IN THE HIGH COURT OF JUSTICE WESTERN REGION HELD AT TARKWA ON TARKWA ON THURSDAY THE 20TH DAY OF DECEMBER, 2007, BEFORE HIS LORDSHIP F.K OPOKU,J.

SUIT NO. LS.34/97

NANA KOFI KARIKARI & 44 OTHERS **PLAINTIFFS**

VRS:

GHANAIAN AUSTRALIAN GOLDFIELDS (GAG) LTD **DEFENDANT**

J U D G M E N T

By their Writ, the plaintiffs claim against the defendants the following reliefs:-

1. A declaration that the demolition of plaintiffs' buildings by the defendant is unlawful.
2. Special Damages
3. General Damages for the unlawful demolition of the plaintiffs' buildings.
4. An order of the Court for the appointment of valuers to value the demolished buildings in order to apply to the Minister for Mines and Energy for compensation under Minerals and Mining Law, 1986 (PNDCL 153).
5. Perpetual injunction restraining the Defendants, their servants and/or agents or otherwise from doing the following act or any of them, that is to say carrying on any demolition exercise on the plaintiffs' buildings without an order of the Court, or preventing the plaintiffs from performing their farming activities and /or causing Armed Policemen to threaten and torture the plaintiffs.
6. Costs.

About a decade ago, the forty-five plaintiffs who felt they had a common grievance against the defendant filed an action in this Court to contest the rightfulness of the demolition of their buildings/structures.

This matter in my view is simple and straight-forward but unfortunately it has lingered on until today. This apparent delay is due to multiple factors: abortive attempts at amicable settlement by opinion leaders, reference to the Land Valuation Board and its incapacity to offer any assistance, transfer of judges, missing exhibits, failure to file addresses within stipulated periods, last but not the least the legal vacation. Happily today, on its 10th anniversary the matter is being determined. But whether the proceedings will terminate here is another thing altogether.

By their statement of defence the defendants on 5/1/98 denied all the claims on the plaintiff's writ.

The issues set out for trial were:

a. Whether or not the demolition on plaintiffs' building by the Defendant Company was unlawful.
b. Whether or not the defendant caused the demolition of the plaintiffs' buildings.
c. Whether or not Nkwantakrom had been in existence before defendants obtained their lease.
d. Whether or not the unlawful demolition of the plaintiffs building by defendant Company caused any loss to the plaintiffs.
e. Any other issues arising from the pleadings

It is the case of the plaintiffs that they are all residents and lawful owners of unnumbered buildings at Nkwantakrom a village near Tarkwa in the Western Region of the Republic of Ghana. The plaintiffs say that on or about 27th June 1997 the defendant Company led by their agents and/or servants caused armed policemen and thugs to unlawfully demolish their buildings at Nkwantakrom.

The evidence of 1st plaintiff, Nana Kofi Karikari, the odikdro of Nkwantakrom was very concise. According to him the land upon which Nkwantakrom is situated was granted to him by Nana Nuako I the chief of Tebrebie and custodian of Nkwantakrom land. To buttress this assertion he tendered a document captioned. HANDING OVER OF NKWANTAKROM LAND TO OPANYIN KOFI KARIKARI AS CARETAKER. It was admitted in evidence without objection and marked exhibit "A". This document was duly executed by the parties on 12th June 1968. He averred further that he has lived there for a duration spanning thirty –five years. He further stated that he in turn granted portions of the land to the rest of the plaintiffs to farm and erect their structures. Again he stated that he is still carrying on farming activities and before the demolition they were living in mud houses. He emphasized that on that fateful day 27th June, 1997 the whole village was demolished in his absence and the defendant failed to show them any legal document authorizing them to do the demolition. He challenged the defendant's assertion that there is no town called Nkwantakrom. He explained that Nkwantakrom is in the same area just like Teberebe, Akyempim and Iduaprem. He concluded by saying the defendants allegation that they never settled on the land but only went to settle there to attract compensation is false. He also said it is not correct the structures were put up between 1996 and 1997.

In his document the 4th plaintiff also tendered a farm tenancy Agreement (EXH B). In this document Nana Kofi Karikari, 1st plaintiff, released his secondary forest land at Nkwanta Agege to him as a tenant farmer on abusa basis. The effective date was 10th day of December, 1987. 5th plaintiff, PWI, 43rd plaintiff and 14th plaintiffs also testified. Their story is essentially the same as the previous witnesses so I don't seem it necessary to repeat it. These witnesses testified on their own behalf and on behalf of the remaining plaintiffs. The plaintiffs also tendered EXHS C and D respectively. EXHC was a letter written on behalf of the Nkwantakrom Development Committee complaining to the Crime Officer of the Tarkwa Division of the Ghana Police Service about the invasion and annihilation of their places of abode and loss of items. It was written on 29th June, 1997 by the Secretary Kwesi Aduakwa and headed 'ANNIHILATION OF FARMERS STRUCTURES AT NKWANTAKROM AND STOLEN (SIC) OF PROPERTIES BY GANG OF DEMOLISHERS'.

Paragraphs 1,2 and 3 of the said letter are reproducing:

"(1) Please we informed you verbally about the annihilated structures of Nkwantakrom farmers by a gang of demolishers employed by GAG Mining Company headed by the Chief Security Officer, Col. Rtd. Dan. Asiamah in conjunction with the Chief Linguist of Awudua, Nana Kwesi Acquah II and by this letter formalizing it, for your immediate action.

(2) It is rather unfortunate, that at this time of persistent rain, structures that belong to indigenous farmers, who are assisting the country to increase food production be demolished in their faith, be placed under the mercy of the chilly weather.

(3) Please, Sir, you will be very surprise to learn that, when the demolishers invaded the village, they forcibly broke doors of the inhabitants who were not around at the time of the operation and made away with the valuable properties and cash summing up to millions of cedis. The untimely occurance of the looting had indeed jeopardized the seekable efforts of the whole community. The whole exercise was carried out without any information or written note from those concerned.

Sir, is it constitutional to enter the room of our compatriot in his absence through forcible entry? We have now been exposed to the act of wickedness. It is indeed an act of victimization by GAG Mining Company. We are very much concerned about the stolen properties which constitute our live treasures". This letter was written two days after the alleged invasion of their community. This letter was followed up with EXH 'D' entitled submission of Inventory of lost items. This letter pegged the total value of property and cash stolen at ¢26,475,000.00. Attached to this are EXHS E, E1-E44 which contain the tabulated details of each of the forty-five plaintiffs. From the evidence it appears the Police did nothing to assist them; not even a single reply was sent to them giving the assurance that their complaint was receiving attention.

In short the Police did practically nothing to assuage their hurt feelings. Additionally, the plaintiffs also tendered in evidence photographs (EXHS F F1 to F3) showing their buildings lying in ruins. In the background of this picture I can see some tall coconut trees.

In their statement of defence the defendants averred that there is no town or village called Nkwantakrom, near Agege, Tarkwa and that they are the owners of the mineral and mining rights of a large tract of land including the place wrongly described by the plaintiffs as 'Nkwantakrom'.

They pleaded in paragraph 5,6,7,8 as follows:-

"5. In or about August, 1996, the defendants defined a blasting Zone in their concession and compensated owners of all properties therein located. The said blasting zone extended to the edge of the cottage of one Opanyin Acheampong who was advised by the defendants to continue to live at his cottage until the next blasting zone is defined.

6. Following this, the plaintiffs came and rented the farmland contigous to Opanyin Acheampong's cottage and put up some shabby thatch structures and named the place "Nkwantakrom", with the view of attracting compensation from the defendants at the

latter's next defined blasting zone. This was done without the consent of the defendants.

7. The defendant would contend that thy filmed the whole area of their concession before they began their mining operations and none of the area survey films obtained in both 1991 and 1994 respectively has the plaintiffs' said thatched structures existing in the concession.

8. The defendants in observing the said illegal settlement of the plaintiffs, reported the matter to the District Security Council, Tarkwa and the Chief of Apinto who own those lands, with copies of their 1991 and 1994 aerial films of the area, and it was they who after inviting the parties and calling witnesses to ascertain the truth of the matter, engaged the services of some security personnel to demolish the said structures".

The plaintiffs proceeding under Order 31 rule 15 and 16 of LN 140A gave notice to the defendants to produce for their inspection and taking of Copies the names of owners who were compensated, their mining lease concession and the aerial survey films of their concession.

It appears the defendants did not accede to their request.

From the pleadings and the evidence of DWI, Mr. Benedict Addo, a former environmental officer of the defendant currently with Goldfields Ghana Ltd, the Defendant's case may be summarized as follows: The defendant holds a mining concession in the area including the place called by the plaintiffs as "Nkwantakrom". In August 1996 the defendant defined a blasting Zone in their concession and compensated owners of all properties. It says the blasting Zone extended to the edge of a cottage of one Opanyin Acheampong. That the plaintiffs came and rented the farm lands contiguous of Opanyin Acheampong's cottage and put up some shabby thatched structures and named the place Nkwantakrom with a view to attracting compensation from the defendant at the latter's next defined blasting Zone. In their attempt to exploit the minerals the defendants decided to mine a particular area referred to as Block 5 and demarcated 750 radius around block 5. Defendant says they located six landowners in the area however, five landowners had property within the radius. Their crops were enumerated accordingly and were compensated by October 1996. At that time no structure was within that radius hence the enumeration of crops only. The defendant says after the payment of compensation in 1996, a lot of activities in terms of structural development started taking place on the Kofi Karikari part of his farm and by the beginning of the year 1997; so much structural erection had gone on in the area that management of GAG felt very concerned. Therefore in April, 1997 management wrote to DISEC complaining about the structures. Defendant says after a couple of meetings with the community, it was decided by DISEC that the structures be demolished. In other words it is DISEC that ordered and carried out the demolition of the illegal structures on GAG acquired land. DWI stressed that GAG did not use any of its equipment in carrying out the demolition. EXHIBITS 1,2,3,4 and 5 were tendered and admitted without objection. These are CROP COMPENSATION CLAIM/PAYMENT FORM in respect of five farmers. Attached to each is CROP COMPENSATION ESTIMATES RECORD SHEET (C.C.E.F). The beneficiaries were Kofi Ayensu (PWI), J.K Appiah, Kweku Mensah, Francis Gadah and Charles Cobbinah. They were compensated for their crops and

not for the destruction of structures (buildings). Indeed none of them is a party to the instant action. The location of their farms is at a place described as BLOCK 5 NORTH. It is silent on the village/communities where the respective farms are located; But from EXHS 6,7,8. Some of the villages in this area are Adisakrom, Diwobrekrom and Akyeampongkrom.

In the concluding part of his evidence DWI stated "The demolition of the structures was carried out two days after the structures were marked. Management decided not to use any of its equipment in carrying out the demolition, it therefore requested the custodian of the land (Apintohen) who knew all that was going on to help demolish or bring those structures down. He therefore assigned his chief linguist Nana Kwesi Akwaw to organize a team to carry out the demolition. So on that day DISEC representative, team of policemen and the demolition team led by the chief linguist carried out the demolition. As far as I know none of the structures marked was demolished. That I was not there. The whole demolition was handed over to DISEC and our head of security ……." We do have aerial photographs of the concession and this was taken in 1994".

I shall deal with issue (3) first i.e whether or not Nkwantakrom had been in existence before the defendant obtained their lease. Counsel for the plaintiffs contended that the plaintiffs have adduced sufficient evidence and have provided sufficient proof to establish all the issues, including issue 3.

On the contrary, it was submitted for the defendant that the evidence of Yaw Marfo (14th plaintiff) is crucial and influential in deciding this issue. Counsel pointed out that he said he had lived at Nkwantakrom for the past 10 years and from the conservative figures he put up the Salem Pentecostal church 8 years from the date he was testifying and

so he built his alleged demolished structure in 1996 after the defendant Company had acquired its concession in 1992. He further contended that the aerial survey over the area in 1994 based on due diligence did not disclose any human settlement. Again he argued that the affirmative answer to his question.

"Q. Are you aware that the original Nkwantakrom was moved to where the demolished exercise took place must necessarily resolve the issue in their favour.

In counsel's own words once the original Nkwantakrom was moved to where the demolition took place it only follows that as at 1992 when defendant acquired its area for operations, Nkwantakrom was not founded.

In my view this submission concedes that a village called Nkwantakrom former or new exists. Why then the vehement denial about its existence? Quite apart from their admission of this fact, there is abundant evidence from the plaintiffs' camp particularly EXH A which establishes clearly that Nkwantakrom was founded in 1968 or even earlier at least 24 years before the defendant allegedly acquired its mining lease/concession in 1991 or 1992.

The evidence of the 14th plaintiff in isolation cannot persuade the Court to hold that Nana Kofi Karikari the founder of Nkwantakrom and other plaintiffs also erected their structures in 1996. What I gather from this answer is that he is a credible witness. It appears when the village was expanding and the population increased he decided to go and establish a church there. Of course, in Ghana today churches are mush rooming in areas where the expected congregation will grow for obvious

reasons. Quite obviously the inhabitants settled there at different times. He was a latecomer. Some of them moved to the area during the revolutionary era (1979-1981). Right from the day they filed their defence they have insisted on aerial survey films which they allegedly gave copies to the DISEC and the chief of Apinto and when they were unhappy about the proliferation of structures within their concession they "independently" engaged the services of security personnel to demolish the structures.

I think the production of copies of the aerial photographs of the concession taken in 1991 and 1994 as alleged would have put their case absolutely beyond any doubt. The plaintiffs requested for copies way back in the year 1999 but they refused their request without assigning any reasons. In this Court too they have not tendered their mining lease and the aerial photographs. Why? Was it accidental, tactical or a deliberate omission? I have been handling most of these cases involving sister mining companies and invariably these documents are produced for inspection with little or no prompting. That would have made the issue about the existence or non-existence of Nkwantakrom (old or new) an easy task. At least the mining lease with the accompanying map would have depicted locations of settlements in their concession. In other words these documents showing villages, hamlets and farms within GAG operational areas may have even resulted in the settlement of this case as far back as 1999. Unfortunately the plaintiffs have no access to it. It is difficult to appreciate the refusal of the defendant to make their documents available to the Court, but the Court is not incapacitated by such refusal. Where a document is in the possession of a party to a suit and he fails to produce it the presumption of law is that its contents are against him. Therefore the refusal of the defendant to produce their mining lease and/or aerial films leads to the conclusion that if the said documents were produced they would not show that the founding of Nkwantakrom was subsequent to 1992 or it was founded in 1996 or thereabouts. See the case of KORLEY V. BRUCE (1962) 1 G.L.R at page 10 per Ollennu J. as he then was.

The defendants' oral evidence about the non-existence of Nkwantakrom does not find corroboration in any shape or form from any other evidence.

When one scans through Exhibits F, F1-F3 i.e photographs showing the devastated village, one can see very tall coconut trees, some appearing to have reached their "menopause" Obviously it is an indication that it is an old and established village and not recent settlement as the defendants would have vigorously and strenuously contended. The production of these documents would have sealed the issue whether or not Nkwantakrom had been in existence before the defendant obtained their concession. This would have avoided this litigation which has been pending in this Court over a decade between the poor rural dwellers and the giant Mining Company. It appears from the attitude shown by the defendant right from the day of the invasion that the defendant thinks of the plaintiffs as weak and voiceless who would never be able to litigate them and that they should therefore keep quiet if a wealthy and influential multinational company demolishes their place of abode and uses their land in the way it likes against the wishes of the poverty-stricken rural dwellers. Now I hold without any fear of contradiction that the plaintiffs have successfully proved that Nkwantakrom is one of the mining communities in the Teberebie Electoral area and that the company came to meet it. Before their arrival

they were living and farming there. Defendants were rather late comers. From the evidence it shares boundary with Akyeampongkrom. It is also in the same vicinity as Diwobrekrom and Adisakrom among others. The evidence satisfied me that the defendant devastated Nkwantakrom in defiance of all objections and protests raised by the plaintiffs.

Though it is not disputed that the defendant holds a concession in the area, I am not too sure of the exact date of its acquisition.

DWI, the then community affairs officer made a very poor impression upon the Court; He appeared as one struggling to conceal some vital facts from the Court. To be blunt the defendant was economical with the truth on this issue. Differently put DWI was not honest with the court as far as the above issue is concerned.

On the contrary, plaintiffs and their witness were most impressive.

The next pertinent issue to grapple with is whether or not the defendant caused the demolition of the plaintiffs' buildings.

It was submitted on behalf of the defendant that not only did DISEC hold series of meetings with the community leaders over the issue of unauthorised buildings of structures on GAG operational lands, but it is the same DISEC that ordered and carried out the demolition of the unauthorized structures and therefore the defendant cannot be held liable for the demolition of the illegal structures on GAG acquired land.

Contrariwise, it was contended that it was GAG and its agents that carried out the demolition of plaintiffs' structures. Obviously the agents referred to here are the representatives of the Apinto Stool armed policemen and thugs and that powerful body known as DISEC. Relying on Exhibit 9 a letter dated 20/04/97 from GAG to DISTRICT CHIEF EXECUTIVE WASSA WEST DISTRICT ASSEMBLY headed DEMOLITION OF STRUCTURES AT DIWBREKROM AND ITS SURROUNDING AREA and DWI's evidence, I find as fact that it was the defendant company that pressurized the DISEC to provide them assistance and support in carrying out the demolition exercise and that the defendants agents DWI, and their chief security officer Lt Col. Asiamah and the management of GAG particularly Harry Michael, the General Manager were at all material times involved in events leading to the invasion and annihilation of plaintiffs' houses and structures. The argument that the defendant did not use its own equipment is neither here nor there. It is legally and factually untenable. Counsel for the plaintiffs further submitted that "where the defendant invited any person or persons, agency or institution of government to carry out any activity within the defendant concession, the said person(s), agency or institution will be acting as agents and/or servants of the defendant in the execution of the stated activity that the defendant requested the agency or institution to carry out including any thing ancillary to the execution of the request".

It was also submitted that even if it was DISEC that took the decision to demolish the structures within the defendant concession, DISEC was doing so at the express invitation of the Defendant and were thus acting as agents and/or servants of the defendant. He cited two cases to support his contention. Branwhite Vrs: Worcester Works Finance Ltd (1969) IAC 552 at 587 and Shell Co of Australia Ltd. Vrs: National Shipping Bagging Services Ltd. (The Kilman) (1988) 2 Lloyds Report 1 at

16. For the purpose of this judgment no useful purpose will be served by stating the facts except the principle which has been correctly stated above.

I am entirely in accord with the above unassailable submission and hold that DISEC, the Apintohene's chief linguist Nana Kwesi Akwaw, the heavily armed policemen and "thugs" wielding long iron bars and cutlasses acted for and on behalf of the defendant. They acted under the control and direction of the defendant company. Far from attacking the integrity of DISEC. I am compelled to remark that on this occasion they were not resilient enough. If I may say so they all allowed themselves to be misled or manipulated by the defendant company.

I find therefore that the defendant company itself with the assistance and support of its agents particularly DISEC demolished the plaintiffs buildings on 27th June, 1997.

But before I tackle the next issue whether or not the demolition of plaintiffs' building by the defendant company was unlawful, I wish to pose this question. Assuming without admitting that DISEC alone used its own equipment in the physical destruction of the alleged illegal structures and at the end of the day their actions is declared wrongful and unlawful, would the defendant company be held answerable or accountable?

The answer is that any person who authorizes or procures a tort to be committed by another person is responsible for that tort as if he had committed it himself. This principle of law of delict or tort or civil wrong is adequately described in the Latin rubric: Qui facit per alium facit per se". The principal and the agents in such circumstances are both jointly and severally liable as joint tort feasors for the wrong authorized or procured by the former by the latter. The principle was clearly stated by Tindal C.J in the case of WILSON vr. TUMMAN (1843) 6 man JG 236 thus at P. 244; "all who procure a trespass to be done are trespassers themselves" (The value is the same). See also the case of FORSON vr KOENS & or (1975) 2 G.L.R 479 at 454. In this case the plaintiff, a private legal practitioner agreed to purchase the 1st defendant's Mercedes Benz Car at the agreed price of ¢11,400.00. He was given possession of the car after making some part payments leaving an outstanding balance of ¢2,400.00. The car was used by the plaintiff for his professional work as well as his social activities.

There was no express provision in the verbal contract of sale that the 1st defendant could seize the car on failure of the plaintiff to pay the full purchase price at the end of the stated period. Nevertheless, the 1st defendant under a false belief that she had a legal claim to the car for non-payment of the outstanding balance, authorized the 2nd Defendant, a senior army officer, then in uniform to seize the car in a public place where the plaintiff was practicing his profession".

The Court held in holding (1) "the seizure of the car by the 2nd defendant on the instruction of the first defendant was clearly the tort of trespass (ie an intentional and direct interference with the a chattle in the possession of another) whose object was to give not only protection to a plaintiff in the retention of possession of his chattel and his interest in its physical condition but also protection against inter meddling with his chattle".

The Court awarded punitive costs in favour of the plaintiff against the defendants jointly and severally.

After the above exposition of the law I will proceed to consider the next crucial issue stated supra.

Briefly learned counsel contended on behalf of the defendant Company that since these structures were unauthorized or illegally erected the company was justified in destroying same without compensation payable to the plaintiffs.

From their pleadings, exhibits and evidence of DWI as well as the submissions of Counsel, it was their contention that the plaintiffs put up these structures with a view to attracting compensation and since the structures were constructed without the company's consent contrary to the Minerals and Mining Law 1986 PNDCL 153 Section 70 subsection 4 no form of compensation will be paid for the proliferation of structures within their concession. It was submitted that since these buildings were unauthorized development or illegal structures their destruction is justified for they engaged in speculative development and that being so they are not entitled to compensation at all. Speculative development may be defined as the erection of structures with the perceived intention and anticipation of attracting compensation.

In fine, by their submission the defendants deny that the demolition of the buildings is wrongful and unlawful.

The relevant provisions of P.N.D.C.L 153 as far as the resolution of this dispute is concerned are Sections 70 subsections (1), (2) and (4) (1). "The holder of a mineral right shall exercise the rights of the holder under this Act subject to the prescribed limitations relating to a surface right".

(2) The right conferred by a mineral right shall be exercised in a manner consistent with the reasonable and proper conduct of the operations concerned so as to affect as little as possible the interest of a lawful occupier of the land in respect of which the rights are exercised"

(4) In the case of a mining area, the owner or lawful occupier of the land within the mining area shall not erect a building or structure without the consent of the holder of the mining lease, if the consent is unreasonably withheld, without the consent of the Minister".

In his reply to the above submissions learned counsel for the plaintiffs cited the case of Randolph V. Accra City Council (1975) 2 GLR 198 where a house was demolished by the Defendant without an order of the Court where Aboagye J stated at page 200 that,

"It is clear the provisions of Section 44 of the Local Government Act, 1971, were not complied with in as much as no complaint was made to a District Magistrate and no magisterial order requiring the plaintiff to pull down her property was obtained. The act of the defendants in demolishing the plaintiff's house was outside their jurisdiction and therefore wrongful for which the plaintiff is entitled to recover damages".

Counsel submitted that the fact that the defendant, its agents, servants including DISEC failed to obtain a Court order before carrying out the demolition exercise, the demolition of plaintiffs' building is wrongful and therefore unlawful under any circumstance. He further submitted that demolition of plaintiffs' houses and buildings is a violation of their fundamental human rights under the constitution,

1992 and under International Law. He referred to Article 18 clauses 1&2. Reference was also made to Article 14 of the African Charter on Human and people's rights, Article 25(1) of the Universal Declaration of Human Rights, referred to supra.

He also cited Article 11(1) of the International covenant on economic social and Cultural Rights of States, and last but not the least the United Nations Human Rights Commission, Resolution 1993/77 which declared that the practice of forced eviction constitutes a gross violation of human rights.

I shall not reproduce verbatim these provisions since they are all singing the same tune as Article 20 1&2 of the constitution, 1992. In the end, he submitted that the demolition of plaintiffs' houses and buildings by the defendant, their servants and agents amounted to forced eviction and a violation of the right of the plaintiffs to housing under the constitution and international law. Finally, he urged on the Court to hold that the plaintiffs are entitled to a declaration that demolition of their buildings by the defendant is unlawful.

To be able to resolve the crucial and relevant issue whether or not the demolition of plaintiffs building was unlawful; a critical look at the provisions of P.N.D.L 153 cannot be over looked. Otherwise put the Court suo motu will raise the issue whether or not the defendants act in demolishing the plaintiffs building is in conformity with PNDCL 153 and in accordance with Section 70 Subsections 1, 2, 3 and 4.

If the language of these provisions quoted above is carefully analysed it is patently clear that the mineral right holder's interest is qualified by the owner's or lawful occupier's surface right hence the admonition by subsection (2) that "the right shall be exercised in a manner consistent with the reasonable and proper conduct of the operations concerned so as to affect as little as possible the interest of a lawful occupier. The language in subsection 2 is not exhortatory or permissive. It is couched in mandatory terms. In short this subsection must be interpreted as having a qualifying effect. The subsection prescribes or imposes a condition to be complied with in the exercise of the holder's right.

(1) The Act refers to it as prescribed limitations. In other words the holder's right is not absolute, unqualified, limitless or automatic. It cannot be doubted that it was to ensure fairness, mutual understanding and peaceful co-existence that the drafters provided for compensation for disturbance of owners surface right in section 71 subsection (1).

The next to be considered is subsection (4) on which the defendants pinned their faith or relied heavily.

In simple terms neither the owner nor the lawful occupier shall undertake structural erection without the express permission of the holder of the right.

To be able to appreciate subsection (4) we are going to deal with two scenarios. First, where the inhabitants are already settled and constantly expanding their habitation before the arrival of the mining company and where people subsequently establish new settlement within a concession without the permission of the concessionaire.

In both situations, it is my humble view, that the inhabitants deserve and are entitled to be given thorough, adequate, sufficient or due notice failing that will amount to non-compliance with the law and a violation of the law under which they seek refuge.

Now, it is undisputed that the plaintiffs, inhabitants of Nkwantakrom new or old have been living and farming in this area prior to the coming of the defendant company and the defendant company being the holder of the mineral right, the Court finds itself obliged to decide whether or not the defendant company served the plaintiffs with requisite notice before the demolition exercise. Whereas the plaintiffs vehemently denied that they were served with notices, the defendant insisted that they were duly notified before the demolition exercise. But I must observe that the defendant company gave conflicting accounts as to how notice was served on the plaintiffs. In cross examination learned counsel for defendant suggested to the Odikro of Nkwantakrom (1st Plaintiff) that there was a meeting held with opinion learders and GAG representatives before the demolition. This was flatly denied. An inconsistency is that the inhabitants were notified of the demolition through their assembly member but the witness said it is false. When the 5th plaintiff, Kwesi Aduakwa and secretary to the chief also testified, He was cross-examined as follows:-

Q. I put it to you that you knew <u>of the advance notice given</u> by GAG to residence in the area?
A. No.
Q. Similar notices of the impending demolition was given by the DISEC
A. I don't know.
Q. The demolition was the penalty you paid for refusing to heed the notices?
A. Not correct.

Another contradictory mode of notification is that GAG wrote letters to some of the inhabitants and both agreed on the modalities for embarking on the exercise. Yet another sharp conflict is that Mr. Ben Addo, DWI the environmental officer of defendant company informed the 43rd plaintiff sister Ekua verbally.

Q. You remember that Ben Addo informed you there was going to be a demolition exercise in due course".
A. No.

14th plaintiff, Yaw Marfo was also bombarded with a barrage of questions and one such question relating to notice is:

Q. Are you aware that when the defendant acquired the land, there was effective communication i.e publication about the acquisition and gave notice before they entered the area?
A. It was not in Nkwantakrom that they beat gong-gong and gave notices

From these conflicting modes of giving notices the question that naturally comes to the fore is: was there any notice given at all? If the answer is yes, was it at a meeting with the opinion leaders excluding their chief who is supposed to be the primary opinion leader or through the assembly member of the place, publication in the newspapers, radio announcements, beating of gong-gong, oral or written notice and were they also served individually?

I will quickly pose this question. What was the length of time given the plaintiffs to vacate? Assuming there was such notice was it reasonable in the circumstances? What was the designated date to remove their items for the exercise to be carried out?

Are there higher opinion leaders than the chief of a town or village? If by opinion leaders they mean member of a negotiating committee what is the membership? It is simply incredible that the defendant company had discussions with leaders of Nkwantakrom. Is it proper to discuss the fate of a village without the knowledge and involvement of the founder himself? Let us remember that 1st plaintiff is the chief, I reject this manner of communication to the inhabitants. I am satisfied that there was no such meeting. In their bid to establish that letters were sent to the inhabitants, the defendant company tendered exhibits 6,7and 8 complaining about unauthorized Development adjacent to Block 5.

A casual perusal of the contents reveal that the addresses were Messers Akyeampong, Kwofie and Ayensu of Akyeampongkrom, Diwobrekrom and Adisakrom respectively. None of them is a resident of Nkwantakrom and neither of them is a party to the suit. Does service of notices on the residents of these villages constitute any notice to the plaintiffs or residents of Nkwantakrom? The answer is emphatic "No". As far as this case is concerned EXHS 6, 7 and 8 are irrelevant.

On the evidence I am not convinced that some of the inhabitants were served verbally by Mr. Ben Addo, the Environmental officer moving from house to house or door to door as if he was on a political campaign canvassing for votes.

It is also my finding that the defendants have woefully failed to demonstrate that they served them notice by the beating of gong-gong. Though P.N.D.C.L 153 is silent on what constitutes sufficient notice. I am of the view that my pronouncement in the recent case of Moses Armah vrs. Wassa West District Assembly Suit No. E1/4/05 unreported will be apposite in the instant case.

In that case the defendant assembly demolished the plaintiff's structure for failing to obtain permit before commencing to erect a two storey building. Their defence was hinged on Section 49 of Local Government Act, 1993 Act 462 which provides "A physical development shall not be carried out in a district without prior approval in the form of a written permit". However, Section 52 which deals with unauthorised development provides

a. where a physical development has been or is being carried out without a permit contrary to this Act or
b. the conditions incorporated in a permit are not complied with a district planning authority may give written notice in the prescribed form to the owner of the land requiring the owner on or before a date specified in the notice to show cause to the district planning authority why the unauthorized development should not be prohibited, altered, abated, removed or demolished". On what constitutes sufficient notice I repeat my view in the Moses Armah case. "The Sections talk about the giving of notices to the owner, occupier or developer who is constructing a building or other structure without a permit. Counsel for the defendant assembly contends that the giving of notices is optional whereas counsel for the plaintiff is of the view

> that it is mandatory. Having read thoroughly sections 49, 52 and 64 I am in entire agreement with plaintiff's counsel that the defendant has no discretion when it comes to the giving of notices in respect of unauthorized building. It must be emphasized that the very Act under which they sought refuge and demolished the plaintiff's property lays down elaborate procedures for enforcement in respect of unauthorized development. The developer or owner must be given written notice to show cause why his development not be prohibited, altered, abated, removed or demolished. He must be given ample or reasonable time to respond and act. It seems to me, any manner of notice other than written would not be in strict compliance with the Act. A resort to the print media or electronic media (such as Space and Dynamite F.M Stations) will not constitute sufficient notice. It appears service of the notice should be effected on the affected person personally. The beating of gongong, radio announcements and publication in the news papers alone will be in contravention of the law. It may be resorted to as additional notification to the notice in writing". I will only add that there ought to be regular public forum with the affected community in situations of Resettlement/Relocation.

In the case whatever the situation it was imperative for the defendant company sot sit with them to negotiate instead of bringing armed security men to demolish their property unheard. It was incumbent on the company to meet with the chiefs, opinion leaders and the inhabitants in the area to dialogue over the demolition and the payment of appropriate compensation. If really there was agreement between them on the modalities why the present of heavily armed policemen and thugs? They ought to have embarked on intensified sensitization programme since the effect of their action was definitely going to render them homeless i.e making them internally displaced persons or "refugees". They should have been given repeated notices. I must reiterate that no notice at all was served them. I find as unmeritorious their argument that they were duly served but refused to listen and the penalty they had to pay was the demolition.

It seems to me that the defendant misdirected itself by concluding that they were encroachers/squatters or illegal miners (galamseyers) without any vestige or a right. The company reacted as though they were illegal miners on the company's bonafide concession: I think they got it all wrong and I am constrained to hold that this is a terrible mistake.

The correct legal position is where a statute prescribes a prior condition or requirement to be fulfilled before another act can be performed then unless that prior condition or requirement has been fulfilled, that act, even if done, cannot be valid.

Even though a concessionaire's right takes precedence over the surface owner's right, that right did not abridge or extinguish those rights and so those rights must be respected and protected. In so far as the defendants failed to serve them prior written notices or notify them at a public forum before the demolition they have

not complied with the P.N.D.C.L 153. That is to say they had no right in demolishing the plaintiffs' places of abode (emphasis mine).

Consequently, I hold that the defendant overstepped their bounds and therefore their act is wrongful, unlawful, unconstitutional and without justification. Obviously, they have violated the law (PNDCL 153) and the constitution, 1992. Their conduct amounts to tramping upon their fundamental constitutional right. It is akin to compulsory acquisition of their property without payment of prompt, fair and adequate compensation contrary to Article 20(2). The defendants did not act with due circumspection for failure to bargain with the inhabitants as regards payment of compensation due them. Clearly, they abused their mineral holding right. I recommend that they emulate the example of sister companies in respect of Resettlement/Relocation.

Before I proceed further I wish to observe that the case of RANDOLPH VRS, ACCRA CITY COUNCIL was decided under the Local Government Act, 1971 Act 359 as amended by the Local Administration (Amendment) Decree, 1974 (N.R.C.D 254). I have looked at Section 44 subsection 1, 2 and 3 which require magisterial order before any demolition could take place.

There is no corresponding section in the current law (ACT 462) and by extension PNDCL 153. The District Assembly or the defendant company is not obliged to obtain a magisterial order before demolition could be carried out in every instance, where the provisions are complied with particularly after giving written notice, adequate opportunity to show cause but is unable to do so and further opportunity to the developer himself to demolish and he fails the assembly or the company for that matter could carry out the demolition and their act would be justifiable.

Having said this I hold that the Randolph case is inapplicable. Another distinction is that in the above case the claim was for general damages but as will be demonstrated shortly, the issue here is, are they entitled to compensation? If yes what should be the quantum of the compensation? Certainly, the guiding principles will not be necessarily the same, though some of the considerations definitely will overlap in both situations. The case and the instant one are distinguishable. It is for this reason that I ignored the above authority in my analysis.

The next point is whether or not the unlawful demolition of plaintiffs' buildings by the defendant company caused any loss to the plaintiffs.

Having resolved issues (a), (b) (c) in favour the plaintiffs it is axiomatic that they suffered losses. From exhibits (c) and (d) as well as the evidence of some of the plaintiffs which I have no reason to disbelieve the demolition squad embarked on the operations in the absence of some of the inhabitants who had either gone to their farms or travelled. Indeed, it was a stab in their backs. However, those who

were present and felt intimidated were not given adequate opportunity to remove their personal effects and/or other valuable items. The church, mosque and school buildings were not spared the ordeal. They were pulled down or invaded in the presence of the congregation, the school children and the innocent teacher. What sad spectacle. Since then where have they been worshipping and schooling? This apparently barbaric act has caused them grave inconvenience. This gives cause for concern. Two days after the invasion Kwasi Aduakwa, Secretary to the Nkwantakrom Development Committee petitioned the crime officer for redress. They complained about their stolen properties. In this letter he reiterated the fact that the whole exercise was carried out without any information or written notice. He did not receive any reply. On 2nd July 1997, he submitted to the police an inventory of lost items, comprising various stolen items, monies and destroyed items.

This is contained in EXH D and Exhibits E, E1-E44. The total value of property destroyed, cash and properties looted amounted to twenty six million four hundred and seventy five thousand cedis. Whether this amount is exaggerated or realistic I am not in a position to say conclusively. But since the EXH 'D' was prepared soon after the items lost in the attack. To demand receipts from them is to expect the impossible. Available receipts would have been buried and therefore impossible to be traced. I am saying this because special damages must be proved strictly.

The impact of inflation in our economy is a well know fact which I think I will be justified in taking judicial notice. Looking at the current values of clothes and other items generally, I can safely say their prices have rocketed astronomically or manifold. To be able to restore the plaintiffs to their former position, I shall award them jointly and severally this amount under the head special damages (¢26,475,000) plus 10% interest per anum form 27th June 1997 (date of destruction) to date of final payment. Upon receipt of this amount it shall be shared proportionately amongst the 45 plaintiffs herein as per EXHS E, E1-E44.

The plaintiffs also claimed General Damages for the unlawful demolition of their buildings: without further ado, I say on the authority of GLIKSTEN (WEST AFRICA) LTD v APPIAH (1967) G.R.R. 447 and KWADWO v SONO (1984-86) 1 G.L.R that where a person enters upon the land of another by lawful authority or licence (legislative authority or consent conferred by concession agreement between Government and the concessionaire), acts done in pursuance of the authority or licence cannot be the subject for general damages in trespass. It is for this reason that the entry or disturbance of the owner's surface right is held not to be a trespass.

In the Gliksten's case the question was whether or not general damages can be awarded against a concessionaire for the acts done by him in promotion of the objects of his concessionaire. In this case they destroyed cocoa tress when felling timber. Amissah J.A in his analysis observed when the farm is grown before the

grant of a concession or afterwards the question of which preceded the other is of very little moment. In a concurring view Apaloo J.A as he then was lucidily put it thus "There is, I think, nothing unique about a cocoa farmer bringing an action against a person who caused devastation to his farms seeking general and special damages. In my opinion, in the cocoa growing areas of this country, such actions are common place. The right of an aggrieved farmer to recover both general and special damages against an ordinary tortfeasor for destruction of his farm and cocoa tress has not, in my experience, ever been questioned nor could have been questioned with anything approaching reason. But in this case, the appellants cannot be regarded as tortfeasor in any sense of that word. They are entitled to enter the land by reason of the fact that they are concessionaires and the right which the Concessions Ordinance confers on them is almost all-embracing. As I see it, the only basis on which they could properly be mulcted in general damages must be that their entry upon the land was per se a wrong redressible by the award of pecuniary compensation. If I am right in thinking that a concessionaire commits no wrong in entering land in respect of which he holds a validated concession, then there can be no rationale for awarding general damages".

In the words of Amissah J.A "If the law allows a person to go on land to carry out certain activities, it cannot be a wrong for the person to act in accordance with that permission. I do not think the appellants committed any wrong for which general damages could be awarded. Different considerations apply to the award of general damages for the actual destruction of the cocoa trees."

The present case involves a concessionaire and surface owner's right but the fact that the subject matter in the instant case is a building as opposed to crops is no valid reasons why the same principles should not apply. I shall adopt this principle and hold that the claim for general damages is misplaced. But is this fatal? No. The remedy they are seeking can be salvaged under relief (d).

Although plaintiffs claim inter alia general damages, from relief (d) the pleadings, evidence and addresses it is patent that the substance of the entire cliam is for payment of prompt, fair and adequate compensation under PNDCL 153 and Article 20 (2) of the constitution, 1992.

Section 71 (1) of the minerals and mining law PNDCL 153 provides "the owner or occupier of any land subject to a mineral right may apply to the holder of the right for compensation for the disturbance of the rights of such owner and for damage done to the surface of the land, buildings, works or improvements or to livestock, crops or trees in the area of such mineral operations".

As I have indicated earlier, claims for compensation can be determined by agreement between the parties. It is only when the parties disagree that they have to resort to assessment with the aid of land valuation officers who are experts in the assessment of damages.

If there is still a deadlock the matter shall be referred to the minister responsible for mines. He may also consult the Land Valuation Board. And in cases involving resettlement he may seek advice of other relevant authorities like the E.P.A the Local and regional authorities to determine the compensation payable.

In this case no opportunity whatsoever was offered the plaintiffs to make an offer to be accepted or rejected by the defendants. Unfortunately the buildings were destroyed without being surveyed. Since there was no consultation nor negotiations at all not amount has been proposed. As far back as 30th day of March 2001 this Court differently constituted referred the matter to the Land Valuation Board for assistance but they wrote back saying since the buildings have been demolished the properties cannot be valued. It also added that since the existence of the village is one of the issues in dispute, a determination cannot be made by it. They also recommended that it is only the Court that can make a determination. It is doubtful if the LVB really wanted to assist.

Regrettably, the Court did not derive assistance from the experts in this field, yet it is duty bound to determine appropriate compensation. What is worse, because of the line of thinking by the plaintiffs not much assistance was offered by their lawyers regarding the compensation issues. Furthermore no evidence has been offered by the Relocation manager of the defendant-Company or any other company to serve as a guide to the Court.

Besides, I have not come across any locally decided case throughout my independent researches. May I be right to say I am dealing with a novel point. What is unique about this case is that the principles I have come across are in relation to general damages for demolition of a house and devastation of crops and as such are inapplicable. For this reasons I must confess that I have been struggling for the past weeks to arrive at something meaningful. As far as this case is concerned the legal basis of cash compensation payment or resettlement is PNDCL 153.

Inspite of my difficulties, I have managed to come out with the following guidelines. PNDCL 153 contains provisions and mechanisms for payment of fair and adequate compensation to those whose surface rights are disturbed by the operations of the holder of a mining lease. It is worthy of note that those involved in the mining industry have been confronted with the task of dealing with compensation, an issue which seriously affects mining companies relationship with community members in the area in which the companies operate. The behaviour of some communities could be repulsive to investors. The claimant or compensatee has a right of election when it comes to building compensation.

He has the option or choice to relocate or resettle. The cost of resettlement shall be borne solely by the holder of the mineral right. The World Bank usually uses the term “involuntary resettlement/relocation” and explained it as resettlement/relocation as a result of some development need other than the person being affected. This was best exemplied in the development of Lake Volta for the supply of electricity when people resident in the area were required to resettle and relocate in other areas in Ghana. Similar

patterns of movement occur around the world, often driven by project development sponsored by government and private companies. Resettlement is not a new phenomenon in the Wassa West District. Menion could be made of Atuabo, Monkey compound, Adieye, Damang and Kyekyewere resettlement projects. For convenience resettlement and relocation are defined differently by practitioners to ease the problem of distinction, but technically the two terms are the same.

Resettlement is defined as compensating persons affected by a project though the construction of new building/ structures on suitable alternate land with due regard to their economic well-being and socio cultural value. The resettlement is carried out in accordance with the relevant town planning laws.
Relocation is also used to explain for persons who have structures and have opted to be compensated by way of cash. For buildings, structures and fish farming the replacement cost method is commonly used. The valuers call it "the depreciated cost approach". The method is based on the assumption that the cost of reinstatement of similar properties tend to reflect the value of the improvements after taking account of any depreciation which might have occurred as a result of usage and obsolescence. If a settler relocates he shall receive cash compensation and a relocation allowance from the company in question. The relocation allowance includes the following components: Travelling and Transport allowance, inconvenience allowance and goodwill. If he resettles he shall be provided with a new house built by the company. The size and specifications of the houses shall be determined by both parties after exhaustive discussions. People who choose to resettle shall not receive a relocation allowance whilst the people who choose relocation shall not be resettled at the new site. During the survey they also look out for the existing building materials. A formula has been evolved in the survey. Was the building constructed with sandcrete, land crete, swish, wattle and daube, or other less material e.g bush sticks. When a landlord is to be relocated or resettled his old house will be replaced with sandcrete blocks with metal roofing irrespective of the previous building material used (emphasis mine). Other facilities to be provided are potable water, toilet facilities, electricity, schools, churches, mosques, shrines, market if applicable. Another important factor is the total number of rooms in the building. The minimum standards and guidelines for resettlement include the following: Replacing in a higher form room for room vrs: value for value. On the other hand paying cash for houses takes into account market value, replacement value and Disturbance cost.

Based on negotiations, however the number of rooms may be reduced because of the high quality used. Also Landlords with one existing surveyed kitchen room, bathroom and toilet room have these replaced with one standard kitchen, bathroom and toilet room as the case may be. The internal dimensions of these structures also vary from company to company but it does appear the standard size is 12x12 (Area for Area). In the interviews I conducted there is a huge public outcry that such rooms are not spacious. Buildings compensation will also be paid out to surveyed commercial portion of buildings surveyed as having residential and commercial use rooms provided that the landlord who owns the building opts to resettle then he/she will not receive any relocation allowance. Other provision in such arrangement is a clause for acknowledgment or undertaking. One of the clauses is that if I have chosen to resettle I bind myself to move into the new house(s)

built f or me by the company once they are ready for occupation in strict accordance with the provisions of the agreement. The landlord and his family also undertake not to erect any moveable or immoveable buildings and structures. No planting shall take place except with the prior written permission of the company. Should any such construction or planting take place it shall be done at one's risk and the company shall be entitled to demolish/destroy any such buildings, structures, crops etc without any prior notice to the occupations.

It is significant to not at this juncture that all occupants of buildings on the concessions are obliged to vacate them timeously so that the destruction/demolition can take place on the day designated by the company. The following is very important. The occupant ought to be present on the day designated by the company for their departure. If the occupant fails to make himself available on the designated date after sufficient notice the company will be entitled to remove all items in and on the building or structure and farms and demolish the buildings, structures, crops, plants, trees and farms. Once the day designated for the landlords departure has elapsed neither he nor any one else in his family will without the prior written permission of the company be entitled or allowed to enter or use any buildings, structures etc.

In this case I have found that the demolition took place without prior written notice or notice at all to the inhabitants of Nkantakrom which had been in existence before independence. The demolition also took place behind the backs of some people. Another observation is that in addition to resettlement the company may pay every landlord who has opted to resettle a flat amount.

I did not have assistance from a valuer but this is due to the fault of the defendants that being the case the principle value for value is inapplicable. In may assessment I shall apply room for room and give them cash equivalent to construct their own houses.

In this case the plaintiffs prefer cash/monetary compensation to resettlement. For the past ten years some of them are either perchers or internally displaced persons. Despite the appreciable difficulty in arriving at what is accurate, fair equitable and adequate compensation. I should not be deterred in making a reasonable award. As has been held often times in such cases the plaintiff should be restored to his former position as far as money can do so, to the position he would have occupied if the infringement had not occurred. Difficulties in assessing such compensation should not deter the making of a substantial award. Whatever figure I arrive at I am conscious of the fact that over compensation is as much a vise as under compensation. Having said that, I have decided to give the plaintiffs the following compensation package. It is a known fact that building materials have increased greatly as a result of inflation spirals. I must therefore make sure that inflation plays a key role in determining compensation rates. This is part of the process in determining level of compensation. Now the question is what amount will be adequate to provide the plaintiffs with durable housing that can withstand the impact of the constant rock blasting operations of the defendant Company? I am looking at a decent residential accommodation. I am thinking of a self contained flat i.e two bedrooms, a hall, standard toilet, kitchen and bath room with security bars. The

dimensions are as follows: - Bed 12x 12, Hall 14 x 18, Toilet 3x6. Bath room 3x 6 Kitchen 10 x 8.

Damages of any description be it special, general, exemplary, punitive or compensatory are always at large. I assess the level of compensation as follows: cash compensation of ¢130,000,000 or GH¢13,000.00 to each plaintiff and ¢20million or GH¢2,000 as relocation allowance to each of them, but I must confess that I have been unable to find any satisfactory measuring rod in so doing due to lack of authority, but following the example of 1911 English judge who said that the measure of damages "is to be dealt with in rough doing the best one can not attempting or professing to be minutely accurate… Such matters should be dealt with broadly and as best as we can as much of common sense". I have done by best.

The plaintiffs claim for an order of perpetual injunction against the defendant: since the defendant is permitted by law to operate in the concession I do not think I would be justified in halting their lawful activities. But before I am done I wish to repeat and emphasise that the company itself carried out this invasion in conjunction with the DISEC and armed security men but if my findings is wrong and it was done solely by the DISEC the defendant will still be vicariously liable for they were their agents thus both the principal and the agent are liable on the authority of Koens case cited supra.

I nearly glossed over the destruction of the church, the mosque and community school. I award ¢20million or GH¢2,000.00 to the founder of the church, and ¢20 million or GH¢2,000.00 will be sufficient to enable them reconstruct a school.

The ¢20 million or GH¢2,000.00 for the reconstruction of the school should be paid to the 1st plaintiff, Nana Kofi Karikari the founder of Nkwantakrom for and on behalf of the community.

I shall also award the plaintiffs costs ¢40,000.000.00 or GH¢4,000.00

(SGD) F.K OPOKU
HIGH COURT JUDGE

COUNSEL
MR. AUGUSTINE NIBA FOR PLAINTIFFS
MR. DZIBA FOR DEFENDANT.