

SC CIV. APP. 3/18



IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN:-

**THE ATTORNEY-GENERAL &
MINISTER OF JUSTICE
3RD FLOOR GUMA BUILDING
LAMINA SANKOH STREET
FREETOWN**

- APPELLANT

AND

**HORSE FISHING COMPANY LTD
JUI-HASTINGS
FREETOWN**

- RESPONDENT

COUNSEL:

OSMAN KANU FOR THE APPELLANT

PA MOMO FOFANAH FOR THE RESPONDENT

CORAM:

HON MR. JUSTICE DESMOND B. EDWARDS CJ

HON. MR. JUSTICE NICHOLAS C. BROWNE-MARKE JSC

HON. MR. JUSTICE M. F. DEEN TARAWALLY JSC

HON. MR. JUSTICE ALUSINE S. SESAY JSC

HON. MR. JUSTICE ALHAJI MOHAMED MOMOJAH STEVENS JA

Camara JA and Hon. Mr. Justice Sengu M. Koroma JA dated the 20th of April, 2018.

2. THE GROUNDS OF APPEAL ARE AS FOLLOWS:

- i. That the Court of Appeal (Fynn JA., Taylor-Camara JA and Sengu Koroma JA) were wrong in law when they stated that the Lease Agreement is only voidable and not *void ab initio* when the provision of the Law states that when a non-compliant Lease is entered into, the property which is the subject matter of the Lease automatically vests in the Board by operation of law. Therefore the lease agreement can be deemed to be *void ab initio* as the right to property does not pass to the intended lessee by operation of law.
- ii. That the Court of Appeal (Taylor-Camara JA) was wrong in law to have concluded that the Learned Trial Judge “did not follow that line of thought through so as to direct the Board to modify the agreement and issue a license which would have made the Lease a compliant reserved leasehold” and by regard for the fact that the Learned Trial Judge without regard for the fact that the Learned Trial Judge had seen and heard the evidence and therefore had obvious advantages over the Court of Appeal who only had the printed record to go by.
- iii. That the Court of Appeal (Fynn JA., Taylor-Camara JA and Sengu Koroma JA) were wrong to castigate the Appellant herein by suggesting or concluding that the Appellant Solicitors have failed to advise the Respondent to seek independent legal advice on the status of the law and had undertaken in the Lease Agreement to obtain the necessary licence but failed to do so, when the Appellant Solicitors had no legal obligation to do so.



- iv. That the Court of Appeal (Taylor-Camara JA.) was wrong in law to have concluded that the Respondent herein failure to observe the law was due to genuine and excusable ignorance without due regard to the maxim “Ignorantia juris non excusat or ignorantia legis neminem excusat” that is ignorance of the law excuses not and ignorance of law excuses no one.”
- v. That the Judgment of the Court of Appeal (Fynn JA. Taylor-Camara JA. And Sengu Koroma JA.) is against the weight of the evidence led in the lower court and contained in the record of the Court.

RESPONDENT’S CASE

3. The Respondent filed and relied on their Statement of Case dated the 12th of October, 2020. The graven of the Respondent’s Case was that:

i. That they agreed with the Justices of the Court of Appeal, Justice Fynn JA presiding, that the non-compliance of the Respondent to secure a licence pursuant to Section 4(1) of the Non Citizens’ Interest in Land Act No30 1966 prior to the Lease Agreement being made out to them, was only voidable and not *void ab initio*, as a result of Section 5 of the aforesaid Act and the special circumstances of the case, in that the Respondent, was a foreign investor who was unrepresented by a solicitor at the time of granting the lease for 50 years.

ii. That the Court of Appeal had the right to have invoked its own jurisdiction to review the case and evaluate the evidence led in the lower court in order to arrive at a fair, independent and just decision; and that this was so despite being denied of assessing the witnesses, it being, a judgment that did not go to a full blown trial.



iii. That the contra proferentem doctrine flies against the fact that the Appellant argued that he was not under obligation or duty to provide the Respondent, a lay foreign investor with independent Legal advice on the law relevant to Leases and the requirement for licences to be obtained by the Board prior to any Lease agreement .

iv. That in light of the failure to advise the foreign investor to obtain licence prior to the Lease by the state's Lessor's Solicitors in circumstances where the Respondent had no knowledge of this, was a genuine and excusable mistake, unlike the deliberate and calculated imposition of a 3rd party SABCO LTD on the demised premises granted by the Respondent, now Appellant. He relied on the case of Ronald Lisk CAREW V ALIMAMY SAMUEL BANGURA CIV /APP39/2009 UNREPORTED.

v. That the weight of evidence was such that in view of the fact as alleged that there was no evidence of breach of the Lease Agreement by the trial judge with respect to subletting without consent or repairs and the fact that that no notice was given to the Respondent before termination of the lease and action for forfeiture, the Justices of Appeal were right in restoring the Respondent to the whole of the demised premises.

BACKGROUND

4. The background of this Appeal discloses that the Appellant, the Attorney-General and Minister of Justice is the principal legal adviser to the Government of Sierra Leone, who was the Lessor of all that state land and premises situate, lying and being at Jui Hastings, Greater Freetown in the Western Area of the Republic of Sierra Leone. The said land was by an Indenture of a Lease dated



the 20th October, 2003 registered as No. 150/2003 at page 11 Volume 96 and Indenture of a Supplemental Lease dated 9th December, 2014 registered as No. 241/2014 at page 106 in Volume 112 in the Book of Leases kept in the office of the Registrar-General, Freetown, leased to Horse Fishing Company, the Respondent herein for a term of 50 (fifty) years upon the terms and conditions stated therein.

5. By a Writ of Summons dated 17th day of June, 2016, the Appellant as Plaintiff instituted proceedings against Horse Fishing Company the Defendant now the Respondent seeking several reliefs, to wit,

- i. An Order for immediate possession of the premises situate lying and being at Jui Hastings, Greater Freetown in the Western Area aforesaid as the Lease previously held by the Respondent, to wit, that for 50 years, as per the Lease and Supplemental Lease hereinbefore mentioned had been forfeited.
- ii. An Order for cancellation of any other interest in the aforesaid premises.
- iii. Damages for breach of contract.
- iv. Any other or further Orders that this Court may deem fit.
- v. Cost.

6. The Respondent in its defence failed and refused to admit that the Plaintiff now Appellant was entitled to possession of the said land and premises and averred that the Lessor/Appellant being the Government of Sierra Leone through the Ministry of Lands, Country Planning and the Environment were only entitled to the reversionary interest after the 50 years would have expired. The Respondent, in particular, denied having breached clause 2 (x) of the Principal Lease which dealt with the covenant *“not to assign or sublet or part with possession and occupation of the premises hereby demised or any part*



thereof during the said term without the written consent of the Lessor' and failed to comply with the covenant to repair clause, to wit, to uphold, maintain and keep in good and tenantable repair, the buildings and structures on the demised premises. Against the forgoing the Respondent counterclaimed for-

- i. Damages for breach of contract
- ii. Damages for wrongful interference with the quiet enjoyment of the demises premises and
- iii. A declaration that the Principal and Supplemental Lease Agreements dated 21st October, 2003 and 9th December, 2014 respectively be held to be valid and subsisting until its expiration; plus Costs.

7. In their reply and defence to the counterclaim, the Plaintiff now Appellant contended that by virtue of Clause 4 (1) of the Lease Agreement, it had the right to re-enter and repossess the demised premise in the event of a breach of any of the covenants contained in the said Lease, as the Defendant, as alleged, breached both clauses 2 (x) and 2(iii) of the Lease respectively. The Plaintiff now Appellant contended that 1) the Defendant now Respondent subleased the premises to a 3rd party MONZA FISHING COMPANY without obtaining the required consent, the fact that the sublease Lease agreement was terminated four months after it was signed being irrelevant; 2) that the Respondent failed to uphold, maintain and keep in good and tenantable repair, the buildings and structures on the demised premise and that the Appellant did not breach any covenant on quiet enjoyment but that it was the Respondent who had breached fundamental covenants in the Lease Agreement as stated above .

8. At this stage of the proceedings, the Defendant now Respondent decided to apply by Judges summons on the 10th day July, 2017 for leave to enter Judgment for the Defendant / Applicant now Respondent pursuant to O16 of the HCR 2007; damages for breach of contract; damages for wrongful interference



with the Defendant/Respondent's quiet enjoyment of demised premises and a declaration that the principal and supplemental leases dated 20th October, 2003 and 9th December, 2014 respectively between the Defendant/Applicant (now Respondent) and the Plaintiff/Respondent (now Appellant) were valid and subsisting until their expiration respectively.

9. The said Application was entertained by the Learned Judge Hon Justice Amy Wright J despite the fact that Order 16 under which the Application was made was for Summary Judgment and not for 'Leave to enter Judgment' which was clearly outside the dictates of Order 16 Rule 5 of the High Court Rules CI No 8 of 2007. The Plaintiff/Respondent now Appellant opposed the Application.

10. In the course of the arguments by both sides, the Plaintiff/Respondent's solicitor for the first time submitted that the Lease granted to the Defendant/Applicant was *void ab initio* as certain requirements of the **NON-CITIZENS INTEREST IN LAND ACT 1966** had not been complied with, in that by virtue of the fact that the Defendant is a non-citizen it had to obtain a licence from the Board as prescribed by Section 4 of the aforesaid Act and it was the responsibility of the Lessee as per Law and in those circumstances to have secured that licence prior to the said Principal and Supplemental leases which they failed to do thereby making those 2 agreements void. After hearing both parties on their argument the learned Judge Hon Justice Amy Wright J delivered her Judgment. In her judgment dated 12th September, 2017, the Learned Trial Judge made the following Orders

1. The Defendant/Applicant now Respondent shall be granted a new Lease Agreement by the Plaintiff/Respondent now Appellant (at its own cost as damages for the wrongful interference with the quiet enjoyment of the demised premises) from the date of this Order for the maximum statutorily required term with an option if it so desires at a rent in line



with the reviews that were provided for in the Lease Agreement dated 20th October, 2003; the demised premises in the Lease Agreement shall be clearly demarcated by the Ministry of Lands and the Defendant/Applicant shall immediately erect a concrete wall on its boundaries.

2. The Plaintiff/Respondent now Appellant shall ensure the full compliance of the terms and conditions of the offer letter to SABCO Fishing Company dated 12th October, 2016 including the clear demarcation of the Land Area to be granted and SABCO shall, with immediate effect construct a concrete wall between its operating area and the Defendant/Applicant's area and establish a new and different Exit and Entrance to its operating area, different from the existing entrance and gates of the Defendant/Applicant.
 3. The Defendant/Applicant now Respondent shall have full and unfettered access to the Jetties at the Jui Fishing Complex and shall work out a timetable of operations with SABCO Fishing Company on the usage of the said Jetties.
 4. The Ministry of Lands shall carry out regular inspection/monitoring of the Jui Fishing Complex (including the Jetties) that shall be demised to both the Defendant/Applicant and SABCO Fishing Company and shall involve the Ministry of Fisheries and Marine Resources for its expertise, when so required.
 5. Each party shall bear its costs.
11. The Defendant now Respondent appealed against those orders of the High Court to the Court of Appeal presided by Hon Justice RS Fynn JA requesting that the findings and Orders of the High Court presided by Justice Amy Wight J be set aside and one in favour of the Defendant/Applicant to be substituted



thereof; such other or further reliefs to be granted to meet the Justice of the case, & Costs.

12. The Court of Appeal on the 20th April, 2018 by an unanimous decision elevating the *contra proferentem doctrine*; the fact that a 3rd party who is not a party to a land transaction could not benefit and that the actions of the Defendant then appellant was a genuine or excusable mistake or ignorance and therefore voidable, overturned the Judgment of Justice Amy Wright J supra in favour of the Respondent herein. The Court of Appeal ordered as follows 1) that the Appeal was upheld on grounds 1 and 4 ; 2.) That the Lease Agreement entered into between the Government of Sierra Leone and Horse Fishing Company Limited in 2003 remains extant; 3. that the Board established under the Non-Citizens Interest's in Land Act 1966, shall convene and take the necessary steps to bringing the Lease Agreement entered into between the GOVERNMENT OF SIERRA LEONE AND HORSE FISHING COMPANY LIMITED in 2003 in full compliance with the terms of that Act without any detriment to the then Appellant the Respondent herein; 4) that the Plaintiff's Lease with SABCO FISHING COMPANY is hereby declared null and void and of no effect; 5). That SABCO shall forthwith deliver vacant possession of the entire property to the then Appellant, the Respondent herein. Until then, SABCO shall take subject to the Respondent's Lease and the Respondent shall be entitled to and remain in possession of the entire land covered by the Original Lease Agreement until such time as the Board and the Appellant herein (the government, through the ministry responsible for Lands) shall comply with the Court and 6) Horse Fishing Company Ltd shall also be entitled to all rents payable from the portion of land presently occupied by SABCO LTD.

13. It is this Judgement that the Appellant now seeks to overturn in this their Appeal to the Supreme Court on the grounds of Appeal stated supra.



CONSIDERATION OF ISSUES

14. This case raises several issues and these will be addressed seriatim

A. WHETHER THE APPELLANT IS ENTITLED TO RE-ENTRY OR FORFEITURE

15. **The Conveyancing and Law of Property Act 1881** is part of the Laws of Sierra Leone by virtue of the **Imperial Statutes Laws of Property Adoption Act Cap 18** Second Schedule thereof. Among the adopted sections of the said Act is Section 14. Section 14 (1) provides that

‘A right of re-entry or forfeiture under any proviso or stipulation in a Lease for breach of any covenant or condition in the Lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the Lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach and in any case requiring the lessee to make compensation in money for the breach and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.’

16. It is clear to me from the records that those preconditions outlined for enforcement by action or otherwise were never put in place by the Appellant to warrant the Appellant to such right of re-entry or forfeiture for repairs and development; there is no evidence that notification of the specific breaches, if at all, were put out by the Appellant to the Respondent requiring the Respondent to remedy same and within a specific time that is reasonable and that the Respondent further pay compensation; there is no evidence that having given



such notice (which is not admitted) the Respondent failed to so comply thereby giving the right to forfeiture by action or otherwise.

17. This provision is applicable for the alleged breach of the stipulation as contained in clause 2(iii), to wit, which deals with the Respondent not upholding, maintaining and keeping in good and tenantable repair, the buildings and structures on the demised premises and doing development thereon. But, even so, I think the right approach would have been for the Respondents to apply for relief against forfeiture pursuant to Section 14(2) of The Conveyancing and Law of Property Act 1881 which they failed to do.

18. That having been said, Section 14 by virtue of Section 14(6) of the Conveyancing and Law of Property Act 1881 is inapplicable when you are dealing with a covenant, condition or stipulation 'not to assign, sublet, part with possession or disposal of land leased. Section 14(6) of the Conveyancing and Law of property Act 1881 states ***'This section does not extend i) to a covenant or condition against the assigning , underletting , parting with the possession, or disposing of the land leased'***

19. In the case before us, one of the complaints of the Appellant was that the Respondent breached the provision on clause 2(X) which stated that the Respondent was ***'not to assign or sublet or part with possession and occupation of the premises hereby demised or any part thereof during the said term without the written consent of the Lessor'***. What we see from the records is a 'Co-operation Agreement' between the Respondent and one Monza Fishing Company but there are portions in the said Agreement which meant that the Respondent parted with the possession without the written consent of the Appellant see for instance clauses in the 'Co-operation Agreement' between the Respondent herein and that 3rd party Monza Fishing Company which had to deal with use of the facilities leased by the Appellant to the Respondent.



20. In the case of **MACFOY V UAC LTD 1964-66ALRSL @ page 9** it was held by the Court of Appeal that where one subsidiary company is merely permitted to use premises demised to another, this will not necessarily amount to a breach of covenant against assignment, the test being whether the lessee retained possession after parting with possession. In the absence of actual trial just looking at the provisions of the “Co-operation Agreement” with Monza Fishing Company for the use of the Demised Premises it is safe to conclude that while this agreement was subsisting, the Lessee, Horse fishing Co Ltd never retained possession of those parts it surrendered to the absolute use of Monza Fishing Company. In such circumstances the Appellant is in a good position as Lessor to re-enter and take possession of the premises. The reasoning for this is simple. For a lessee to part with possession of the Appellant’s property and without the Appellant’s consent is impugning the Lessor’s title. See the case of **JABER v RADAR 1950-56ALRSL page 97 @ page 104** where it was held that relief against forfeiture will be refused where the lessee or tenant by conduct impugned the landlords title in a way which amounts to a disclaimer or renunciation of the relation between the Lessor and lessee, or if he continues in breach of the covenant.

21. Against this background, the Lessor, Plaintiff, now Appellant is entitled to re-enter and to forfeiture as claimed. The Defendant/Applicant now Respondent, however, because this contract was terminated after 4 months would in my opinion be entitled to relief against forfeiture. This was however never claimed. Against the preponderance of evidence it is clear that the Defendant/ Applicant now Respondent having breached clause 2(x) entitles the Plaintiff /Respondent now Appellant to re-enter the Demised premises leased and take possession and sue for forfeiture which is the genesis of this action. The decision to have decided otherwise is therefore against the weight of the evidence and, on this ground alone, the Appeal succeeds.



B. Whether by Operation of Law the failure of the Lessee to comply with the provisions of the NON-CITIZENS INTEREST IN LAND ACT No 30 1966 makes the Lease void or voidable

22. The second issue is whether by Operation of Law the failure of the Lessee to comply with the provisions of the **NON-CITIZENS INTEREST IN LAND ACT No 30 1966** was such that it meant the whole transaction as between the Lessor, Government of Sierra Leone represented by the Attorney –General and Minister of Justice and the Lessee the Horse Fishing Company Limited in respect of the Lease and Supplemental Lease of 2003 and 2014 respectively was *void ab initio*? Counsel for the Appellant puts it in his grounds of Appeal thus: That the Court of Appeal (Fynn JA., Taylor-Camara JA and Sengu Koroma JA) were wrong in law when they stated that the Lease Agreement is only voidable and not *void ab initio* when the provision of the Law states that when a non-compliant Lease is entered into, the property which is the subject matter of the Lease automatically vests in the Board by operation of law. Therefore the lease agreement can be deemed to be *void ab initio* as the right to property does not pass to the intended lessee by operation of law.

It was argued by the Respondent's Solicitor that this issue regarding non-citizen's failure to obtain a licence is being raised now when in fact it was never raised in the High Court as part of their pleadings. Firstly, it must be said that it being an operation of Law issue it can and should be raised at any stage.

Moreover in the Court of Appeal case of **Thomas V Johnson & Thomas (1968-69) ALRSL 380** it was held that the Court of Appeal is a court of rehearing and will not non-suit a party merely because his case was not conducted according to rigid pleadings particularly where no objection was taken at the trial stage. The same would apply in the Supreme Court. This Court will not non-suit a party merely because the pleadings did not raise the issue of



the non-compliance in their pleadings. As a matter of fact in the argument before Justice Wright for Summary Judgment, it was so raised by operation of law.

In this connection, we are in a position to consider the arguments under this ground.

23. The meaning of void has always been destitute of any legal effect and *void ab initio* means legally invalid from the very beginning. Where a document is declared *void ab initio*, it means that the document was invalid from the date it was made. The law treats it as if the document never existed.

24. Section 4(1) of the Non-Citizens Interest in Land Act No. 30 of 1966 provides '*No Non-citizen shall purchase or receive in exchange or as a gift any reserved leaseholds in the Western Area without first obtaining a licence from the Board*'. It is not in dispute that the Respondent, the Horse Fishing Company is a non-citizen company. This Respondent entered into the Principal Lease and Supplemental lease *without having first obtained a licence* from the Board established for this and such a lapse was brought to the fore when the Defendant/Applicant now Respondent sought to justify that it had a right to quiet enjoyment following the action brought against them by the Plaintiff now Appellant for recovery and immediate possession of the demised premises it occupied allegedly resulting from a right to re-enter the demised premises and forfeiture. The Appellant had claimed it had such right by virtue of clause 2(iii) and 2(X) of the aforesaid Lease which it claimed the Respondent had breached.

25. The Appellant's interpretation of this provision is that so long as the Respondent had failed refused or neglected to first obtain the required Licence prior to the Lease of the demised premises, or at all, the Lease and Supplemental Lease were *void ab initio* making the property previously leased



to the Respondent constituted by a specific acreage of land to now vest in the Board. The view of the Learned Justices of Appeal is that so long as the failure was due to some genuine mistake or ignorance it is voidable which meant that the problem ought be regularised and this ought not be prejudiced against the Respondent in anyway that would make the Respondent Horse Fishing Company to suffer by losing part of its total acreage previously acquired via this lease, to a 3rd party, SABCO Ltd, but rather, by putting the Respondent in the same position it was when the said leases were originally concluded. They rely heavily on section 5(1) of the Non-citizen's Interest in Land Act 1966 and on the case of **RONALD LISK CAREW V ALIMAMY SAMUEL BANGURA CIV/APP39/2009 UNREPORTED**.

26. To address this issue one must first attempt to interpret Sections 4 and 5 of the **NON-CITIZENS INTEREST IN LAND ACT No 30 1966**.

27. In interpreting the aforesaid Provisions of the Non-Citizens interest in Land Act No30 of 1966, the first debacle with respect to Section 4 (1) of the said Act is that it does not expressly state what should happen when a Non-citizen fails to get the required licence prior to the Lease of the Reserved Leasehold from the Board. The question that begs for consideration is why should this court declare void the failure to obtain the licence from the BOARD when the Act does not specifically say so? Another problem is the absence of a Long title. Only the Short title of the Act is given. The necessity of a Long title is that it summarises the description of the purpose and scope of the Act –a clear statement of the legislative intent. See the case of **REGINA V SECRETARY OF STATE FOR HEALTH EX PARTE QUINTAVALLE (ON BEHALF OF PROFLIFE ALLIANCE) HL 2003 WLR 692**. What this calls for is interpretation of the relevant Statute by this Court and there are rules for interpretation of a section like this. On this note one can glean that there may be



a literal interpretation as gleaned from the word 'shall' or 'May' and whether same is mandatory or directory and also a purposive interpretation which tends to seek the intention of parliament. According to **SGG EDGER'S CRAIES ON STATUTE LAW, LONDON, 7TH Ed by SWEET AND MAXWELL 1971**

"If the Statute itself provides for a punishment or a penal consequence implying that the act so done or done otherwise would be invalid, naturally the provision is mandatory in nature."

28. Since Section 4 (1) of the aforesaid Act as a whole does not provide expressly that failure to obtain the required licence is void or that the non-citizen would be penalised, the aforesaid provision tends to suggest that section 4(1) is not a mandatory provision. The examination of the language of the statute is a big criterion to be used; the language of the statute for example by the use of "may" or "shall" is definitely a guideline. It is however not a definitive test. In the Indian case of **THE STATE OF HARYANA & ANOTHER V RAGHUBIR DAYAL (1995) 1 SCC 133** the Supreme Court of India observed,

"The use of the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment or consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall' therefore ought to be construed not according to the language with which



it is clothed but in the context in which it is used and the purpose it seeks to serve.”

29. It thus becomes clear to me that despite the use of word “shall” in Section 4 (1) supra, it only serves as a guideline but not a definitive test which definitive test can only be provided by a careful examination of the whole scope of the Act. But even so, as said earlier, the Long title which could have given a glimpse is absent. This point is re-emphasised in **HALSBURY’S LAWS OF ENGLAND 4TH EDITION VOLUME 44 STATUTES PARA 933** when it stated

“No universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and in particular, at the importance of the provisions in question in relation to the general object to be secured’.....

30. The legislative intent and purpose of the Act comes with the Purposive interpretation of Statutes. In the case of **REGINA V SECRETARY OF STATE FOR HEALTH EX PARTE QUINTAVALLE (ON BEHALF OF PROFLIFE ALLIANCE) HL 2003 WLR 692** the House of Lords held that the Court’s tasks within the permissible bounds of interpretation was to give effect to parliament’s purpose i.e. give effect to the intention of parliament and statutes were to be read accordingly.

31. Against the foregoing, *it behoves me at this stage to do quote the whole of Sections 4 and 5 of the of the NON-CITIZENS INTEREST IN LAND ACT No 30 1966 and see from same what the real intention of parliament is. Section 4 provides:*



1. No non –citizen **shall** purchase or receive in exchange or as a gift Reserved Leaseholds in the Western Area **without first obtaining a licence from the Board.**

2. The Board may grant licence to purchase or receive in exchange or as a gift reserved leaseholds to non-citizens **on such terms and conditions as it shall think fit** and every such licence shall contain a description of the land to which it applies.

3. **At least 3 weeks before the grant of any such licence** the Board **shall publish a notice of its intention to grant the licence in a gazette specifying the land and the name of the intending purchaser.**

4. The Provision of subsection 3 shall not apply to sales by public auction.

5(1) Any Conveyance, Lease, Grant, transfer, declaration, agreement, settlement or other dispositions (other than an Assent in favour of persons entitled under a Will or An Intestacy) **which apart from the provisions of this Act would have vested –**

- a) **Freehold land; or**
- b) **Reserved Leaseholds**

In a Non-Citizen (whether alone or together with other person) shall vest such land (whether freehold or leasehold) in the Board for the whole estate or interest conferred by or in virtue of, the Instrument and the Board shall cause the sheriff to sell the same by public auction.

2) **If satisfied that failure to observe the law was due to genuine or excusable mistake or ignorance (whether of law or fact) the BOARD May either**



a) permit the parties to annul the transaction or modify it in such manner as may be approved by the Board and grant such licence as may be necessary in relation thereto, or

b) cause the sheriff to sell the property by public auction and’.

32. Section 4(1) is to the effect that so long that you are a Non-citizen it was compulsory without exception that you must first of all obtain a licence from the Board prior to any disposition of land constituted by a Freehold or a Reserved Leasehold, to wit, a long lease for which the unexpired portion was more than 21 years.

Section 4 (2) was to the effect that there was a reason why a licence ought be obtained from the Board, in that, it was not just for mere formality but for a reason, to wit, for the Board to dictate the terms and conditions under which it would grant or lease its premises over and above the standard terms under a lease as the circumstances may demand or as the Board may think fit.

Section 4(3) was to the effect that the granting of Licence was not automatic or as matter of course but rather ‘a process’- a process that required firstly, publication of the name of the Applicant – Non-citizen Intending Licensee in the Gazette for at least 21 days before the grant of any such licence that was to specifically state the special terms and conditions of the Lease called licence which as a matter of must should be incorporated in any Lease being engrossed between Government and a Non-citizen party.

S4(4) was to the effect that you should skip publication of the request or Application for licence where the disposition of the Freehold or Reserved Leasehold to a noncitizen was to be by public auction.



33. Section 5 is the Section that shows what happens where there is a failure to obtain a licence when you are a non-citizen. It virtually displays or expresses two things. Firstly 1) what happens with/to the instrument that purports to have disposed, conveyed, leased, granted, transferred, declared, agreed, settled a long Lease with an unexpired term of over 21years to a non-citizen without the required licence having been first obtained; and secondly, 2) the Powers that ensues to the Board thereafter.

Section 5(1) is to the effect that the Board is all too powerful and can come in even if there has been a conveyance, lease, grant, transfer or other dispositions save dispositions made by a Will or Letters of Administration which if not for the provisions of this Act requiring first obtaining licence would have vested Freehold Land or reserved Leasehold where the purchaser did not obtain or secure licence before sale (to wit, Reserved Leasehold Sold) in a Non-citizen (whether alone or together with other person); shall vest such land (whether Freehold or leasehold) in the Board for the whole estate or interest conferred by or interest conferred by or in virtue of, the Instrument. It implies an instrument otherwise conveying or leasing the property in question to the non-citizen would automatically be reversed with the Instrument vesting in the Board for the whole estate or interest conferred by or in virtue of the Instrument.

How does this happen? What does this mean?

34. The starting point is that the Lease Agreements, to wit Principal and Supplemental lease is between the Minister of Lands, Country Planning and the Environment acting for and behalf of the Government of Sierra Leone of the One Part and Horse Fishing Company Limited on the other Part. What the Government owns and by extension the Board, once there is a Lease, is the reversionary interest, which is an interest that does not vest until the expiry of the Lease. This is not by any stretch of imagination the whole Estate. The whole



estate, so long as the Lease is valid and subsisting, will vest on the Lessee, Horse Fishing Company Co. However, because that Lessee is a Non-citizen with an obligation created for it to first obtain a licence by Section 5(1), where the lessee non-citizen fails to obtain the required licence, to wit, a document containing separate terms and conditions over and above the covenants in a Lease, as it were, instead of the property vesting in that Lessee, it would instead, vest in the Board. This means the previous transaction vesting it in the non-citizen/Lessee is cancelled from the very beginning and the Board therefore is empowered to do any of the following

- a) Sell that premises which otherwise had been transferred or would have been transferred to the NON-CITIZEN and this so by public auction through the Sheriff. See Option 1 Section 5 (1) of the Non-Citizens Interest in Land Act 1966 ‘**and the Board shall cause the Sheriff to sell the same by public auction**’; or
- b) If satisfied that the failure to obey the law which required obtaining licence prior to the Lease was due to some genuine or excusable mistake or ignorance, permit the parties to annul the transaction between them or modify the agreement in such a manner as may be approved by the Board & take the opportunity to create terms and conditions of licence for the first time see Section 5(2)(a) of the said Act or if the Board so desires better still sell the property in question see Section 5(2) (b) both as part of the 2nd option.

35. The second option presupposes that the Board must meet and take certain decisions based on facts which must be put before it after which it and it alone can subjectively decide that the failure to obey the Law to obtain the required



Licence was due to some genuine or excusable mistake or ignorance; after which it can take certain decisions.

36. It would appear to me that Section 5 (1) which embraces the first option is not only the natural course of events and what should happen when there is such failure to obtain the required licence prior to the lease but by Operation of the Law. With reference to Section 5(2) which constitutes the second option it is different and certainly not by Operation of the law. For the second option to come into being or be put in place would in my considered opinion not be *suo moto* by the BOARD but rather by any of the parties or both parties presenting a case to the Board whether of law or fact which the Board must look at to determine whether it is satisfied that the failure was due to some genuine or excusable mistake or ignorance. From the records before us there appears to be no letter to the Board claiming that. Until that is done, the 2nd ambit cannot come into being and the effect is that indeed the failure to take out licence prior to the Lease makes that Lease *void ab initio* as the intention of Parliament. It seems that both parties should come with a concerted plan of Let us go and annul or let us go and modify the old Agreement to bring in terms and conditions of a licence after which the Board could then decide to allow them to annul the Lease or modify the lease as the case may be. In the current circumstances this has not been done and it would be premature to talk about the lease being voidable.

37. It is pertinent to note that even where the Board is satisfied that failure to observe the law was due to some genuine and excusable mistake or ignorance the Board can still cause the Sheriff to sell the property by public auction thereby reversing the Reserved Leasehold and making the purported Lease *void ab initio*. Either way, whether under Section 5(1) or 5(2)(a) &(b), the parties are never returned to the Original Lease which means that the Original Lease is



rendered void. In the first instance, it is automatic, whilst in the 2nd instance, even though it is not automatic, the end result is that it is eventually rendered void. Even where the mistake is due to genuine or excusable mistake or ignorance it is permission that must be given by the Board to the Parties to annul the original Lease or modify the terms. This means the original lease is rendered void. At no point in time is it left with any of the parties to opt to stick with the Original Lease which would have made it voidable. The conclusion by the Court of Appeal that the lease is voidable is therefore misplaced or misconceived.

38. It is imperative to note that what comes out as the intention of parliament from the Statute which has no long title and does not state whether the failure of a non-citizen to take out licence prior to a Lease or Freehold (where possession would pass entirely or subject to reversionary interest as the case may be) is for the Board to always be in control by having in the first place the prerogative and opportunity to prescribe special terms and conditions of the Lease over and above the standard conditions in the Lease and this should never be denied or omitted; and where omitted, is so bad that any intending Lease must be reversed either as of right or be rectified so as to address the issue of lack of control by allowing the Board to reverse everything with a view to prescribing terms and conditions separate and distinct from the standard terms in the Lease. In this case before us it goes without saying that this power was denied or omitted calling for imposition of new terms and conditions for a licence.

39. The above notwithstanding, it is, however, my considered view that this section, that is Sections 5(1)&5(2) is not on all fours with what we have at hand and therefore inapplicable in the current situation. The reason is this. While it may be assumed that that this is a reserved Leasehold of which the unexpired term is above 21 years, it is not so stated anywhere. The Power to Lease a

Reserved Leasehold stems from the fact that a land which is purportedly a Reserved Leasehold was one of such. Except that the Lease was for 50 years, there is nowhere in the Lease of 2003 where it is so stated in that lease that it is a reserved Leasehold. There is nothing stopping a Recital in a Lease although this is not usual and in Leases of this nature it would have been most appropriate for it to have stated that "Whereas the Land is a Reserved Leasehold for which the unexpired term is above 21 years". Like the declaration that the land to be Leased is a reserved Leasehold the terms and conditions of the Licence could have been stated in a recital which is not the case here.

40. What is more, however, is that having assumed it is a reserved Leasehold of an expired term above 21 years, the powers of the Board to automatically take control is limited to when you are talking about dispositions that would vest 'Freeholds to Non-citizens' or vest **'Reserved Leaseholds Sold'** to Non-Citizens. I say **'Reserved Leaseholds Sold'** to Non-citizens because Section 5(1) states 'Reserved Leaseholds 'where the purchaser' has not been previously authorised by a licence under Section 4; there is a difference between **'Reserved Leaseholds Sold'** and **'Reserved Leaseholds Leased'**. The aforesaid section must be taken as not applying *stricto sensu* when you are talking about **Reserved Leasehold Leased** to non-citizens which is what we are dealing with here. The section clearly in my view does not talk about **reserved leaseholds** that were leased. This being the case, it provides an avenue for this court to say we note the provisions; we direct that the purported lease is declared null & void. We direct however that it be sent to the BOARD with all its powers to sell by public auction or to consider whether the failure to secure the licence before the lease was due to genuine mistake or ignorance of the law and permit annulment by the parties or still decide to sell by public auction or 2) rather than directing that the Board do any of the above the Court itself take the

scruff by the neck and decide to give directions itself as may be appropriate in the circumstances.

41. I note that the conspicuous absence of the Board which though constituted by Statute has been largely absent in all the records before us. It is safe to conclude that the BOARD has not been effective and one of the reasons for this now long protracted matter. I will be loathe to go down the road of giving directions to the Board when we as court can give such directions.

We cannot also lose sight of section 4(1) creating a condition precedent

42. As a matter of further analysis of section 4 (1) the inescapable conclusion that one runs into is that by that self-same provision a condition precedent was created. To recap it provides '**NO non-citizen shall purchase or receive in exchange or as a gift Reserved Leaseholds in the Western Area without first obtaining a licence from the Board**' According to **Jowitts Dictionary of English Law @ Page 410** condition precedent is one which delays the vesting of a right until the event happens. Under Halsbury's Laws of England the failure of one party to perform a condition precedent operates as a discharge of the contract or agreement if the other party elects to treat the contract at an end. In West Law Dictionary in five languages 'condition precedent' was explained thus

43. A condition precedent is one which must happen or be performed before the estate to which it is annexed can vest or be enlarged; or it is one which is to be performed before some right dependant thereon accrues, or some act dependent thereon is performed. A fact other than mere lapse of time which must exist or occur before a duty of immediate performance of a promise arises see the case of **USV SCHAEFFER, CA WASH, 319 F.2d 907.911**. A condition precedent is one that is to be performed before the agreement becomes effective, and

which calls for the happening of some event or the performance of some act after the terms of the contract has been agreed upon or before the contract shall be binding on the parties see the case of **SHERMAN V METRO POLITAN LIFE INSURANCE CO 297 MASS 3308 N.E. 2d 89.**

Against the forgoing, it is clear in the case before us that it being a condition precedent it is one for which there has been no Performance.

C WHETHER THE 3RD PARTY SABCO LTD COULD BENEFIT FROM THE LAND THAT WAS PREVIOUSLY LEASED TO THE RESPONDENT?

44. Much was said by the Court of Appeal about SABCO LTD a 3rd Party not being entitled to the portion of land within the demised premises leased to SABCO LTD by the Appellant after it had purportedly re-entered and terminated the Lease with the Respondent on the 16th of JUNE, 2016. The evidence before this court shows that SABCO Ltd was on the 12th of October 2016 offered a portion of the land previously leased to the Respondent herein. On the 20th of October, 2016 SABCO LTD wrote and accepted the offer of the Lease and paid the ground rent in November 2016 and they have been in occupation ever since. The Learned trial Judge recognised this occupation by ordering:

1. The Plaintiff/Respondent now Appellant shall ensure the full compliance of the terms and conditions of the offer letter to SABCO Fishing Company dated 12th October, 2016 including the clear demarcation of the Land Area to be granted and SABCO shall, with immediate effect construct a concrete wall between its operating area and the Defendant/Applicant's area and establish a new and different Exit and

Entrance to its operating area, different from the existing entrance and gates of the Defendant/Applicant.

2. The Defendant/Applicant now RESPONDENT shall have full and unfettered access to the Jetties at the Jui Fishing Complex and shall work out a timetable of operations with SABCO Fishing Company on the usage of the said Jetties.

45. But the Court of Appeal have rescinded those orders. On the 20th of April, 2018 it ordered that the Plaintiff's Lease with SABCO FISHING COMPANY is hereby declared null and void and of no effect; that SABCO shall forthwith deliver vacant possession of the entire property to the Appellant then Respondent. Until then, SABCO shall take subject to the Defendant's now Respondent's lease and the Defendant shall be entitled to and remain in possession of the entire land covered by the Original Lease Agreement until such time as the Board and the Respondent/Plaintiff (the government, through the ministry responsible for Lands) shall comply with the Court's orders and that Horse Fishing Company Ltd shall also be entitled to all rents payable from the portion of land presently occupied by SABCO LTD.

46. Relying on the case of **RONALD LISK CAREW V ALIMAMY SAMUEL BANGURA CIV /APP39/2009 UNREPORTED** much reliance was placed on the Principle that a 3rd party could not benefit. They also relied on the fact that the Law in support of the Bonafide innocent purchaser without notice does not apply were the purchaser or innocent purchaser has notice of fraud.

47. The circumstances of this case do not however support such principles. There was for instance a presumption that that the Respondent's demised premises was wrongfully interfered with when in fact the Plaintiff had a lawful right to re-enter and cause the Defendant to forfeit the lease. From the

circumstances of the case before us it is clear that the Appellant had power to re-enter following the breach OF CLAUSE 2(X). Where the appellant had power to re-enter or sue for forfeiture it had power to deal with the property in anyway it deems fit.

48. In the alternative or by the same token even coming under Section 5, the failure to have had licence prior to the lease and supplemental lease meant that the so called instruments – principal and supplemental leases were cancelled from the very beginning; therefore no longer in existence. If not in existence it meant that the Appellant was empowered to deal with the whole acreage as to the way it deemed fit without any restrictions and by the same token the Respondent had no right to quiet enjoyment.

49. In such circumstances it had the right to deal with the property the way it wanted and to engage a 3rd party for the offer of a portion thereof as it did with SABCO Ltd.

D THE DOCTRINE OF CONTRA PROFERENTEM AND WHETHER IT HAS A PLACE IN THE CURRENT PROCEEDINGS

50. The circumstances of this case are such that on those discussed above the Appeal Succeeds. It is important to note, however, that the Court of Appeal made a heavy weather of lawyers of the State and Government failing to advice the foreign investor/Non-citizen to seek independent counsel in a situation where they claimed they ought to, noting that the Respondents as foreigners were unrepresented. Secondly, the Court of Appeal observed that since part of the conditions of the Lease to which the Lessor covenanted to upholding was the proviso in clause 3 (iii) which stated ‘Provided that any permit necessary for the implementation of the Lease as is required to be complied with by any

Statutory enactment in Sierra Leone regarding land leased shall provide such permit as shall be so be so necessary.” ‘This meant that the Government undertook an obligation to acquiring permits necessary to ensuring that the agreement becomes effectual inferring that the obligation to obtain such a licence was Government’s responsibility and not the Respondent’s courtesy of which the provisions in the lease should be interpreted against them invoking the *Contra proferentem* doctrine.

51. It is the opinion of this court at the outset that the doctrine of *Contra Proferentem* has no place in this case. The doctrine of *ContraProferentem* is a rule against the offeror/interpretation against the draftsman. The rule applies when there is a dispute as to the interpretation of a contract or there is ambiguity as to the meaning of a contract.

52. From the case before us there has been no dispute as the interpretation of the Lease Agreement which is contract in a Deed and evidenced in writing and there is no ambiguity as to the meaning of the Lease Agreement. The provision in the proviso which stated ‘*Provided that any permit necessary for the implementation of the Lease as is required to be complied with by any Statutory enactment in Sierra Leone regarding land leased shall provide such permit as shall be so be so necessary.*’ was never lifted for interpretation by the Respondent. It only came about during the course of the Judgment by the Justices of Appeal. It does not refer to the prior Licence required to be obtained but is rather a reference to things like Building Permits which may be needed to construct further premises on the demised site. While it is not a usual term in Lease Agreements it is a standard term for leases of this nature and unambiguous.

53. Regarding the so called negligence of the lawyers of the State to advise the Foreign investor, it is unimaginable that a foreign investor would engage in

such a major lease without consulting their own solicitor. It is a legal requirement for the Lessors solicitor to prepare a Lease agreement between that Lessor and any lessee while the Lessee pays the Costs for the preparation and execution of that Lease Agreement See the Case of **WRIGHT V ALIEU MUSTAPHA AND ABU HAIDAR 1964-66; ALRSL @PAGE 171-176**. The Lessor prepares the lease -When the Lease is prepared the Lessor sends it to the Lessee. If the Lessee has problems with the terms stated therein it has powers to reject same or have it amended . It is only after the lessee accepts the conditions of the lease that the lease is finalised and payment for the cost of the Lease as well as for rent effected . More importantly there is on the case of **WRIGHT V ALIEU MUSTAPHA AND ABU HAIDAR 1964-66; ALRSL @PAGE 171-176** no relationship between the **LESSOR'S SOLICITOR AND THE LESSEE**. In that case the Learned Judge in his judgement observed that

“It is elementary knowledge that it is the custom for the lessor’s solicitor to prepare the Lease, and for the lessee to pay all costs incidental to the preparation and execution of the lease. This by itself does not in any way raise a solicitor and client relationship between the solicitor and the lessee.”

54. On the above law which I quote with approval from this Court there was no obligation on the solicitors for the State despite their poor handling of the lease arrangements for them to advise AS WOULD IN A SOLICITOR CLIENT RELATIONSHIP.

55. That apart, I wish to observe that the parties are not of unequal bargaining power as would happen in an employment or insurance contract and if the lessee feels the terms are unacceptable it is not bound to accept same and can even refuse payment for incidentals in preparation of the lease, and the rent. There is no evidence before this court that the lessee did not accept any of those provisions. The *Contra Proferentem Doctrine* therefore cannot hold.

All things considered this court holds that the Appeal from the Court of Appeal for reasons outlined above succeeds and orders as follows:

1. Principal Lease and Supplemental Leases Registered as No. 150/2003 at page 11 Volume 96 and No. 241/2014 at page 106 in Volume 112 in the Book of Leases kept in the office of the Registrar-General are hereby declared Null and void.
2. The Lessee Horse Fishing Co Ltd, the Respondent herein is however allowed continuing occupation of the reduced Portion or acreage granted to them courtesy of Justice Wright Judgment of 12th September 2017
3. The Board is hereby directed to convene within 30 days and Prescribe terms and conditions of a Licence which should be incorporated in a New Lease Agreement Between the Government of Sierra Leone and Horse Fishing Company Ltd for the new acreage of Land Occupied by Horse Fishing Co Ltd.
4. The Appellant's Lease with SABCO FISHING COMPANY is hereby declared valid and subsisting and separate from the Respondent's current occupation and will continue unabated for the duration granted by the Appellant.
5. SABCO Ltd shall take POSSESSION OF THE AREA GRANTED TO THEM subject to no obligation to the Respondent for payment of rents or at all.
6. The Parties herein shall peaceably coexist in the separate portions of Land allocated to them by Government with the demarcation wall already built while they share the same jetties. In this regard, The Defendant/Applicant now Respondent shall have full and unfettered access to the Jetties at the Jui Fishing Complex and shall work out a timetable of operations with SABCO Fishing Company on the usage of the said Jetties.

7. Each Party to bear its own Costs.



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Hon Justice Desmond B. Edwards CJ



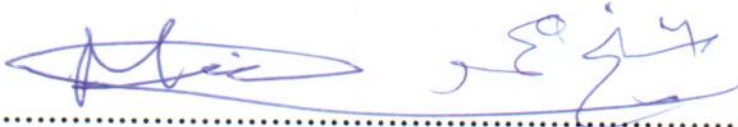
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Hon. Mr. Justice Nicholas C. Browne-Marke JSC



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Hon. Mr. Justice M. F. Deen Tarawally JSC



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Hon. Mr. Justice Alusine S. Sesay JSC



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Hon. Mr. Justice Alhaji Mohamed Momjah Stevens JA