## WILSON v SAMURA & KOROMA

SC

**SUPREME COURT OF SIERRA LEONE**, Supreme Court Civil Appeal No 3 of 1974, Hon Mr Justice COS Cole CJ, Hon Mr Justice SCU Betts JSC, Hon Mr Justice E Livesey Luke JSC, Hon Mr Justice SJ Forster JSC, Hon Mr Justice S Beccles Davies JSC, 3 June 1975

**[1] Land – Sale of land – Whether tenants had acquired legal or equitable interest in land prior to sale – Proprietary estoppel – Whether purchaser had any prior notice of interest in land – Whether facts established an equitable obligation**

**[2] Civil Procedure – Court of Appeal – Whether reasonable grounds to overturn trial judge's findings of fact**

On 17 August 1961, Mr Lucien Genet sold land in Freetown which he had owned for 39 years to the appellant. The two respondents, who were employed by Mr Genet, had lived on the land since 1955 and 1956. The issue in this case was whether the respondents were monthly tenants of the land or whether they had acquired an interest in the land so as to raise the doctrine of proprietary estoppel which was binding on the appellant. At first instance, the High Court held that, based on all the evidence, the respondents were tenants and could be evicted by the appellant. On 5 April 1974, the Court of Appeal allowed the respondents' appeal holding that Mr Genet allowed them to build on the land and that the appellant was estopped from denying the interest that they had acquired.

**Held, per Cole CJ, allowing the appeal**:

1. Taking the totality of the evidence before the High Court, the trial judge came to the right conclusion of fact in not believing the respondents but rather in accepting the case for the appellant. It was settled law that it should be on the rarest occasions, and in circumstances where it is convinced by the plainest considerations, that an appellate court is justified in overturning a trial judge's finding of fact. There were no reasonable grounds for the Court of Appeal to disturb the trial judge's findings. *El Nasr Export &Import Company Limited v Mohie El Deen Mansour* (Unreported, Supreme Court, Civil Appeal No 3/73, 25 April 1974) applied.

2. There was no allegation or evidence of mistaken belief in the defence of the respondents such as to raise unconscionable behavior or proprietary estoppel. The facts must be established for the equitable obligation to arise. The evidence showed that the only notice the appellant had when buying the land was that the respondents were tenants. There was no actual or implied notice of any prior interest in the land. *Gissing v Gissing* [1971] AC 886 applied. *Inwards v Baker* [1965] 2 WLR 212 distinguished. *Katah v K Chellaram & Sons* [1957-60] ALR (SL) 7 referred to.

3. This was a case where the respondents were originally monthly tenants of the land with Mr Lucien Genet as landlord. It was not established that the respondents built on the land under any special circumstances. They subsequently became tenants of the appellant who, on 17 August 1961, acquired the fee simple ownership of the land and thereafter lawfully determined the tenancy. *Ramsden v Dyson* (1866) LR 1 HL 129 applied.

**Cases referred to**

*Cairncross v Lorimer* (1860) 3 LT 130
*Dillwyn v Llewelyn* (1862) 6 LT 878
*El Nasr Export &Import Company Limited v Mohie El Deen Mansour* (Unreported, Supreme Court, Civil Appeal No 3/73, 25 April 1974)
*GB Amancio Santos v Ikosi Industries & EPE Native Administration (joined by Order of Court) (1942) 8 WACA 29*
*Gissing v Gissing* [1971] AC 886
*Inwards v Baker* [1965] 2 WLR 212
*Katah v K Chellaram & Sons* [1957-60] ALR (SL) 7
*Kissiedu v Dompreh* (1937) 2 WACA 281
*Plimmer v Mayor of Wellington* (1884) 9 App Cas 699
*Ramsden v Dyson* (1866) LR 1 HL 129

**Legislation referred to**
*Freetown Municipality Act (Cap 65) s 95*
*Freetown Municipality (Amendment) Act 1964 (No 31 of 1964)*

**Other sources referred to**
*Snell's Principles of Equity* [27th Ed] (1973) p 566

**Appeal**
This was an appeal by Ayo Wilson against a decision of the Court of Appeal on 5 April 1974 which held that the respondents, James Samura and PA Koroma, were not mere tenants and had acquired an interest in land acquired by the appellant. The facts appear sufficiently in the following judgment of Cole CJ.

*S Hudson Harding for the appellant.*
*G Okeke for the respondents.*

**Cole CJ**: For well over thirty-nine years Mr Luc Genet was the fee simple owner of a certain piece of land which he disposed of to the appellant by deed of conveyance dated the 17 August 196l. That deed was put in evidence as Exhibit "A" in the trial court, namely High Court. In it the piece of land in question was said to be at Kingtom in Freetown at Hand Street, off Hennessy Street. Both in the High Court and in the Court of Appeal as well as in this Court there appears to be no dispute between all concerned regarding the identity of this piece of land. I shall therefore hereafter refer to it as "the said land".

The respondents had been on the said land for a number of years, the first respondent since sometime in 1955 and the second respondent since sometime in 1956. When they went on the said land Mr Lucien Genet was still the owner in fee simple. The dispute regarding the said land relates to the question whether the respondents were merely monthly tenants of the said land up to and after 17 August 1961 (the date of the disposition to the appellant) or whether the respondents had acquired such interest in the said land as to raise the equitable doctrine of proprietary estoppel binding on the appellant. As regards the latter question it is but proper to mention that at no time was Mr Lucien Genet ever sought to be made a party to the action.

The appellant issued her writ of summons on 18 September 1970, claiming a declaration that she is entitled in fee simple in possession of the said land; possession of the said land and mesne profits from November 1965 until possession is given up. In her statement of claim, after alleging that she was the fee simple owner absolute in possession of the said land it having been conveyed to her by Mr Lucien Genet her predecessor in title she further claimed that the respondents were tenants of Mr Lucien Genet on the date of the deed of conveyance. The respondents, on the other hand, denied these averments. The first respondent alleged:

> "3. Further and in answer to paragraph 4 of the statement of claim, this defendant says that the said Lucien Victor Genet and his wife Mrs Genet gave him permission to build on the said land in 1955. He did build on the said land between 1955 and 1956 and has been in possession of the said land and building from the said date till now.
>
> This defendant admits paragraph 5 of the statement of claim and says that the plaintiff on several occasions from 1965 onwards took action for ejectment against him in Magistrate's Court No 4 but on each occasion, over four times, the plaintiff's claim was dismissed.
>
> Further this defendant says that if in fact the said land was conveyed to the plaintiff as alleged in paragraph 3 of the statement of claim, the plaintiff had notice of this defendant's interest in the said land and took subject to the defendant's interest."

The second respondent also alleged:

> "3. Further and in answer to paragraph 4 of the statement of claim, this defendant says that the said Lucien Victor Genet and his wife Mrs Genet gave him permission to build on the said land in or about 1955. He did build on the said land in or about 1956; and has been in possession of the said land and building from the said date till now.

This defendant does not admit paragraph 5 of the statement of claim.

Further, this defendant says that if in fact the said land was conveyed to the plaintiff as alleged in paragraph 3 of the statement of claim, the plaintiff had notice of this defendant's interest in the said land and took subject to this defendant's interest.

Further or in the alternative, this defendant will object in law that the plaintiff's alleged claim is barred by the Limitation Act."

At the close of the pleadings it would appear that the main issues to be determined by the High Court were:

(a) Was Lucien Genet, previous to 17 August 1961, the fee simple owner absolute in possession of the said land?

(b) If so, did he effectively in law pass that interest to the appellant?

(c) What was the nature of the interests of the respondents in the said land?

(d) Were their interests such as to encumber the said land legally or equitably as alleged in their respective defences?

(e) If so, did the appellant have notice in law of any such encumbrance?

(f) Did any of the Statute of Limitations apply?

It is clearly apparent from the record of proceedings both of the High Court and of the Court of Appeal that the defence set up by the second respondent based on the Limitation Act was never pursued.

The learned trial judge after an exhaustive review of the evidence and after consideration of the legal authorities applicable, said as follows:

"Considering the entire evidence of the case with all its surrounding circumstances, I hold that the defendants (respondents) are the tenants of the plaintiff (appellant) in respect of the land in dispute and that she has successfully established her claims.

I will give judgment for the plaintiff (appellant) and I make the following orders:

(a) That the plaintiff (appellant) is the owner of the land.

(b) That the defendants (respondents) give up possession of the land within three months from the date of this judgment.

(c) That the first defendant (respondent) pay as mesne profit to the plaintiff (appellant) the sum of Le5.00 monthly from December 1965 until possession is delivered.

(d) That the second defendant (respondent) pay as mesne profits to the plaintiff (appellant) the sum of Le3.00 monthly from December 1965 until possession is delivered."

The burden of proof was on the appellant to prove that she was the fee simple owner of the said land and that she bought without notice, actual, constructive or implied, of any legal or equitable encumbrance which would prevent the fee simple ownership in the said land legally passing on to her.

The appellant without objection produced her registered deed of conveyance Exhibit "A". She called as a witness her predecessor in title, Mr Lucien Genet, before her acquisition of the said land. The respondents were monthly tenants of the said land of Mr Lucien Genet, the first respondent paying a monthly rent of Le2.00 since 1955 and the second respondent paying a monthly rent of Le2.00 since 1956.

There was abundant evidence before the learned trial judge of this fact both on the side of the appellant and of the respondents. The first respondent was for some time a tyreman working in the tyre factory of Mr Lucien Genet. The second respondent was for quite some time a cook employed

by Mr Lucien Genet. Mr Lucien Genet categorically denied that it was with his permission that the respondents built on the said land.

The appellant gave evidence which was corroborated by Mr Lucien Genet that on a Sunday in 1962, after the acquisition of the said land from Mr Lucien Genet, Mr Lucien Genet called both respondents and herself at his 13 Mandalay Street, Kingtom residence where in the presence of the appellant he told the respondents that he had sold the said land to the appellant and that he was no longer the owner of the said land. She enquired of the respondents what rents they were paying. The first respondent said he was paying Le3.00 monthly. The second respondent said he was paying Le2.00 monthly. The appellant there and then increased the rents to Le5.00 and Le3.00 respectively. The respondents not only agreed to pay, but in fact paid, the increased rents. This incident was however denied by the respondents.

The respondents on the other hand gave evidence that Mr Lucien Genet and wife gave the said land to them to build on and told them then, that after paying ten years rent starting from the completion of the buildings, the said land in question would become theirs absolutely. Relying on these arrangements they proceeded to build on the said land and paid what the second respondent described as ground rent.

The first thing of particular interest to note is that in spite of the case for the respondents as to the existing arrangements between them and Mr Lucien Genet I find the following answers being given by Mr Lucien Genet to learned Counsel for the respondents:

> "I did not tell them (respondents) that if they paid rent for eight years, I would convey the property to them."

Later on in answer to learned counsel for the respondents Mr Lucien Genet said:

> "It is not true that I arranged with the first defendant (respondent) that I would convey the land to him after he had paid rent for about eight years."

The second respondent in answer to his own counsel said:

> "I said that I was paying rent for land. Mr Genet told me that, after ten years he would give me a document and that the land would belong to me. I built a house in 1956. I started to pay rent in 1951. I paid rent up to 1967".

In answer to the Court this respondent said:

> "The agreement was to pay rent for ten years. I started to pay rent in 1951. I paid rent up to 1967".

In that very unsatisfactory state of the evidence relied on by the respondents how could any reasonable court have held that the alleged arrangements between Mr Lucien Genet and the respondents, other than that of a monthly tenancy *simpliciter* was proved?

The second thing about the case as the evidence was before the High Court is this. Evidence was led that the appellant took the respondents before the Magistrate under summary ejectment proceedings on three occasions after the acquisition of the said land by her. If there was any semblance of truth in the story of the respondents one would have thought that they would have taken such appropriate steps as to give effect to the arrangements alleged by them. There is no evidence that they took any such steps not even at that late stage when proceedings commenced in the High Court.

Taking the totality of the evidence before the High Court which I have carefully considered, the learned trial judge came to the right conclusion of fact in not believing the respondents but rather in accepting the case for the appellant. I shall consider the legal position later.

From the decision given by the learned trial judge (which decision was against the respondents) the respondents appealed to the Court of Appeal on the following grounds:

> "1. The learned trial judge misdirected himself in law in distinguishing the case *Inwards v Baker* [1965] 2 WLR 212.

2. On the facts to wit:

   (a) that the defendants were given permission to build on the land by PW2, Lucien Genet;

   (b) that they did build on the land on or about 1956;

   (c) that the appellants had spent substantial sums of money in putting up their buildings as per evidence of JGE Valentine-Cole; and

   (d) that the respondent knew at the time the purported conveyance was made to her that the appellants had built on the land and were in possession of the lands:

   the appellants had established an equitable right to remain in occupation of the property and the respondent, if at all, should take subject to the appellant's interest.

3. The learned trial judge was wrong in law in that he failed to take into consideration the fact that PW2 Lucien Genet said on oath that the respondent did not pay any money for the land.

4. That the judgment of the learned trial judge was wrong both in law and in fact and was unjust and inequitable and the decision was against the weight of the evidence."

The Court of Appeal heard arguments on 14, 15 and 16 November 1973. On 16 November 1973 the appeal was "adjourned to a later date for decision."

The record of proceedings before the Court of Appeal discloses that the appeal came up before that Court on that date and the record of proceedings for that day, signed by all three justices, reads:

> "Court notifies parties that in the interest of justice the Valuation Officer of the Freetown City Council be called upon to produce the Record of Rate, Demand Note or Rate Valuation Roll of the property in dispute from the year 1950 to 1970. Counsel on either side to render the Valuation Officer all necessary assistance.
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> N.B. Both counsel state that they have no objection. Court accordingly so orders. Adjourned to 19 December 1973."

On the 19 December 1973 the appeal was adjourned to 22 January 1974. On that date Mr Frederick Eusobius Ngozika Kawallay, Valuer, Freetown City Council gave evidence as a witness of the Court. In view of the observations I shall make later it would be in place to set out, in extenso, the evidence this witness gave. He said:

> "I have in my custody the Valuation Lists for 6A Handel Street, Kingtom for as far back as 1949/50. The owner is Musa Kamara and the assessment was Le.6.00 then per annum in 1949/50. He is also owner of No 6. Was then Le.12.00 per annum. From my records property No 6 Handel Street which was demolished in 1959. No change of ownership is shown in respect of No 6A up to present date but the assessment has been increased to Le74 as from 1968/69. There is no No 6C at Handel Street. In respect of Hennessy Street there is a record in respect of No 6 and 6A as far back as 1949/50 and 1950/51. The owner for this period was Violet R Smith. For the period 1951/57 the owner was still Violet R Smith. From 1957-62 the owner was still Violet R Smith. 6A was demolished during this period no assessment. From 1962-68 Violet R Smith was still owner of No. 6 - no assessment for No 6A. Owner of 6B Hennessy Street from 1953-57 was LV Genet. The first time this property was assessed was 1953/54. I can say that it was a new structure. Ownership changed in 1962 from LV Genet to Sierra Leone Enterprises Ltd. Speaking from my personal knowledge 6B was formerly the Tyresole Factory. It is now owned by Sierra Leone Enterprises. 6C was first assessed in 1959/60 – was built around November 1958. There was no owner stated then in the Assessment List; however in the Survey File, Lucien V Genet appeared as owner, from 1960/on to 1967/68 no name appeared on the Assessment List as owner. From 1968/69 to 1973, the name A Koroma appears as owner. I became Valuer in 1966. No 6C is adjacent to 6B and they have a common boundary wall. 6B is almost at the boundary wall and 6C is about 20 feet from the boundary wall. There are two

structures in 6C. The smaller one is about 27 feet from the wall and the larger one about 20 feet from the wall."

Cross-examined by SH Harding. From the Survey File, when survey was done in 1958 both buildings in 6C wore constructed of CI sheets roof and of CI sheets walls, the smaller one being made of old 44 gallons drum sheets. On 6 April 1962 Mr Lucien Genet wrote to the Town Clerk regarding change of ownership in respect of 6 Hennessy Street to Sierra Leone Enterprises Ltd. Properties 6A and 6C are two independent properties on the same plot of land, that is, according to the Survey File, but in spite of this both have been assessed under 6C.

Cross-examined by Mr Gelaga-King. I went with members of my staff after receipt of the subpoena to have a look at the property. I see this Demand Note for the year 1958/59 addressed to Mr Amara Koroma for property No 6 Hennessy Street. The property must have been assessed for the year 1958/59 at least. Demand Note tendered, marked exhibit 'A'. Mr S Hudson Harding is the City Solicitor. I have a site plan in respect of No 6C Hennessy Street. I see this receipt for payment of City Council Rates for No 6C Hennessy Street by Amara Koroma in 1960 for the year 1959/60, tendered marked exhibit B. I see this Demand Note from City Council for 1973/74 to A Koroma in respect of 6C Hennessy Street, tendered marked exhibit C. When I visited the property in December last year I observed that the larger building is on a concrete base and the walls were painted yellow."

At the end of his evidence there appears this note:

"Both Mr Hudson Harding and Mr Gelaga-King agree that the property the subject of this dispute is the same as that which the witness (the Valuation Officer) has testified to be No 6C Hennessy Street.

Adjourned to a later date for decision."

The judgment of the Court of Appeal was delivered on 5 April 1974. The Court allowed the appeal and set aside the judgment of the learned trial judge. They ordered that plaintiff/respondent (now appellant) pay to the defendant/appellants (now respondents) the present day value of both buildings *viz*: Le3,640.00 and Le5,160.00 respectively or failing that, the defendant/appellants (respondents) be allowed to retain possession of the said building for the rest of their respective lives. The Court of Appeal based their valuation on certificates dated 10 July 1972 given by a witness for the defence. It is interesting to note in passing that these valuations were done after the appellant had closed her case before the High Court and the first respondent had started giving evidence. That was after 22 June 1972 when the case stood adjourned to 5 July 1972.

In the course of their judgment the Court of Appeal had this to say:

"Applying all the authorities quoted above to the facts in this case there is no doubt that Genet allowed the appellants to build on the land in question. This can be gathered from the evidence adduced in the trial court, and also here in this court. Genet first of all said that the appellants asked him to have the use of his land in the 1950's as it was near their place of work. He never asked them as any reasonable man would have done what they wanted to do with it. In short what connection has the land got to do with where they work, unless it was for them to live there. He further said that when he let them have the use of the land that there was a shed there, he himself never said that this shed was empty, in fact he said that at the time he was using it to stock materials for his factory. There is no evidence that the appellants ever lived in the shed. In fact the evidence of Kawallay throws a different light on this altogether. Finally Genet at first said that he only knew that buildings had been erected on the land in 1962, then he said 1961, then he said it was earlier than that he knew they were staying on his land, in what he did not say. On the whole there is ample evidence before this court to show that Genet must have known of the existence of the buildings on the land before he purported to part with the land in question to the plaintiff/respondent. We believe that he allowed them to build on the land without any objection from him."

My first comment here is that Mr Genet was never made a party to these proceedings. Secondly, with respect, I fail to see how payment of rates affected the issue of proprietary estoppel for by s 95

of the Freetown Municipality Act (Cap 65), as amended by section 3 of the Freetown Municipality (Amendment) Act 1964 (No 31 of 1964), the occupier is equally liable as the owner in respect of payment of rates. That section reads:

> "95. (1) If the City Bailiff acting as aforesaid finds no goods, or if the amount realised by any sale as aforesaid is insufficient, the Mayor is hereby empowered to authorise the City Bailiff in writing to demand from the occupier payment within fourteen days of any amount owing, less any poundage or other costs of levy upon the goods of the owner, and if at the end of such period of fourteen days as afore said, the occupier has not paid such amount, the City Bailiff is hereby authorised to direct payment to the said City Bailiff by the said occupier of any rent due or accruing due to the owner, to the extent of the amount due to the Corporation in respect of the City rate, and every such payment shall be a valid discharge to the occupier of the rent to the extent of the amount so paid.
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> (2) If an occupier shall refuse or neglect to pay the rent as aforesaid to the City Bailiff when so required, the Mayor is hereby empowered to issue a warrant under his hand and the seal of the Corporation directed to the City Bailiff requiring and commanding him to levy the amount due to the Corporation in respect of the City rate on the goods and chattels of such occupier in the like manner as is provided in section 93 and 94 for levying on the goods and chattels of a defaulting owner.
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> (3) An occupier may deduct any sum paid by him under this section from the amount of rent payable by him to the owner and should a levy have been made on the goods and chattels of such occupier he may also deduct from such rent the poundage and cost of such levy."

If the issue regarding "the Limitation Act" was being canvassed perhaps the relevance of the additional evidence would have been appreciated. That issue was, however, not pursued. It is my considered view that the additional evidence of Kawallay did not put the case for the respondents higher than it was when judgment was given for the appellant by the High Court. On the contrary, as Mr Hudson Harding rightly pointed out before us, the whole tenor of this additional evidence tends to give additional strength to the appellant's case.

The position as regards findings on question of facts therefore in my view reverts to the position they were when judgment was given by the High Court. I would here and now re-iterate what this Court had laid down as guidelines to the court below in cases were that court thinks it fit to disturb the findings of facts by the High Court. This is what we said on this question in the yet unreported case of *El Nasr Export &Import Company Limited v Mohie El Deen Mansour* (Supreme Court, Civil Appeal No 3/73, 25 April 1974). I said, inter alia:

> "It is true that rule 21 of the Court of Appeal Rules 1973 (Public Notice No 28 of 1973) gives very wide and swooping powers to the Court of Appeal even to the extent of re-hearing the whole case. At the same time it is settled law and good sense that it should be in the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding, that the trial judge had formed a wrong opinion. In this connection I quote with approval the words of Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] AC 484 referred to in the House of Lords case of *Benmax v Austin Motor Co Ltd* [1955] AC 370.
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> '1. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion, on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
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> 2. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> 3. The appellate court, either because the reasons given by the trial judge are not satisfactory, because it unmistakably so appears from the evidence, may be satisfied that he has not

> taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'
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> I also cite in support and with approval the older cases of *Kponuglo v Kodaja* (1933) 2 WACA 24 and *Kissiedu v Dompreh* (1937) 2 WACA 281, decisions of the Privy Council. In the former case it was held that it was trite law that not possessing the advantages of the judge of first instance, a Court of Appeal should be chary of over-ruling his opinion on a pure question of credibility. In the latter case it was held that an appeal in a case tried by a judge alone is not governed by the same rules which apply to an appeal after a trial and verdict by a jury. It is a re-hearing. Nevertheless, before the Appellate Court can properly reverse a finding of fact by a trial judge who has seen and heard the witnesses and can best judge not merely by their intention and desire to speak the truth but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is presumption of its correctness which must be displaced."

As I have stated earlier on, the state of the evidence before the learned trial judge justified the findings of facts at which he arrived. I agree with these findings. Applying the relevant principles of law I am not satisfied that Court of Appeal had good or reasonable grounds for disturbing these findings.

We all take cognisance of the fact that equity is still not past the age of childbearing and that one of her progeny, not necessarily the latest, is the doctrine of proprietary estoppel. This equitable doctrine has from time to time been clad with a coat of many colours. In *Dillwyn v Llewelyn* (1862) 6 LT 878 the coat took the colour of operating through providing valuable consideration which in the circumstances of that particular case established a contract. The next one following is the Privy Council case of *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699. There the doctrine took the colour of making a revocable license irremovable. Then followed the House of Lords case of *Ramsden v Dyson* (1866) LR 1 HL 129 where, at page 140, the then Lord Chancellor (Lord Cranworth) said:

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

As the learned authors of *Snell's Principles of Equity* [27th Ed] (1973) at p 566 put it, this colour of the coat is based "on unconscionable behaviour or fraud".

The authors add: 'knowledge of the mistake makes it dishonest for him to remain wilfully passive in order afterwards to profit by the mistake he might have prevented. The knowledge must accordingly be proved by "strong and cogent evidence".'

I adopt this passage. In the instant case there was no allegation of mistaken belief in the defence of the respondents, nor was there any evidence to that effect.

The most recent of the authorities in this line cited before us is *Inwards v Baker* [1965] 2 WLR 212, an English Court of Appeal case. In that case there was a definite finding of fact on the evidence before the court of first instance that there was a request or encouragement on the part of the father to his son to build.

The pith and marrow of the respondents' case before us is that the respondents, on the evidence before the learned trial judge and the justices of the Court of Appeal, were licensees by estoppel and their interests were therefore protected even as against the third parties. The legal authorities establish the principle that licensees by estoppel are protected against third parties taking with notice; but contractual licensees are not. The protection based on estoppel will be essential if the licensor has transferred the property to a third party.

That brings me to this point, namely, that facts must be established for the equity to arise. The right of the parties must be determined upon the proper construction of the contract or arrangement. Lord Diplock in the English House of Lords case of *Gissing v Gissing* [1971] AC 886 at p 906 puts it this way:

> "As in so many branches of English law in which legal rights and obligations depend upon the intention of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by the party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct."

Each case must depend upon its own facts. Learned counsel for the respondents canvassed before us the question that the burden of proof of notice as to the nature of user of the said land was upon the appellant. I entirely agree with this proposition. Such a notice in law may be actual, constructive, or implied. Actual notice is the simple case where the purchaser knew of other legal or equitable interests existing prior to his purchase. It is constructive where such knowledge would have come to him if he had made all such enquiries as a prudent purchaser would have done. Implied notice covers actual or constructive notice to the purchaser's agent who was acting as such in the transaction in question.

This burden is discharged where the purchaser showed by evidence that he or she took all reasonable care, made enquiries and that having taken that care and made the necessary enquiries he or she received notice of any legal or equitable encumbrance which affected the said land. The totality of the evidence before the learned trial judge justified a finding of fact that the only notice the appellant had was that of the respondents being merely monthly tenants of Mr Lucien Genet and that on the Sunday in October 1962 when the meeting of Mr Lucien Genet, the appellant and the respondents took place at Mr Lucien Genet's residence they attorned tenants to the appellant by not only agreeing to pay the increased rents but in fact paid the increased rents. That tenancy the appellant quite lawfully determined. In coming to this conclusion I have taken into consideration the fact that the burden of proving tenancy is on the party setting it up. In the West African Court of Appeal case of *Katah v K Chellaram & Sons* [1957-60] ALR (SL) 7 that Court had this to say at p 10:

> "It is in each case a question of fact as to whether in the particular circumstances it is shown to have been the intention of the parties to create such a tenancy or whether the facts show that there was no such intention. It is, of course, upon the party setting up the tenancy to prove its creation and if the question is upon the facts left in doubt, he has failed to discharge the onus laid upon him."

In this case the learned trial judge's findings on this point are loud and clear in favour of the appellant. There is abundant evidence in support of such a finding. Counsel for the respondents has quite rightly drawn our attention to the fact that the law we have to apply in this case is that of "the laws of all civilized nations". He relied on the dictum of Lord Chancellor Campbell in the case of *Cairncross v Lorimer* (1860) 3 LT 130 at p 133 quoted with approval in the West African Court of Appeal case of *GB Amancio Santos v Ikosi Industries & EPE Native Administration* (joined by Order of Court) (1942) 8 WACA 29. I certainly agree with this proposition of law. Indeed it is the law I have applied in this case and I fervently hope it is the law that will be applied in the Courts of this Republic

The end result is that in my judgment this was a case where the respondents were originally monthly tenants of the said land with Mr Lucien Genet as landlord; that it was not established that the respondents built on the said land under any special circumstances, that they subsequently became tenants of the appellant who, on 17 August 1961, acquired the fee simple ownership of the said land and that she quite lawfully determined the tenancy. I would apply the principle of law laid down by the then Lord Chancellor (Lord Cranworth) in the case of *Ramsden v Dyson* (1866) LR 1 HL 129 at p 141, where he said:

> "If any tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment and order of the High Court.

**Hon Mr Justice GCW Betts JSC**: I agree. **Hon Mr Justice E Livesey Luke CJ**: I agree. **Hon Mr Justice SJ Forster**: I agree. **Hon Mr Justice S Beccles Davies JSC**: I agree.

Reported by Anthony P Kinnear