**JUDICIARY**

**IN THE HIGH COURT OF MALAWI**
**PRINCIPAL REGISTRY**
**CIVIL CAUSE NUMBNER 1111 OF 2005**

**BETWEEN:**

**ALLESSANDRO NIGRISOLI AND**
**GUIDO PALMERIO ……………………………………………PLAINTIFFS**

**- AND -**

**ILLOMBA GRANITE COMPANY LIMITED…………1ST DEFENDANT**
**FAISAL HASSEN ……………...………………………2ND DEFENDANT**
**ANWAR PATEL ……………………………………...3RD DEFENDANT**

**CORAM: THE HONOURABLE MR JUSTICE J. S. MANYUNGWA**
Mr. Kalekeni Kaphale/Chipembere, of Counsel for the defendants
Mr Dengerelavyoto Katundu, of Counsel for the plaintiff
Mr Rhodani-Official Interpreter
Mrs Mauluka/Mr Chinthenga-Recording Officers.

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**J U D G E M E N T**

**Manyungwa, J**

**INTRODUCTION:**

By their Originating Summons issued on 6th April 2005 the plaintiffs Italian businessmen namely Messrs Alessandro Nigrisoli and Guido Palmerio being the 1st and 2nd Plaintiffs respectively brought this action against the defendants namely Illomba Granite Company Limited, Messrs Faisal Hassen and Anwar Patel who are 1st, 2nd and 3rd defendants respectively. The 1st defendant is a limited liability company dealing in the area of mining. The 2nd defendant is the 1st defendant's managing director and shareholder, whilst the 3rd defendant is the 1st defendants shareholder.

The plaintiff's are seeking the following reliefs and declaratory orders:-

a) That under the Memorandum of understanding (MOU) dated 15th day of February 2001 as read with two letters of intent dated the 4th day of April, 2001, the 1st defendant through the 2nd and 3rd defendants were under a legal obligation to take all the necessary steps to achieve the transfer of a Mining Licence No. ML0019/95 granted on the 16th day of June, 1995 under the Mines and Minerals Act to a joint venture company called Blue Rock Limited.
b) That the 2nd and 3rd defendants acting on behalf of the 1st defendant deliberately, fraudulently, dishonorably and/or recklessly failed to make any effort to effect transfer of the said mining licence to the said joint venture company, Blue Rock Limited.
c) That under the said Memorandum of Understanding [MOU] dated 15th February 2001 read with the 2 Letters of Intent dated 4th April 2001, the 2nd and 3rd defendants, on behalf of the 1st defendant misled the plaintiffs into believing that the defendants would effect transfer of the said mining licence when they knew all along that they would never attempt to do such a thing.
d) That based on the terms of the said Memorandum of Understanding [MOU] and letters of intent, the defendants acted in bad faith by not informing the plaintiffs the status of the mining licence while at the same time allowing the plaintiffs to make substantial investments in the joint venture company
e) That without the mining licence, the joint venture company, Blue Rock Limited cannot lawfully operate in Malawi
f) That failure to transfer the said licence has caused the plaintiffs to suffer damage and loss.
g) That there should be an enquiry as to the loss and damage suffered by the plaintiffs
h) Any further order as the court may make including order on costs.

The summons is supported by an affidavit sworn by Dengerelavyoto Anthony Katundu, of Counsel for the plaintiffs and also another one jointly sworn by Allesandro Nigrisoli and Guido Palmero the plaintiffs herein which is materially similar to the one by Mr Dengerelalvyoto Katundu. The defendants vehemently oppose the summons and there is an affidavit in opposition jointly sworn by Messrs Faisal Hassen and Anwar Patel, the defendants herein. The defendant's Counsel also cross-examined the plaintiffs, while the plaintiffs

elected not to cross – examine the defendants despite their earlier indication to do so. As a result the defendant's affidavit evidence went unchallenged.

The plaintiffs, Alessandro Nigrisoli and Guido Palmeiro of Black and Rock, Italia S.R.L Stockyard C/O CSC Area Retroportuale, Via Zaccagna, 34,54036 Marina di Carrara (MS) in their joint affidavit in support of the Originating Summons deposed as follows:- That they are Italian citizens and investors in the mining industry in Malawi. That the 1st defendant is a company of limited liability incorporated in the Republic of Malawi and is the legal holder of a Mining Licence Number ML0019/95 issued under the Mines and Minerals Act, 1981. The plaintiffs exhibited exhibit ***"SC1"*** which is a copy of the said Mining Licence dated 28th June 1995. The said Licence was in the following terms:-

**MINES AND MINERALS ACT, 1981**
**(CAP 61:01)**
**MINING LICENCE NO. ML0019/95**

**THIS LICENCE** is renewed this 28th day of June 1995 by the Government of Malawi acting through the Minister of Energy and Mining (herein after referred to as ***"the grantor")*** to Illomba Granite Company Limited (herein after referred to as ***'the licencee"***) a limited company registered in Malawi under the Companies Act (Cap 39:01) and approved by the Minister as having its registered address at P.O. Box 1226, Blantyre, Malawi.

| | |
|---|---|
| Term Mineral Area | 1. This licence grants to the licencee area and the exclusive right to mine and process SODALITE for a term of twenty-five years commencing 28-06-1995 with an option to renew for further twenty-five years periods in the area delineated in red on the plan attached as Appendix A to this licence which area is herein after referred to as "the licenced areas" |
| Annual Charge Loyalty | 2(1)The licencee shall pay to the Government of Malawi on 28-06-1995 and thereafter annually on that date until termination of the licence the charge prescribed under regulation 8(1) (c) of the Mines and Minerals (Mineral Rights) Regulations 1981(or under any law amending or replacing the same) which charge shall be calculated on the basis of the licenced area. |

(2) The licencee shall also pay the Government in accordance with the Mines and Minerals (Royalty) Regulations 1981 and royalty payable there under or under any amendment or Regulation replacing the same.

Programme of operations

3. The licencee shall before commencing mining operations under this licence and three months before the end of each year of operation under this licence submit to the Minister for his approval a statement of the programme of operations for the ensuing year and a forecast of the amount to be expended on those operations in that year.

Employment and training of Malawi citizens

4(2) The licencee shall use its endeavours to employ and train citizens of Malawi and for the operations of the licencee and for the management of such operations.

(2) The licencee shall be permitted to employ non-citizen in a post only if the skills required in that post are not obtained by recruitment of a Malawian citizen, and the licencee may at any time be called upon by the Commissioner for Mines and Minerals to give satisfactory reasons for the continued employment of a non-citizen in any post.

Purchase of Local goods

5. The licencee:

(a) Shall use and purchase goods and services supplied and produced or manufactured in Malawi wherever they can be obtained at competitive terms and are in substantive respects of quality comparable with those available from outside Malawi.

(b) Shall make maximum us of local sub-contractors where service of comparable standards with those obtained elsewhere are available from them at competitive prices and competitive terms.

Further covenants by licencee

6. The licencee convenants with the grantor are as follows:-

(a) To comply with all obligations imposed under or by virtue of any Act of Parliament for the time being in force and in particular but without prejudice to the generality of this sub-clause to comply with all obligations imposed under or by virtue of the Mines

and Minerals Act or any Act amending or replacing it.

(b) to take all measures necessary for the conservation and protection of the environment.

(c) to make a spoil bank or spoil banks on the licensed area at or places approved by the Commissioner for Mines and Minerals.

(d) to reinstate the surface of the licenced area which has been mined progressively, as and when it is exhausted of minerals

(e) to plant trees so as to replace those which have been felled.

(f) to abide by such directives of the Commissioner for Mines and Minerals as he may issue in relation to the matters mentioned in paragraphs (b) to (e) inclusive and in relation to the safety and maintenance of plant and equipment;

(g) at the end or sooner termination of this licence

i. To remove all plant, machinery and buildings from the licenced area, restoring the area to its original state; and
ii. To make safe by filling-in, sealing or fencing off all dangerous excavations
iii. To keep the grantor indemnified against all actions, claims and demands which may be brought or made against it by reasons of any thing done by the licencee, its servants, agents or contractors in the exercise or purported exercise of the rights granted under this licence.

Submissions of reports to Chief Mining Engineer

7(i) The licencee shall render to the Chief Mining Engineer within 10 days of the end of each month a return showing the quantity of ore produced during that month and the quantity of ore sold and its value.

(ii) The licencee shall render monthly labour and

wages returns to the Chief Mining Engineer within 10 days of the end of each month.

Cancellation — (8) Nothing in section 57 of the Mines and Minerals Act shall affect any power exercisable by the Minister under any other law to cancel this licence.

Appendices — Appendix A and B to this licence are an integral part of it.

Dated this 28th day of June, 1995

Signed
R. Patel, MP
**MINISTER OF ENERGY AND MINING**

APPENDIX

(clause 1)
**LICENCED AREA**

Area Corner points are described by the grid reference systems of the 1:50,000 National Topographical series maps of Kameme
Sheet number 1434 D1 and Part of C2 corner

| | |
|---|---|
| A | 217483 |
| B | 202470 |
| C | 190490 |
| D | 200496 |

Total Area 3.4
The sketch of the licenced area is attached as outlined and coloured red on appendix B.

The plaintiffs further deponed that the 2nd defendant is the 1st defendant's Managing Director and signatory to the agreements referred to in their affidavit, and that the 3rd defendant is a 50% shareholder in the 1st defendant company and signatory to the said agreements. The plaintiffs further state that on 15th February, 2001 the plaintiffs and the 1st defendant executed a Memorandum of Understanding hereinafter referred to as MOU. The said MOU was executed by the two plaintiffs on their own behalf and by the 2nd and 3rd defendants on behalf of the 1st defendant. The plaintiffs exhibited exhibit ***"SC2"*** which is a copy of the said MOU dated 15th February, 2001. The said MOU was couched in the following terms:

**BLOCK & ROCK**
**CARRARA 15TH FEBRUARY, 2001**
**MEMORANDUM OF UNDERSTANDING**

**BETWEEN ALESSANDRO NIGRISOLI-GUIDO PALMERIO (HEREINAFTER ALSO CALLED ALESSANDRO & GUIDO) AND**

**ILLOMBA GRANITE COMPNAY LIMITED (HEREINAFTER ALSO CALLED "IGC") A COMPANY INCORPORATED IN THE REPUBLIC OF MALAWI)**
**WE AGREE AS FOLLOWS:**
**WHEREAS**

IGC is the beneficial owner of a Mining Licence No. ML0019/95 granted on June 16, 1995 under the Mines and Minerals Act, (Cap 61:01 of the Laws of Malawi) which gives the Licence Holder the right to mine and process the Mineral "**SODALITE"** over the area described therein in the Chitipa District, in the Republic of Malawi and comprising of 3.42 square kilometers of land, copy of the land licence is available for perusal on request from IGC:

1) Alessandro Nigrisoli-Guido Palmerio and Illomba Granite Co. will enter into a joint venture to mine and procure blocks of granite-sodalite from Illomba Hill.
2) The joint venture company will enjoy for the duration of the licence held by Illomba Granite Co. the rights to extract and buy all/any blocks they deem marketable.
3) The shareholding structure of the joint venture company will be on an equal footing (50% to be owned by each party)
4) The Financial consideration to acquire the shareholding will be US$21,000=00 from either party, including the provision of a quarry master by Alessandro and Guido for a period of 4 months.
5) The plant and equipment contribution, on loan and at no cost to the joint venture will be as follows:

   Alessandro Nigrisoli and Guido Palmerio will provide one excavator, one diamond wire machine, one diamond wire, one driller.
   Illomba Granite Co will provide: one bulldozer, one compressor, ancillary equipment for the compressor, and the use of blasting powder
6) The joint venture will pay to Illomba Granite Co. a royalty of US$200 for each cm extracted and exported from the quarry.
7) The joint venture will give exclusive marketing rights to the trading company whose shareholding structure will be DITTO to that in the Malawi Joint Venture.
8) The trading company will pay to the join venture a rate of US$500 FOB Dar-es-Salaam, for each cm of material selected and imported from the Illomba Hill quarry.
9) Illomba Granite Co. will oversee and administer the operations of the joint venture for a fee equivalent to 10% of its monthly sales turnover.

10) The trading company will pay for the purchase of all blocks within a ninety day period from the date of the shipmen of the blocks from the quarry.

11) To facilitate the costs of transportation of all blocks shipped within the initial four month period, Alessandro Nigrisoli and Guido Palmerio undertake to take care of the costs of the ocean freight of all blocks shipped to the trading company, full costs of which will be recovered from the proceeds from the eventual sale of the blocks.

12) The trading company will pay to Block an amount equal to 10% of the realized sales value of all blocks for services rendered towards marketing costs and technical and other support to both the trading company as well as the Malawi JV

13) An Additional fee equal to 2% of realized Block sales will become due to the broker responsible for the administration of the trading company.

14) The name and Administrative structure of the trading company will be put into place jointly by IGC and Allessandro and Guido as unanimously agreed by both parties.

15) The disbursement of any revenues earned by the trading company will be as per instruction issued by each party from time to time.

16) The trading company will be incorporated by not later than end July 2001 subject to the viability of the quarry.

17) Any/All material deemed by Alessandro and Guido as being not suitable for marketing in the dimension stone industry will remain the exclusive property of IGC to do with it as it pleases.

18) For the Malawi Joint Venture Malawi Law will apply.

19) For the Trading Company, the Law of the country in which it is incorporated will apply.

In witness whereof Alessandro and Guido and the authorized representatives of IGC have hereunto set their hands the day and the year first above written.

Signed by: signed_______
Alessandro Nigrisoli

Signed by: Signed
Guido Palmerio

Signed by: Signed
Anwar Patel (for and on behalf of IGC)

Signed by: Signed
Faisal K. Hassan (for and on behalf of IGC)

The plaintiffs further depose that on 4th day of April 2001, they executed two Letters of Intent together with the defendants. The first letter of intent, exhibit SC 3(a) read as follows:-

**LETTER OF INTENT**
**JOINT VENTURE AGREEMENT**
**BETWEEN**
**ILLOMBA GRANITE CO. LTD**
**AND**
**M/S ALLESSANDRO NIGRISOLI & GUIDO PALMERIO**

The letter of intent is made this 04th day of April, Two Thousand and one between Illomba Granite Company Limited, a company incorporated in the Republic of Malawi of P.O. Box 1226, Blantyre (hereinafter called **IGC"**) of the first part, and M/S Allesandro Nigrisoli &, Guido Palmerio, individuals ordinarily resident in Carrara, Italy, of Via Antica, Massa 38, 64031 AVenza (MS), (hereinafter called **"A&,G"**) of the second part.

**WHEREAS:**

a) IGC is the beneficial owner of mining licence no ML0019/95 granted on June 16, 1995 under the Mines and Minerals Act (Cap. 61:01 of the Laws of Malawi) which gives the licence holder the right to mine and process the mineral **"SODALITE"** over the area described therein (herein after called the "Licenced area") in the Chitipa district in the said Republic and comprising of 3.42 square kilometers of land. Copy of the said licence is attached hereto, and forms part of this letter of Intent, and IGC confirms that it has no impediment to transfer use of the Mining Licence.
b) A & G has represented to IGC that it is, among other things, in the business of marketing various products in the dimension stone sector and has further represented to IGC that it has, in place the expertise and marketing machinery to carry out the object of this agreement.
c) Limited assessment work, on the presence of the mineral **SODALITE "**has been carried out on certain areas of the licenced area. All reports and data relating thereto have been made available to A & G for their unrestricted perusal. There is the need to establish further the accuracy of the data contained in the various reports. As a direct result thereof, the joint collaboration will be structured in two tiers, as follows:

i. Upon successful completion of (i) above the adoption of a longer term joint collaboration running for the duration of the validity of the Mining Licence. In view of the fact that A & G are the technical partners to this agreement, A & G will have the right to exercise the option to form the relationship described in (ii) above, within a period of three months from the completion of the trial period. This decision however, will be based purely on the conditions relative to the quantity/quality of the material. In the event that other factors come into play, which drastically alter the scope of this agreement, then the decision not to advance to stage (ii) of the agreement must be reached jointly by the parties i.e. A &, G and IGC. IGC will further make an irrevocable undertaking that it will grant A &, G the exclusive rights as described above, to advance to state (ii) of our joint venture relationship.

**<u>NOW IT IS HEREBY AGREED</u>** AS FOLLOWS:-

1. A &, G and IGC will jointly incorporate a Joint-Venture company (Initially and immediately, a joint-venture company will be registered) whose role it will be to quarry and procure blocks of blue sodalite syenite blocks from Illomba Hill and deliver the same to the sea Port of Dar-Es-Salaam. As mutually agreed between both parties, the joint venture vessel will be called **<u>"BLUE ROCK"</u>** (hereinafter to be called BR)
2. A & G and IGC will each hold equal shares in BR, in consideration of which A & G and IGC will each make the following financial and capital equipment contributions:-

   i. A &, G and IGC will each make a financial contribution, equivalent to US$21,000 towards the initial working capital requirements of BR. The disbursement of these financial contributions will be staggered over a period to be mutually agreed upon by both parties but certainly falling within a period not exceeding 90(ninety) calendar days from the arrival of the quarry master in Malawi and hence commencement of the quarry operations. In addition, and in the interest of operating the quarry at the highest possible levels, A &, G will provide to BR a quarry master of their choice, for a period of no less than four calendar months, at no cost to BR, for the 'trial period'. A &, G further guarantees continued full support in the technical aspects surrounding the operations of BR and the

marketing aspects in the forward integrated company, with a spin-off benefit for IGC (10% of added revenues)

ii. A &, G will provide on loan, at no cost and time restriction, the following equipment
   - One No. CAT 325 ME excavator
   - One No. Marini-self-powowedered diamond-wire saw machine
   - One No. complete diamond wire
   - One No. drilling equipment for feeding the diamond wire through rock, IGC will provide on loan, at no cost and time restriction to BR, the following equipment
   - One No. CAT D7G Bulldozer
   - One No. XA125Dd Atlas Copco portable air compressor,
   - All ancillary equipment presently on site (hand drills, directional/drill-steels, hammers, air blasting powder, detonators, etc.

3. IGC will grant BR exclusive rights to quarry and procure any/all blocks that BR deems suitable for marketing in the dimension stone sector (blocks). Any/all material that falls below the minimum block size, will remain the exclusive property of IGC, to do with it as it pleases. Therefore, any revenues that may be earned from the disposal of any such material will remain exclusively for IGC
4. BR will pay to IGC a fee of US$200 for each cubic metre extracted and exported from the quarry.
5. A &, G will in turn pay to BR US$500 F.O.B. Dar-es-Salaam, for each cubic metre of sodalite imported from the quarry. However, should the administration and operating costs of BR exceed US$500/m, then the price payable for each cubic metre will be subject to review. This however will not exceed 20% of the current price.
6. A &, G will pay for the purchase of all blocks within a ninety day period from the date of delivery of the blocks to Dar-Es-Salaam.
7. A &, G, to facilitate the transportation of all blocks shipped within the initial four month period undertakes to take care of the ocean freight costs of all blocks shipped from Dar-Es-Salaam. The full costs of this cash expenditure will be recovered from the proceeds of the eventual sale of blocks to A & G.
8. BR will grant A &, G exclusive marketing rights for all sodalitte syenite blocks produced and selected from the Illomba Hill quarry.
9. IGC will oversee and administer the operations of BR for a fee equivalent to 10% of its sales turnover.

10. It is envisaged that the material initially, will be sold at U$1,800 per cubic metre. If the size of the blocks and the quality of material improves, it is certain that a better sale price will eventually be realized. In this case, A & G undertakes to enter an added-revenue sharing arrangement with IGC whereby A & G agrees to pay to IGC an amount equal to 10% of the added revenues for any material sold above the provisional US$1,800/m³ mark. Records of sale will be available, upon request, should the need arise to examine the same.
11. The construction, validity and performance of this agreement shall be governed, in all respects, by Malawi Law. The construction of this agreement, and any that might follow later, will be prepared by Malawian legal Counsel and the costs relating thereto will be shared equally by IGC and A & G

**IN WITNESS WHEREOF** the authorized representatives of A & G and IGC have hereunto set their hands the day and year first above written
SIGNED BY ____________(not signed)______________________
Alessandro Nigrisoli (A & G)

SIGNED BY _____________(not signed_________________________
Guido Palmerio (A & G
WITNESSED BY ____________(not signed)___________________

SIGNED BY ______________Signed ________________________
Faisal K Hassan (IGC)
SIGNED BY _______________Signed_____________________
Anwar Patel (IGC)
WITNESSED BY ___________Signed_______________________

The second letter of Intent, exhibit ***"SC 3(b)"*** was in the following terms:-

**JOINT VENTURE AGREEMENT**
**Between**
**Illomba Granite Company Limited**
**And**
M/S Alessandro Nigrisoli & Guido Palmerio.

This Letter of Intent is made this 04th day of April two thousand and one, between Illomba Granite Company Limited, a company incorporated in the Republic of Malawi of P.O. Box 226, Blantyre (hereinafter called IGC) of the first part, and M/S Alessandro Nigrisoli and Guido Palmerio, individuals

ordinarily resident in Carrara, Itally, of via Antica, Massa 38, 64031 Avenza (MS) (hereinafter called “A & G”) of the second part.

**WHEREAS:**

a) IGC under the umbrella of a Joint Venture Agreement, has granted the rights to Blue Rock (BR) to produce and sell the mineral Blue sodalite syenite from its Illomba Hill quarry.
b) The joint venture company in Malawi (BR) is jointly owned by IGC (50%) and A & G ( 50%)
c) The Malawi Joint venture (BR) will sell the sodalite blocks exclusively to an offshore trading company (hereinafter called “**Offco”)**
d) BR will pay a royalty to IGC for every block exported form its quarry.

**NOW IT I HEREBY AGREED** as follows:-

1. A & G and IGC will jointly incorporate a joint venture company whose role it will be to procure all sodalite blocks produced by BR ‘exclusively’ and to take care of the forward marketing of the blocks
2. A & G and IGC will each hold equal shares in the off-shore joint venture company hereinafter called **“Offco”)**.
3. Offco will pay to A & G an amount equal to 10% (ten) of the realized sales value of all blocks for services rendered towards marketing costs and technical and other support to both Offco as well as BR. This includes travel costs and incidentals when carrying out block selection, etc.
4. Offco will pay an amount equal to 2% (two) of the realized block sales to the broker responsible for the administration of its affairs, inclusive of any minimum tax liabilities.
5. The disbursement of the profits generated by Offco will be made in accordance with instructions received from IGC and A & G, from time to time. As it stands now, IGC, will have a standing instruction to receive 20% (twenty) of its share of the profits paid to its account in Malawi, under the guise of a “commission on improved sale prices”.
6. The country of incorporation of Offco has not been decided upon at this stage.
7. In any event, the law of that land will apply to this agreement in its entirety

**IN WITNESS WHEREOF** the authorized representatives of A & G and IGC have hereunto set their hands the day and year first above written

Signed ______________not signed_______________

Alesandro Nigrisoli (A & G)

Signed _________not signed _______________
Guido Palmerio (A & G)

Witnessed by _________not signed______________

Signed by ______Signed_________________
Faisal K. Hassan (IGC)

Signed by _______Signed _________________
Anwar Patel (IGC)

Witnessed by _________Signed_______________

The plaintiffs contend that the 1st defendant has not transferred the exclusive rights in the mining licence to the joint venture company despite executing a clear undertaking to do so. And further that the 2nd and 3rd defendants, acting as agents of the 1st defendant, have not taken any actions to transfer exclusive rights in the mining licence to the joint venture company despite their clear representations to the plaintiffs that they would do so. The plaintiffs therefore contend that without the mining licence or rights to the use thereof, the joint venture company can not lawfully conduct mining operations in Malawi and that the joint venture effectively becomes of no effect.

The plaintiffs further contend that the 2nd and 3rd defendants deliberately misled the plaintiffs into thinking that the mining licence would be transferred to the joint venture company thereby causing the plaintiffs to make substantial investments into a project that was a sham from the outset. Further, the plaintiffs contend that the 2nd and 3rd defendants have never at any point informed the plaintiffs of the non-transfer of the mining licence to the joint venture company. Throughout their dealings from 2001 todate, the 2nd and 3rd defendants have deliberately and/or recklessly, through their acts or omissions caused the plaintiffs, who are foreign nationals to believe that the transfer of the mining licence was effected when such has never been the case. The plaintiffs go on to depone that the 2nd and 3rd defendants, being the parties who actually negotiated and executed the MOU and the Letters of Intent, should have honestly and openly informed the plaintiffs of the status of the mining licence which was clearly an intergral pat of the entire business venture, but the 2nd and

3rd defendants acting in bad faith, opted to keep the plaintiffs in the dark as to the status of the said licence.

The plaintiffs further contend that trusting that the defendants were acting in good faith and that the mining licence would be transferred to the joint venture company, the plaintiffs made substantial investments in the joint venture business. Thus the defendant's breach of their undertaking jointly and severally and their acts of bad faith have caused the plaintiffs to suffer substantial losses, which losses include lost profits that the plaintiffs would have earned if the mining venture were to continue for the duration of the mining licence, and loss of business reputation of the international market. Further, that being substantive in nature and requiring expert evidence on some aspects such as the life span of the quarry, it is the plaintiffs prayer for an order that there be an inquiry as to the qantum of damages. The plaintiffs therefore prayed that the declaratory orders and reliefs be granted.

The defendants oppose the plaintiffs' Originating summons. In their affidavit in opposition, Messrs Faisal Hassen and Anwar Patel, both of care of Box 1226 Blantyre deposed that they are both shareholders and directors in the first defenant company and contend that it had never been the intention of the parties, certainly not the defendants, to transfer the mining licence held by the 1st defendant exhibited in the plaintiffs' affidavit as exhibit "SC1" at any time either before or during the course of the defendant's relationship with the plaintiffs. The defendants exhibited exhibit HP 1, which is a copy of a letter dated 10th August, 2000 from the plaintiff's addressed to the defendants as evidence that the two parties exchanged various correspondence as they were attempting to negotiate the terms of their relationship. The said letter read.

Block 2 Lock
Carrara 10/08/00

To: Illomba Granite Co. Ltd
From: Guido Palmeiro/Alessandro Nigrisoli
Att: Mr Faisal K Hassan

Re: **MALAWI BLUE SODALITE**

-
Dear Faisal

Following your latest fax dated August 4th, please find hereunder our comments: we confirm our proposal to establish a commercial partnership with

equal shares for block dealing 50% on your behalf and 50% on our behalf, which in our opinion represents the best contribution can be offered you and has to be deeply considered and kept strictly confidential as you stated in your a.m. fax. Regarding the final requirements for the trial period, we are ready to transfer you US$50,000 as loan without security; US$25,000 at contract stipulation and commencement of the quarry operations and US$25,000 after 45 days. Illomba commits itself to selling us $50m^3$.
We hope that this solution will finally allow us to undertake the trial period with positive results
Yours faithfully,

Signed
Alessandro Nigrisoli/Guido Palmerio.

The deponets further deposed that on 17th August 2000, they replied to exhibit HP1, in their fax exhibited as HP2. The said letter in part read as follows:-

To: Allessandro Nigrisoli/Guido Palmerio
BLOCK & ROCK/MARIANI GRANITI
From: Faisal K Hassan
ILLOMBA GRANITE CO. LTD
Date: August 17, 2000

**MALAWI BLUE SODALITE**

Thank you for your fax of August 10, containing the confirmation, albeit one of the structure you believe to be the optimum one to be adopted as the instrument that will govern our eventual working relationship.
…
As a prequisite to the now seemingly protracted negotiations that appear to be leading us both into deeper misunderstandings as to where it is we both want to go, I am taking the liberty of summarizing herein what we consider to be both a meaningful and fair proposition for both our companies-
1 The object must be to provide a platform for a mutually rewarding "win-win" position into the future, with total good intentions on the one hand, and total transparency from each end or the other hand;

4 As you appreciated, Illomba is the rightful owner of the Mining Licence over the Blue sodalite syenite occurrence at Illomba Hill.

> Therefore, Illomba will be responsible for paying ground rent, royalties, etc to the relevant Government authorities. In additions there are regulations in place that may restrict Illomba from sub-letting the use of the land to another company-Illomba will have to appear to be the company working the deposits at Illomba. As in the agreement, we had structured with GEMS, Illomba will have to receive some form of payment (royalty?) for every cubic metre of sodalite extracted and shipped from its mining claim. This will, in effect, provide some form of monthly revenues for our country, generated from the activities taking place at the quarry.
> …
> We have given this matter its due consideration and whilst attempting to formulate a working relationship with your company that will create a "win-win" situation for our respective companies, we would also like to meet the objectives and regulations of our country.
> …
> I now ask you to give this matter its due consideration and let me have your thoughts on the foregoing passages
> Kind regards
> Signed
> Faisal K Hassan
> Managing Director.

Further, the 2nd and 3rd defendants depone that in response to exhibit "HP2", the plaintiffs faxed the defendants, exhibit "HP3" dated 05-09-2000, which in part read:

CARRARA,

05/09/2000

Page 1 of 1

TO: Illomba Co. Ltd
From: Guido Palmeiro/Alessandro Nigrisoli
ATT: Mr Faisal K. Hassen

Re: **MALAWI BLUE SODALAITE**

Dear Faisal,

Thank you for your fax transmission dated 17th August, excuse us for the delay in answering you, we only yesterday came back to our office after the summer

vacation. The contents of your letter have been accurately analyzed and we refer hereunder our comments.

…

The summary you have reported on items 1 through 10 well explain our intention of co-operation to reach the agreement.

…

Hoping you can reconsider all the situation in the way that we can begin the operations without wasting more time and money.

Faithfully yours

Signed

Allessandro Nigrisoli/Guido Palmeiro.

The 2nd and 3rd defendants therefore contend that the plaintiffs did not object to the proposal that the 1st defendant would keep the Mining Licence during the duration of the two parties' relationship. The deponets further exhibited exhibit 'HP4' which is a copy of a fax sent by the 1st defendant to the plaintiffs dated 1st December, 2000. The said fax dispatch read in part, as follows:-

To: Guido Palmeiro/Alessandro Nigrisoli
BLOCK & ROCK

From: Faisal Hassen
ILLOMBA GRANITE CO. LTD

Date: December, 01, 2000

**MALAWI BLUE SODALITE**

Thank you for your fax transcript of November 22, 2000 pertaining to the Blue Sodalite Syenite from our mineral concession in Malawi.

…

As iterated to you before, although it is natural for me to want the best deal for my company alone, I would like to see us achieving a working agreement where both our companies stand to win from our relationship. Unfortunately what you propose will clearly not allow the development of such a situation and our company is inclined against accepting your proposals as they stand now.

Having given the matter considerable thought and having carefully weighed the situation, the following proposals are the optimum manner in which we see our company becoming linked to yours in a working relationship.

1. We propose that two Joint Venture vessels be established. One to produce the material at quarry level (local J/V) and the other the market the material in Europe (Offshore J/V). Illomba and Block & Rock are to

hold 50% of the equity of each company. Illomba's structure will remain intact, and we have no intention of relinquishing any portion of our stockholding. I should believe this should be the case with Block and Rock/Mariani.

Because we intend to carry out an initial 4 month test-mining programme, perhaps we can start by establishing the local J/V only with an option to immediately adopt a longer term relationship. There after upon the last exercise producing positive data, we can proceed to establish the offshore J/V. Obviously, this decision will lie entirely with Block & Rock/Mariani. Upon the establishment of the longer term, Exclusivity Agreement, the offshore J/V will buy all the sodalite blocks from the local J/V at a price of US$1000 per $m^3$, F.O.B. Dar-Es-Salaam. The local J/V will pay to Illomba a fixed value of US$500 for each cubic metre of sodalite syenite extracted and exported from its mineral concession. Illomba, being the rightful owner of the lease, will take care of all the ground rent and other fees. The local J/V, being the producing and exporting company, will be responsible for taking care of the production costs, as well as paying the Mineral Royalties and the freight charges up to Dar-Es-Salaam.

…

Once again, I reiterate our proposals are not intended to appear to favour our company but rather to achieve a "win-win situation for our respective companies.

Looking forward to hearing from you at your earliest convenience, I remain, with kind regards.
Signed
Faisal K Hassen
Managing Director.

The 2nd and 3rd defendants therefore contend in their affidavit that prior to the entry into agreements referred to in exhibits "SC2", "SC3(a)" and "SC3(b)" in Mr Katundu's affidavit, there was an undertaking if not an agreement, by all the parties concerned that 1st defendant would not transfer its Mining Licence to the plaintiffs or to the Joint Venture Company which was subsequently named Blue Rock Limited. The defendants further state that they are aware that under the Mining and Minerals Rights Act, a holder of a Mining Licence or Mineral Right can exploit the licence or Mineral Right by himself or using employees or agents. The said employees or agents do not have to hold a licence in order for them to do the work, but that they would be using the holders licence, and that

in such a scenario, the agent or employee would be exploiting the mineral with the leave of the licence holder and further that actually, the agent can have use of the licence by exploiting the Minerals at a fee or commission, to be paid to the licence holder. The deponets further state that they are aware that a "Royalty" is a fee that one pays for the use of a right or a licence that is held by another person.

The defendants confirmed that exhibit 'SC2' in the affidavit of Mr Katundu was the agreement that the 1st defendant entered into with the plaintiffs which set out the broad parameters to govern their relationship, and that the said exhibit "SC2" was a result of negotiations that lasted over a year. The defendants however refuted that it is not true that in exhibit "SC2" the 1st defendant expressed any intention to transfer its mining licence to the Joint Venture Company, neither could one garner from the said exhibit "SC2" an intention by the 1st defendant to transfer its Mining Licence to the plaintiffs or to the Joint Venture Company. The defendants further argue, that actually exhibit "SC2" confirms that the 1st defendants never intended to transfer the Mining Licence to the plaintiffs i.e. in the citation part of the said exhibit, the 1st defendant is identified as the "holder of the Mining Licence", whilst in clause 1 of the same exhibit, it is stated that the plaintiffs and the 1st defendant will enter into a joint venture to mine and procure blocks of granite sodalite from Illomba Hill. Further, the defendants contend that in paragraph 2 of exhibit SC2", it is stated:

> "The Joint Venture Company will enjoy for the duration of the Licence held by Illomba Granite Company, the rights to extract and buy all/any blocks they deem marketable".

In paragraph 6 of the same exhibit, it is stated:

> "The Joint Venture will pay Illomba Granite Company a royalty of US$200 for each cm extracted and exported from the quarry".

In paragraph 9, it is stated:

> "Illomba Granite Company will oversee and administer the operations of the Joint Venture for a fee equivalent to 10% of its monthly sales turn over".

And in paragraph 17 of exhibit “SC2” it is stated:

> “Any/all material, deemed by Alessandro and Guido as being not suitable for marketing in the diamension stone industry, will remain the exclusive property of IGC, to do with it as it pleases”.

Thus, the defendants contend that the recital to exhibit “SC2” as read with paragraph 2 thereof, clearly show that the parties intended the licence to remain vested in the 1st defendant for the whole period of the duration of the licence. Further, the defendants contended that the payment of the royalty envisioned in paragraph 6 of exhibit “SC2” by the joint venture company to Illomba is a clear recognition of the fact that Illomba, the 1st defendant, would remain the holder of the licence and that the Joint Venture Company would only have use thereof would be exploiting the 1st defendant’s rights under the licence, the consideration for which use or exploitation would be the “royalty’

The defendants further contend that in exhibit “SC3 (a)” which is the 1st Letter of Intent dated 4th day of April, 2001, it is repeated in the recital that the 1st defendant is the beneficial owner of the mining licence and confirmed that “it had no impediment to transfer use of the Mining Licence.” The defendants therefore state that by making the foregoing statement the 1st defendant was merely indicating absence of any hindrance on their part or impediment for them to transfer use of the mining licence and that the defendants did not indicate that it would transfer the actual mining licence. Further, the defendants contend that when read together with exhibit “SC2”, in which the 1st defendant undertook to allow the joint venture company to work on the mine whose licence was held by the 1st defendant, and pay in consideration thereof a specified royalty. This, the defendants depose would be “use” by the joint venture company of the 1st defendant’s mining licence. Further, the defendants contend that clauses 1 and 3 of exhibit “SC3 (a)” demonstrate that by the plaintiffs and the defendants incorporating a joint venture company which would have the right to quarry and procure rocks for sale in its own right, the joint venture company would, by doing so, be “using the 1st defendant’s licence. Furthermore, the defendants contend that a closer reading of paragraphs 3 and 4 of exhibit “SC3 (a)” confirms that the 1st defendant would retain its licence but would merely be paid for its use, a particular sum, as is evident by paragraph 4 of exhibit “SC3 (a)”

> “BR will pay IGC a fee of US$200for each cubic metre extracted and exported from the quarry.”

The defendants further state that according to the recital of exhibit "SC3(a)" the two parties' relationship was to be structured in two phases (1) being the establishment of a commercial collaboration between the two companies for trading and trial mining purposes which was to run for a limited period not exceeding 4 months from the date of the arrival of the quarry master and (2) upon successful completion of (1) above the adoption of a longer term joint collaboration running for the duration of the validity of the Mining Licence. The defendants therefore contend that from the foregoing, it is clear that after the lapse of the initial four months trial period i.e from the date of the arrival of the Quarry Master, the plaintiffs would within a period of 3 months, be granted the exclusive rights to advance to the state where the parties would adopt a longer term joint collaboration, running for the duration of the validity of the Mining Licence. The defendants therefore contend that nothing in the recital to exhibit "SC 3(a)" indicates an intention by the 1st defendant to transfer the Mining Licence to the Joint Venture Company. It was only after the 4 months trial period, that the parties would have had the right to adopt a longer term joint collaboration relationship. The plaintiff never exercised their exclusive right to establish a longer term joint collaboration relationship with the 1st defendant within the said 3 months, neither did they propose any terms for the said joint collaboration and so the expression of the intention by the 1st defendant to grant the plaintiffs the right to a longer term joint collaboration was not utilized by the plaintiffs or by the Joint Venture Company. In otherwords the defendants contend that it was merely an agreement to agree. In any case, the tying up of the long term joint collaboration in relationship to the duration of the quarrying licence indicates, the fact that the Mining Licence would remain that of the 1st defendant.

As regards, exhibit "SC3 (b)" the defendants contend that it does not in any way show any intention on the part of the 1st defendant to transfer the mining licence to the plaintiffs or to Blue Rock Ltd, but that on the contrary it indicates that Blue Rock would be allowed 'use' of the Mining Licence for a fee and that the licence would remain with the 1st defendant. The defendants actually argue that the payment of royalty by Blue Rock to the 1st defendant, signifies the fact that the 1st defendant would own the Mining Licence.

The defendants therefore deponed that even after the execution of exhibits "SC2", "SC3(a)" and "SC3(b)", the 1st defendant has never undertaken to transfer its mining licence to anybody or to Blue Rock Limited for that matter. Further, the defendants contend that throughout the operation of the mine by Blue Rock Limited, the correspondence exchanged by the parties never led to

any agreement to transfer the mining licence nor did the defendants ever lead or mislead Blue Rock Limited or the plaintiffs to believe that the 1st defendants Mining Licence would be transferred. The defendants exhibited exhibit "HP5", which is a copy of an e-mail dated 28th February 2003 from the 1st defendant to Block & Rock, a company owned by the plaintiffs under note (c), the 1st defendant wrote:

> "Royalties payable to IGC need to be addressed urgently (Reserve Bank and Malawi Exchange Regulators) have queried this when we submitted our agreement for registration of your investment"

The defendants further state that the 1st defendant reiterated to the plaintiffs its position on the issue of the Mining Licence in an e-mail sent on 10th May, 2004, which is exhibit "HP7" in paragraph 2 the defendants wrote;

> "As you are aware, IGC are the holders of the Mining/Mineral rights and as such any/all activities by BR have to be fully sanctioned and accepted by IGC as required by law to fully control and be fully accountable for all activities and developments at the quarry."

Further, the defendants state that in their e - mail dated 10th May, 2004, addressed to the 1st defendant, which was a reply to exhibit "HP7", the plaintiffs did not dispute the 1st defendant's position as regards the Mining Licence, as stipulated in paragraph 2 of exhibit "HP7". The defendants further contend that even as late as the 7th of February, 2005 it was not expected or envisioned by the plaintiffs or the 1st defendant that the 1st defendant would transfer the Mining Licence, as is evident from exhibit "HP10" which is a copy of an e-mail message dated 7th February, 2005 from the plaintiffs addressed to the 1st defendant in which the plaintiffs confirmed the discussion that took place at a meeting held by the 1st defendant with the plaintiff's lawyer and the plaintiffs in which the centre of discussion was the issue of "Fixed Royalty" to be paid by the Joint Venture Company to the 1st defendant. The defendants therefore argue in their affidavit that the discussion of Royalties could only have been in recognition of the 1st defendant's right to hold the Mining Licence.

The defendants therefore dispute the allegations in Mr Katundu's affidavit, and that of the plaintiffs as follows:-

a) The 1st defendant ever undertook or promised the plaintiffs or Blue Rock Limited that it would transfer the Mining Licence to Blue Rock Limited.
b) That the 1st defendant would take all necessary steps to achieve the transfer of the Mining Licence.
c) That the defendants recklessly, fraudulently or dishonestly failed and/or recklessly failed to make any effort to transfer the Mining Licence.
d) That the 2nd and 3rd defendants misled the plaintiff that they would effect the transfer of the Mining Licence. As a matter of fact the 1st defendants through the 2nd and 3rd defendants made it very clear before the execution of exhibits "SC2", "SC3(a)", and "SC3(b)" and even thereafter that the 1st defendant had no intention to transfer the Mining Licence.
e) That the defendant acted in bad faith in not informing the plaintiffs the status of the Mining Licence while at the same time allowing the plaintiffs to make substantial investments. The defendants contend that provided that Blue Rock had all the rights to use the licence, there was no need to inform anybody on the issue of the status of the Mining Licence as there never was any agreement to transfer the Mining Licence. The defendants further contend that both the plaintiffs and the defendants invested in the mine via the Joint Venture Company, and each shareholder in Blue rock invested in it with the aim of profiting from it within the parameters of the Joint Venture agreement. In fact, Blue Rock was able to operate without owning the mining licence.
f) That without the mining Licence Blue Rock can not lawfully operate in Malawi. The defendants contend that this is absolutely untrue, as Blue Rock has operated in Malawi without ever holding a Mining Licence but after being allowed to use the 1st defendant's Mining Licence for a Royalty or a fee as evident from exhibit "HP11" a copy of the Minutes of a meeting of shareholders of Blue rock Limited held on the 2nd and 3rd of May, 2003 in Italy, which minutes are initialed by all the Directors of Blue Rock present. Further, there is also exhibit "HP12", which is a copy of the minutes of the meeting of Directors of Blue Rock Limited held in Chitipa on 11th December, 2003. Both these exhibits and the respective minutes show that Blue Rock was operational in May, 2003 as well as in December, 2003.

Further, as is evident from exhibit "HP 13", which is a copy of an e-mail message from the plaintiffs to the 1st defendant dated 23rd June, 2004, Blue Rock operated in 2004 notwithstanding the fact that it only had a right to use the 1st defendant's mining licence and did not own or hold the same in its name.

g) That the defendants have not transferred exclusive rights in the mining licence in Blue Rock. The defendants contend that they are not dealing with any other person at the quarry apart from Blue Rock, and defendants do not need to transfer the licence as they never undertook to do so. However the 1st defendant's licence is subject to due observance wth all the laws of Malawi, and by implication therefore any agent that would use the 1st defendant's licence would likewise have to comply with all the laws of Malawi.

The defendants further contend that they have suffered financial losses. They depose that having operated the quarry under the 1st defendant's licence, the defendants as directors of Blue Rock note that the joint venture deal was more of a drain on their resources and that there being no reasonable prospect for the mine earning profits in the foreseeable future, the defendants on March, 19, 2004 wrote the plaintiffs a letter, which is exhibit "HP 14" in which they expressed their concerns about the future of the Joint Venture, and notwithstanding that the defendants did not get a reasonable response, they nevertheless allowed the mining operations to continue. Thus, the defendants state that throughout the duration of the Joint Venture, the 1st defendant did not receive any Royalties despite the mine having operated for 3 years, and that granite blocks were being exported abroad.

As regards breaches of the law, the defendants state that towards the end of 2003 and in early part of 2004, the plaintiffs begun funding the operations of the Joint Venture Company directly from abroad, without sending funds through the company. As is evidence from exhibits "HP 7" and "HP 8" and also exhibit "HP 15", the defendants pointed out the illegality of such acts as the practice contravened the Regulations of the Exchange Control Act. The defendants further state that the issue of illegal funding coincided with that of continued loss - making by the Joint Venture Company, and since quarry operations are normally undertaken between May and November, each year, the

defendants suggested to the plaintiffs that the quarry should not be opened until all the outstanding issues were settled, and so the plaintiffs accepted closure by their faxed letter of 17th May, 2004, exhibit "HP 16". The defendants further state that the quarry was only re-opened after the issues raised in exhibit "HP 15" were resolved. However, the plaintiffs then demanded that the then Quarry Master, Mr Silvano, be replaced by Mr Anchise Franchini, another quarry master from the plaintiff's quarry in Tanzania, who when he arrived and took up his job, it immediately became clear that he was a trouble maker and had no respect for the law. The defendants cite an occasion when the said Mr Franchine brought to the quarry explosives without licence but with the knowledge of the plaintiffs. See exhibits "HP 17" (a) and "(b)", which are copies of e-mails from the defendants to the plaintiffs on the matter. As a result, the Department of Mines sent the defendants letters, exhibits "HP 18 (a)" and "HP 18 (b)" dated 22nd November 2004 and 9th March 2005 respectively in which various charges were laid against the 1st defendant for breaches of the Explosives Act, and these were forwarded to the plaintiffs as is evident from exhibit "HP 18(a)", under cover of the defendant's fax dispatch exhibit "HP 19". The defendants further depose that even if they would have liked to close the quarry there and then, the decision to close the quarry was however made about 10 days later by Mr Guido Palmeiro when he arrived in Malawi to supervise the activities of Mr Franchini. After the quarry was closed in November, 2004, the defendants made several attempts to call for a meeting as reflected in exhibits "HP 21", and "HP 22".

The defendants further deposed that as they awaited for the meeting on 9th February, 2005 the plaintiffs sent an e-mail exhibit "HP 23", in which they, for the first time in their relationship as joint partners with the defendants, they demanded that the defendants had to transfer their Mining Licence to Blue Rock Limited, as per "original agreement". The defendants contend that no such "original agreement" for the transfer of the Mining Licence existed. The said exhibit "HP 23" read:

From: BLOCK AND ROCK
TO : ILLOMBA
SENT : WEDNESDAY

SUBJECT: Re: MEETING HELD IN BLANTYRE
WITH MR ELIO BIZZARO

Dear Faisal,

Following to your communication dated February, the 8th, 2005, we confirm our availability to fly to Blantyre from the second week of March to attend a meeting regarding the various issues raised, aimed to resume the mining operations.
In order to avoid, any further loss of time please confirm you agree the following points.

1) Transfer of the Mining Lecence from Ilomba Granite Company Limited, to Blue Rock as per original agreement.
2) Our acquisition of the technical and administrative management of the mine with all the relative liabilities.
3) Your status of sleeping shareholder in return for a fixed loyalty of US$300 (US$200 as already agreed for Illomba, US$100 in addition) on every cubic meter of material exported, as already proposed and advanced by Guido during his last trip to Blantyre.

Further details will be deeply discussed during the forthcoming meeting.
We remain at your disposal for whatever additional information you could require
Faithfully yours
Guido Palmeiro/Alessandro Nigrisoli.

The defendants further state that on 10th February 2005 they replied to the plaintiffs e-mail as evident in exhibit "HP24", but did not respond to the demands raised in exhibit "HP23", without first meeting the plaintiffs. On 26th January, 2005, the plaintiff's lawyers Savjan & Company wrote a letter addressed to the defendants, exhibit "HP25" wherein they accused the defendants of among other things continued failure to transfer the Mining Licence; they also demanded resumption of mining activities, which the defendants say could not have been possible in the light of the various problems and unresolved outstanding issues. The defendants responded in exhibit "HP26".

The defendants further depone that on 10th March, 2004 all the parties met and the plaintiffs made proposals to the defendants, which the meeting agreed had to be put down in writing, to enable the defendants consult their legal practitioners, and make a formal response. The defendants further state that however on 11th March, 2004 Mr Katundu, of counsel phoned the 2nd defendant and communicated the plaintiff's offer, to take over controlling shares of the 1st defendant in return for a royalty of US$300 per cubic metre of stone produced and exported from the quarry. The 2nd defendant explained to the said Mr Katundu that he could not respond to the plaintiff's offer without a board resolution, and went on to state that in his personal view the offer could not be accepted. This discussion was confirmed in the defendant's letter exhibit "HP 27" dated 14th March, 2005. The defendants actually argue that the very offer of a royalty by the plaintiff's through Mr Katundu was a tacit recognition of the fact that the 1st defendant was the rightful holder of the Mining Licence.

The defendants further state that next they then were served with the Originating Summons herein, and that the defendants were surprised by the plaintiff's allegation that the defendants had undertaken to transfer the mining licence to the paintiffs or Blue Rock Ltd.

Further the 2nd and 3rd defendants contend that a close reading of exhibits "SC2" "SC3 (a)" and "SC (b)" in the affidavit of Mr Katundu clearly shows that the plaintiffs contracted with the 1st defendant, which is a limited company, for whom the 2nd and 3rd defendants are shareholders and directors and that they did not therefore contract with the 2nd and 3rd defendants in their personal capacities. The 2nd and 3rd defendants therefore contend that they are improperly joined as parties to the action and they therefore pray that their names be struck of from this action.

The defendants further stated by way of counter-claim that although the agreement in "SC2", "SC3(a)" and "SC3(b)" envisaged the formation of an off-shore company to do the marketing of the blocks from Illomba quarry, the said company has remained in active throughout the relationship of the parties and the plaintiffs have been the ones selling the blocks first through Block and Rock SLR, a company owned by the plaintiff, and later through Block & Rock, Italia whose ownership or structure remains a mystery to the defendants. The defendants further state that it is their belief that all along the plaintiffs have misrepresented to them the actual selling price of the blocks and that they have in fact cheated them on the price. The defendants exhibited exhibit "Hp28" which is a copy of an invoice faxed by the plaintiffs to the defendants on 10th May 2004 which showed high prices for the blocks. Yet, when Mr Guido

Palmeiro came to Malawi on 13th September, 2004 he presented to the plaintiffs an original of the faxed invoice that now showed lower prices for the same transaction, as is evident from exhibit "HP29", an original invoice of exhibit "HP28". Further the defendants state that although they agreed with the plaintiffs that the plaintiffs would only be selling rough blocks and not polished granite tiles, the plaintiffs on 23rd January, 2003 sent a marketing report to the defendants, which is herein exhibited as "HP30", which in effect showed the plaintiff quoting a customer the price of polished granite tiles. The defendants responded to this report via e-mail in exhibit "HP31", and wondered the considerable differences in the prices. The defendants therefore contend that in their belief the plaintiffs have been cheating them on the transaction, and therefore pray for an order that the plaintiffs should render a full and truthful account of the income they made from the sales of the blocks, and that the plaintiff's action herein is a sham and has no basis at all. Therefore that the plaintiffs' action should be dismissed.

## EVIDENCE ON CROSS-EXAMINATION

The two plaintiffs were cross-examined on their depositions by Mr Kaphale for the defendants, and then re – examined by Mr Katundu.

In his cross-examination Mr Allesslandro Nigrisoli, aged 50 told the court that he holds a degree in Philosophy and that his job involves qualying and trading in granite and marble, and that he has been in the business for the last 20 years. He told the court that apart from Illomba hill, he has also been qualying in Tanzania, and he always went into agreements which are in English and they are written. The witness said he would not sign an agreement if it did not contain what he wanted. The witness admitted in cross-examination that the two letters Intent, thus exhibits "SC3 (A)" and "SC3(B)" are neither signed by him nor Mr Guido Palmeiro, the 2nd plaintiff. The witness admitted that qualying had stopped in one of the quarries in Tanzania because there was some problem with some local person in Mbeya. Mr Nigrisoli however admitted that before entering into the Memorandum of Understanding exhibit "SC2", there were some correspondence that exchanged hands between the plaintiffs and the directors of the 1st defendant company, following protracted negotiations both in Italy and Malawi, and that the parties, as a matter of fact, kept on corresponding even after the MOU and the two Letters of Intent. Further, the witness admitted that the Memorandum of Understanding exhibit "SC 2", and the two Letters of Intent "SC 3(A)" and "SC 3(B)" essentially capture what the

two parties herein agreed. When asked on exhibit "HP1", the witness admitted that he was indeed the one who wrote the said letter on 10th August, 2000 addressed to Mr Faisal K. Hassen of Illomba Granite. The witness further admitted that by virtue of exhibit "HP1" there was a commercial partnership, and that at that stage, the witness testified, it was so agreed that the commercial partnership after qarrying would buy from the 1st defendant. The witness told the court that on 17th August, 2000 the 2nd defendant responded to exhibit"HP1" in exhibit"HP2". The witness further admitted that the commercial venture which he proposed in HP1, which would buy from the 1st defendant is also repeated at point 7 in exhibit "HP 2" by the 1st defendant. The witness further admitted that there was also a proposal to establish two companies, one being local and another off-shore. The witness further told the court that when in exhibit "HP 3" he referred to the "summary you have reported, he was referring to points 1 to 10 adumbrated by the defendants in exhibit "HP2". Mr Nigrisoli further admitted that his proposal was that his company would extract the granite/mineral and then buy it, and that at the completion of the trial mining exercise, he expected that the 1st defendant would grant exclusive rights to the plaintiffs company, to buy. Further, Mr Nigrisoli admitted that according to exhibit "HP2", the 1st defendant would continue to retain the licence. When asked as to what is meant by a loyalty, the witness replied that a 'loyalty' is 'something you pay for a benefit you earn.' On this point Mr Nigrisoli admitted that the owner of the thing is paid a royalty and that this is what was intended that the 1st defendant would keep the licence, and that for use of the 1st defendant's licence, the plaintiff would pay a loyalty to the 1st defendant. The witness further agreed that according to exhibit "Hp 7", the 1st defendant was asserting that it would continue to hold the licence because it owned the Mining concession. As regards the MOU, exhibit, "SC 2" the witness agreed with Mr Kaphale, that it represented the agreement of both parties, at least as of that time. Further, he admitted that the 1st defendant and the plaintiffs would form a joint venture company, which was subsequently formed and named Blue Rock, and that the joint venture company was to enjoy for the duration of the licence the right to buy and extract minerals from the 1st defendants mine at Illomba, for which the joint venture was to pay a loyalty to the 1st defendant, since the 1st defendant held a licence. The witness further told the court that the shareholding in the joint venture company would be 50/50 and that the financial contribution was to be US$21,000 each. In short, that both parties would invest in the join venture and that this was the joint intention of the parties. Mr Nigrisoli however, when asked whether the 1st defendant had undertaken to transfer the licence, his reply was that it had, however he was quick to admit that that intention was not present in exhibit "SC2", the MOU. As further confirmation of this the witness admitted that if the Blue Rock was to hold the

licence it would not have to buy, and that it could not pay a loyalty if it owned the licence. This meant therefore that as Blue Rock was not the holder to the licence, this explains why it was buying or indeed paying a loyalty. When the witness was asked to show the court where in the MOU one could get the slightest indication that the 1st defendant would transfer the licence, he was silent for sometime only later said that that indication was found in point 2, which the witness later admitted was not clear and that the blame, if anything was to be on him.

Further, Mr Nigrisoli admitted, when he was referred to exhibit "HP 25" that the licence was held by Illomba, the 1st defendant, also was the beneficial owner and had no impediment to transfer the use of the licence. The witness agreed that in exhibit "HP25" he proposed to rearrange the deal, though the plaintiff would still pay the royalty and that this offer was rejected by the defendant in "HP 26". The witness told the court that he did not know now much the 1st defendant spent on the mine up to the time of the discussions. When asked whether the parties agreed on the value of the transfer of the licence, the witness answered that the value was included in the licence but he later admitted that he did not have a document that showed the value of the transfer of the licence or the defendant's investment; Neither could the witness explain, where in the MOU it was said that the mining licence would be transferred from the 1st defendant to the joint venture company. The witness could also not point anywhere in his affidavit where this was stated. However Mr Nigrisoli admitted that the plaintiffs had to pay a loyalty because the 1st defendants owned the licence, and he further admitted that nowhere in the MOU was it indicated that the 1st defendant would transfer its mining licence to the plaintiffs. Further, Mr Nigrisoli also admitted that exhibit "HP2" attests to the fact that the 1st defendant are the owners of the mining licence, and that even the MOU recognizes the 1st defendant as the owner of the mining licence. The joint venture company was to extract and buy rocks from the 1st defendant, the holder of the mining licence. Mr Nigrisoli also admitted in cross-examination that the purchase price would be in form of a royalty of US$200. The witness told the court that the joint venture company did not own the mining licence. When asked further, the witness admitted that the word "procure" would include buying. The witness further agreed that the words "mine and procure" and "extract and buy" are the same. The witness further admitted that the 1st defendant owned the mining licence, and that after the formation, it would be Blue Rock that would be using the said licence, and that for use of the mining licence Blue Rock would be paying the 1st defendant US$200, and that it is this fee that is called a "royalty" in exhibit "SC2". Further Mr Nigrisoli admitted that he owned Blue Rock. When asked by Mr Kaphale whether there was any

provision in exhibit "SC3(a)" the first letter of intent that, stated that the 1st defendant would transfer the licence, the witness said there was none but only said that the 1st defendant would transfer use of the licence. When pressed by Mr Kaphale, the witness told the court that he was not in court seeking the transfer of the mining licence, but that the defendants according to the amended originating summons were under an obligation to transfer the mining licence and or mineral rights. However when pressed further, the witness told the court that he was not seeking transfer of the licence, but use of the same. Mr Nigrisoli when asked as to whether he knew that a mining licence is a mineral right, said he did and he read Section 3 of the Mines and Minerals Act Cap. 61:01 of the Laws of Malawi. The witness therefore admitted that a Mining Licence and a mineral right meant the same thing. The witness also agreed that the 1st defendant never said that it would transfer the licence but only the use. The witness further agreed that according to the arrangement the 1st defendant could either do the mining itself or use agents to do the mining, as is stipulated in Section 43(1)(A) of the Mines and Minerals Act. He therefore conceded that the holder of a mining licence can use either employees or agents. The witness also conceded that before the formation of Blue Rock, the defendant whose major task was to quarry and sell the rocks had the right to do the same, and that this the 1st defendant could either do by itself or by using an agent, and that in the later case, the agent would use the 1st defendant's licence. The witness further admitted that the relationship between the 1st defendant and Blue Rock was that the 1st defendant would hold the licence, while Blue Rock would quarry and sell the blocks, and that Blue Rock would then pay a loyalty to the 1st defendant. The witness further said when asked, that the 1st defendant has to transfer use of the mining licence, notwithstanding the fact that Blue Rock was using the licence and that no time if at all was agreed for this. and when asked whether the plaintiffs failed to mine because they did not have use of the mining licence or whether there was any document that evidenced such a complaint, the witness after fumbling through the paperwork said there was none. The witness further agreed that according to exhibit "SC3(a)" the 1st defendant was only agreeing to grant exclusive rights to Blue Rock to quarry and procure, and Blue Rock would pay a loyalty, so the right was exclusive. The witness when asked failed to point anywhere in clause 3 of exhibit "SC 3(a)" where the 1st defendant breached the agreement. He conceded that he only trusted the 1st defendant that they would transfer the licence, and that they never agreed on time frame. Yet when later quizzed the witness said he trusted them, and conceded that the issue of the mining licence was important yet it was not incorporated in the agreement. Further the witness conceded that no authority questioned Blue Rock for mining in the 1st defendant's quarry and that although he was a director and shareholder of Blue Rock he could not

remember whether Blue Rock paid a loyalty to the 1st defendant, which did not depend on whether Blue Rock made a profit or not when asked as to whether the defendants would have received a royalty without acknowledging the same, the witness said he did not know. The witness admitted that although Blue Rock did not have the licence it was able to quarry the stones and sell them outside the country even without the licence. However the witness said in December 2004, he received some news and through his counsel he approached the Department of Mines whereupon he came to know that the mining licence had not been transferred. He admitted however that he had never been bothered as Blue Rock, and that he was not aware of any letter that had been sent to Blue Rock or Illomba over the issue of a licence. Mr Nigrisoli also admitted that one of the issues that worsened relations between the parties was the conduct of a certain Mr Franchin, for which the 1st defendant wrote a letter of complaint. The witness was non-committal as to whether he knew that the said Mr Franchin was smuggling explosives from Tanzania. On the issue of agency, the witness admitted that according to exhibit "HP 32", Blue Rock used to invoice Italia, and that it was Blue Rock under Illomba Granite Limited. When asked whether he protested this arrangement, the witness said he did not know the meaning of the work "**under".** The witness further admitted that even under exhibit "HP 33" which is an Export permit Blue Rock needed the 1st defendant, and that this arrangement never caused problems at all. The witness also admitted that although there were many problems in 2004, these problems never touched on the issue of the mining licence, and that under the Joint Venture Company the parties would work out their problems without the mining licence. The witness admitted that looking at exhibit "SC 2", "SC 3(a)" and "SC 3(b)", there is nowhere where it says that the 1st defendant would give the licence to Blue Rock, only that it would grant the right to mine and process (quarry and sale). The witness also admitted that if you have a mining licence you can ask other people to do it for you, and that this is what happened here. Further, Mr Nigrisoli admitted that a reading of clause 2 of exhibit "SC 3(b)" shows that Blue Rock would pay a loyalty to the 1st defendant. The witness told the court that he realized towards end of November, 2004 that the mining licence had not been transferred, yet he admitted that before the MOU and the 2 letters of intent, the 1st defendant indicated that it was not willing to transfer the mining licence. The witness told the court that he remembered that according to exhibit "HP7", dated May, 2004 the 1st defendant repeated what it said in the year 2000, that they were the holders of the licence, as stated in both the MOU and that the 2 letters of intent that they would not transfer the licence, but only the use or the mining right. The witness also admitted that although the US$200 was included in the payment of the royalty, it did not include the fact that the said US$ 200 included the fees for the transfer. The witness also

admitted that despite several Board meetings, the issue of the transfer was not raised, even in exhibit “HP 11”, “12”.

The witness told the court that in exhibit “HP22”, he is demanding the transfer of the licence from Illomba Granite to Blue Rock, and that after the same is done Blue Rock would own the licence, and that was what the plaintiff’s are demanding. The witness further told the court that they met with the defendants on two occasions first, in February, 2005 and secondly in March, 2005 in trying to resolve the dispute. At the end, he said the parties agreed to resume the mining operations but that he did not remember whether a Mr Katundu had to drawn the agreement. The witness agreed that for Blue Rock to mine again it does not really need the licence but that the Directors of Blue Rock have to sort out the problems as the issue is not about the licence but other problems. The witness failed to answer or show how the issue of the mining licence was causing the plaintiffs loss, only replying that he did not have an answer. He insisted that he entered into an agreement with both 1st defendant and the 2nd and 3rd defendants. When asked as to what makes Blue Rock not an agent, the witness simply said because it was not **said.** The witness said that the plaintiffs wanted to take the controlling shares of the 1st defendant because he knew that the mineral concession had increased. Yet he admitted that he did not know if in the three years or so of operation Illomba did not benefit and that he could not remember as director of Blue Rock if Blue Rock made payments in royalties to the 1st defendant and that according to exhibit HP 11, the 1st defendant did not receive a royalty.

In re-examination by Mr Katundu, the witness told the court that he remembered that the two parties had protracted negotiations before entering into agreement in February 2001 as evidenced by exhibits “SC2”, and “S3(a)” and “SC 3(b)” in April, 2001 and that these were binding agreements. The witness told the court that as far he was concerned exhibit “HP3” was part of the negotiation. Further the witness testified that the contents of exhibits “HP2” and “HP3” were completely different from those of “SC2”, “SC3(a)” and “SC3(b)”, which were the results of 8 months of dealing and that all of them including the witness, Guido Palmerio, Faisal Hassen and Anwar Patel signed the MOU. The witness told the court that one of the things that one of the issues that the parties discussed in the MOU is the issue of the joint venture company namely Blue Rock, and that this was the main thing. The witness said the agreements as contained in exhibits “SC 2”, “SC 3(a)” and “SC 3 (b)” were very clear, and that nothing was left out. The witness explained that according to the agreement it was Blue Rock that was going to do the extracting of the rocks, and that the 1st defendant company was to be in-charge of the

administration as per clause 6 of the MOU. The witness said according to clause 6 the 1st defendant was not producing any items, it was the joint venture, Blue Rock that was to extract the rocks. The witness said that according to his understanding of exhibit "SC 3 (a)", it meant that the 1st defendant would transfer use of the mining licence. When asked as to what was the role of the joint venture, the witness said that it was to 'quarry and procure' and that according to exhibit "HP2", the 1st defendant would grant Blue Rock exclusive rights to Blue Rock and that to him this meant that only Blue Rock was to exercise exclusively the quarrying and procuring. The witness told the court that according to paragraph 4 of the letter of intent Blue Rock was to pay the 1st defendant US$200 per cubic metre of rock exported; The witness said this was a 'royalty' to recognize the material that Blue Rock would export, and that the word 'royalty' was the same as a fee. The 1st defendant's would be to take care of administration, and that in recognition Blue Rock would pay a fee. The witness testified that the 1st defendant was neither mining, procuring or extracting blocks according to the letter of intent, and that it was Blue Rock that had the right to produce the blocks and sale. The witness told the court that the word "**buy**" appears in the MOU but was not used in the two letters of intent because the witness could not buy from himself. The witness said Blue Rock would not be able to mine without a licence and that Blue Rock was not an agent as there was no such agreement, and further that an agent receives a commission, so he never received an agency fee.

Mr Nigrisoli told the court that his complaint was that the defendants have not transferred the mining licence and that this was realized in 2005. The witness was not sure if royalties were paid to the 1st defendant. The witness admitted that indeed in exhibits 11 and 12, which are minutes the issue of a mining licence was not discussed because he said he trusted his partners. When asked as to what damages he had suffered the witness said that he had not been able to restart production because he realized that his weakness was that the licence was still with the 1st defendant and that he sent US$20,000 and that since the licence was not transferred the witness lost his image, he lost orders. The witness repeated to say the US$200 was a royalty in recognition for the use of the licence or transfer.

The second witness who also happens to be the 2nd plaintiff to be cross-examined by Mr Kaphale was Mr Guido Palmeiro. The witness told the court that he is a partner with Mr Nigrisoli in Blue Rock, and not Block and Rock. The witness told the court that he could not remember if he accompanied Mr Nigrisoli when negotiations to enter into agreements were taking place. The witness told the court that he understood the agreements that were entered into,

including all documents exhibited to his affidavit in support of the Originating Summons, and that they represented what they agreed. The witness told the court that indeed a close reading of exhibit "HP 2" clause 4 shows that the 1st defendant was saying that it was a rightful owner of the mining licence, and that it would be responsible for ground rent and it would appear to be the company working at Illomba Hill. The witness said he understood that if the rocks would be extracted the 1st defendant would receive a royalty and that this was used even after signing the agreements.

The witness said to transfer the licence, there was a payment of US$200, but that he did not know how the transfer would take place. However, the witness contradicted himself when he said there was no payment to transfer the licence because the 1st defendant was not allowed to sell the licence. The witness told the court that the 1st and 2nd plaintiffs, put US$21,000 and machinery but admitted that the 1st defendant also contributed. The witness however failed to show the court as to the point at which the licence would be transferred. When asked what was to be paid in exchange for the transfer of the licence, the witness failed to answer, he gave no answer. He however admitted that the 1st defendant spent some money on the geological surveys. The witness agreed that the agreement was that there would be established a local joint venture called Blue Rock which would be paying a loyalty and that the 1st defendant would continue owning the licence. The witness admitted though that going by both exhibits "HP2" and "HP4", the 1st defendant was saying that it would continue owning the licence and that for the extraction of the rocks it would have to be paid some money. The witness told the court he read and signed exhibit "SC2" the MOU and that it contained the essential points. The witness told the court that Blue Rock was, according to exhibit "SC2" to quarry and extract, the rocks and that for this 1st defendant was supposed to be paid US$200 for every cubic metre. When asked whether in the whole 3 years of operations the 1st defendant benefited anything or received anything, the witness remember as per exhibit "HP11" 1st defendant making noise about payment of royalties, only saying that it was some four years ago, so he could not remember yet he admitted that he had been attending meetings of shareholders of Blue Rock, and he was also Director of Blue Rock. Further, the witness admitted that indeed according to exhibit "HP11" the 1st defendant did not receive any royalty. He also confessed in cross – examination that according to exhibit "SC2", the licence was to remain with the 1st defendant. Mr Palmerio admitted that Blue Rock was able to quarry and that nobody or authority wrote Blue Rock querying it that it did not have the right to query. The witness when asked failed to show the court any evidence to the effect that the authorities wrote Blue Rock and asked it to stop mining, saying it was not relevant. He

admitted that he did not have any communication from the Ministry of Mining to that effect. The witness further admitted that going by exhibit "HP8", dated 10th May, 2004 the 1st plaintiff did not dispute that the 1st defendant are the owners of the mining licence. Mr Palmerio told the court that the only time the plaintiffs asked for the licence was when Savjan & Company wrote the defendants in exhibit "HP25". He admitted that the plaintiffs' also made the mistake when they said Blue Rock would buy. The witness however agreed with Mr Kaphale that it was possible for a person's mining licence to be used by another person, an agent and that the agent would not have to own the mining licence. Further he agreed that in the mining world investors use other people's mining licence to mine. The witness said the use of the word 'royalty' in the agreement was meant as a compensation for the fact that the licence had to be transferred, but he went on to admit that Blue Rock had been using the 1st defendant's licence. The witness could not however explain, why if that was correct, even his lawyers still used or proposed to pay a royalty for every fixed block. The witness could not show the court as to where in MOU was the US$200 not a royalty but a purchase price for the licence. He also admitted that if the transfer of the licence was that crucial, then it had to be expressed in writing and seemed to shift blame to Mr Faisal Hassan, the administrator of Blue Rock. He admitted that despite his several trips to Malawi he never demanded for the licence, because he thought it had already been transferred. The witness told the court that for Blue Rock to produce and sale, it would pay the 1st defendant a royalty, and the witness said that the issue of royalties was raised by the 1st defendant even in as early as 2nd May 2002 at a meeting held in Italy. When asked why, if the 1st defendant was asking for royalties, why the did the witness not raise the issue of the transfer of the licence he only said the relationship was between the 1st defendant and Blue Rock, yet he admitted that the responsibility rested on 1st plaintiff and himself and 2nd defendant to follow the issue up, and that Blue Rock had not sued. Further the witness admitted that the money that was paid by the 1st plaintiff and himself was paid to Blue Rock, and not to Illomba, the 1st defendant herein. The witness however agreed that Blue Rock was supposed to pay royalties, but that as per exhibit "HP6", it was the 1st and 2nd plaintiffs. And when asked why the issue of the licence was not raised in that letter, the witness simply told the court that he thought that it had already been transferred. The witness agreed further that according to exhibit HP7, the 1st defendant was indicating that the first defendant was the holder of the licence. Indeed in "HP10", the plaintiffs were demanding to take control of operations of the quarry and that in turn the 1st defendant would get out of administration, but not give up the licence and that even in exhibit "HP25" the legal practitioners for the plaintiff were offering a royalty and not to take over the control of 1st defendant company. The witness also when told that the 1st

demand for the licence was made in “HP25” dated 25th February in 2005, told the court that the 1st demand was contractually made, and it was to transfer ‘use of the mining licence’. PW2 further agreed with Mr Kaphale that nowhere in the letter of Intent could one find where it was stated that the 1st defendant would transfer the licence, it was simply not written there. When asked as to what is mean by procure in the Letter of Intent, the witness said ‘procure’ meant making the material ready for exportation, he also agreed that it meant to ‘obtain’. He however disputed that Blue – rock would not have to pay US$200 to the owner of the rock for procuring, because in exhibit “HP2”, the said sum is a royalty for transfer of the mineral right. The witness however admitted that it was not precisely put in “HP2”, to show that the US&200 was for the transfer of the licence, that he used words whose meaning he did not intend. The witness further admitted that the documents “HP1”, “HP2” and “HP3” were drafted by himself and. The witness also admitted that mining stopped because there was an agreement between the partners and that the issue of a certain Mr Franchin was one of the issues, and that the said Franchin put the licence in jeopardy. The witness further told the court that the Mine was closed due to disagreements between the parties, and that at that moment he did not know the problem, but that it was not closed due to the licence. When asked what damages the plaintiffs had suffered the witness, simply told the court that Bule – Rock could not operate without a licence and that 2 years had been lost. He admitted that production did not stop due to the licence but said this was correct until 2004.

When the witness was asked to explain how he could say that the 1st defendant had acted fraudulently, the witness said that the MOU (SC2) and two letters of Intent (SC 3(a) and “SC3 (b)” underlined the fact that the mineral rights should have been transferred. The witness further said the word ‘remain’, when it was stated that the material not selected will remain the property of the 1st defendant, said that the 1st defendant was not the owner of the deposits but the licence, and that the Ministry of Mines owned the material before extraction, and that some of the material extracted was left with the 1st defendant for local use. The witness insisted that the 1st defendant should have transferred the licence, but when it was put to him that the 1st defendant never received a royalty for three years, the witness simply said that the 2nd defendant did not transfer the licence. When pressed further as to why the 1st defendant had not received any royalties, the witness simply said that it was because the 1st plaintiff had not paid a royalty. The witness however admitted that the issue of US$26,000.00 was not before the court. Further the witness told the court that the US$26,000.00 was not only for repairs of the excavator but other things as well. The witness agreed that the 1st defendant performed its part because it

allowed Blue Rock to collect the rocks and export them in 2003, and 2004, yet no royalties were received. When it was put to him that since the 1st defendant had not received royalties, and yet it was to transfer the licence, would it the not have felt cheated, the witness simply said a contract was made which was not respected and that a royalty was owed to Blue – Rock but he denied that he cheated the 1st defendant of its rocks, he said Block Rock sent US$17,000.00 yet the 1st defendant had no control. When asked whether the 1st defendant had been treated fairly, when it was paid nothing, the witness said the plaintiffs were not supposed to pay anything. The witness when asked court not explain why it was not specified in the agreement time limit for the transfer of the licence, but simply told the court that the licence had to be transferred right away. However the witness admitted when it was put to him by Mr Kaphale, that it was possible to mine using somebody's mining licence. When asked further as to what the 1st defendant has benefited, the witness simply said that the 1st defendant is part – owner of a mine whose material is needed world – wide. The witness further agreed that since in 2004, 2003 and 2004 Blue – Rock continued to quarry, and procure with the knowledge of the 1st defendant, it can be said then that the 1st defendant had given Blue – rock the exclusive right to quarry and procure, and he agreed that the mine belonged to Illomba, according to exhibit "SC3(b)".

In re – examination by Mr Katundu the witness told the court that there are three documents that formed the agreement between the parties namely exhibit "SC2", exhibit "SC3 (a)" and exhibit "SC3(b)" which are the MOU the two Letters of Intent PW2 said that apart from these documents there does not exist any other document that contained the terms of the agreement. The witness told the court that exhibits "HP2", "HP3" and "HP4", which are documents dated before the MOU did not contain terms of the agreement. The witness further said that in exhibit "HP2" and 2nd defendant wrote and informed the plaintiff's that it would be the 1st defendant that would be responsible for loyalties paid to the relevant Government authorities. The witness said he understood the phrase 'In addition, there are regulations in place that may restrict Illomba from sub – letting the use of the land to another company' to mean that probably there were some rules that prevented sub – letting, as regards quarrying, or farming the mineral rights, that the 1st defendant would have to appear as the company holding the mineral rights, but the witness agreed that in the same paragraph the 2nd defendant is raising the issue of loyalties, that the 1st defendant will have to receive some form of payment (loyalty for every cubic metre of sodalite extracted and shipped from its mining claim'. The witness told the court that he did not agree to these terms. The witness further said that before "HP2" the 1st defendant was quarrying and that after the MOU exhibit "SC2" was signed, it

was the joint venture company namely Blue – Rock that worked the deposits, and that the 1st defendant never worked the deposits after signing the MOU. PW2 further told the court when asked on the regulations mentioned in exhibit "HP2" quoted above that, these were discussed and it was a fundamental issue that was formally resolved with the MOU and the two letters of intent.

The witness also confirmed to the court when he was asked to look at exhibit "SC3 (a)" paragraph (a) that 'IGC confirms that it has no impediment to transfer use of the mining licence' and when asked why the defendants had to confirm this the witness told the court that it was fundamental to have it in the letter of intent. The witness told the court that he understood the word 'transfer' to mean, to move from one subject to another. When asked as to what transfer was being talked in exhibit "SC3 (a)" the witness replied that it was use of the mining licence. The witness was further referred to "HP4" and told the court that it was written by the 2nd defendant in December, 2000 and that in paragraph 1 of that exhibit the local joint venture company was to pay US$500/ $m^3$ to the 1st defendant, for the sodalite syenite extracted and exported from its mineral concession, and that the 1st defendant being the rightful owner would take care of ground rent and other fees. Further, it was stated in the same exhibit "HP4" that the local joint venture (Blue – Rock) would be responsible for taking care of the production costs as well as paying the Mineral Royalties which PW2 said were a sum payable to the Ministry of Mining, and that the mineral royalties were different from the US$500/$m^3$ which Blue Rock was to be paying to the 1st defendant. The witness further told the court that the 2nd defendant was proposing in exhibit "HP4" that Blue Rock would be producing and exporting the stones, pay productions costs, pay mineral rights to the Ministry of Mining, and also to pay shipping costs to Dar – Es – Salaam. The witness told the court that he understood the word to produce as to mean quarrying, and that there was no agreement on the US$500/$m^3$The witness said that after a series of negotiations, the US$500/$m^3$.was reduced to US$200/$m^3$, and that this was contained in final contract namely the MOU (exhibit SC2) at point number 6, in which it was agreed that 'The joint venture will pay to Illomba Granite Co. a royalty of US$200 for each cm extracted and exported from the quarry'. The witness further said that the same point is also articulated in point number 4 of the first letter of intent exhibit "SC3(a)" when it says 'BR will pay to IGC a fee of US$200 for each cubic metre extracted and exported from the quarry'.

The witness further admitted that it was agreed between the parties to establish a local joint venture called Blue Rock, which produced and exported blocks of Blue Sodalite Syenite Blocks from Illomba Hill. The witness further told the

court that the licence exhibit "SC1" was granted to the 1st defendant, and that it was this licence that was in issue. The said licence, the witness said granted the exclusive right to mine for 25 years, and the right being granted was the right to quarry and mine, to the exclusion of anybody else. The witness, when asked, that the 1st defendant was required to pay under the licence mineral rights to Malawi Government, and he said that there was therefore a relationship between paragraph 2.2 of the of the licence, and paragraph 1 of the "HP4" in that the company (Blue Rock) had to pay royalties to Government, and that it was therefore essential that the company had to have a mineral licence. The witness further told the court that in the MOU, it was provided that 'the joint venture Company will enjoy for the duration of the licence held by Illomba Granite Company the rights to extract and buy all/any blocks they deem marketable'. The witness testified that the word 'to extract' meant to quarry and when asked whether the joint venture company namely Blue Rock extracted and bought, the witness gave a negative answer. However when asked as to why they used the word 'buy' in paragraph 2 of the MOU, the witness stated that it was a mistake, and that the word 'buy' was not used in the letters of intent, nor "HP4". The witness told the court that the joint venture was to enjoy the rights to extract, for the duration of the licence and that this was only going to be the licence if the mining licence was transferred, because the mining licence granted exclusive rights to the 1st defendant, yet it was agreed in the MOU that the joint venture would have the right to extract and procure. The witness told the court that the share holding in Blue Rock was 50% 1st defendant, 25% for 1st plaintiff and 25% for himself. When asked to explain whether the royalty talked about in paragraph 6 of MOU and mineral royalty in exhibit "HP4" were linked, the witness told the court that these were different as mineral royalties is the sum the company payable to Government, whilst the other specified royalty of US$200 was compensation that the joint venture, Blue Rock had to pay to the 1st defendant for the transfer of the mineral rights.

The witness told the court that the licence formed part of the agreement between the parties and that the 1st defendant confirmed in exhibit "SC3 (a)" that it had no impediment to the transfer of use of the mining licence. The witness testified he understood the word 'procure' as to mean to process or make or turn the block into something that make or turn the block into something that could be exported. The role of the joint venture, PW2 said, was to quarry, procure and process the material, and that he understood clause 3 of exhibit "SC3 (a)" to mean that the 1st defendant the mineral right for the licence, when it was agreed 'IGC will grant BR exclusive rights to quarry and procure…'and that to him it meant only one subject had to exercise the rights. The witness told the court that the 1st defendant was granting exclusive rights

because it was an essential condition to Blue Rock to have the mineral right because Blue Rock was the company to do the quarrying. The witness said according to exhibit "SC3 (b)", the 1st defendant had granted the rights to Blue Rock to produce and sell the mineral Blue Rock Sodalite Syenite from Illomba Hill, and that the said Blue Rock was selling the said mineral over – seas. The witness admitted that Blue rock did produce, sell and exported. When asked whether Blue Rock produced and sold, the witness answered 'yes, absolutely yes'. The witness also admitted that a company could mine through an agent, as it was a company that was incorporated, and that Blue Rock was not an employee of the 1st defendant. The witness told the court that although the issue of the transfer of the licence was so important to him he never followed it up even after the signing of the agreement because he trusted his partners, as it was their duty to transfer and that the 2nd defendant was to do that. The witness explained when asked as to how this could be when in exhibit "HP7" the defendants are expressly saying that 'As you are aware, IGC are the holders of the Mining/Mineral rights…', that he or they knew that it was a very important matter but that they trusted their partners (the defendants) when asked, if the issue of the transfer of the mining licence was important, why the plaintiff's were making proposals instead of pressing for the mining licence, the witness simply said that they were interested in resuming operations of the quarry. The witness told the court that Blue Rock is not mining at present, because according to what he was told the said Blue Rock had no right to quarry. The witness further told the court that if he were told that Blue Rock had the right to quarry he would not mind to resume operations.

This is the totality of the evidence that was presented to the court, and as can be seen the court has taken the trouble to substantially go through the same so that the issues involved can better be appreciated.

**<u>ISSUE(S) FOR DETERMINATION</u>**:

The main issues for the determination of this court, are in my view, as follows:-

1) Whether there was an agreement between the plaintiffs and the defendants to the effect that the defendants would transfer the Mining Licence to the Joint Venture Company, Blue Rock.
2) Whether the failure, if any, by the defendants to transfer the Mining Licence constituted a breach of any undertaking by the defendants to the plaintiffs.
3) Whether the said Blue rock was the 1st defendant's agent or employee.
4) Whether or not without the Mining Licence (or rights granted under it) Blue Rock could not lawfully operate mining operations in Malawi.

Whether or not, under the Mines and Minerals Act, it is possible to transfer Mineral Rights.

**SUBMISSIONS:**

Before I delve into the law and analysis of the evidence I wish to commend Counsel for both the plaintiffs and the defendants for the able manner in which they presented their arguments and submissions. Their research and industry on the law is to say the least enriching, for which the court is grateful. However, I must say that I may not be able to recite all their submissions in the course of this judgement. This will not be out of disrespect to Counsel but will be due to reasons of brevity. Where necessary however I shall have recourse to Counsel's submissions.

**THE LAW:**

Mining in Malawi is governed by the Mines and Minerals Act[1]. In the said Act, a mineral right is defined under Section 3 as:-

> S3 "In this Act, unless the contex otherwise requires –
>
> 'Mineral right' means a reconnaissance licence, an exclusive prospecting licence or mining licence".

Furthermore, Section 43 of the Act provides as follows:-

> S43 "Subject to this Act, and the conditions of the licence, a mining licence, while it has effect confers on the holder of the licence the exclusive right to carry on prospecting and mining operations in the mining area and for the purpose of the exercise of that right the may, subject to this Act and the conditions of the licence in particular –
>
> a. Use employees and agents".

[1] Mines and Minerals Act, Cap 61:01 of the Laws of Malawi

It must be observed at the outset that prior to February, 2001 the plaintiffs entered into negotiations with the 1st defendant which negotiations were primarily aimed at creating a working partnership for the exploitation of the mineral deposits in the licenced area for which the 1st defendant held a licence, which is perhaps, the main bone of contention. Observably, following these negotiations several correspondences were exchanged between the parties which culminated into the execution of the MOU "SC2", dated 15th February, 2001 and two letters of intent exhibited as "SC3(a)" and "SC3(b)", respectively dated 4th April, 2001. It is perhaps the interpretation of these three documents that has given rise to the dispute between the parties.

It is necessary to discuss the law on interpretation of contracts. The construction of written contract was said to involve the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words[2] but as we shall see later perhaps the position has somewhat shifted. As has been stated by Lewson on ***The Interpretation of Contracts***[3] the object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them. In the case of ***Reardon – Smith Line V Hansen***[4] Lord Wilberforce Said:-

> "When one speaks of the intention of the parties to the contract one speaks objectively – the parties can not themselves give direct evidence on what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one speaks of aim or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like "knew or must be taken to have known".

See: ***Lewis V Grant Western Railway Co.***[5] [1877] 3QBD, 195

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[2] Lewiston, ***The Interpretation of Contracts,*** 2nd ed, Sweet and Maxwell
[3] ibid
[4] ***Reardon – Smith Line V Hansen*** [1976] 1WLR 989
[5] ***Lewis V Great Western Railway Co.*** [1877] 3 QBD 195

Thus when construing the intention of the parties the courts will concentrate on the words used in the text of the agreement and will not admit evidence of what either of the parties understood the document to mean. This is called the parol evidence rule. In ***Jacobs V Batavia and General Plantations Ltd***[6] P.O. Lawrence J, stated; in deciding the question arising on the construction of the prospectus in favour of the plaintiff that:

> "It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that (except in cases of fraud or rectification and except, in certain circumstances as a defence in actions for specific performances parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties".

See also: ***Lord Inham V Child***[7]**,** ***Martin V Pycroft***[8] and ***Jervis V Berridge***[9]. This parol evidence rule is justified on grounds of certainty. In ***Shore V Wilson***[10], Tindal C. J. said:

> "[I]f it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, the ablest advice might be controlled and the clearest title undermined, if at some future period, parol evidence of the particular meaning which the party affixed to his words or of his secret intention in making the instrument or of the objects, he meant to benefit under it, might be set up to contradict or vary the plain language of the instrument itself".

[6] ***Jacobs V Batavia and General Plantations Ltd*** [1924] 1Ch. 287
[7] ***Lord Inham V Child*** (781) 1Bro. C. C. 92
[8] ***Martin V Pyscroft*** (1852) 2 D. M. & g 785
[9] ***Jervis V Berridge*** (1873) L. R. 8 Ch. 351, 360
[10] ***Shore V Wilson*** (1842) 9 CI8, F 35

In ***Mc Cutcheon V David Mac Brayers Ltd***[11] Lord Reid, speaking of the judge's task as regards the parties intentions said:

> "The judicial task is not to discover the actual intentions of each party, it is to decide what each was reasonably entitled to conclude from the attitude of the other".

Further, Mason J in ***Codefa Construction Pty Ltd V State Rail Authority of New South Wales***[12] said:-

> "When the issue is which of the two or more possible meanings is to be given to a contractual provision we look not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the contract…It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used".

Further as was stated in ***Pangenan S. P. A. V Tradax Ocean Transportation***[13]. by Steyn, J:

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[11] ***Mc Cutcheon V David Mac Brayne Ltd***

[12] ***Codelfa Construction Pty Ltd V State Rail Authority of New South Wales*** 91982) 149 C. L. R. 337

[13] ***Pangenan S. P. A V. Tradax Ocean Transportation*** [1987] 3 AllER 565

> "The court's task is simply to determine the meaning of the provision, against its contractual and contextual scene".

In ***IRC V Raphael***[14] Lord Wright speaking on the same said:

> "It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the words actually used. There is often an ambiguity in the use of the word 'intention' in cases of this character. The word is constantly used as meaning motive, purpose, desire as a state of mind, and not as meaning intention as expressed. The words usually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them; such facts may be proved by extrinsic evidence or appear in recitals; again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonize as far as possible all the parts; particular words may appear to have been used in a technical or trade sense, or in a special meaning adopted by the parties as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of the intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. In some cases, hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there had been a real intention and a real mistake in expressing that intention; these

[14] ***IRC V Raphael*** [1935] AC 96

> matters may be established, as they generally are by extrinsic evidence. The court will thus reform or rewrite the clauses to give effect to the real intention. But that is not construction but rectification".

Clearly therefore, it is the words actually used that matter and this is the approach that has been taken by English law. As was stated by Saville J in ***Vitol B V V Caompagnie Europeene de Petroles***[15]

> "The approach of the English law to questions of the true construction of contacts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never agreed upon the vital terms of their burgan.

Indeed it was said that in construing a contract, the intention of the parties should be ascertained from the language the parties have used, considered in the light of the surrounding circumstances and the object of the contract in so far as that has been agreed or approved. In ***Cargill International S. A. V Bangladesh Sugar Food Industries Corporation***[16], a case that dealt with performance bonds, the facts were that the defendant had accepted the plaintiffs tender for the supply of sugar subject to receipt of a performance bond covering 10% of the total C & F value. Clause 13 of the contract of sale provided that the performance bond was liable to be forfeited if the plaintiff's failed to fulfill any terms and conditions of the contract and clause 16 that if the plaintiff failed to

[15] ***Vitol B V V Caompagnie Europeene de Petroles*** (1988) l Lloyds Rep 574.

[16] ***Cargill International S. A. V Bangladesh Sugar Food Industries Corporation*** [1998] IWLR, 461

adhere to the arrival time they were liable to forfeit the bond. The vessel used was, contrary to a stipulation in the contract, over 20 years old, and arrived late. The defendant rejected the shipment and made a call on bond. The plaintiffs sought an injunction restraining the defendant from drawing on the bond and a declaration that the defendant was not entitled to make any call on the bond or to retain any money so received on the ground that the defendant had suffered no loss. On the trial of preliminary issues the judge ruled that the defendant was entitled to make a call for the full amount of the bond but that it was entitled to retain only an amount equal to the loss actually suffered. On appeal by the defendant, the Court of Appeal held in dismissing the appeal, that a performance bond was a guarantee of performance which provided security to the buyer for the fulfillment by the seller of his contractual obligations so that the buyer might have money in hand to meet any claim he had for damage as a result of the seller's breach. In delivering his judgment Potter L J had this to say:-

> "[W]hen construing the effect of particular words in a commercial contract, it is wrong to put a label on the contract in advance and thus to approach the question of construction on the basis of a preconception as to the contract's intended effect, with the result a strained construction is placed on words, clear in themselves in order to fit them within such preconception…As Seville, J observed in another context in ***Palm Shipping Inc. V Kuwait Petroleum Corporation***[17]
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> > 'It is not a permissible method of construction to propound a general or generally accepted principle…and then (to use the words of Lord Goff in ***The Natos case***[18] to seek to force the provisions of the [contract] into the straight jacket of that principle'.
>
> On the other hand modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in restricted meaning would lead to an apparently unreasonable and unfair result".

[17] ***Palm Shipping Inc. V Kuwait Petroleum Corp*** [1988] l Lloyds Rep 500
[18] ***The Natos*** [1987] l Lloyds Rep 503, at 506

Furthermore, where the words of the operative part of the contract are clear, they will not be controlled, cut – down or qualified by recitals. In ***Walsh V Trevanion***[19] Patterson J said:

> "When the words in the operative part of a deed of conveyance are clear and unambiguous, they can not be controlled by the recitals or other parts of the deed. On the other hand when those words are of doubtful meaning the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words".

So too did Lord Romilly M R say in ***Holliday V Overton***[20]

> "It is impossible by a recital to cut down the plain effect of the operative part of a deed".

Perhaps an emphatic statement on the point was made in ***Mackenzi V Duke Devenshire***[21] by Lord Halsbury L C when he said at 405:

> "It appears to me that this case is susceptible of a very short solution. I simply look at the deed itself and I find that the provisions for the beneficiaries intended by this deed are satisfied by the persons claiming now as heirs female. I really have great difficulty in saying more than that, because if the language of the instrument itself is sufficiently clear as to the beneficiaries pointed to, as I think it is, and if the trust purposes are set forth in the paragraph of the deed which is appropriate to such purposes, it seems to me to be absolutely unarguable that the true meaning of those words, and the purposes of the trust so set forth, can be in any way controlled, qualified or modified by the initial statement of what the motive of the author of the deed was. It would to my mind be disastrous to introduce such a system of construing a deed. One has known the language of

[19] ***Walsh V Trevanion*** (1850) 15QB 733
[20] ***Holiday V Overton*** (1852) 14 Bear 4b7
[21]Mackenzie V Duke Devenshire[1896]AC 440

> will somewhat perverted to perform the function which it was assumed the testator intended to be performed, ***but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made***". (emphasis supplied by me)

I said earlier on this judgement that the position of the law in this branch of the law has somewhat shifted. While courts have continued to be guided by the foregoing principles as regards interpretation of contractors, it was not until 1997 when Lord Hoffman delivered his celebrated judgement in ***Investors Compensation Scheme V West Bromwich Building Society***[22] in wherein the learned judge summarized the law about the interpretation of contracts into five principles. In what has become a much cited passage he stated:

> "My Lords, I will say at once that I prefer the approach of the judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in ***Prenn V Simmonds***[23], ***Reardon Smith Line Ltd V Yngar Hansen - Tangen***[24] and ***Yngar Hansen – Tangen V Sanko Steamship Co***[25] is always sufficiently appreciated. The result has been, subject to the one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarized as follows:-

[22] ***Investors Compensation Scheme V West Bromwich Building Society*** [1998] l WLR 896
[23] ***Prenn V Simmonds*** [1971] lWLR 1381, 1384 - 1386
[24] ***Reardon Smith Line Ltd V Yngar Hansen – Tangen*** [1976] lWLR 989
[25] ***Yngar Hansen – Tangen V Sanko Steamship Co*** [1976] lWLR 98

1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
2) The background was famously referred to by Lord Wilberforce as the '**matrics** of fact' but this phrase is, if anything an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. In ***B. C. C. I. V Ali***[26] Lord Hoffman qualified the word 'anything'. He said:

'when…I said the admissible background included

> 'absolutely anything, which would have affected the way in which the language of the document would have been understood by a reasonable man'. I did not think it necessary to emphasize that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally in effective) or proved common assumption which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with

[26] ***B. C. C. I. V Ali*** [2002]lAC251 at 269

conventional usage… 'we do not easily accept that people have made linguistic mistakes particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties have departed from conventional usage'.

3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interprets utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. See ***Mannai Investments Co Ltd V Eagle Star Life Assurance Co Ltd***[27]
5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes particularly in formal documents. On

[27] ***Mannai Investments Co Ltd V Eagle Star Life Assurance Co*** [1997] AC 749

the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in ***Antaios Compania Naviera S A V Salen Rederiera A. B.***[28]

> '[I]f detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to commonsense".

These are now the principles applicable to interpretation of contracts. In ***B. C. C. I. V Ali*** [supra] Lord Bingham of Cornhill summaries the five principles enunciated by Lorde Hoffman in the ***Investors Compansation Scheme Case***[supra] as follows:-

> "To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as is known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgement based on the materials already identified".

This is perhaps the same thing as Lord Hoffman's passage. However, it must be said that as is usually the case, not all judges have accepted that the five principles represent a new departure in the interpretation of contracts. For example Chadwick L. J. in the case of ***Bromarin v IMD Investments Ltd***[29] said:

> "But for my part, I am not persuaded that Lord Hoffman intended, in the passage in the ***Investors Compansation Scheme Case*** [supra] which is so

[28] ***Antaios Compania Naviera SA V Salen Rederiera A. B***. [1985] AC 191 AT 201
[29] ***Bromarin V IMD Investments Ltd*** (1998) STC, 244

> often relied upon, to propound any novel principle. See also ***Den Danske Bank V Skipton Building Society.***[30] To my mind, he was doing no more than emphasizing that words are to be construed in the context of the agreement which the parties are making, having regard to the other provisions in the agreement, and the commercial purpose for which the agreement made. What is, of course, essential is that the court can be confident, from the other provisions of the agreement and an understanding of its commercial purpose, what meaning the parties did intend the words to bear. That may lead to the conclusion that the words used do not express the meaning which the parties intended; but that will be an exceptional case".

Similar sentiments were made in ***BOC Group V Centeon***[31] when Evans L. J. postulated:

> "The old intellectual baggage has been discarded but the courts are not traveling light. The cabin trunks have been replaced by airline suitcases: the contents are much the same, though they are expressed in more modern language".

Further in ***WRM Group V Woods***[32]**,** woods LJ in delivering his judgement described Lord Hoffman's passage as having restated well established principles and in ***New Hampshire Insurance Co. Ltd V Phillips Electronic North American Corp***[33] Clarke J said that he did not think that Lord Hoffman intended to alter the principles of legal interpretation of contracts. In the words of the learned Lord Justice:

> "I do not think that the he [Lord Hoffman] intended to alter the principles in recent years".

See also ***Zeus Tradition Mine V Bell***[34] wherein Coleman, J in describing Hoffman J's first principle said:

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[30] ***Den Dansket Bank V Skipton Building Society*** [1988] 1 E. G. L. R. 155

[31] ***Boc Group V Centeon*** [1999], April 29, (unreported)

[32] ***WRM Group V Woods*** [1998] CLC 189

[33] ***New Hampshire Insurance Co. Ltd V Phillips electronic North America Corp*** [1998] CLC 1244

[34] ***Zeus Tradition Mine V Bell*** [1999] C.L.C. 391

> "References to the meaning which would be conveyed to a reasonable person…are merely another and familiar way of expressing the judicial process of inference from admissible primary evidence".

It is however be appreciated by prominent scholars and jurists that Lord Hoffman's summary of the principles about interpretation of contract have revolutionalised the law in this branch of the law and the said principles have so far quite apart from the United Kingdom been adopted by the courts in Hong – Kong as is evident from the decision in ***Jumbo Kinf Ltd v Faithful Properties Ltd***[35] and also in ***New Zealand*** as seen in the case of ***Boat Part Limited V Hutchinson***[36]. The Courts in Australia however have taken a more cautious view. See ***Royal Botanic Gardens and Domain Trsut V South Sydney City Council***[37]

In simply put, the object of interpretation is to ascribe to the language used in the text the most befitting meaning coming out of the words actually used. In the words of Lord Steyn in ***Equittable Life Assurance Society V Hyman***[38] he said:

> "The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear".

The learned authors of Lewison, ***The Interpretation of Contracts***[39] have said although the formulation of this principle sounds simple, it is the fundamental philosophy on which the English courts have approached the law on interpretation of contracts. This is what they have said:

> Beguilingly simple the formulation of this principle is, it contains the fundamental philosophy underlying the English approach to the interpretation of contracts. That is that interpretation does not involve the search for the actual intentions of the parties, but for an objective meaning. The purpose of interpretation is not to find out what the parties intended but what the language of the contract would

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[35] ***Jumbo Knif Ltd V Faithful Properties Ltd*** (1999) H. K. CFAR 279
[36] ***Boat Part Limited V Hutchonson*** (1999) 3 NZLR 74
[37] ***Royal Botanic Gardens and Domain Trust V South Sydney City Counsil*** (2001) 76 AJLR 436
[38] ***Equittable Life Assurance Society V Heyman*** [2000] 3 llER, 961, 969
[39] Lewsion on ***The Interpretation of Contracts,*** Sweet & Maxwell, 3rd, Edition p.5

> signify to a properly informed speaker of English[40]. It is this philosophy that explains the rationale for such of the exclusionally rules of evidence as remain in English law. In this respect, as Lord Hoffman acknowledged, the five principles do not follow the way in which serious utterances are interpreted in ordinary life[41].

It must be acknowledged of course, that there are other respects in which the interpretation of contracts differs from interpretation of utterances in ordinary life. In the case of literary work, an ambiguity may enrich the text and may have been a deliberate technique on the part of the author. The interpreter of such text may readily conclude that it is open to several interpretations each one of which is a reasonable one. However, in the case of a contested contractual interpretation, the court can not usually content itself with the conclusion that a text is ambiguous. Thus where for example, there are, or appears to be competing interpretations, the court must choose between them and declare one of them to be correct (and hence the only) interpretation. The point was perhaps succinctly put by Lord Diplock in ***Slim V Daily telegraph Ltd***[42] when he said:

> "[T]he argument between lawyers starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them, but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it".

And in our own jurisdiction, the courts have indeed held that business agreement must be construed broadly and fairly without being too astute or subtle in finding defects, but seeking to apply the maximum *verba ita intelligenda ut res magis valeat quam petreat.* Such was the holding in the case of ***Kamange V Mussa Garage***[43] in which the appellant brought an action before the Resident Magistrate, Zomba against the respondent for breach of a contract

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[40] ***Steyn,*** Written Contracts: To what Extent May Evidence Control Language [1998] C. P. L. 23

[41] Hoffman, 'The Intolerable Wrestle with Words and Meaning' (1997) 114 S. A. L. J. 656. Lord Hoffman argues that any interpretation, even in every day life, is necessarily objective since the interpreter does not have a window into the speaker's mind, and hence can not know his subjective intention. However, in everyday life a listener may ask for clarification in cases of ambiguity; whereas it is precisely in those cases that the court is called upon to interpret a contract with no possibility of seeking clarification.

[42] ***Slim V Daily Telegraph Ltd*** [1968] 2 QB 157

[43] ***Kamange V Mussa's Garage***[1973 – 74] ALR, Mal 315

made between the appellant and the respondent for the repair of the appellant's motor car by the respondent. The relevant facts were as follows:-

The appellant asked the respondent to repair the appellant's motor car. The respondent agreed and asked for a deposit and the appellant paid the deposit and left the car with the respondent. The respondent did not repair the car but removed a number of parts and sold them thus rendering it unusable. After two years the appellant asked the respondent to replace the parts so that he could take back the car, and when the parts were not replaced he told the respondent he was no longer prepared to accept the car whether the respondent repaired it or not, and demanded the payment of the deposit and payment of a further sum of money. Subsequently the appellant instituted the present proceedings and claimed those amounts.

On the basis of the foregoing facts and findings unsupported by evidence, that the respondent had told the appellant he could not give an estimate of the cost of repairs until he had ascertained the extent of the damage, and that he later gave the appellant an estimate and asked him to pay half, which the appellant did not do, the magistrate found that the parties had never been ***ad idem*** and that there was no contract, and gave judgement for the value, to be assessed, of the parts removed from the car. The appellant appealed, and Jere Ag J as he then was, in allowing the appeal and finding that there was a contract quoted with approval the principles set down by Lord Wright in ***Hillas & Co Ltd V Acros Ltd***[44] wherein it was said:

> "Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly the duty of the court, to construe such documents fairly and broadly without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, "*verba ita sunt intelligenda ut res magis voleat quam patrea'.* That maxim however does not mean that a court is to make a contract for the parties, or go outside the words they have used except in so far as there are appropriate

[44] ***Hillas & Co Ltd V Arcos Ltd*** [1932] AllER 503 at 504

> implications of the law, as for instance, the implication of what is just and reasonable to be ascertained by the court as machinery where the contractual intention is clear but the contract is silent on some detail…Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted".

In the instant case, the parties after some negotiations executed three documents which, in my considered view, represents the contract between the parties viz, the Memorandum of Understanding [MOU] dated 15th February, 2001 between the 1st and 2nd plaintiffs on the one hand, and the 1st defendant on the other hand. The Memorandum of Understanding was exhibited as exhibit "SC2" in the affidavit of the plaintiffs. The Second and third documents were the two Letters of Intent, exhibits "SC3 (a)" and "SC3 (b)", both of which were executed on 4th April, 2001. It was agreed in exhibit "SC2" between the parties ***inter – arlia***, That the plaintiffs and the 1st defendants would enter into a 50 – 50 joint, venture to mine and procure blocks of granite – solidite from Illomba Hill, and that the joint venture would enjoy for the duration of the mining held by Illomba Granite the rights to extract and buy all/any blocks they deem marketable, and that the joint venture would pay to the 1st defendant a royalty of US$200 for each CM extracted and exported from the quarry. In exhibit "SC3 (a), under clause 1, the parties agreed that while the 1st defendant was the beneficial owner of Mining Licence No ML0019/95, which gave it the right to mine and process "sodalite", and that the 1st defendant confirmed that it ***had no impediment*** to transfer use of the mining licence [emphasis supplied] whilst in exhibit "SC3 (b), the parties were more or less agreeing on the modalities of setting up the joint venture and its operations. These three exhibits should also be understood, in my most considered opinion, in the light of other documents like exhibit "HP2" and "HP3", "HP4" which provide background information in line with the principles in ***Investors Compensation Scheme V West Bromwich Building Society.[supra].*** Was the intention of the parties that the 1st defendant would transfer the Mining Licence. In my most considered judgement I think, the answer should be in the negative. To begin with, it is clear that right from the period before the contract came into existence, the 1st defendant in exhibit"HP2" in which it analysed the plaintiffs' offer, clearly stated that it was the rightful owner of the mining licence over the Blue Sodalite Syenite occurrence at Illomba Hill when it ***inter - alia*** proposed

> "Illomba is the rightful owner of the mining licence".

In reply to this propositions the plaintiff's in HP4 stated ***inter – alia***

> "The summary you have reported on items 1 through 10 well explain our intention of cooperation to reach the agreement".

The 1st defendant's position on the mining licence is also maintained in exhibit "HP4" when it said:

> "Illomba being the rightful owner of the mining licence will take care of ground rent and other fees…"

Now it should be appreciated that these pre – contractual agreements culminated into exhibit "SC2", [the MOU] which hardly shows any intention whether mutually agreed or otherwise, that the 1st defendant had agreed to part with or transfer, the mining licence.This point was conceded by the 1st plaintiff in his cross-examination. It should be noted, as was stated in MC Cutcheion V Macbrayne (David) Ltd[45] per Lord Devlin that the primary material available is the document to be interpreted. In that case the learned judge said:

> "It seems to me that when a party assents to a document forming the whole or part of his contract, he is bound by the terms of the contract, read or unread, signed or unsigned, simply because they are in the contract; and it is unnecessary and possibly misleading to say that he is bound by them because he represents to the other party that he has made himself acquainted with them".

In my opinion, the Joint Venture Company, Blue Rock in exhibit "SC2" was to enjoy, for the duration of the mining licence held by the 1st defendant the rights to extract and buy all or any blocks. Even if one were to ignore exhibits "HP, "HP3" and "HP4", the clear and objective intention of the parties was that the mining licence was to be held by the 1st defendant and that for as long as the said licence was held by the 1st defendant, Blue Rock was to enjoy the rights to extract and buy. Blue Rock was to extract or bring out the rocks and buy them.

[45] [1964] IWLR 125 at 134

This point is perhaps vividly brought out when one considers exhibit "SC3 (a)" in which the parties agreed that whilst the 1st defendant was the beneficial owner of the mining licence, it had no impediment to transfer 'use' of the mining licence to Blue Rock. Now in my understanding no matter how one were to stretch his or her understanding, transferring use of the mining licence, and transferring the mining licence can never mean the same thing. In Oxford Advanced Learners Dictionary, the word 'use' is defined as 'to do something with a machine, a method, an object, etc for a particular purpose. Indeed as I understand it, the meaning therefore ascribed by the plaintiffs that to 'transfer use' of a mining licence meant transfer of the licence itself has, in my view, no support either in law or elsewhere. The clear meaning was therefore that what was to be transferred was the use of the mining licence, and not the mining licence itself and this I so find.

Furthermore, in cross – examination, Mr Alessandro Nigrisoli could not exactly point out where if at all in exhibit "SC2" the intention to transfer the licence was manifested or provided for.The witness agreed in cross-examination that the intention to transfer the Mining Licence was not present in exhibit "SC2". This however is despite the fact that he told the court that the agreement contained in exhibit "SC2", "SC3" (a) and "SC (3)" contained what he wanted them to contain and that therefore he could not sign the agreement if it did not contain what he wanted, yet he signed it and there is no indication that the licence would be transferred. Infact both the 1st and the 2nd plaintiffs in cross – examination admitted that "SC2" was drafted by them and that it contained everything. On the basis of the foregoing therefore it is my finding that neither under the MOU nor the two Letters of Intend did the 1st defendant undertake to transfer the Mining Licence to Blue Rock.

Secondly, since I have found that there was no undertaking either express or implied to transfer the mining licence, there was therefore no failure, by the 1st defendants to transfer the same, and consequently there was no breach as the 1st defendants made no such undertaking. I therefore declare that there was no breach in this respect,

As to whether the defendants deliberately or fraudulently or dishonourably failed to make any effort to transfer the mining licence, the answer again should be in the negative. This is because in my view, the 1st defendant was under no obligation whatsoever to transfer the said licence. What was to be transferred was 'use' of the mining licence. As a matter of fact the evidence shows that Blue Rock was able to quarry and export and that all along the defendants maintained that they would continue to hold the mining licence. It is clear, in

my considered opinion, that since the 1st defendant was to continue being the licence holder, that is the reason why the parties agreed in the MOU that the joint venture was to pay a royalty of US$200 for each cm extracted and exported from the quarry. When asked on the issue of the royalty, the 1st plaintiff told the court that loyalty is something you pay for the befit u earn.He went on to say that the owner of a thing is paid a royalty and explained that this was what was intended that the 1st defendant would keep the licence and for the use, the plaintiffs would pay a royalty to the 1st defendant. A royalty is put simply compensation the use of property i e natural resources.See Blackstone's Law Dictionary. The same royalty in "SC2" is described as a fee in "SC3 (A)". The defendants on many occasions in their correspondence with the plaintiffs raised the issue of royalties but the plaintiffs never raised the issue of the transfer of the mining licence, if that was connected with the royalty. Actually on the contrary, there is overwhelming evidence on record that the rocks from the 1st defendants mine were extracted and exported, and yet there was no loyalty paid to the 1st defendant. The plaintiff's assertion of fraud on the part of the defendant's, is if anything, unbelievable if not unconvincing, actually it should be the other way round. In my most informed, judgment there was no basis upon which the 1st defendant would have transferred the licence, and consequently I declare that there was no fraud on the part of the 2nd and 3rd defendants in not transferring the Mining Licence to Blue Rock.

Having so declared that there was no fraud, I similarly hold, and declare, on the reasons based on the foregoing that the 2nd and 3rd defendants, did not therefore mislead the plaintiffs that they would transfer the mining licence. Actually a close reading of the documents, "SC2", "SC3(a)" and "SC3(b)" plus the various correspondence it crearly emerges that the intention was clear on the part of the 2nd and 3rd defendants that the 1st defendant was not going to transfer the Mining Licence to Blue Rock.

On the issues as to whether based on the terms of the MOU, the defendants acted in bad faith, by not informing the plaintiffs on the status of the mining licence, here again the answer must be in the negative. As observed elsewhere in this judgment, the defendants were under no obligation to transfer the mining licence. As a matter of fact it is quite evident that the defendants kept on saying they were holders of the mining licence as seen from "HP2" "HP3" and "HP7". As already found out nowhere in exhibits "SC2" "SC3 (a)" and "SC (b)" did the defendants agree to transfer the mining licence and as they were not required to effect the said transfer, I consequently declare that the defendants did not act in bad faith in not informing the plaintiffs the status of the Mining Licence as regards transfer as there was no such duty on the part of the defendants.

I now come to the issue as to whether without the mining licence, the joint venture company Blue Rock can not lawfully operate in Malawi. As we have seen in under Section 43 (a) of the Act a holder of the mining licence apart from having the exclusive right to carry on prospecting and mining operations in a particular designated area and for the purposes of the exercise of that right may use employees of agents. Clearly, the Act therefore allows use of agents. According to ***Bowsted on Agency***[46], an agency is the relationship which exists between two persons one of whom expressly or impliedly consents that the other should represent him or act on his behalf and the other of whom similarly consents to represent the former or so to act. The one who is to be represented or on whom the act is done is called the principal. The one who is to represent or act is called an agent. An agency relationship may be by agreement whether contractual or not, between principal and agent, which may be express, or implied from the conduct or situation of the parties. The relationship may also be retrospectively, by subsequent ratification by the principal of acts done on his behalf. Thirdly the relationship may also come by operation of the law. A closer reading of exhibit “SC2” and a recital of exhibit “SC3 (a)”, the plaintiffs and the 1st defendant were to enter into a joint venture namely Blue Rock, whose function would be to mine and procure blocks of granite – sodalite from Illomba Hill, and that the 1st defendant was therefore required to make an irrevocable undertaking that it would grant the plaintiffs the exclusive rights to advance the objectives of Blue Rock. As observed above, the Act allows the creation of an agency relationship. It is evidently clear from the affidavits as well as the ***viva-voce*** testimony that government was actually aware of the relationship between the 1st defendant and Blue Rock on the one hand, and the plaintiffs on the other. This in my view explains why Blue Rock was able to mine and export the rocks extracted with the knowledge of the government notwithstanding that Blue Rock never owned the mining licence as is clear from “HP32, 33 and 34”. As a matter of fact in exhibits “HP18 (a)” and “HP18 (b)” which were copied to the plaintiffs, government was only took issue with regard to explosives and not the licence. Further, it was admitted by the plaintiffs during their cross – examination that the reason why mining stopped had nothing to do with the issue of the mining licence but rather on the disagreements that arose between and amongst the shareholders of the joint company, Blue Rock Accordingly, I declare that there is nothing either in the Act or in the agreements signed to the effect that without the mining licence Blue Rock can not lawfully operate in Malawi.

[46] ***Bowsted on Agency*** 14th Edition, Sweet and Maxwell

On the claim for damages, it emerged clearly in their cross – examination, and the plaintiffs did not deny that the mining operations herein did not stop due to the non – transfer of the mining licence by the defendants. In these premises it is virtually incomprehensible in my view, to assert that the failure, if at all, to transfer the mining licence has caused the plaintiffs loss and damage. The plaintiffs admitted during cross – examination that the Blue Rock had the exclusive right to mine the rocks and then sell them to an off – shore company and that this was done even when the mining licence remained with the 1st defendant. The plaintiffs therefore have not established, what loss in if they suffered due to the non – transfer of the mining licence by the defendants. As noted earlier, the defendants were under no such obligation. Consequently, it is my order that the plaintiffs did not suffer any loss, rocks were extracted and sold, without any royalties being paid to the defendants contrary to the clear and express terms of the agreement.

In these circumstances and in view of the foregoing, the plaintiff's claims against the defendants must surely fail, and consequently I dismiss the plaintiffs original summons in their entirely.

On the other hand however, the defendants have satisfied me that for three years the plaintiffs extracted the rocks and exported them, and eventually sold them. For all this period contrary to the agreement, the plaintiffs never paid the royalty to the 1st defendant as was clearly agreed. Consequently, I find that the defendants have proved their counter claim, and I hereby order that the plaintiffs must render a true and just account of the transaction, from the period the quarry begun operating up to the time the mining stopped. This must be done within the next 21 days.

As regards costs these follow event, since I have found for the defendants I accordingly award costs to the defendants.

***Pronounce in Open Court*** at Principal Registry this Tuesday 4th November, 2008.

Joselph S Manyungwa

**JUDGE**