston referred the court to the issues which he submitted are contained in the case for defendants duly filed .

Among the issues Counsel argued before this Court are the following which I considered to be important in deciding the Appeal:-

1. 'The subject-matter of this action being leasehold land in the Provinces, can it be properly determined without having any regard to the provisions of Section 76 of the Courts Act. No.31 of 1965 but merely and wholly on concept of English Jurisprudence and English ~~proceedings~~ precedents

2. (i) Having regard to the preamble to the ~~Provisions~~ Provinces lands Act Cap.122 as well as the provisions of Section 2(i) thereof; Is it correct to say that (Land Owners' have no role to play in the granting of a lease under the ~~Provisions~~ Provinces Land Act.

(ii) To whom do the phrases "Native Communities and "Men of Note" refer as used in the Act.

3. (i) Can the Court ignore clear and direct evidence that the actual area in dispute i.e. land around Kpafaia Village was never part of the land leased to "Bitco" even though the plan tendered in Court would seem to suggest that it was? Ought the Court to act in vain or to act in a manner contrary to the interest of the Native Communities mentioned in the Provinces Land Act and likely to end in a breach of the Peace?

4. . . . . .

5. . . . . .

6. (1) Is there any evidence that the Plaintiffs Bitco were ever in clear and Exclusive Possession of the area in dispute?. . . . . .

7. . . . . .

8. . . . . .

9. "In all the circumstances should the Court of Appeal have allowed Bitco's Appeal?."

Counsel ~~contained~~ contended that Section 76 of Courts Act No.31 of 1965 was totally disregarded by the Court of Appeal and consequently the Judgment of the Court cannot stand since it was based merely and wholly on the concept of English jurisprudence and English precedents. Counsel submitted that the subject-matter of the action being a Lease of land in the Province, Section 76 of the said Act should have been given due regard.

Counsel further submitted that the Court of Appeal ought to have considered the evidence of the witnesses in the High Court vis-à-vis the lands comprising the area leased to the Plaintiffs which belonged to the native communities of the five villages within which the land in dispute existed, rather than restrict itself to the Lease Ex."A".

Counsel submitted that the area in dispute was never surveyed by the Plaintiffs. Indeed, the evidence of the witnesses for the Defendants show clearly that the survey plan of the plaintiffs' did not accurately reflect the agreement between the plaintiffs' and the Chiefdom Council and as such they cannot sustain any claim based on it.

Counsel referred the Court to the ~~Provinces~~ Provincial Boards Act Cap.122, more specifically to section 2 of the Act and submitted that from the evidence of both plaintiffs and defendants, "men of note" in customary practice refer to the landowners or respective heads of ~~the~~ the native communities.

Counsel contended and submitted that the Plan on Ex."A" was irregular because it had no delineations and was not signed by the Director of Surveys and Lands. The Plan breached section 25 of Cap. 256 Registration of Instruments Act. Counsel submitted that even though Cap. 256 did not expressly provide the consequences of non-compliance, it ought to be regarded as obligatory with an implied nullification of whatsoever is done contrary to its provisions. The Deed Ex. 'A' therefore is voidable.

Counsel submitted further that the plaintiffs, not having properly identified the land claimed which they had leased from the Chiefdom Council and since it is always a question of fact whether or not a particular parcel of land is or is not contained in a description of land contained in a lease; there must be clear evidence to assist court to determine whether the parcels are sufficiently well defined.

1. As regards possession, Counsel submitted that the Defendants were in possession and the Plaintiffs were never in possession to enable them to ground a claim for trespass. Counsel submitted that the issue of possession was a question of fact and the Court of Appeal should have given due regard to the evidence before the High Court and the findings of the Learned Trial Judge.

2. Counsel had also argued that the Court of Appeal had ignored Ex. "T" the report of the Department of Mines on their investigation into the dispute thereby failing to properly evaluate the evidence in the High Court. In relation to Grounds 9 and 10 of the Appeal – Counsel referred to the relevant pages in the case for the Defendants. On Ground 1 referred to S.107(2) of the Constitution of 1978 Act. No.12. Counsel abandoned Ground (2) with leave of Court.

2. 3. Counsel finally submitted that the Court of Appeal was wrong in awarding damages to the plaintiffs since they did not strictly prove special damage.

In answer to the submissions of Counsel for plaintiffs submitted that Act No.12 of 1978 Section 107(2) refers to hearing not determination and cites specifically S.36 of Act No.31 of 1965 the Courts Act.

In respect of Ground iii Counsel submitted that Section 76 of the said Act. No.31 of 1965 requires considerable analysis and upon such analysis there are limitations to the application of customary law by the Courts. Counsel urged the Court to decide that Section 76(1) and (2) cannot avail the Defendants. Counsel further submitted that the Court of Appeal was correct in not applying customary law in the instant case and in not taking cognizance of landowners as being relevant in the lease.

Counsel submitted that Ex."A" and Ex "X" being Deeds, extrinsic evidence will not be allowed to vary or discharge the contents thereof subject to certain exceptions.

Counsel argued that Defendants cannot impugn Ex "A" because they were not parties to Ex. "A" and cannot avail themselves of Section 25 of Cap. 256.

Counsel further submitted that Cap.122 is a statute of specific application dealing with the granting of lease in respect of ~~granting~~ of land to non-natives.

Counsel submitted that the failure to comply with section 25 of Cap.256 cannot render a lease made under section 9 of Cap.122 dependent on the provisions set out in Cap.256 for registration.

Counsel submitted that the land was clearly identified in the Deed and cited several legal authorities in support of his submission and concluded that the contention that the leased land was not properly identified is not tenable.

The Defendants filed 10 grounds of ~~appeal~~. However, it is my view, that for the purpose of the appeal, the issues are;-

(1) was the land leased to the plaintiffs clearly defined?

(2) were the plaintiffs in possession of the land which they claimed was trespassed upon?

(3) (#) ought the Court of Appeal to have disturbed the findings of facts made by the High Court.

(4) (8) what principles should govern the award of damages in an action for trespass?

The facts of the case are, the Defendants were attracted to prospect for gold in the Kafe Simiria in the Tonkolili District in the Northern Province of Sierra Leone. As a result they took certain preliminary steps to that end. After they had been assured that certain areas the Chiefdom had rich gold deposits they proceeded to negotiate with The Paramount Chief of the Chiefdom Councillors and landowners for a lease of a parcel Of land in the Chiefdom. The negotiations being successful, they ~~served~~ a lease which ~~was~~ signed by Paramount Chief and representatives of the Chiefdom Councillors. The lease was dated 31st December, 1984 and registered in the Office of the Registrar-General. Among the clauses in the lease were a plan and a schedule delineating the land conveyed to the Defendants. The plaintiffs then imported mining and processing equipments ~~s~~to the tune of ~~$2,00,000~~ U.S.Dollars. These equipments were transported to the site where they found the mining on part of the area for which the ~~plaintiffs~~ had got concessions to mine for gold. The plaintiffs conceded that they saw a lease agreement of the Defendants which showed an overlap on the plaintiff's concession.

The Defendants for their part said, that in February, 1985 they secured a mining concession in Gbafayah in the Kafe Simiria Chiefdom in the Tonkolili District in the said Northern Province. They averred that the agreement for the concession was made

between their company and the Paramount Chief and the landowners. It is not in dispute that the Paramount Chief was one of the signatories of both leases. The Defendants testified that after the lease agreement had been signed, they were shown the area were to mine. The boundaries were indicated as the Makoleh river. The Defndants ceased work when the plaintiffs got an injunction against them by the Court. The Defendant have also testified that no one was in possession of the land when they had the concession and started to work on the land.

In a case of trespass to land, the plaintiff must prove the extent of his land with certainty and that he was in possession or had a right to possession when the alleged trespass took place.

In the instant case, the plaintiffs sought to prove the extent or delimitation of the land by virtue of the Lease Agreement which they secured from the Paramount Chief and Chiefdom Councillors. The Lease Agreement was tendered on Ex."AI". It is significant that the Court of Appeal carefully considered the Lease Agreement of the Plaintiffs before making its findings. I will do the same. The Lease Agreement is in issue and the Court of Appeal held that since the lease was by Deed is trite law to say that no extrinsic evidence of the intention of the party to the Deed from his Declarations, whether at the time of executing it, or before or after that time, is admissible in the absence of fraud." "This is a bold pronouncement of the law and in my view it is very restrictive because the rule cannot be said to be absolute in the face of certain exceptions.

Extrinsic evidence may be given to show that the document does not represent the contract to which the parties agreed. There was clear evidence before the High Court that there were five villages involved in two transactions, that is to say, the Lease Agreement

with the Plaintiffs and the Lease Agreement with the Defendants. In such a situation, I think there must be led evidence to determine the true nature of the lease. The five villages involved in the Lease Agreement of the Plaintiffs and Defendants respectively are Masomri, Nonkosokoya, Maranda,Gbafaia and Fonkuma. From the evidence, there seems to have been a misunderstanding vis-avis what piece or parcel of land was leased to the Defendants and the portion that was leased to the ~~Defendants.~~ Plaintiffs

The Court of Appeal in its judgment said inter alia "Since the lease was by Deed, it is trite law to say that no extrinsic evidence of the intention of the party to the Deed , from his Declarations, whether at the time of executing it, or before or after that time is admissible, in the absence of fraud". In the instant case, the Court ignored the fact that the Lease dealt with land situated in the Provinces where Cap.122, Provinces Land Act is applicable and provisions of Section 76 Subsections 1 and 2 of Courts Act No.31 of 1965 are very relevant.

In my opinion this is a case where extrinsic evidence was desirable to ascertain the circumstances existing at the time the Lease Agreement was made; vide the case of River Wear Commissioner V. Adamson (1877) 2 Case 743 at 763. This following passage was quoted by Lord Halsbury L.C. in ButterleyV. New Hucknall Colliery (1910) A.C. 381 at 382.

" Lord Blackburn said in the case of River Wear Commissioners V. Adamson (1877) 2 App. Cases 743 at 763 "in all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without enquiring further and seeing what the circumstances were in

reference to which the words were used what was the object appearing from those circumstances which the person using them had in view, for the meaning of words very according to the circumstances in respect to which they were used."

The Court of Appeal in considering Exh."A" the lease, strictly confined its construction to the contents of the Deed and referred to the case of ; Shore V. Wilson (1842) 9 CL + F.355 at 365.

This case is the locus classicus on the subject. This case was concerned with the interpretation of Lord Hewley Trusts for "poor and godly preachers of Christ's holy gospel" in which the opinions of the judges were taken by the House of Lords. In that case we have excerpts of the following judgments. Coleridge J. at PP. 525, 527 said "where language is used in a Deed which in its primary meaning is unambiguous and in which that meaning is not excluded by the context and is sensible with regard to extrinsic circumstance in which the writer was placed at the time of writing, such primary meaning must be taken conclusively to be that to which the writer used it; such meaning in that case conclusively states the writer's intention and no evidence is receivable to show that in fact the writer used it in any other sense or had any or had any other intention. This rule thus explained implies that it is not allowable in the case supported to adduce any evidence however strong, to prove an unexpressed intention varying from that which the words used import. This may be open no doubt to the remark that, though we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention rejecting which may be most satisfactory in the particular instance to prove it. The answer is, that interpreters

have to deal with the written expression of the writer's intention and Courts of Law to carry it into effect what he has written, not what it may be surmised, on however, probable grounds that he intended only to have written." So also Parke B in the case at P.565 said "No extrinsic evidence of the intention of the party to the deed, from his declaration, whether at the time of his executing the instrument, or before or after that time, is admissible, the duty of the court being to declare what is written in the instrument, not of what was intended to have been written."

Both judges are expressing similar opinions and I agree with them. However, they have not exclude the circumstances existing at the time the instrument was executed from being receivable in evidence to determine the intention of the writer. I would not exclude the circumstances either.

The Court of Appeal quoted part of the judgment of Trindal C.J. in the same case Shore V. Wilson and that of Coleridge J. ibid and said: "from those authorities I apprehend that all Bitco and the Chiefdom Council agreed is to be found within the four corners of the lease. In my judgment therefore it was unnecessary to call the extinsic evidence to which the judge referred and the judge was wrong in law to have so held". In my opinion, this is a regrettable misunderstanding of the judgment in Shore V. Wilson. I say this because of the judgment of Lord Blackburn in the case of River Wear Commissioners V. Adamson (supra). In the peculiar circumstances of the lessors and the subject matter of the lease, it would have been desirable if the land owners had been called to give evidence as regards the delimitation of the land leased to Bitco, the Plaintiffs.

In my view, the Court of Appeal erred when it stated that "the extrinsic evidence of the intention of party to the deed from his declarations, whether at the time of executing it, or before or after that time, is admissible, in the absence of fraud".

The lease, in the instant case, is one leasing land in the Provinces under the Provinces Land Act Cap. 122. In such a case, the Courts should never loose sight of the fact that its jurisdiction to adjudicate is derived from section 21 of the Courts Act No.31 of 1965 which provides: "Nothing in this Act should be deemed to invest the Supreme Court (High Court0 with jurisdiction in regard to

(a) any action or original proceedings;

(i) to determine the title to land situated in the Provinces other than the title to a leasehold granted under the Provinces Act.

(ii) .....

(iii) .....

Having been conferred with jurisdiction, the Court ought to have regard for the provisions of section 76 of the aforesaid Act. Section 76 states (1) "nothing in this Act shall deprive any Court when determining matters arising in the Provinces in its civil jurisdiction, of the right to observe and enforce the observance of or shall deprive any person of the benefit of, any customary law existing in the Provinces and not being repugnant to natural justice, equity and good conscience, nor incompatible, either directly or by necessary implication, with any Act applying to the Provinces."

' (2) Subject to subsection (3) such customary law shall, except where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in all cases and matters where it shall appear to the Court that substantial injustices would be done to any party by a strict adherence to any law other than customary law.

(3) No party shall be entitled to claim the benefit of any customary law if it shall appear either from the express contract, or from the nature of the transaction out of which any cause or matter may have arisen that such party agreed that his obligation in connection with such transaction should be regulated exclusively by any law referred to in Section 74 or any Act of Sierra Leone; and in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justice, equity and good conscience." Subsections (1) and (2) are very relevant in the instant case. In my view, these sections were specifically enacted to address such an issue as in the instant case.

The lease was executed regarding land in the Provinces, more particularly in the Kafe Simiria Chiefdom, Tonkolili District in the Northern Province in the Republic of Sierra Leone.

The Court of Appeal took the trial judge to task in that the judge in his judgment said inter alia:

"The evidence before me clearly shows that the Plaintiffs claim under a Deed of Lease which gave them a colour of title. But they are relying only on this documentary assistance. It is my view that for them to succeed in the action they have perforce to prove their title , but this they have regrettably failed to do. They have sidestepped calling the owners of the land who granted the lease to them to come forward and say both sides of Makokeh River was part of the land leased to them".

In interpreting the lease, the Court of Appeal, in the majority judgment went strictly according to the wording of the lease. This in my view, was in total disregard of the provisions of Section 76 ~~Section~~ of Act 31 of 1965 aforesaid. Gelaga-King J.A. said also in his judgment "No where in the Act does the word "landowner" appear. This is not surprising having regard to the preamble to which I have already referred and the Act, itself, which in effect gives the power of landowners to the Chiefdom Council. And of course, nowhere in the Act does it say that the consent of the landowner is a sinequanon to the granting of a lease. I might say that, land owners is a relevant term in the Western Area as distinct from the Provinces so far as the granting of lease is concerned. In the Western Area, land is not vested in any Chiefdom Council". It seems to me, with respect, that the Learned Justice was approbating and reprobating. He acknowledges in one breath that the Chiefdom Council is Trustee for the landowners, and, in another breath, that the consent of the landowners is not ~~genuine~~ germaine to the granting of a lease to non-natives. In my view, the Learned Justice, with respect, misunderstood the concept of dealing in land in the Provinces otherwise the Court of Appeal would have been guided by the provisions of section 76 of the Courts Act No.31 of 1965. Act No.31 of 1965 hereto before mentioned. In the majority judgment Gelaga King J.A. had this to say in rejecting That part of the judgment of the Learned Trial Judge where he referred to land owners; "In resolving this issue it is pertinent to point out that a distinction must be made between the granting of a lease in the Western Area of Sierra Leone and granting of a lease in the Provinces" I entirely agree. This was why section 76 aforementioned was enacted. Nevertheless, the Learned Justice of Appeal Gelaga-King J.A. referred to the provisions in section 2(1) of the Provinces Land Act Cap 122 in rejecting the judgment of the

Learned Trial Judge. He states, "The preamble to the Act makes it clear that, unlike the Western Area, "all land in the Provinces is vested in the Chiefdom Council who hold such land for and on behalf of the native ~~committees~~ communities concerned.

The act gives further clarification defining chiefdom council under section 2(1) as follows: "Chiefdom Council means Paramount Chiefs and their Councillors and men of note or sub-chiefs and their councillors and men of note."

"Men of note" have not been defined by any statute and as far as my research goes, the definition cannot be found in this or any other enactment. In my view, "men of note include Paramount Chiefs, sub-Chiefs, Chiefdom Councillors and landowners. I cannot envisage a situation where the Chiefdom Council will convey any land, be it a leasehold or otherwise without the consent or cooperation of the owners of the land. If the landowners are ignored, it will be a ~~receipt~~ recipe for disaster and civil unrest. That all lands in the Provinces are vested in the Paramount Chief and Chiefdom Councillors who hold such land for and on behalf of the native communities concerned and connote trusteeship. If the land is held in trust, the Chiefdom Council cannot deal with such lands without resort to the landowners.

In my view, the passage in the judgment of the Court of Appeal where it says,"It seems to me, therefore, perfectly clear that so called "landowners do not have a role to play in the granting of a lease under the Provinces Land Act is a misconception". The Chiefdom Council is effective lessor and only they can grant a lease to a non-native." I ~~regret~~ regret to say that the expression 'so called landowners" is a term of derogation. In my view, the decision of the Court of Appeal, with respect, frustrated and breached. Section 76 of Act No. 31 of 1965 aforesaid. In order to buttress my view I will refer to the

evidence of P.W.3 in the High Court. He gave his name as Arnold Rayan-Coker. He said, inter alia, "~~Paramount~~ Pursuant to Ex.D our Company decided to meet the Paramount Chief of Kafe Simiria Chiefdom and to get his approval to obtain mining concession in the said area provided no part of the said area has been assigned, subletted or leased to any other party being indigenous Sierra Leoneans or foreigners. We were able to get the approval of the Paramount Chief, the Chiefdom Councillors and landowners (emphasis mine). The approval was conveyed in writing"

Some of the landowners named were Bassie Lakoh, Yamba Kargbo and Mayo Seisay. In the Lease Ex."A" the names of Bassie Lakoh and Yamba Kargbo appeared as parties who were among those who conveyed.

In my opinion, the Learned Trial Judge was justified when he opined that none of the landowners was called to testify for the plaintiffs. I am more than surprised that the Paramount Chief as the principal trustee for the landowners was not even called as a witness. In continuing his evidence P.W.3 said ..... "our Company decided to meet the Paramount Chief of Kafe Simiria Chiefdom and to get his approval to obtain mining concession.

I see Exhibit A and the plan attached to it. It is the plan of the area I have been referring to. It is the area leased to our company. It is also the area which the Paramount Chief, Chiefdom Elders and the Landowners (emphasis mine) gave concession in Exhibit 'B'. The acreage of the area is 196 plots in 4.34 sq. miles." Indeed all throughout his evidence the witness kept referring to the P.C., Chiefdom Councillors and

landowners. Under cross examination, the witness said, "The area of our concession was indicated to us by the Landowners (emphasis mine.) P.W.6, Musa Bittar, in his evidence testified, inter alia, that 'According to the directive given to us by the Ministry of Mines we obtained the approval from the P.C. Alimamy Bangura II of Kafe Simiria Chiefdom, his Chiefdom Councillors and the Landowners (emphasis mine) a piece of land referred to in our lease in conformity with the submitted plan attached to the said lease." P.W. 7 Abubakarr Barrie said "Before a licencc is issued to a company or individual first the company or the individual has to go to the Landowners (emphasis mine) and pay their fees which we call surface rent and government receipt should be issued by the Chiefdom clerk ..... I know that the Defendant Company had a lease from the Paramount Chief and the Landowners (emphasis mine)." Suffice it to say the landowners have a role to play in the disposition of land in the Provinces. In the instant case, they did play a role in the lease which was granted to the Plaintiffs. In my view, the learned trial judge expressed a legitimate opinion when he said "the owners of the land who granted the lease to them to come forward and say that Makokeh River was part of the said land leased to them". The Court of Appeal dismissed the consent of the landowners as being unnecessary in granting a lease vis-avis ~~Provisional~~ Provincial lands. In my opinion the Court of Appeal was misguided in its Judgment and contemptuous of local custom in the disposition of Provincial lands when the learned trial judge was taken to task for expressing a legitimate opinion.

In support of my view, to ignore the consent of the landowners would be a recipe for disaster and civil unrest, I will refer to the evidence of P.W.3 Dr. Ryan Coker where he

said "I found them in the area in dispute. I was able to identify the area where I found them as part of the area for which we had got concession to mine gold.....

.....

The people I found in the area I did not say anything to them but I later learnt that our agents were confronted with machetes and sticks (emphasis mine). Among our Agents confronted was Mr. Bongay and other agents I cannot now name. The people referred to the defendants and their agents". D.W. 1 Mankeh Conteh testified, inter alia, that "we the landowners and the company agreed to a lease of the land and the rent to be paid annually. A document was prepared. I signed the document by affixing my thumbprint on it. One Momoh Kargbo also thumbprinted so did one Brima Bangura The P.C. and D.C. also signed in it.

I saw another company. They came to the same land we had given to Rokel Company. They came with machines. One Mr.Bongay was a surveyor who came with them. The company which is called Bitco. They brought their machines to Gbafaya Village. They passed through Gbafaya Village and went to where Rokel Company were working. As one of that landowners I went to P.C. and reported the incident to him. The P.C. instructed that they remove their machines from the area. The machine was removed. It was after that Mr.Bongay came to survey the area. I asked him what was his right coming to survey our land. He said I should go and ask the P.C. not him. I asked him to leave the place immediately. He refused. I then sent for the young men in the town. The pegs he was burying were uprooted by the young men. He had to leave by force". MR.Bongay was P.W.4. The witness further said "He went and complained to

the P.C. who sent for us. My people and I went. We told him we were the ones who drove Mr.Bongay from our land for surviving our land without our consent".

This bit of evidence strengthens my view that the P.C. should have been called to testify.

In my view, the Learned Trial Judge was right in holding that the consent of the landowners was necessary and desirable before the agreement was made for the lease to the plaintiffs. No doubts, in my opinion , the Learned Trial Judge adverted his mind to s 76 of the Courts Act No 31 of 1965 aforesaid & repeal-to say the Court of Appeal failed to do this.

The Learned Trial Judge found that the plaintiffs failed to prove their claim for trespass. The Court of Appeal reversed this finding.

In a claim for trespass, the plaintiffs need not prove title as stated in case of Graslyn v. Williams (1720) Fortes Rep.378 ~~Rep.378~~. Possession alone is indeed sufficient to sue in trespass as against a wrongdoer, but it must be clear and exclusive possession (emphasis mine).

This is an action for damages for trespass to land. Trespass to land is an entry upon or any direct and immediate act of interference with the possession of land.

Trespass to land is defined in Halsburys Laws of England 3rd Edition Volume 38 at 739 Paragraph 1205 as follows:

"Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses on land if he wrongfully sets foot on it, or rides or drives over it and takes possession of it or expels the person in possession or place or fixes anything on it."

Also in the same volume of Halsbudrys Laws of England supra at Page 744 Paragraph 1214 it is also stated as follows:-

"Trespass is any injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who was or is deemed to have been in possession either actual or constructive possession of the said land at the time of the trespass. The type of conduct necessary to evidence possession varies with the type of land, and to maintain an action against a person who never had any title to the land, the slightest amount of possession is sufficient."

In the instant case, the plaintiffs relied on the lease agreement of 31 December, 1984, that is to say, the title to the land in dispute. According to the Learned Trial Judge, they did not succeed. However, the Court of Appeal rejected the findings of the High Court. In rejecting the findings of the High Court, the Court of Appeal said, inter alia "from these authorities I apprehend that all that Bitco and the Chiefdom Council agreed is to be found within the four corners of the lease. In my judgment therefore, it was unnecessary to call extrinsic evidence to which the judge referred and the judge was wrong in law to have so held." I have already adjudged that the Learned Trial Judge was not wrong in law to have so held.

In order to buttress my judgment further, I will refer to Odgers on the construction of Statute 5th edition page 55 et seq the section where it states "The Deeds must be read and interpreted as a whole in order to extract the meaning of any part or expression." How else can this be done? The author referred to the case of East Ham Corporation v. Swlon (1965) 1 W.L.R. 30 at 43 affirmed (1966) A.C. 406 where Salmo L.J. stated "we have been referred many well known rules of

construction. Many of these are artificial, some are contradictory and none is more than a guide, sometimes an uncertain one, for ascertaining the true intention of the parties as expressed in the document under consideration. The principle, however, long ago laid down by Lord Ellenborough C.J. is of the greatest value..... the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus (i.e. from what goes before and from what follows)every part of it may be brought into action in order to collect from the whole one uniform and constant sense, if that may be done." In my opinion the Lease Agreement Exhibit "A" 1 does not provide that one uniform and constant sense from the whole document. The case Lord Salmon referred to by Lord Ellenborough is In Barton v. Fitzgerald (1812)15 East 530 at 541.

I will also cite the case of N.E. R1y v. Hastings (Lord) (1900) A.C. 260 at 269 where Lord Davey said, "The Deed must be read as a whole in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the Deed if that interpretation does no violence to the meeting of which they are naturally susceptible."

The Court of Appeal was unable to ascertain the area of the land leased to the Plaintiffs either from the wording of the lease or the plan attached thereto; but however, found that the schedule provided sufficient proof thereof; in my view, the schedule by itself cannot be interpreted to bring it into harmony with the wording and the plan of the lease.

Be that as it may, the Court of Appeal went on to say, "What then is the area of the land in the Kafe Simiria Chiefdom leased to Bitco by the Chiefdom Council. Can the

land be identified with sufficient certainty from the Deed of Lease? Did the learned trial judge direct himself correctly on the law on this point"? The Court of Appeal then referred to a portion of the judgment of the trial judge and went on to say "But do we really need the evidence of P.W. 3 and P.W.6 to identify the area or the concession in this case, or do we look for such identification in the Deed of Lease....." In my opinion, the Court needed the evidence of P.W.3 and P.W.6 in addition to the Deed of Lease to identify the area of the concession. In support of my opinion, I will refer to certain portions of the evidence of P.W.3 and P.W.6.

P.W.3 Rayan Coker said inter alia, in cross examination, "It is correct that at the time we had the lease we did not have enough time to do proper survey by a licensed surveyor. We did not put beacons on the land to delineate the area but the area was properly delineated. We did not fence our boundaries. We did not make out the land to show that the land belonged to Bittarnol. It is incorrect to say that at the time we signed the lease we did not have a correct plan of the land we were leasing. We had a proper idea of the area leased. The area was brushed to show the various demarcations or boundaries of our concessions."

Bittar P.W.6 testified, inter alia, "I am acquainted with a piece or parcel of land in Kafe Simiria Chiefdom. My ~~compound~~ Company owns interest there. My company owns interest in the area for the purpose of mining gold.

According to the directions given to us by the Ministry of Mines we obtained the approval from P.C. Alimamy Bangura II of Kafe Simiria Chiefdom, his Chiefdom Councillors and the land owners for a piece or parcel of land referred to in our lease.

I know Kafe Simiria Chiefdom very well and particularly the area for which we had concessions. From October, 1983, to June 1986 we planned to mine an area of 1500 feet long to 300 feet wide – three feet deep, making a total of 1,350,000 cubic feet." In my view the evidence of these witnesses were necessary to comprehend the demarcation of the area contained in the lease.

Be that as it may, I will now consider the Lease itself and see if the area leased in Exh."A"1 is clearly defined. The Lease is Ex."A".

The ~~Habeburum~~ Habendum Clause states.

"The Chiefdom Council hereby demise ~~into~~ unto the Tenants ALL THAT PIECE OR PARCEL OF LAND situate, lying and being at Kafe Simiria Chiefdom in the Tonkolili District aforesaid which piece or parcel of land and for greater ~~clespirness~~ clearness and so as not to restrict or enlarge the description hereinbefore contained is delineated and described on the plan attached hereto and thereon and specified in the schedule respectively demised for a term of 35 (thirty-five) years. (emphasis mine)". On a cursory glance it would appear that the area contains both exceptions and reservations and reservations and delimitations. What is meant by " for greater clearness and so as not restrict or enlarge the description herein contained . .....

In my view, the underlined expression is not only equivocal but the delimitation on the plan and schedule is made more difficult to comprehend. I ~~drew~~ draw support for my view from the case of Dodd v. Burchell (1862)1 Hurlstane & Collmans Reports. Where it was stated that "The quantity of land claimed by the defendant under a conveyance to him, must exactly corresponding with the quantity designated by the measurement in the conveyance.

This question seems incomplete please recheck

Held: the probability arising from the relative position of part of this land to neighboring land, that it had been conveyed by mistake, did not enable the plaintiff to show under the words ~~be~~ the same more or lease" that a similar quantity was the land conveyed."

The plaintiffs must prove its case on the strength of the evidence led in support thereof and not on the weakness of the defendants' case.

How should the court construe the underlined expression (supra) In the case of Swinburne v. Milburn(1884) 53 A.C. it is stated:" Ascertaining what the parties meant by the words used ~~in~~ the real function of the Court. Lord Halsbury ~~C.~~ laid down two rules of construction. ~~There~~ are now firmly established as part of our laws and may be considered as limiting those words. One is that words, however general may be limited with respect to the subject-matter in relation to which they are used. The other is that the general words shall be restricted to the same genus as the specific words that precede them."

In the instant case I find difficulty in relating the underlined words to the plan and the schedule contained in the lease. In order that the plaintiffs may prove their claim, the area of land trespassed upon must be clearly defined. I see the Court of Appeal had difficulty in ascertaining the delimitations of the land claimed from the words of the lease and the plan attached thereto in the same manner as the High Court. However, the Court of Appeal referred to the schedule to ground a claim for the plaintiffs. In its judgment, the Court of Appeal said inter alia, "From the foregoing, there can be no doubt, and indeed there is none, that the piece of land leased to Bitco in Exh."A" by the Paramount Chief and Councillors of Kafe Simiria Chiefdom with the approval of the District Officer Tonkolili District is more or less the same area subsequently granted to

Rokel in "Y" (emphasis mine). In my view there is no basis for such positive pronouncement, for this reason alone the claim of the plaintiffs should fail for uncertainty. The Court of Appeal, with respect ignored the evidence of D.W. 3 who said the plaintiffs had not done a proper survey of the area by a licenced surveyor when defendants had started working the area. However, were they in possession of the land on the strength of their Title Exh."A"1. I do not think so. The area which they claimed had not been clearly demarcated. The comment on the habendum clause to which I have referred by the Court of Appeal makes interesting reading. It states: "I cannot help but comment that this clause is rather inelegantly worded and shows scant regard if not a woeful disregard, on the part of the draftsman to express lucidly a complete thought in words. He talks "so as not to restrict or enlarge the description herein before contained." I agree entirely. I have already made my observation vis-à-vis this clause. Having made that comment the Court of Appeal after referring to the piece or parcel "herein before contained or not contained." said "I dare say that if that was all the description of the land in the Deed, I would have no hesitation in summarily throwing the case out on that point". I agree. The Court of Appeal next considered the plan and said "I see a diagram drawn or superimposed on a map with the heading 2sheet 44 and 45 Kafe Simkrka Chiefdom. "It is not signed by a surveyor. There are certain letters (AB,BC,CD,D etc) on certain points of the diagram, and then on a separate sheet of paper, those letters are referred to as for example.

44/45	LATITUDE	LONGITUDE	BEARING	DISTANCE
AB 8 49' 14"	11 45" 16"	315 50	4600 ft.	

If that was all I would have some difficulty in the elucidatory evidence (notice) I have already held is not admissible in the circumstances to identify the land from the map plan and table .....

.....

.....

Be that as it may, I do not in any case attach such weigh to the map/plan in Bitco lease since I would have some difficulty in identifying the land from it alone."

I agree, I would also have difficulty in identifying the land from the plan.

The Court of Appeal went on to say, "I am now left with the schedule which I also hold to be part of the Deed. It tells me that the area lies on topographical sheets 44 and 45 in the Chiefdom and gives the bearings distances from stated points, in detail and even states the geographical co-ordinates. In my Judgment, the description in the schedule affords a sufficient and satisfactory identification of the land leased to Bitco."

Can the schedule provide the answer as to whether the plaintiffs have proved their case with certainty as to the area of the land they claim? I do not think so. I will refer to the case of Dunstant E. John and another v. William Stafford and others S.C.CIV.APP.1/25 unreported. In that case, Betts J.S.C. referred to the case of Riddle v. Nicol which the Court of Appeal has cited as providing the test whether a surveyor could make a plan from the record before the Court. The decision was not limited specifically to the schedule but to the whole record of the case before the Court, vide page 10. For ease of reference. I will quote the portion of the judgment as regards this issue. 'In order to resolve the uncertainties which beat the learned trial judge he followed the principle outlined

In the case, Kondilinye v. Odu 2 W.A.C.A. 336 which states that 'the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought before him to a declaration of title "and also the well known case of Sobanjo v. Oke 14 W.A.C.A. 593 which says "the burden is on the plaintiff to prove his right to title and other relief by independent means "After giving due consideration to the law and the facts before him The learned trial Judge found he could not make the declaration." In the instant case, the Learned Trial Judge after seeing the witnesses and hearing their testimonies and also visiting the locus in quo, and giving due consideration to the law and facts before him found he could not make the declaration. It is a well established principle of law that an appellate court should not easily disturb the findings of fact of a trial Court. I will give my view on this point further on in this judgment.

Betts J.S.C. continued "In this case of Walter Riddle v. Samuel Nicol (1971) the Court of Appeal (S.L) unreported, in which the case of Ate Kwadze and Robert Kwesi Adjie an appeal from the Provincial Commissioner's Court, cited in W.A.C.A. Vol. "X 274 it was held that before a declaration on title is given the land to which it relates must be ascertained with certainty, the test being whether a Surveyor can from the record produce an accurate plan of such land. There is ~~alone~~ also the case of Bitter v. ~~Bitter~~ Boorna Tribal Authorities (1957 – 1960) A.L.R. S.L. 128 (R.B. Mark e J.) this question follow:

"In Kwadze v. Adjei, already cited, the West African Court of Appeal laid down the test to be applied as regards the delimitations of land in dispute." Though this is an action for declaration of title the principles laid down by the Court as to the necessity for defining with certainty the area in dispute, would, in my opinion, apply to the action for ejection.

The Court of Appeal among other things said: "The said test is whether a surveyor taking the record could produce a plan showing accurately the land to which title had been given.

"Applying these principles to this case it seems to me that the Judge was justified in coming to the conclusion he did regarding the declaration of title."

In this instant case, the claim was for trespass based on title. In the case cited per Betts J.S.C. record has not been defined or amplified. I will therefore refer to the Rules of the Supreme Court P.N. No.1 of 1982, Part 1, under Interpretation where "Record"
Means "the aggregate of papers relating to an appeal (including the pleadings proceedings, evidence Judgments) proper to be laid before the Supreme Court on the hearing of an appeal or any application which by these Rules may be made to the Supreme Court.

The cases, having decided, that if a surveyor taking the record could produce an accurate plan of the land claimed then the claim succeeds; the Court of Appeal erred in law when it decided that "the schedule affords a sufficient ~~and sufficient~~ and satisfactory identification of the land leased to Bitco". The schedule is only part of the record.

In this instant case, the record includes the Pleadings and evidence and the judgment.
It seems to me that the Court of Appeal came to its findings by referring to part of the evidence including the lease Exhibit "A" and the judgment of the Learned Trial Judge. It is regrettable that the Court of Appeal having referred to Clause 2 of the Lease and having held that the clause was 'inelegantly worded." failed to ~~release~~ late this clause to the Schedule. The Court of Appeal also specifically observed the phrase "so as not to restrict or enlarge the description herein before contained." and then went on to say "There is hardly any description hereinbefore contained because the only description we have before us, "all that piece or parcel of land, situate lying and being at Kafe Simiria Chiefdom in

Tonkolili District .... That is hardly a description for the purpose of identifying the land. I dare say that if that was all the description of the land in the Deed I would have no hesitation in summarily, throwing the case out on that point." I find it incomprehensible that having made such a pronouncement, the Court could decide that the schedule provides a sufficient and satisfactory identification of the land leased to Bitco. With respect, the Court of Appeal was wrong in law in so holding.

In my view, the Court of Appeal made unwarranted findings of fact which disturbed the findings of fact of the learned trial judge. An appellate court ought not to disturb findings of facts of a lower court unless such findings are clearly wrong and cannot be supported in law, vide the case of Benmax v. Austin Motor Ltd. (1955) All E.R. 326. In that case Viscount Simon held at page 327 that a distinction should be made between facts deposed to by witnesses and found by the Court and inference of facts drawn by the Court.

I will also refer to the case of Watt and Thomas V. Thomas (1947) A.C. at 484. The headnote states: "When a question of facts has been tried by a jury and it is not suggested that the Judge has misdirected himself in law, an appellate Court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witness, and should not disturb his judgment unless it is plainly unsound. The appellate Court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears

unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

As I have already said, the Plaintiffs have not proved their claim.

In the instant case, the positive findings of facts were made by the Learned Trial Judge as a result of facts deposed to by witnesses. These were the findings of the Judge in the High Court. The Learned Trial Judge said inter alia "The law as I understand it is that in a claim of trespass to land coupled with an injunction particularly where portion of area said to have been trespassed upon is an open space, It is of the utmost importance that there must be clear and unequivocal evidence supporting the area being claimed. I would say we need more than the ~~planed~~ land assertion of P.W.3 and P.W.6 in this case to establish ~~oar~~ or identify the area of their concession."

The plaintiffs can have no better right or title than the owners of the land. They are claiming that the defendants are trespassers; but assuming that they were indeed, the plaintiffs in order to evict them must show a better title and cannot succeed in doing so by canvassing a title which itself has been demonstrated to be defective as regards the area being claimed. See Alhaji Adeshaye v. Shimonike (1952) 14 W.A.C.A. 86 at p.87. it is evident that both sides have beautiful maps, the contention between the two parties is as to the ownership of the Gbafaye side of the Makokeh River. On the evidence before me, I find myself unable to say that the plaintiffs have proved their title to the disputed place and I so hold. ~~Moving~~ Having so found, I hold that the plaintiffs are not entitled to claim injunction and/or mandatory injunction to restrain the defendants, by themselves, their servants or agents or otherwise"

It seems to me that the Court of Appeal ignored the evidence in the case or did not appreciate the principles of law relating to the award of damages.

The cases cited by the Court of Appeal did not give a clear cut approach as to the award of damages where the trespass to land was unauthorized mining; Morgan v Powell Speaks of "compensation was given for all injury done to the soil by digging at p.284 per Denman C.J." How then did the Court of Appeal award the damages when the Court acknowledged that plaintiffs did not suffer any loss for any injury done to the soil. To base the damages on the estimated value of the severed gold by the defendants is not only wrong in law, it is contrary to the rules of equity. The defendants had a right to mine in the area the plaintiffs claimed to be trespassed upon. They had incurred great expenses in putting machines on the land, they had constructed roads to the mining site. They had employed substantial labour. They had paid fees to the Chiefdom Authorities and had been granted a lease of the area they mined. They had paid for and obtained mining licences. Mining was in full operation and had begun to mine gold from the area and had started to realise earnings therefrom. The plaintiffs interrupted production by securing a Court injunction preventing defendants continuing production. The defendants had suffered loss. Did the plaintiffs suffer any loss by the seeming trespass on what they claimed to be their area of the lease. Were they entitled to claim the value of the severed gold? I do not think so; until the gold was severed, no value could have been placed on it. In my view, if any award was to be made to the plaintiffs, the defendants were entitled to deduct their expenses.

Deduction of the cost of severing the mineral was laid down in Marttin v. Porter (1838) M &W. 357 that the value of the mineral as soon as it existed as a chattel formed the measure of damages and that no deduction could be made for the cost of severance.

There is however, a qualification on this general rule. In the case of Ward v. Modrewood (1841) 3 Q 3.4400. Parke B. directed the jury that:

> 'If there was fraud or negligence on the part of the defendant, they might give as damages under the Couirt in trover the valuc of the coals at the time they became chattels, on the principle laid down in Martin v. Porter; but if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had right to do what he did, they might give the fair value of the coals as if the coalfield had been purchased by the plaintiff."

The jury found for the latter sum. I am satisfied that was a proper, correct and appropriate award. This was later applied in the Courts of Equity vide J. Jegan v. V. Vivian (1871) L.R. 6 Ch. App. (742) See also the case of Townend V. Askern Coal Company (1934) 1 Ch.463.

In this instant case, the defendants acted honestly in the belief that they had a right to work on the area claimed by the plaintiffs. As a result, if the High Court had found for

the plaintiffs, the award would have been based on the value of the minerals after severance less the cost of severance.

The Rule in Wood v. Moorewood is applied in the following circumstances (i) where the defendant had a bona fide belief in his title to the land in which the minerals lay as in Wood v. Moorewood (ibid) itself and in three later cases Hilton v. Woodes (1867) LR.4 Eq. 432, Ashton v. Stock (1877) 6Ch. D. 719: Livingstone v. Rowards Coal Co. (1880) 5 App.Cas.25 (2) Where the defendant had inadvertently worked into the mine of the plaintiffs, his adjoining owner, as in Re. United Merthyr, Colleries (1872) L.R. 15 Ea.46; (3) Where there was bona fide dispute between the plaintiff and the defendant, which dispute was in course of a long litigation that was finally decided against the defendants so as to make him a wrongdoer: as in Jegen v. Vivian (ibid) (4) Where the defendant had begun work in a mine vested in trustee in the bona fide expectation that a contract would be concluded between them giving him a Licence to work the mine having given one of the trustees notice that that expectation would be immediately acted upon by an entry on the property, but no contract was afterwards entered into.

They had a right to work on the area claimed by the plaintiffs. As a result if the High Court had found for the plaintiffs the award would have been based on the value of the minerals after severance less costs of severance.

The Rules in Wood v. Moorwood is applied in the following circumstances (1) Where the defendant had a bonafide belief in his title to the land in which the minerals lay as in Wood v. Moorewood (ibid) itself and in three later cases Hilton v. Woods (1867)L.R. 4 Eq. 432, Ashton v. Stock (1877) 6 Ch. D. 719: Livingstone v. Hawyards Coal Co. (1880) 5 App.Cas.25 (2) Where the defendant had inadvertently worked into the

mine of the plaintiff, his adjoining owner, as in Re: United Merthyr Collianlens (1872) L.R.15 Eq.46: (3) Where there was a bonafide dispute between plaintiff and the defendant, which dispute was in course of a long litigation that was finally decided against the defendants as to make him abimitio a wrongdoer; as in Jegon v. Vivian (ibid) (4) Where the defendant had begun work in a mine vested in trespass in the bonafide expectation that a contract would be concluded between them giving him a licence to work the mine having given one of the trustees notice that that expectation would be immediately acted upon an entry, on the property, but no contract was afterwards entered into and the trustees had no power to make one; as in Trotter v. Maclean (1879) 13 .H.D. 574: (5) Where the defendants had begun to work the plaintiff's mine in the bonafide expectation that an order granting permission to work would be made in their favour by the Railway and Coal Commission, the application for the order having been filed before their trespass and the expected order being subsequently made, but the defendants had given no notice to the plaintiffs that they wee to commence working the mine as they did not know who was the owner, as in Townend v. Askern Coal Co. (ibid)".

The trend of these decisions and of this dicta in them suggests that the strict rule in Martin v. Porter (ibid) will now apply only where the trespass is wilful and fraudulent, And that the qualification as stated by Parke B. in Wood v. Moorehead is now to be enlarged so as to include cases of negligence.

The above ~~question~~ quotation is to be found in Mayne and McGregor on Damages 12th Edition Pages 598,599,600 paragraphs 687,690.

It is unfortunate that the Court of Appeal made short shrift of the award of damages.

I entirely agree with the principle of law relating to the award of damage vis-à-vis a claim for trespass by unauthorized mining. I adopt the ratio decidendi in the cases cited in its entirety. It is not only good in law but also in equity.

The judgment of the Court of Appeal is flawed. I will start with the preamble to the Judgment of Gelaga King J.A. which is the principle majority judgment. In the interest of ~~charity~~ clarity I will refer to the preamble in full which states; " Kafe Simira Chiefdom Tonkolili District is reported to be vastly rich in gold deposits. This reputation, which stretches far beyond the confines of Sierra Leone, has the backing of reliable geologists. The findings reveal that anyone with the requisite financial support or capital to exploit the huge golden resources would reap great and the nominal rewards".

In my opinion, this is an unusual approach in pronouncing a Judgment on an appeal. However, the learned Justice did not stop there. He went on to say: "These companies – Bittanol Internattional Trading Company Limited (Bitco) and Rokel (Sierra Leone) Limited were attracted to Kafe Simira's gold. They had the requisite financial backing. Both companies acted speedily. Bitco in pursuance of the objective and being a non-native took certain essential preliminary steps as they were obliged to do, after which they leased a certain area of Kafe Simira. The deed of lease was signed on the 31st day of December, 1984 between Bitco and the Chiefdom Council.....

.....

Rokel in similar vein, for like purpose, and, I dare say with commensurate speed (emphasis mine) on the 21st day of February, 1985 signed an agreement by deed for a

certain area. They did so with Paramount Chief Alimamy Bangura of Mabonto Kafe Simira Chiefdom acting for and on behalf of the Chiefdom Council. Paramount Chief Alimamy Bangura was the same Paramount Chief who signed Bitco's lease."

In my opinion, the foregoing preamble to the judgment beclouded the views of the learned justice which led him to be selective in consideration of the evidence before the trial court. The preamble is not based on the evidence nor is an obliter dicta.

It seems to me that the learned justice is inferring that Rokel surreptionsly by fraud entered upon the land and started to mine.

The learned justice in the same ~~with~~ vein went on to say "Rokel wasted no time in starting operations. They constructed access roads and employed about 100 people of the area. They took heavy machinery there. 208 caterpillars, washing plates, 4 pumps and w ~~executors~~ and extracted a lot of gold for which they started digging sometime in 1985`.

It seems to me from the foregoing that Rokel had been on trial on criminal charged. He who avers must prove. Bitco sued Rokel for trespass, indeed trespass on a mining concession. The law requires they must prove their claim. What has the commensurate speed of Rokel in signing an agreement to work in the Kafe Simira's got to do with proof of trespass by Bitco. At the expense of prolixity, I will repeat that the plaintiff must prove his case on the strength of his own evidence not on the weakness of the defendant's case. In my opinion the Court of Appeal was wrong in law to have disturbed the findings of facts by the Learned Trial Judge.

In order to compound the ~~flaw~~ law in the majority judgment of the Court of Appeal, I will refer to parts of the judgment of Navo J.A. (as he then was). The learned justice said "The issue that was before the learned trial judge for consideration was a very simple and

straight forward and on which but for the irrelevant matters the learned judge took into consideration, the necessity to come before this court on appeal might not have arisen".

In my opinion, this approach is a clear disregard and disrespect for the ~~peristaking~~ pains taking judgment of the learned trial judge. It has been said over the years by distinguished and learned justices that an appellate court ought to pay due regard to the judgment of the trial judge who had the opportunity of seeing and hearing the witness and in some cases visited the locus in quo. The Court of Appeal is free to draw its own inferences, form its own view where the judgment of the trial judge is clearly wrong in law or does not support the weight of the evidence. In my view this is not the case here.

It seems to me the Court of Appeal was preoccupied with the mineral resources in thee Kafe Simira Chiefdom more than with the facts of the case. The Learned Justice went on to say, "Rokel, I can rightly infer hearing of the rich mineral resources discovered by Bitco went to the same Council ~~hard~~ loudly two months after they had executed Ex."A" and ~~Offer~~ offered them incentives like supplying Mabonto Town with electric generator to supply the town with electric energy, building or ~~resurfacing~~ reconstructing a six motor road to the disputed area, offers of scholarships to School children, employment facilities to citizens of the Chiefdom etc. which are not quite outside the requirements of Cap.122 thereby inducing to say the least the Council to enter into an agreement purporting to be a lease on the 21st February 1985 Ex."Y" for more or less the same area leased to Bitco. I have only to add that if it is necessary to discover a reason for a sudden volte face the Paramount Chief and Chief Council of Kafe Simira Chiefdom , it is to be found, I think in the fact that a better offer had been made by Rokel after the bargain with Bitco had been concluded."

In my opinion, there is no basis for the learned justice to draw this inference. There is no evidence that Bitco had discovered such mineral resources in the area. Indeed there is evidence that they had not yet done any proper survey of the area leased to them nor had they secured authority to mine nor done any work on the area. It seems to me that learned justice is saying that Rokel came by night and started to plunder and reap what belonged to Bitco. Rokel are not on trial for a criminal offence. I regret that this misconception ~~misconception~~ of the whole case led the Court of Appeal to err in law in finding for Bitco. Bitco was never in clear and exclusive possession of the land claimed nor were they in the first place able to define the area with certainty as the law requires. In view of this misconception of the facts, the appeal must needs succeed.

The appeal is allowed on the following grounds: 3,4,5,6,7,8, 9, 10.

Ground 1 has no merit and is dismissed.

Ground 2 was abandoned with leave of the court and accordingly dismissed.

As a result I set aside all the orders of the Court of Appeal, and restore the Judgment and orders of the High Court. The costs occasioned by this appeal and in the Court below are awarded to the defendants. and such costs shall be taxed

Sydney Warne

J.S.C.

THE HON. MR. JUSTICE BECCLES DAVIES, M.R.S.L.

TEL:223511

3, REGENT ROAD
FREETOWN
SIERRA LEONE

18.5.2005

My Lord,

I have read through your judgment. I have made observations in pencil. I agree with it.

Becs Davies