**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT OF JUSTICE**
**ACCRA**

**CORAM: AKUFFO (MS), JSC (PRESIDING)**
**DR. DATE-BAH, JSC**
**ADINYIRA (MRS), JSC**
**BAFFOE-BONNIE, JSC**
**GBADEGBE, JSC**

CIVIL APPEAL
NO. J4/4/2010
7TH JULY, 2010

1. ENTERPRISE INSURANCE COMPANY LTD. … PLAINTIFFS/RESPONDENTS/ RESPONDENTS
2. CONSORTIUM HOUSE LTD.

VRS

ALBERT ADOMAKO ... DEFENDANT/APPELLANT/ APPELLANT
SCANTRAVEL GHANA LTD
ENTERPRISE HOUSE
HIGH STREET-ACCRA

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## J U D G M E N T

**DR. DATE-BAH, JSC:**

This is the unanimous judgment of the Court. On the fifteenth day of February 1999, the first and second plaintiffs brought action against the defendant in the High Court in Accra. The first plaintiff is a well-known insurance company in Ghana and the second plaintiff is a company incorporated in Ghana which has been, since 1994, a wholly-owned subsidiary of the first plaintiff. The defendant is a lawyer and businessman and a sub-lessor of premises in Accra in relation to which the present

action has been brought. The claims endorsed on the plaintiffs' writ of summons were:

i. "A declaration that the Plaintiffs are by law entitled to a renewal of the Sub-lease dated the 18th day of June, 1971 on its expiration on or about 31st day of May, 1996, and that the Defendant is legally bound to grant to the plaintiffs a renewal of the said Sub-lease.

ii. An order to compel the Defendant to execute in favour of the Plaintiffs a Sub-lease in the terms of the draft attached to the Statement of Claim, and marked "A", which has already been submitted to the Defendant.

iii. A further order directing that if the Defendant persists in his refusal to execute the Sub-lease within a specified period, the Chief Registrar of the High Court, Accra, or some other person appointed by the Court should execute the same on behalf of the Defendant."

The facts from which this suit has arisen are as follows: on the 15th day of February, 1971, an agreement was entered into between the defendant and three other promoters (namely, Kenneth Mackenzie Scott, Royal Exchange Assurance and Union Trading Company Ltd {' UTC'}.) These promoters agreed to incorporate and did indeed incorporate a private company, Consortium House Limited, which is the second plaintiff in this case. The purpose for the establishment of this company was, *inter alia,* to acquire from the defendant land and premises situated at the High Street, Accra, for the benefit of the promoters and for erecting on this land a building which came to be known, after its erection, as Consortium House, now known as Enterprise House. It is admitted by the parties that by the agreement of 15th February 1971, each promoter was bound to make a special contribution towards the project. The defendant was to lease his land to the company at a peppercorn rent, the company was to be granted a loan by the Guardian Royal Exchange Assurance with which to build a commercial building on the demised land and Mr. Scott, the architect, was to be paid for his services in kind, that is with shares, and building materials were to be purchased from the U.T.C. at a discount. The loan was to be secured by the commercial building when completed.

In accordance with this agreement of 15th February, the defendant, by a Sub-lease dated 18th June, 1971, sub-let land on which Enterprise House stands to the second plaintiff for a term of 25 years, from 1st June, 1971, on the terms and conditions specified in the Sub-lease. An important term of the Sub-lease was that the rent was to be at the peppercorn rate of one cedi per annum, to be paid, if demanded. The Sub-lease also provided in Clause 4(iii) as follows:

> If the Company, i.e. the 2nd plaintiff "shall be desirous of taking a lease of the demised premises for a further term of twenty-five (25) years from the expiration of the term hereby granted at the rent and on the terms and conditions hereinafter mentioned and shall not more than (12) nor less than six (6) months before the expiration of the term hereby granted give to the Sub-lessor in writing notice of such its desire and if it shall have paid the rent hereby reserved and shall have performed and observed the several stipulations herein contained and on its part to be performed and observed up to the termination of the tenancy hereby created then the Sub-lessor will let the demised premises to the Company for the further term of twenty-five (25) from the expiration of the term hereby granted at the same rent hereby reserved and subject in all other respects to the same stipulation as herein contained except this clause for renewal."

The availability of this renewal clause to the plaintiffs is at the heart of the dispute that has occasioned the current action.

The next tranche of facts in this case relates to a transaction between the first and second plaintiffs. In 1994, the first plaintiff made a proposal to acquire the Consortium House building for its sole beneficial ownership. As a result of this proposal, the second plaintiff made an offer to the first plaintiff which accepted it, resulting in what the parties considered to be a contract. Certain aspects of the terms of this contract are in dispute between the parties.

The defendant contends that the liquidation of the second plaintiff was intended and was an integral part of the transaction under which the shareholders of the second plaintiff transferred their shares to the first plaintiff. The defendant further contends that it was to avoid paying capital gains tax twice that the transaction was crafted as a transfer of shares in the second plaintiff to the first plaintiff, instead of as a straight purchase of Consortium House from the second plaintiff by the first plaintiff.

In contrast, the plaintiffs have argued that the first plaintiff, having become the sole shareholder of the second plaintiff, it was entirely a matter for the first plaintiff to decide whether to liquidate the second plaintiff or to maintain it. They further maintain that the first plaintiff by a letter of 24th February 1994 to the defendant made it clear that it had no intention of liquidating the second plaintiff.

This dispute as to the terms of the transaction is important because the benefit of the renewal clause at a peppercorn rate inures to the second plaintiff and therefore it is an issue of great moment whether the first plaintiff is entitled to use its wholly owned subsidiary to gain access to that benefit.

The source for the ascertainment of the terms of the transaction is principally Exhibit H, tendered at the trial. This is a letter written by the defendant, in his capacity as chairman of the board of the second plaintiff, and which was dated 17th February, 1994. Because of the importance of the contents of this letter in determining the outcome of this suit, we have set it out *in extenso* below:

"**CONSORTIUM HOUSE LIMITED**

*Phone: 64456/62922* *P.O.Box 4102*

*Telex: 2153* *Accra, Ghana*

17th February, 1994

The Managing Director,

Enterprise Insurance Company Limited,

Consortium House,

High Street,

Accra.

: MR. OSEI OPOKU

[Managing Director]

Dear Mr. Opoku,

ACQUISITION OF CONSORTIUM HOUSE, HIGH STREET ACCRA BY ENTERPRISE INSURANCE COMPANY LIMITED

I am now able to respond on behalf of Consortium Limited to the proposal by Enterprise Insurance Company Limited to acquire our Consortium House Commercial Building for their sole beneficial ownership.

The proposal has been discussed by our Board of Directors and subsequently also by our shareholders in general meeting, and it has been decided that, in principle, we are willing to allow Enterprise Insurance Company Limited to

acquire Consortium House by private treaty on reasonable but realistic price and terms.

Accordingly, I am authorized to convey our formal offer for your acceptance. I am to predicate the offer by explaining to you that the terms hereby offered were arrived at after considerable deliberation, due regard having been had to the contacts and pre-negotiations that have taken place at responsible official levels between our two companies. In particular, it was re-called that the Enterprise Insurance Company had expressed a price reserve position of ¢650 million but this was considered by the Board and its advisers to be in need of improvement.

The terms hereby offered accordingly represent the well considered and minimum position acceptable to Consortium House Limited.

On this basis, we are pleased to make you the following offer:-

1. Price: ¢700,000,000 (Seven hundred million cedis)

2. Date of sale: Not later than 31st March, 1994

3 Legal costs are to be borne by Enterprise Insurance Company Limited.

4. Sale to take the form of share transfer so as to minimize the incidence of Capital Gains Tax. Enterprise Insurance Company Limited will thus take over Consortium House Limited by acquiring its total issued stock and thereby all the residual assets of Consortium House Limited after the latter has been voluntarily liquated

5. Existing other shareholders will agree to sell and transfer their 74% interest to Enterprise Insurance Company Limited to enable Enterprise Insurance Company to become sole shareholder of Consortium House Limited.

6. Consortium House Limited will go into voluntary liquidation and be wound up over a period of one year. For the purpose of the winding up, all former shareholders will contribute to a fund pro-rata in the proportions of their shareholding immediately prior to the sale of their shares to cover all liabilities of Consortium House Limited computed at an accounting date to be specified plus costs and expenses of winding up.

7. At the end of the winding up, which shall be not later than one year from the passing of the resolution, the leasehold interest in the Consortium House Building (of which we have already given you full particulars) and

all other remaining assets of Consortium House Limited will pass beneficially to Enterprise Insurance Company Limited.

8. The foregoing constitutes the offer by Consortium House Limited to Enterprise Insurance Company Limited and is SUBJECT TO CONTRACT.

9. Acceptance by Enterprise Insurance Company Limited should be accompanied by an immediate down payment of a deposit of 25% (twenty-five percent) of the sale price to bind all parties to the contract of sale. The remaining 75% of the purchase price is payable on or before the date of execution of Share Transfer Deed.

We look forward to receiving your acceptance of our offer. For reasons of price inflation, this offer will remain open only for a limited period. Therefore, if in principle the offer is acceptable to you but you would like a discussion of details (not including the price), then we would suggest that you first accept with the required down payment to save the offer.

Awaiting the favour of your early response.

Yours Sincerely,
For CONSORTIUM HOUSE LIMITED

A. Adomakoh
Chairman"

In response to this letter, the first plaintiff sent the following letter of acceptance:

"ENTERPRISE INSURANCE COMPANY LIMITED

No. 11 HIGH STREET
P. O. BOX 50 ACCRA
Your ref
Our ref: 00/SNA
DATE: 24TH February, 1994

PRIVATE & CONFIDENTIAL

A.Adomakoh, Esq
Chairman
Consortium House Limited,
P. O. Box 4101
Accra.

Dear Mr. Adomakoh

ACQUISITION OF 74% SHARES IN CONSORTIUM HOUSE LIMITED BY ENTERPRISE INSURANCE COMPANY LIMITED

We write with reference to your letter dated 17th February, 1994 on the above subject matter and the subsequent discussion we had with you on 24th February, 1994 about your offer to sell to Enterprise Insurance Company Limited 74% remaining shares of Consortium House Limited.

1. We accept your asking price of ¢700,000,000 (Seven Hundred Million Cedis) representing 100% of the shares.

2. We have agreed to pay the 25% of the 74% of the said asking price of ¢700,000,000 (Seven Hundred Million Cedis) as a firm commitment to the sale. Our cheque No. 065011 for ¢129,500,000 is hereby enclosed.

3. Since we are buying the shares we will pay the balance of 75% to the individual shareholders selling their shares on or before 31st March, 1994, who in turn, will simultaneously transfer their Share Certificates to Enterprise Insurance Company Limited

4. The Liabilities of Consortium House Limited should be determined and ascertained and confirmed by the Auditors of Consortium House Limited, if possible by 31st March, 1994 so that our pro rata liability and that of GRE shall be discharged.

5. On the completion of the sale transaction the Directors of the Consortium House Limited shall resign their directorships from the company.

6. We agree to bear the cost for the preparation of Legal documents.

7. For the time being Enterprise Insurance Company has no intention of liquidating Consortium House Limited.

Please kindly acknowledge receipt by signing and returning a duplicate copy of this letter.

Thanking you for your co-operation in this matter.

We remain,
Yours sincerely,

OSEI OPOKU
MANAGING DIRECTOR

ENC."

On that same 24th February, 1994, there was a second letter by the Chairman of the second plaintiff to the first plaintiff. Its contents were as follows:

"CONSORTIUM HOUSE LIMITED

Phone: 64456/62922 P.
O. Box 4104
Telex: 2153
Accra, Ghana
24th February, 1994

The Managing Director,
Enterprise Insurance Co. Ltd.,
Consortium House,
High Street,
Accra.

Dear Sir,

ACQUISITION OF CONSORTIUM HOUSE BY ENTERPRISE INSURANCE CO. LTD

With further reference to our offer letter dated 17th February 1994 we note that in your pre-acceptance discussion of details today with our Chairman, you conspicuously did not raise the question of ground rent which, as we have previously explained, will need to be negotiated with the Landlord after you have acquired the Consortium House premises. You may have over looked this important detail because in your previous approaches you have indicated that you would also negotiate with the Landlord to acquire his reversionary interest.

But we feel that it is important to draw your special attention now to the fact that the peppercorn ground rent was arranged as a special concession to operate between and for the benefit of the original four Promoters of the Consortium House Project. As you are not one of the original four Promoters or, conversely, as with the sale of their shares all the original

four promoters will have divested their interest in the property, the benefit of this special perppercorn ground rent arrangement will not accrue to you as purchaser. That arrangement was not between Consortium House Limited and the Landlord, but specifically between for individuals parties with a common purpose. Accordingly, it cannot be passed on by Consortium House Limited.

You will therefore have to negotiate an appropriate ground rent with the Landlord

Yours faithfully
For: Consortium House Ltd

A. ADOMAKOH
CHAIRMAN"

On this exchange of correspondence, the main issue that has arisen for determination, in our view, is the second of the issues set down for trial in the summons for direction filed on 17th February, 2000, namely:

> "Whether on a proper interpretation of the renewal clause in the sub-lease dated the 18th of June, 1971, the Plaintiffs are entitled to have the said sub-lease renewed at the same rent as reserved by the Sub-lease, namely, at a peppercorn rent of c 1.00 per annum, to be paid, if demanded".

Although evidence was led at the trial of other documents and circumstances relevant to the transaction between the first and second plaintiffs, to our mind, the correspondence set out above represents the core of what needs to be interpreted in order to resolve the main issue in this case, which is what has been set out above.

The learned trial High Court judge, Akwaah J., held that the plaintiffs' action succeeded and entered judgment for them. The defendant appealed to the Court of Appeal, which affirmed the decision of the trial judge. It is from this decision of the Court of Appeal that the defendant has brought an appeal to this Court. The grounds of appeal filed by the defendant/respondent/respondent (hereafter "the defendant") are as follows:

a) That the Court of Appeal erred when it affirmed the decision of the Learned Trial High Court Judge that the Defendant/Appellant had divested himself of all his interest in the land on some portion of which Consortium House stood following the allotment of his Shares in Consortium House Limited to the 1st Plaintiff when upon the undisputed facts Consortium House Ltd. only held a leasehold interest in Appellant's land.

b) That the Court of Appeal erred when it affirmed the determination of the Learned Trial Judge of the High Court that the sale transaction between the 2nd Plaintiff Company and the 1st Plaintiff Company was a sale of Shares and NOT a sale of the Consortium House building in spite of clear unambiguous evidence on Record that the Parties, for their mutual benefit agreed and chose the transfer of Shares only as a modus operandi to avoid payment of capital gains tax twice.

c) That the Court of Appeal erred when it failed to consider, and by implication affirmed the wrong admission of Exhibit "IC", the unsigned and unconfirmed Minutes of 2nd Plaintiff Company held on 10th March, 1994 on which the Learned Trial Judge based his decision.

d) That the Judgment of the High Court was against the weight of evidence and the Court of Appeal erred in failing to analyze and assess the evidence and come to proper conclusions in respect thereof."

Arguing ground (a) in its Statement of Case, the defendant attacked the reasoning of the trial High Court Judge and the lead judgment in the Court of Appeal. The learned trial judge had said (at pp 138-9 of the Record):

> "In his Statement of Defence and in his evidence in Court, the Defendant, as noted supra, talked about special contributions and sacrifices made by the original shareholders, as he puts it, for their mutual benefit. However, it is clear from the evidence that what the Defendant described as special contributions as sacrifices were not contributions or sacrifices made by them for no gain. They were allocated shares for that. The architects' services were in payment for his shares and the defendants' land was valued and this was converted into shares. It follows therefore that the sub-lease at the peppercorn rent together with the cash defendant paid, gave him the 30% shares of the 2nd Plaintiff Company. This then is what Defendant paid as consideration for his shares. Shareholders divested themselves of their 74% of the shares at a price of c700,000,000 in 1994, Defendant received his due portion of this amount. The other shareholders also received their due portions.

What the Defendant is trying to do here in this case is to make unjust profit or double profit from his land. It is my view that having his land valued and used in paying for shares, the Defendant has been fully paid for this land or the use of this land. He thus has no interest again in the land. To hold otherwise is to defeat equity and good sense. It is also my view, in this regard, that Defendant is referred to as Sub-lessor whose only duty is to renew the term of the sub-lease as and when demanded by the 2nd Plaintiff or whomsoever takes over the 2nd Plaintiff. The Defendant cannot, and should not be allowed, to have his cake and eat it.

Indeed, in this regard, it is immaterial whether 1st Plaintiff is the successor in title to Royal Exchange Assurance. Defendant owes an obligation to renew the sub-lease for the 2nd Plaintiff or whosoever takes it over. Thus it is my view that even if 2nd Plaintiff had been taken over by any other company apart from the 1st Plaintiff, 2nd Plaintiff and thus by extension, the new owner would still be entitled to the renewal of the sub-lease Exh. 'D' in the terms contained therein, including especially the right to the peppercorn rent."

The Court of Appeal, in affirming the decision of the High Court, similarly said (*per Gyaesayor JA)* at p.494 of the Record:

"Having said so, it is pertinent to state that the peppercorn rent was for the benefit of 2nd Plaintiff. The Defendant/Appellant is a shareholder having used the land to pay off his shares. In cross-examination he was asked what was your portion of the shares he said "30%. 20% fully paid in cash 100% otherwise other than cash i.e. how did you make payment in kind i.e. it was the land which amounted to 10%. Obviously the Defendant was a shareholder having used the land and cash to pay for his shares; now the 1st Plaintiff is the the 100% shareholder of 2nd Plaintiff Company and my view is that the shares of Defendant/Appellant were validly transferred to Respondents.

Any interest that Defendant/Appellant had in the property had been extinguished and he no longer has any interest in the said property as found by the learned trial judge. There is sufficient evidence to show that upon the expiry of the first 25 years the Plaintiff acted within the terms of the sub lease by giving notice of their intention to renew the sublease for a further 25 years…"

The defendant easily demonstrated in his Statement of Case that both courts were in error in holding that the defendant had no interest in the land on which Consortium House or Enterprise House stands. It is quite clear that what the defendant transferred to the second plaintiff was a part only of the leasehold interest that the defendant held from UTC. He correctly asserts that he has a reversionary interest in the land sub-let to the second plaintiff. The fact that the defendant conveyed a leasehold interest in the land to the second plaintiff in exchange for valuable consideration in the shape of shares in the second plaintiff cannot be correctly construed as divesting the defendant of all his ownership rights in the land. This point is in effect conceded by the plaintiffs in their Statement of Case when they state that:

> "The said statements by the Learned Trial Judge and the Learned Judges of the Court of Appeal cannot affect their evaluation of the evidence led at the trial and the conclusion reached by them that the Defendant was, under the agreement, obliged to grant a renewal of the sub-lease at a peppercorn rent.
>
> It may be argued that the language of these statements could have been more felicitous in describing the legal consequences of the event. However, this does not affect the conclusion reached by the Learned Trial Judge and by the Learned Judges of the Court of Appeal. The above-mentioned statements are *obiter dicta* and not the *ratio decidendi* in the case."

The plaintiffs also contend that the nature of the defendant's interest in the land on which Consortium House stands was never raised in the plaintiffs' Statement of Claim, the Statement of Defence or the Reply. However, the issue raised in the defendant's ground (a) is relevant because if it were correct that the defendant's title in the relevant land had been extinguished, he would be out of court. He would no longer be a sub-lessor and therefore the issue of whether or not he is obliged to renew the sub-lease would no longer arise. We would therefore uphold ground (a) of the defendant's appeal.

The defendant argued his grounds (b), (c) and (d) together, attacking the decision of the Court of Appeal which affirmed that of the learned trial judge that on a proper interpretation of the renewal clause the plaintiffs are entitled to have the sub-lease renewed at the same rent as reserved by the sub-lease. The defendant admitted that the second plaintiff was, on a proper construction of the sub-lease, entitled to renew the sub-lease in terms of its clause 4(iii) (set out near the beginning of this judgment), but contended that in all the circumstances of the case it was

unreasonable and inequitable to allow the second plaintiff so to renew the sub-lease. The defendant also contended that the Court of Appeal made an error when, having found that the transaction between the first and second plaintiffs involved a sale of shares rather than a sale of the Consortium House building, it nevertheless held in all the circumstances of the case that the first plaintiff was entitled to renew the sub-lease.

In connection with these grounds, the defendant made the following arguments: the first was that the first plaintiff was not entitled to renew the sub-lease in terms of clause 4(iii) *(supra)* because it was not privy to the sub-lease agreement between the defendant and the second plaintiff. It was the defendant's contention that the first plaintiff was a legal person distinct from the second plaintiff and therefore not the company referred to in clause 4(iii) *(supra)*. Neither could the first plaintiff be said to be a "successor" or assignee of the second plaintiff. We consider that these contentions are sound and we uphold them. Although the first plaintiff argues that it is the successor to the Royal Exchange Assurance, that is not relevant to the issue here and it does not address any serious argument towards rebutting the defendant's argument that the first plaintiff is not a successor to the second plaintiff; neither is the first plaintiff an assignee of the second plaintiff. What the first plaintiff clearly is is the owner of the second plaintiff, which is different from being its successor or assignee.

The second of the defendant's arguments is that the first plaintiff cannot in law or equity benefit from the renewal clause in the sub-lease because of the circumstances leading to the formation of the second plaintiff and the explicit notice given to the first plaintiff before the conclusion of the transaction between the first and second plaintiffs. The defendant contends that before the transaction between the first and second plaintiffs, the second plaintiff took steps, particularly through its Board Chairman, who was then the defendant, to inform the first plaintiff that it did not qualify to enjoy the peppercorn rent arrangement applicable to the second plaintiff company as owned by its four original promoters in accordance with the provisions of the formation agreement concluded by the original promoters.

This is an argument which calls for a close analysis of the process for the formation of the contract that enabled the first plaintiff to own all the shares in the second plaintiff. The orthodox tools of analysis deployed in relation to the formation of contracts have to be applied to determine whether the contract concluded between the first and second plaintiffs contained a term or understanding along the lines alleged by the defendant.

The contract between the first and second plaintiffs was formed as a result of the acceptance by the first plaintiff of the offer contained in the second plaintiff's written

offer dated 17th February, 1994. That written offer is set out in full above. It purports by its own terms to be a comprehensive and carefully-considered offer. It is described as a "formal offer for your acceptance". This was the offer that was accepted by the first plaintiff's letter of 24th February, 1994, also set out in full above. By this exchange of correspondence, an agreement was reached under which the first plaintiff became entitled to purchase the shares of all the other shareholders in the second plaintiff. Although this agreement was expressed to be "subject to contract", the subsequent conduct of the parties to it indicates a waiver of the need for a subsequent formal written agreement.

Under normal circumstances, having converted the second plaintiff into its subsidiary, the first plaintiff could procure its subsidiary to exercise the subsidiary's rights under its pre-existing sub-lease. However, the defendant seeks to counter such an outcome by contending that there was a condition attached to the transaction between the first and second plaintiffs. He claims that that condition was that the first plaintiff was not to benefit from the peppercorn rent arrangement that had been embodied in the sub-lease between himself and the second plaintiff. His argument was that the peppercorn rent was a special concession meant for only the original promoters of the second plaintiff.

The difficulty for the defendant in this contention of his is that this alleged feature of the sub-lease was not reflected in its language. Nowhere in the sublease is reference made to the fact that the peppercorn rent is to be payable only for so long as the original promoters remained the shareholders of the sub-lessee. Even if subjectively, this is what the promoters intended, this subjective intent is not enough. The common law of contract, as is well-known, adopts an objective approach in recognizing the manifestations of assent. Thus Denning L.J. (as he then was) said in *Hornal v Neuberger Products Ltd.*[1957] 1 QB 247 at p. 257:

> "Now I quite agree that if the judge did try to look into their inmost thoughts it would be a mistake. In seeing whether there is a contract or not, the law can only look to outward appearances. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice even though neither party in fact had it in mind."

Lord Denning makes the same point again in *Storer v Manchester City Council* [1974] 3 All ER 824 at p. 828 where he said:

> "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: "I did not intend to contract', if by his words he has done so. His intention is to

> be found only in the outward expression which his letters convey. If they show a concluded contract that is enough."

Earlier, Lord Blackburn had expressed a similar approach in *Smith v Hughes* (1871) LR 6QB 597 at p. 607 as follows:

> "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

Secondly, the existence of the condition alleged by the defendant is not referred to in the formal offer made to the first plaintiff. Nevertheless, the defendant energetically contends that he communicated the existence of this condition in his letter of 24th February 1994, which is also set out above. In our considered view, however, this letter of 24th February 1994 cannot be construed to be part of the offer made to the first plaintiff which it accepted by its letter also of 24th February.

On the whole, in analyzing the contents of the transaction between the first and second plaintiffs, we have given primacy to what we consider to be the principal building blocks of the contract, namely the letter constituting the offer and the letter constituting the acceptance. We have given greater weight to these than to the minutes of meetings held by directors, which are merely the backdrop to these main building blocks.

The third argument raised by the defendant is that the first plaintiff cannot be lawfully permitted to renew the sub-lease in terms of clause 4(iii) on account of another key condition which was an integral part of the transaction between the first and second plaintiffs, namely that the second plaintiff company was to be liquidated as part of the transaction. This argument has a firmer footing in the actual language of the deal. It will be recalled that paragraph 6 of the offer contained in Exhibit H is in the following terms:

> "6. Consortium House Limited will go into voluntary liquidation and be wound up over a period of one year. For the purpose of the winding up, all former shareholders will contribute to a fund pro-rata in the proportions of their shareholding immediately prior to the sale of their shares to cover all liabilities of Consortium House Limited computed at an accounting date to be specified plus costs and expenses of winding up."

The first plaintiff counters this contention with the claim that in its letter responding to the second plaintiff's offer it did not accept this particular term in the offer. In what we consider to be its acceptance of the second plaintiff's offer of 17th February, there is this sentence:

> "For the time being Enterprise Insurance Company has no intention of liquidating Consortium House Limited."

This sentence has to be construed as either introducing a new term into the transaction and therefore turning the communication into a counter-offer or else as not altering any of the significant terms of the offer and therefore serving as an effective acceptance. The orthodox learning on this issue is that an acceptance must be an absolute and unqualified acceptance of the terms of the offer. (See *Deegbe v Nsiah &* Antonnelli [1984-86] 1 GLR 545). However, the unqualified acceptance need not replicate exactly the language of the offer, so long as all the significant terms of the offer are assented to. (See *Domins Fisheries Ltd. V Bremen-Vegesacker-Fisheries* [1973] 2 GLR 490). The defendant has argued that the phrase "for the time being" is not to be interpreted as a rejection of the term in the offer that the second plaintiff was to go into voluntary liquidation and be wound up over a year. He has contended that the phrase means that the first plaintiff accepted the principle and condition of liquidation, but not immediately. The phrase did not mean that the second defendant would not be wound up at all, but that for the time being it would not be wound up. The plaintiffs, on the other hand, have argued that the first plaintiff's letter of 24th February was a counter-offer to the second plaintiff's letter of 17th February, which counter-offer was accepted when the shareholders accepted the cheques enclosed in that letter. The letter of 24th February certainly was not cast expressly in the mould of a counter-offer. Neither was its tone evocative of a counter-offer. It purported to be responding to the second plaintiff's offer and merely requested acknowledgement of receipt by the second plaintiff signing and returning a duplicate copy of the letter. Apart from the term on voluntary liquidation, it was in substance a full acceptance of the exact terms of the offer letter. In our view, the sentence in question is to be construed as not intended to alter the offeror's term that "Consortium House Limited will go into voluntary liquidation and be wound up over a period of one year." In this Court's opinion, the exchange of the letters of 17th and 24th February resulted in the formation of a contract and one of its terms was that the second plaintiff was to be wound up within one year. It was on this understanding that the transaction was concluded and the shareholders accepted the cheques enclosed in the letter of 24th February. Abban J., as he then was, reached a similar conclusion in *Domins Fisheries Ltd. V Bremen-Vegesacker-Fisheries* [1973] 2 GLR 490. As he rightly held in that case, whether or not a letter such as that of 24th February is a counter-offer or an

acceptance is a matter of interpretation. In the circumstances of this case, our interpretation of that letter is that it is an acceptance.

The implication of this analysis is that the second plaintiff would continue to have the benefit of the peppercorn rent embodied in its sub-lease with the defendant for the period of up to a year within which there was a contractual obligation to liquidate it. After the year, the first plaintiff would be in breach of contract if it continued the second plaintiff in existence. Accordingly, it could not enjoy, through its subsidiary, the benefit of the peppercorn rent. An interesting question is what the rights of the first plaintiff would be upon the liquidation of the second plaintiff. The first plaintiff, as the sole shareholder of the second plaintiff, would of course be entitled to the proceeds of the liquidation. It would be up to the liquidator to determine how he or she would dispose of the company's assets. Among these assets would be the sub-lease with the defendant at a peppercorn rent. A liquidator appointed for the purposes of a private liquidation stands in a fiduciary relationship to the company to be liquidated as if that liquidator were a director of that company. It would thus be this fiduciary of the second plaintiff that would determine the fate of the sub-lease and its peppercorn rent. Though the first plaintiff would not have an automatic entitlement to the benefit of the sub-lease, it would be reasonable to expect the liquidator to assign the sub-lease to the first plaintiff, given the fact that Exhibit H provides in paragraph 7 of the offer contained in it that:

> " At the end of the winding up, which shall be not later than one year from the passing of the resolution, the leasehold interest in the Consortium House Building (of which we have already given you full particulars) and all other remaining assets of Consortium House Limited will pass beneficially to Enterprise Insurance Company Limited."

From this provision in the parties' agreement, it is reasonable to conclude that the liquidator would be bound to assign the sub-lease to the first plaintiff.

Thus, though the first plaintiff is not automatically entitled, as of now, beyond 24th February 1995, to the benefit of the peppercorn rent on the Consortium or Enterprise House, through its subsidiary, the second plaintiff, it can reasonably expect that, after the winding up of the second plaintiff, this benefit will accrue to it. In sum, the first plaintiff is hereby declared to be under an obligation to cause the second plaintiff to be wound up as soon as reasonably practicable. The liquidator will, however, be under an obligation to assign the sub-lease with its peppercorn rate to the first plaintiff.

We have arrived at this result by focusing on interpreting what are, for us, the contractual documents, namely the letters of 17th and 24th February. We have done this, as earlier indicated, because this is required by the common law's objective

view of contract, expressed, for example, in *Cheshire, Fifoot & Furmston's* Law of Contract (14th Ed.) p.33 through the assertion there that the title of the book's chapter on formation of contracts: "is not 'Agreement' but the 'The phenomena of agreement', concerned not with the presence of an inward and mental assent but with its outward and visible signs." For this Court, the phenomena of agreement, on the facts of this case, are to be found in the correspondence that the parties entered into with a view to reaching an agreement, rather than in their deliberations in any board room before or after sending the letters concerned. However, both plaintiffs and the defendant went to considerable lengths in trying to persuade this court and the lower courts of the parties' contractual intentions from the minutes of the board of directors. We, therefore, need to deal with this aspect of the case.

On behalf of the defendant, it was argued that the minutes of the Emergency Board Meeting of the second plaintiff held on 2 February 1994 at which the decision was taken to sell the Consortium House building to the first plaintiff(Exhibit 1D at p. 362 of the Record) supported the defendant's contention that it was a condition of the contract between the first and second plaintiff that the second plaintiff be liquidated. It is true that one of the minutes recorded that: "It was further decided that Consortium House would go into voluntary liquidation after transfer of the shares over a period of one year." However, this decision of the Board *simpliciter,* without its communication to the first plaintiff, has no contractual significance. Hence, what was significant was its communication to the offeree in the letter of 17th February.

Another set of minutes which the parties resorted to in their efforts to elucidate the contractual intent of the first and second plaintiffs was that recorded in Exhibit 1C, at p. 359 of the Record. These minutes, whose validity was challenged before this court by the defendant, were of a meeting of the Board of Directors of the second plaintiff held on 10 March 1994. Paragraph 3.2 of these minutes read as follows:

> "Acquisition of Consortium House Limited
>
> The Board was informed by the Chairman that since the last meeting, an offer in writing of c700,000,000 was made to EIC together with conditions. He said EIC had indicated their acceptance of the price. However, they preferred transfer of shares to liquidating the Company.
>
> They were expected soon for further discussion. The Chairman pointed out that, after the transfer of the shares by the other shareholders, all members of the board with the exception of Mr. Opoku should resign from the Board since EIC was not informed of the decision to liquidate Company.

> EIC, in this case, will take over and operate the Company. It was decided that after sale, 25% of the proceeds due to shareholders should be deposited with the Company to be accounted for after all liabilities had been settled.
>
> The date of transfer was scheduled for 31 March, 1994."

The trial judge attached great weight to this minute. We will quote a passage from his judgment shortly, but before that we want to stress that for this Court what counts is the language and context of the letter of 24th February, rather than any *ex post facto* report on it in a boardroom. This is what the learned trial judge said (at pp. 136 of the Record):

> "…we have to have a look at the Exhibits in evidence as Court Exhibits '1. 1A, 1C and 1D' these are the minutes of the meeting of the Board of Directors of 2nd Plaintiff Company. Though they were not signed, thus signified that they were un-confirmed (*sic*), the fact that the Company Secretary DW1, who in fact prepared the minutes and testified in Court that he prepared them and particularly the fact that he said the minutes Book which ought to contain the confirmed minutes could not be traced, I am of the view that a very great weight ought to be attached to these Exhibits. The combined effects of Exh '1D and 1C' is that 1st Plaintiff Company indicated its preference for a transfer of shares to liquidating the Company, thus in the minutes of 10th March 1994 Exh 1C."

The learned trial judge's conclusion is, with respect, not supportable. What happened in a board room after a letter of acceptance had already been delivered cannot safely be taken as evidence that the first plaintiff company had indicated its preference for a transfer of shares, as opposed to liquidating the company. In this regard, this Court finds persuasive the following passage relating to the minutes of 10th March from the defendant's Statement of Case:

> "Furthermore, what the Chairman was alleged to have said at the alleged Meeting on 10th March, 1994, assuming but without accepting that it was true, was NOT the communication the Board of the 2nd Plaintiff Company was expected to make to 1st Plaintiff Company for its reaction. It was a report he was making. That report arose out of the offer and acceptance. As stated above, it was to be noted that 1st Plaintiff was to go for further discussion to state its preference for a share sale transaction as against liquidation of 2nd Plaintiff Company. This expected meeting never took place, and therefore 1st Plaintiff was held bound by its contract arising out of its acceptance of Exhibit H Exhibit G. The 1st Plaintiff's reaction was contained in Exhibit G *(i.e. the letter of acceptance)* and NOT in Exhibit 1C (*i.e. the minutes of 10th March*

*1995)* which was the Chairman's report rightly or wrongly of what he thought had already taken place."

A further reason for caution with regard to these minutes is that they were hotly contested by the defendant, because they were unsigned and unconfirmed, although prepared by the company's Secretary. However, in the light of the views that we have expressed above, it unnecessary for us to express an opinion on whether the minutes were wrongly admitted or whether a wrong weight was given them by the courts below. Our view, in sum, is that the contents of the minutes discussed above should not materially affect the earlier analysis set out in this judgment as to the formation of the contract between the first and second plaintiffs.

In the result, this Court allows this appeal and denies the plaintiffs the declaration and orders which they seek.

[SGD] DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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