BERESFORD COLE v MENDEKIA

SC

SUPREME COURT OF SIERRA LEONE, Civil Appeal 2 of 1973, Hon Mr Justice S C W Betts PJ; Hon Mr Justice E Livesey Luke JSC; Hon Mr Justice N E Browne-Marke JSC; Hon Mr Justice C A Harding JA; Hon Mrs Justice A V A Awunor-Renner JA, 29 October 1974

[1] Contract Law – Agency – Agency only created where intention to bring principal and third party together or where intention to bring third party under the direction and control of the principal – No third party in existence – Building contract that established relationship of principal and independent contractor

[2] Contract Law – Construction of written documents – Language of the instrument is to be understood in its ordinary and natural meaning notwithstanding the fact that such construction may appear not to carry out the view the parties intended to carry out – General principles

[3] Contract Law – Construction of written documents – Whether signed document was a contract or receipt – Where the document reveals a concluded bargain between the parties it will constitute a valid contract – Differences between contract and receipt

[4] Contract Law – Damages – General principles – Cost of completion – Time at which damages to be assessed

[5] Words and Phrases – "Receipt"

The respondent entered into an agreement with the appellant. The written contract provided, inter alia, that the appellant would construct a two storey building of four self contained flats for the sum of Le24,000.00 within a maximum period of six months. The respondent paid the appellant an advance of Le14,000.00 with the balance to be paid on or before the 14 February 1969. The balance was paid on 16 December 1968. The contract expired without the building being completed. The appellant asked for one more month until July 1969 to complete to which the respondent agreed but the building was still incomplete at the end of July 1969. The respondent issued proceedings in the High Court claiming damages for breach of contract. Judgement was given to the appellant and the respondent appealed to the Court of Appeal who allowed his appeal and awarded daamages. The appellant appealed against the judgement of the Court of Appeal arguing, inter alia, that he was a gratuitous agent of the respondent and that the signed document (Exhibit C) was a receipt and not a contract.

Held, per Betts PJ and Livesy Luke JSC, dismissing the appeal:

1. The general rule of construction of a written document is that the language of the instrument is to be understood in its ordinary and natural meaning, notwithstandaing the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out. *Lee v Alexander* (1883) 8 App Cas 853 applied.
2. The appellant was not an agent. The role of the appellant was incompatible with either bringing a principal and third party together or bringing himself under the direction or control of the principal. The words 'agent' or 'agency' had no relevance to the appellant or to his relationship with the respondent for at no time was a third party in existence or contemplated. All the evidence showed that the relationship between the appellant and respondent was that of principal and independent contractor and the use of the word 'agent' in the document did not change the nature of that relationship.

3. The essential elements of a receipt are that it is an acknowledgement, it is in writing and it is a mere admission of a fact that money or some other form of valuable has been received. Nothing further was required. The document was not a mere acknowledgement of money received, but made provisions as to the fulfillment by the appellant of specific obligations and also created binding legal duties for the respondent, his heir and successors.
4. To be a good contract there must be a concluded bargain. All the indices leading to a concluded bargain were embodied in Exhibit 'C'. The failure of the appellant to complete the building by 2 July 1969 (ie, the extended period) constituted a breach of contract. *Scammell v Ouston* (1941) 1 All ER 14 and *Hutton v Watling* (1948) 1 Ch 398 applied.
5. The applicable principle as to the measure of damages was to assess what it cost the respondent to complete the building substantially as it was originally intended, less any amount that would have been due and payable to the appellant had the appellant completed the building at the time agreed by the terms of the contract. *Mertens v Home Freeholds Company Limited* (1921) 2 KB 526 applied.

Cases referred to

British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Rys Company of London Limited (1912) AC 689
Caddick v Skidmore (1857) 44 E K 907
Charles Richards v Oppenhaim (1950) 1KB 616 CA
Crawford v Toogood (1879) 13 ChD 153
Davies Contractors Limited v Fareham UDC (1956) AC 696
Falck v Williams [1900] AC 176
H. Dakin & Co Limited v Lee (1916) 1 KB 566
Hawkins v Rogers (1951) 85 1 TR 128
Hartley v Hymans (1920) 3 KB 475
Hutton v Watling (1948) 1 Ch 398
Jones v St John's College, Oxford (1870) LR 6 QB 115
Lee v Alexander (1883) 8 App Cas 853
May & Butcher, Limited v R, reported in a note to *Foley v Classique Coaches Limited*
Mertens v Home Freeholds Company Limited (1921) 2 KB 526
Nathaniel Stuart Chalmers v Lawrence Pardoe (1963) 1 WLR 677
Penn v Simmonds (1971) 1 WLR 1381
Phillips v Ward (1956) 1All ER 874
R v Boardman 2 Moore & R 147
R v Martin 7 C & P 549
Scammell v Ouston (1941) 1 All ER 14
Skife v Jackson (1824) 3 B & C 421
Spawforth v Alexander 2 Espinasse 621
Throckmerton v Tracey 15 ER 22
Wilson v Short (1848) 6 Hare 366

Legislation referred to

Statute of Frauds 1677 s 4

Other sources referred to

Halsburys Laws of England 3rd Edition, Vol 1, paras 350, 351, Vol 3, para 843
Jowitt's Dictionary of English Law
Stroud's Judicial Dictionary, Volume IV, 4th edition, p 2278
Webster's New World Dictionary

Appeal

This was an appeal by the defendant against the judgement of the Court of Appeal which allowed the plaintiff's appeal againt the judgement of the High Court dismissing a claim for damages for breach of contract. The facts appear sufficiently in the following judgment of Betts PJ.

Dr W A Marcus-Jones for the appellant.
Mr G Gelaga-King for the respondent.

BETTS PJ: On the 13th October 1970, the plaintiff, Sahr Mendekia, (whom I hereinafter refer to as the respondent), issued a Writ of Summons accompanied by a Statement of Claim against George Beresford Cole, (whom I shall hereinafter refer to as the appellant), for breach of a written contract dated 3rd December 1968. The written contract provided, inter alia, that the appellant would construct a two-storeyed building of four-self contained flats for the sum of Le24,000 (twenty-four thousand leones) within a maximum period of six (6) months, that is to say by June 1969. The respondent paid the appellant an advance of Le14,000 (fourteen thousand leones), and agreed to pay the balance on or before the 28th February 1969. As a matter of fact, the balance of Le10,000 (ten thousand leones) was paid on the 16th December 1968. After the expiration, according to the respondent's evidence, the appellant asked for one more month to complete the building that is to say, by July 1969. The respondent said he accepted. The building however was still incomplete at the end of July 1969.

Litigation started by a writ of summons which was filed on the 13th October 1970, followed by a statement of claim. The appellant filed a statement of defence and counter-claim on the 28th April 1971. By leave of the Court, an amended statement of claim was delivered and filed on the 3rd of November 1971. The respondent claimed damages – general and special – for breach of contract. The action was tried by Ken During, J (as he then was) who gave judgment on the 10th April, 1972 dismissing both the respondent's claim and the appellant's counter-claim. The respondent appealed against that judgment and the Court of Appeal (Percy R Davies JA, O B R Tejan JA and Rowland Harding J) allowed the appeal on the 11th July 1973, and ordered the appellant to pay the respondent Le14,085 (fourteen thousand and eighty-five leones) as general damages; Le500 (five hundred leones) as special damages and costs of the action in the High Court and the Court of Appeal.

The present appeal is against the judgment of the Court of Appeal and the following issues were raised: (a) was the appellant a gratuitous agent of the respondent? (b) was Exhibit 'B' a contract or a receipt? (c) if is was a contract, was there a breach of it? (d) was the respondent entitled to the damages he was awarded or to any damages at all?

It will be useful at this stage to set out Exhibit 'C' as it relates significantly to the answers to be given to the issues raised.

EXHIBIT 'C'

Received the sum of Le14,000 (fourteen thousand leones) from Sahr Lebbie Mendekia, Esq, farmer of 27 Yaradu Road, Koidu Town, Kono District, in the Eastern Province of Sierra Leone, being part payment of the sum of Le24,000 (twenty-four thousand leones) for the costs of construction of a Two-Storeyed Building with Boys' Quarters and Car Port on 1.907 acres of land situated off Kissy Bye Pass Road, Kissy Village as more fully described and delineated on the Director of Surveys and Lands Plan LS 1070/68 dated 28th November, 1968 to be built and constructed with the best labour and materials available within a maximum period of (6) six calendar months from the date hereon; the said structures to contain the following:

Two–storeyed building: 4 (four) self-contained semi-detached flats:

Ground Floor: Flat No 1 – Lounge cum dining room, two bedrooms, one bath and water closet, estimated unit cost Le4,400.00.

Flat No 2 – Lounge cum dining room, three bedrooms, one bath and water closet, kitchen, estimated unit cost – Le6,600.00.

First Floor: Flat No 3 – Lounge cum dining room, two bedrooms, one bath and water closet, kitchen estimated unit cost – Le4,400.00.

Flat No 4: Lounge cum dining room, three bedrooms. One bath and water closet, kitchen, estimated unit cost – Le6,000.00.

Boys' quarters and car port: Boys' quarters:- two bedrooms, one water closet and shower. Car port: covered accommodation for four cars, Estimated unit cost – Le2, 200.00.

Exigencies - 800.00

TOTAL COST – Le24,000.00

I, Sahr Lebbie Mendekia aforesaid for myself my heirs and Successors in title do hereby contract and agree with my agent, George Beresford Cole, Real Estate Agent, of 23 Liverpool Street, Freetown, Sierra Leone, to pay to him the balance of Le10,00.00 (ten thousand leones) in full on or before the 28th February, 1969 for the fulfillment of the purposes hereinbefore contained.

Dated in Freetown this 3rd day of December, 1968.

(Sgd) George Beresford Cole

Real Estate Agent.

Read over and fully explained to Sahr Lebbie Menedkia by Kai Mossay No 27 Yaradu Road, Koidu, TRADER. When he, Shar Lebbie Mendekia seemed perfectly to understand the same before inscribing his mark and/or thumbprint hereon.

(Sgd) R. T. P.

Sahr Lebbie Mendekia.

Having set out Exhibit 'C' I propose to construe it to determine whether its intention was to appoint the appellant as an agent or to create an agency. If one or the other kind of relationship can be ascribed to the document as a result of the construction, then that is the end of the matter, in regard to the agent or agency excluding other incidents.

But if not, Exhibit 'C' will be subject to further construction to determine if it is a contract or a receipt. It is accepted that the word 'agent' is capable of being used in a number of ways and in these proceedings it was sought to use it by the appellant's counsel as a conduit pipe merely to effect the transportation of the terms of agreement between the respondent and some other third party. *Halsbury's* 3rd Edition, Volume I at page 146 and paragraph 351, states that an agent has been defined as a "person primarily employed for the purpose of placing the principal in contractual or other relations with a third party and it is essential to an agency of this character that a third party should be in existence or contemplated". *Wilson v Short* (1848) 6 Hare 366, refers.

There are other definitions but that is the one relevant to our present purpose. It may however be necessary to refer to the distinction between the conduct and exercise of the functions of an independent contractor and an agent. The distinction between an independent contractor and an agent is clearly stated in *Halsbury's* 3rd edition at page 146, paragraph 350

Volume I as follows, "an independent contractor, on the other hand, is entirely independent of any control or interference, and merely undertakes to produce a specified result, employing his own means to produce that result" ... "An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal." I think this is a point to be kept in mind in construing Exhibit 'C'. The above examples indicate that two roles are contemplated – one whose only duty is the production of a specified result without any control and the other in which lawful restrictions may be imposed during the performance of the object to be achieved. It cannot be denied that the respondent attached his right thumbprint to Exhibit 'C' and that such act was accompanied by other legal requirements to make it effective as a legal document. Exhibit 'C' also contains a paragraph which reads:

> "I, Sahr Lebbie Mendekia aforesaid for myself, my heirs and successors in title do hereby contract with my agent, George Beresford Cole, Real Estate Agent of 23 Liverpool Street, Freetown, Sierra Leone", and signed, "George Beresford Cole, Real Estate Agent".

Appellant's counsel argued that because George Beresford Cole was referred to as 'my agent' in the passage quoted above, and because of other references to him, the appellant, as 'Real Estate Agent', there is sufficient evidence to show that his duty as an agent was to bring the principal and the third party together, and that this was particularly so because he, the appellant, was receiving no payment for his services.

The first general rule of construction of a written document is that the language of the instrument is to be understood in its ordinary and natural meaning, notwithstanding the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out. This view was expressed in the case of *Lee v Alexander* (1883) 8 App Cas 853 at pages 869 and 870. One of the cardinal rules of construction is that words must be construed as they stand. In the case of *Throckmerton v Tracey* 15 ER 222 Staunford J laid down the rule that "words shall be construed according to the intent of the parties and not otherwise". In determining the intent of the parties, the document in question should be construed as a whole. In an instrument of the kind we are considering, *Wilson v Short* already quoted requires it as essential to an agency that a third party should be in existence or contemplated. In Exhibit 'C' there was only one reference to the words 'my agent', from which one could arrive at the sense in which the word, 'agent' was used. The words 'Real Estate Agent' are merely descriptive of what I may call the primary occupation of George Beresford Cole. In construing Exhibit 'C' it is necessary to examine the sense in which 'my agent' is used. Does it imply the existence or contemplation of a third party when considered along with various other portions of the document? A passage of the document reads,

> "I, Sahr Lebbie Mendekia aforesaid for myself, my heirs and successors in title do hereby contract and agree with my agent, George Beresford Cole, Real Estate Agent of 23 Liverpool Street, Freetown, Sierra Leone, to pay to him the balance of Le10,000.00 (ten thousand Leones) in full on or before the 28th February, 1969, for the fulfillment of the purposes hereinbefore contained".

The purposes hereinbefore contained are set out in another section of the same document – "for the costs of construction of a two-storeyed building with boys' quarters and car port; to be built and constructed with the best labour and materials available; within a maximum period of six calendar months; from the date hereon", that is, when the document was signed between the appellant and the respondent. The words, 'do hereby contract and agree' are significant as also the words, 'for the fulfillment of the purposes hereinbefore mentioned. One would ask, what do the words, 'my agent' really signify? Do they imply a mere conduit pipe or are they of much greater importance? Do they create a situation in which the principal could exercise his authority by giving lawful instruction to the agent or do they indicate that the principal is only

interested in the production of a specified result? Put in this way, they answers are obvious. The role of the appellant in these circumstances is incompatible with either bringing the principal and a third party together or bringing himself under the direction or control of the principal. I believe that the words, 'agent' and 'agency', as argued by Counsel for the appellant, do not have any relevance to the appellant or to his relationship with the respondent for at no time was a third party mentioned by name or description nor was there any suggestion in Exhibit 'C' that a third party was in existence or contemplated. I do not agree with the argument convassed by Counsel for the appellant that the appellant was a gratuitous agent. From all the material which could be gathered the word 'agent' in my opinion as used in Exhibit 'C' showed that the relationship between appellant and respondent was that of principal and an independent contractor; and also that the use of the word 'agent' has not changed the nature of that relationship.

One of the issues which emerged as a result of the argument of Counsel for the appellant was that Exhibit 'C' was not a contract. He submitted that it was a receipt. I propose to deal with that submission as it was strongly convassed.

In the course of his argument, counsel for the appellant said that the object of Exhibit 'C' was to acknowledge the receipt of money and not as the Court found, a contract 'to erect buildings on the land'. The whole of Exhibit 'C', by that I mean, its entire content, is called in question. When read and appraised as a document relevant in its entirety to the subject matter of this appeal, could it be said that it evokes only an impression of acknowledgement of money received? Before referring to the component sections of the exhibit in some detail it will be useful to outline the main characteristics of a 'receipt', and then attempt to discover whether the contents of Exhibit 'C' would match the constituent elements of a receipt as defined by law. *Stroud's Judicial Dictionary*, Volume IV, 4th edition, beginning at p 2278, defines 'receipt' as requiring 'no particular form of words necessary to constitute a receipt'. The word 'settled' or 'paid', or any other word purporting to give a discharge, together with signature of the creditor, or his mere signature on a document specifying the amount due without any words indicating payment, is sufficient *R v Martin* 7 C & P 549; *Spawforth v Alexander* 2 Espinasse 621; *R v Boardman* 2 Moore & R 147. In *Jowitt's Dictionary of English Law*, a receipt is defined as 'an acknowledgement in writing of having received a sum of money, which is prima facie but not conclusive evidence of payment', *Skife v Jackson* (1824) 3 B & C 421. In *Webster's New World Dictionary*, 'a receipt is a written acknowledgement that something, as goods, money, etc, has been received'. In the light of these definitions, it could be concluded that the essential elements of a receipt are that it is an acknowledgement, it is in writing; it is a mere admission of a fact that money or some other form of valuable has been received. In none of these definitions is it even mildly suggested that any further information is required, while in *Stroud's Judicial Dictionary* already referred to, it is stated that 'a mere signature on a document specifying the amount without any words indicating payment is sufficient'; *R v Martin.*

The appellant is entitled to raise the question that, if the other parts of the document are expunged, could Exhibit 'C' not be regarded as a receipt? If as argued that should be the proper approach, then Exhibit 'C' would inevitably be acknowledgement be a fragmentary document. But this is not so. It takes into account a whole range of connected incidents and fuses them into a distinctly discernable pattern in such a way that each section is linked up with the preceding and subsequent one. The topics specified that the respondent was paying, at the time the document was drawn up, the sum of Le14,000.00 for a particular type of building at a named site as delineated on Director of Surveys and Lands Plan LS1070; the buildings to be completed in six (6) months. The buildings were treated on a unit basis and an attempt was made to set a price for each unit. The respondent then went on to contract and agree with the appellant for himself, heirs and successors to pay a balance of Le10,000.00 by the 28th February 1969. These to my mind do not suggest that the document was a mere acknowledgement of money received.

It did not simply acknowledge a receipt of money, it made provisions as to the fulfillment by the appellant of specific obligations and also created binding legal duties for the respondent, his heir and successors.

Having disposed of this, I come to Counsel's strong contention that Exhibit 'C' was a contract stressing that there was no 'ad idem' that is, 'a mutual understanding between the parties as to the exact type of buildings to be constructed'. The plan approved for the buildings, Exhibit 'B', was produced on the 11th December, 1968, and Counsel argued that if a contract Exhibit 'C' had been signed on the 3rd December, 1968, the approved plan could not necessarily have been the same plan the parties had in mind when Exhibit 'C' was executed. In the case of *Falck v Williams* [1900] AC 176 (PC) where the same words were used with different meanings it was said that the parties were not at one and therefore there was no consensus ad idem. The facts in this case are different and distinguishable. Both sides conducted negotiations together before the project was decided upon. The layout and general character of the project were determined and these resulted in the production of an approved plan on the 12th December 1968. On the 16th December 1968, the approved plan was seen by the respondent after it had been prepared on the instruction of the appellant. There was no question at this time that the parties were not of the same mind. In the instant case, the appellant was solely responsible for all constructional arrangements and Exhibit 'C' which, as I have already mentioned was drawn up by the appellant. It will sound very harsh in the mouth of the appellant to say that in the month of December 1968, the respondent and himself did not have a mutual understanding of the kind, nature and quality of buildings it was agreed and contracted to construct. Even conceding that Exhibit 'B' was to be the basis on which Exhibit 'C' was to be constructed, when it did turn up, apart from the details in measurements which were included, was there any substantial difference at all in the basic ideas incorporated in the two documents? I say no. Further, since the respondent paid on the 16th December 1968, that is, after the appellant had seen Exhibit 'B', which was in his possession, would his conduct not amount to an adoption of the two documents? How then could it be said that there was no consensus? Counsel for the appellant leant heavily on the case of *Scammell v Ouston* (1941) 1 All ER 14. Lord Wright quoting Lord Dunedin said, "however, as Lord Dunedin said in *May & Butcher Ltd v R* (reported in a note to *Foley v Classique Coaches Ltd* at page 21:

> "To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course, it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties".

This passage very succinctly puts the case for the respondent against the appellant. Exhibit 'C' did leave certain things out but these things were not dependent on a further agreement between the parties. In counsel for the appellant's own words, I quote, "there were many areas in which agreement should be reached such as, how the buildings were to be erected was a subsequent term to be considered; and that there was no decision about who was going to be the building contractor or surveyor or costs". The most cursory of examination will show that these were not matters dependent on agreement between the parties as all the indices leading to a concluded bargain had already been embodied in Exhibit 'C'. The cases cited *Hutton v Watling* (1948) Ch 398 at p 403/405; *Caddick v Skidmore* (1857) 44 E K 907; and *Penn v Simmonds* (1971) 3 ACR 327 by counsel for the appellant did not do anything to improve the inconsequential vein of this particular submission.

I have read with interest the cases referred to above and observe that the former two were cited by the counsel for the appellant in support of his submission that a good contract is one which has settled everything necessary to be settled between the parties leaving nothing for future determination between them; whilst the latter was a submission that in construing written

agreements only evidence of factual background should be received. All these cases in my opinion, do not effect this issue. It is significant that *Hutton's* case was referred to by Counsel for the appellant. I shall read out a portion of the judgment of Lord Greene, MR, he said, and I quote, "the first thing we have to do, as I have said, is to construe that document. The true construction of a document means no more than that the Court puts upon it the true meaning being the meaning which the other party, to whom the document was handed or who is relying upon it as an ordinary intelligent person construing the words in a proper way in the light of relevant circumstances". It goes on to say, "what then would the purchaser when she received the document have thought it meant as an ordinary reasonable person intelligently understanding the English language and construing it in the light of the relevant circumstances? She could only have understood that the vendors were deliberately and solemnly recording the terms of an agreement into which they were prepared to enter, or indeed, into which they had entered". It continues, "I should have thought it quite impossible for the vendors to turn round now and say, 'although the document which we handed to you on 6 September 1937, quite clearly purports to record the agree terms between us ... there was no consideration'. With a slight change of words the situation could easily be that in the instant case. Of course, the appeal was dismissed. The reference in this case to the absence of consideration is also apposite. As the principles involved are similar to those in the instant case, and as they have been accurately analysed and the law properly applied, I adopt and apply them. Exhibit 'C' has been examined fragmentally as well as cohesively and the examination has revealed that there was a concluded bargain between the parties and this constituted a valid contract. It should be particularly borne in mind that it was the appellant who drew up Exhibit 'C'.

Counsel for the appellant questioned if it was conceded that Exhibit 'C' was a contract whether the respondent should be entitled to both the Le6,000 which he had spent out of pocket and the Le14,085, the amount estimated to complete the buildings after the Le24,000, the agreed amount in the contract, had been spent? With regard to the Le6,000, the trial judge had this to say. "As regards the defendant's counter-claim, although he alleged therein that he spent an extra sum of Le6,000 of his own money thereon with the concurrence and at the request of the plaintiff, there is abundant evidence before this Court that the allegation is not true." Those are strong words and the Court of Appeal rightly did not pursue the matter. Counsel also submitted that the award of Le14,085 would amount to an unjust enrichment as that vast sum would be supplemental to the ownership of the buildings or whatever else the respondent had acquired from them. He cited the case of *Nathaniel Stuart Chalmers v Lawrence Pardoe* (1963) 1 WLR 677. *Chalmers'* case was based on an oral agreement of land in Fiji which could not be leased without the permission of the Native Land Trust Board. The said land was leased and a building erected thereon. Before an application for the Board's consent was made the appellant and respondent fell foul of each other. No consent was in fact obtained though the building had been erected. Sir Terence Donovan delivered the judgment of the Privy Council and advised Her Majesty that the appeal should be dismissed. It is pertinent to point out that case related to the application of the doctrine of equitable estoppel. This principle does not arise in this case. The question here is based on contract. Had the appellant any authority to vary or break the terms of Exhibit 'C' without reference to the respondent? The outstanding questions now are – Was there a breach? If there was, was the respondent entitled to the quantum of damages he was awarded?

In considering whether the conduct of the appellant amounted to a breach, account should be taken of the performance of his promises; if these were executed in the manner and the time agreed upon. In the case of *Hawkins v Rogers* (1951) 85 1 TR 12 "a race horse had been sold with its engagements; after the sale the vendors, in whose name the engagements stood, without consulting the purchaser cancelled the engagements. The High Court of Eire held that such cancellation was a clear interference with or violation of the purchaser's contractual rights and was intended to and did injure him. The purchaser was entitled to damages, which were

assessed at L750". Any breach of contract of one party gives the other party an immediate cause of action for damages. Usually time is not of the essence in contracts involving work and labour, but where the contract so provides time becomes of essence. In the case of *Charles Richards v Oppenhaim* (1950) 1 KB 616 CA (following *Crawford v Toogood* (1879) 13 Ch D 153 and *Hartley v Hymns* (1920) 3 KB 475 the facts were that in August, 1947, the defendant placed an order with the plaintiff for the building of a body on to the chassis of a motorcar on the footing that the plaintiffs could obtain it within six months, or, at most seven months. From March 1948, onwards the defendant kept pressing for delivery. On 28 June 1948, the defendant wrote to the plaintiff, "I regret I shall be unable to accept delivery after 25th July". When the defendant learnt from the plaintiffs that the body of the car would not be ready by that date, the defendant cancelled the order. The plaintiffs completed the car on 18th October 1948, but delivery was refused by the defendant. The plaintiffs thereupon brought an action claiming the price of the body of the car. Lord Denning delivering the judgment said:

> "If this had been originally without any stipulation as to time and, therefore, with only the implication of reasonable time, it may be that the plaintiffs could have said that they had fulfilled the contract; but in my opinion, the case is very different when there was an initial contract, making time of the essence of the contract: within six or at the most, seven months".

Exhibit 'C' contained the terms of the contracts which stipulated among other things that a "two storey-building with Boys' Quarters and car port was to be constructed on 1.907 acres of land situated off Kissy Bye Pass Road within a maximum period of six (6) calendar months from the date hereon, that is the 3rd day of December 1968. There is no contention that the building as described was incomplete six or even seven months after; also that the building was not ready either for occupation or rental. The original provision was inscribed in the contract, Exhibit 'C' and had not been performed in the manner and time agreed upon, then on the basis of the cases cited, a breach had been committed for which the respondent was entitled to take action for damages. This means that his right of action for damages had therefore accrued. The facts of this case reveal that Exhibit 'C' was signed on the 3rd December 1968. The appellant entered into an agreement to carry out the purposes inscribed in Exhibit 'C' for the sum of Le24,000. On the 10th December 1968, Exhibit 'B' had been produced. This was handed over to Malhab, defendant's 1st witness, some time during that month for an estimate to be prepared. In that same month, the estimate was prepared and found to be Le36,209.95. This was before the commencement of construction of the building. These facts were never reported to the respondent until the 11th June 1969, when the completed building should have been delivered up. Assuming that Malhab's figures were correct, then the appellant was taking on an obligation voluntarily and deliberately entering into a contract he knew it was impossible for him to fulfil. This could not release him from his liability to pay damages. Before going on to deal with appellant's contention, I should refer to the effect of a building contract which is absolute. An extract from *Halsbury's Laws of England* 3rd Edition Volume 3 at p 444 paragraph 843, reads as follows:

> "If the contract to build or erect works is absolute", (which this is), 'and unrestricted by any condition expressed or implied, and it is impossible to do the work and the contractor does not complete it, he will not be excused from the consequences of not fulfilling the contract or from a liability to pay damages. In the case of *Jones v St John's College, Oxford* (1870) LR 6 QB 115 at page 127, Hawner, J, said, 'In that case a contractor undertook unconditionally to perform a contract within a specified time, including any extra which might be ordered; and extras were ordered, which made completion impossible within the contract time; the contractor was held liable to pay damages for the delay'. The Court of Appeal ordered as follows:

1. That the respondent pay to the appellant the sum of £14,085.00 as general damages;

2. That the respondent pay to the appellant the sum of £500.00 as special damages; and
3. That costs on the claim in the High Court, costs of appeal in this Court and costs on the respondent's notice be paid by the respondent.

The basis on which damages under the first head were fixed was the evidence of John Thompson, a Chartered Surveyor, who, in January 1971, estimated the value of the work required to complete the buildings as £17,450.00. From the amount, the Court deducted Le3,370 leaving the sum of £14,085. Counsel for appellant forcefully contested this award. He referred to the case of *Philips v Ward* (1956) 1 All ER 874 (CA) (Denning, Morris, Roamer LJJ), and quoted a principle which he alleged emanated from Lord Denning. The alleged principle was "that where cost of completion or reinstatement is wholly disproportionate to the advantages of undertaking such work, the measure of damages is to be assessed by calculating the diminution in the value of the property caused by the breach of contract". I am sorry to say those words were not used in my report. The major finding of that Court of Appeal was based on the dictum of Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Rys Company of London Limited* (1912) AC at p 689. The Court of Appeal in fact held that:

> "The measure of damages was the difference between the fair value of the property if it had been in the condition described in the defendant's report (£25,0000) and its value in its actual condition (£21,000); accordingly the amount recoverable in damages was £4,000".

In the course of his judgment, Lord Denning did say, 'I take it to be the clear law that the proper measure of damage is the amount of money which will put the plaintiff into as good a position as if the surveying contract had been properly fulfilled'; and also, 'the proper criterion is to take the difference in value between the premises as they ought to have been delivered up in repair, and the value of the premises as they are delivered out of repair. The difference is the measure of the damages to which the landlord is entitled'. I am afraid I am at a loss as to what the alleged principle quoted really means but I will accept it could mean the difference between the actual and the assessed prices. That is near enough to the finding in that Court of Appeal. I do not however accept that the principle by which damages were determined in *Philips* case is applicable in the instant case. The basis on which damages in the *Philips* case was founded was in negligence and damages were measured to satisfy the requirements of a liability in tort as per the dictum of Viscount Haldane in the *British Westinghouse Electric* case supra. What is being considered in this case is damages in respect of a breach of contract. The case of *Mertens v Home Freehold Company Limited* (1921) 2 KB 526 gives an admirable exposition of the proposition in such a case. In the course of his judgment in that case Lord Sterndale MR said:

> "I think the right measure is correctly stated in *Hudson on Building Contracts*, 4th edition, Volume I, p 491, on the authority of an American case: *Hirt v Hahn*. B agreed to erect for the plaintiff according to plans for a certain day. The defendants were B's sureties. After partly completing, B ceased work, and the plaintiff, after giving notice to the sureties, entered and completed and sued the sureties. Held, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended, and in a reasonable manner, less any amount that would have been due and payable B by the plaintiff had B completed the house at the time agreed by the terms of his contract'. It is true that that is an American case. Though I cannot put my finger on them for the moment I feel satisfied that there are English cases which fix the same measure of damages'.

This, in my opinion, is the principle applicable and I find nothing wrong with the measure of damages awarded. The second leg of the finding in *Philips v Ward* was, "that the damages should be assessed at the date the damage occurred, viz, 1952, and accordingly, allowance should not be made for the increase of the cost of executing the requisite work of repair between

that time and the date of bearing of the action". Whilst I agree with this statement as an underlying principle it must however be actively borne in mind that occasions could arise when individual tests are necessary. In this case, the conduct of the appellant made it impossible for any assessment to be done before action commenced. I would therefore hold that the proper time that assessment could have been made here is when the keys were obtained considering all the circumstances of the case.

As there is no contention that the building was not completed in the time agreed I would have to consider whether circumstances had changed so fundamentally that made it impossible for the contract to be performed. In building contracts, hardships, inconvenience for material loss are not grounds for the frustration of contracts. In the case of *Davis Contractors Limited v Fareham UDC* (1956) AC 696, 729, the plaintiff agreed to build seventy-eight houses for the defendant for a fixed price, the work to be concluded in eight months. As a result of weather, shortage of labour, the work took twenty-two months to complete at an extra cost of £17,000. It was claimed for the contractors that the intervening circumstances over which they had no control had frustrated the contract. The House of Lords held unanimously that the circumstances did not frustrate the contract.

In the instant case, also such an argument cannot be supported by the facts as the appellant had voluntarily contracted terms which turned out to be onerous. He had with him the estimate submitted by Malhab and if he was so minded he could have informed the respondent and or sought a revision of the terms of Exhibit 'C' during the currency of the contract. This he failed to do. Liability to damages is the legal consequence for a breach of contract and in view of all the circumstances of this case, I find no justification to interfere with the awards made. The appeal is therefore dismissed with costs to the respondent in this Court and the Courts below. Costs to be taxed.

LIVESY LUKE JSC: I agree that this appeal should be dismissed I would, however, like to make a few observations of my own.

1. Contract or Receipt

Counsel for the appellant submitted with considerable force that Exhibit 'C' (hereafter referred to as "the document") was not a contract but a mere receipt. In order to determine the soundness of that submission it is necessary to construe the document in or to understand its nature and purpose. The general principle upon which the Court acts in construing documents is well settled. The primary purpose of construction is to ascertain the intention of the parties having regard to the words used in the whole document and to the circumstances under which it was made. In this connection the words of Lord Greene MR in *Hutton v Watling* (1948) 1 Ch 398 are appropriate. He said at p 403:

> "The true construction of a document means no more than that the Court puts upon it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances. This document, on the face of it, was intended to be handed to the purchaser, and it is produced by the purchaser. Indeed, the whole tenor of the document indicates that it is to be purchaser's document. What then would the purchaser when she received the document have thought it meant as an ordinary reasonable person, intelligently understanding the English language and construing it in the light of the relevant circumstances? She could have understood that the vendors were deliberating and solemnly recording the terms of an agreement into which they were prepared to enter, or, indeed into which they had entered."

I now propose to analyse several portions of the document which I consider significant, in order to ascertain the nature and purpose of the document starts off with the words "Received the sum of Le14,000 from Sahr Lebbie Mendekia, Es., Farmer of 27, Yaradu Road Koidu Town, Kono District in the Eastern Province of Sierra Leone being part payment of the sum of Le24,000." In my opinion this is quite clearly an acknowledgement by the appellant (George Beresfore Cole) of the receipt of the sum of Le14,000 from the respondent (Sahr Lebbie Mendekia) as part payment of a total sum of Le24,000. My understanding of a receipt is that it is an acknowledgment in writing of the receipt of money, chattel etc. In my opinion therefore the above quoted potion of the document if signed by the appellant would have constituted a sufficient receipt by the appellant of the sum Le14,000. But the document goes on to make further and detailed provisions relating to the purpose of the payment of the Le14,000. After the receipt portion quoted above the document continues "for the cost port on 1.907 acres of land situate off Kissy Bye Pass Road, Kissy Village as more fully described and delineated on Director of Surveys and Lands Plan LS 1090/68 dated 28th November 1968 to be built and constructed with the best labour and materials available within a maximum period of (6) six calendar months from the date hereon". In my view, this portion states that the money was paid for the construction of a two story building etc (hereafter called "the building"), specifies the land on which the building was to be built, makes stipulations as to the quality of workmanship and materials and stipulates the period for the completion of the building. These are terms which are common in building contracts. The document then goes on to spell out the specifications and costing of the various sections of the building. I do not think that it can be seriously contended that a mere receipt for money received would make such detailed provisions. In my opinion these provisions point unequivocally to the fact that the document is a building contract. The document then goes on to provide that "I Sahr Lebbie Mendekia aforesaid for myself, my heirs and successors and title do hereby contract and agree with my agent George Beresfore-Cole, Real Estate Agent of 23, Liverpool Street, Freetown, Sierra Leone to pay to him the balance of Le10,000 in full on or before but not later than 28th February, 1969 for the fulfillment of the purpose hereinbefore contained." By this provision, the respondent solemnly bound not only himself but also his heirs and successors in title to pay the balance of the contract price for the fulfillment of the purposes of the contract ie, the construction of the building. By this provision, the appellant also took steps to protect himself by ensuring that the respondent entered into the obligation not only on his own behalf but also on behalf of his heirs and successors in title.

Another significant aspect of the document is that it was signed by both the appellant and the respondent. If the document was a mere receipt, one would expect that only the appellant who received the money would have signed it. In my opinion the fact that it was signed by both parties is a clear indication that it was more than a receipt and that it contained obligations binding on both parties.

It is important to state that the document was prepared by the appellant, was type-written and was stamped with a fifteen cents stamp. What then was the nature and purpose of the document? In my opinion having regard to what I have said above, it was a contract entered into between the appellant and the respondent for the appellant to construct a building etc at Kissy Bye Pass Road, Kissy Village in accordance with the specifications stated in the document and to complete the same within 6 months in consideration of the respondent paying to the appellant the sum of Le14,000 on the date of the execution of the document and the sum of *Le10,000 on or before 28th February 1969.* Quite clearly that was the meaning put upon the document by the respondent as an ordinary reasonable and intelligent person in Sierra Leone, and not surprisingly he regarded it as a solemn document, for apart from fulfilling his initial obligation by paying the sum of Le14,000 on the date of the execution of the document, he fulfilled his other part of the bargain by paying the balance of Le10,000 well in advance of the date stipulated in the document.

In coming to this conclusion, I am guided by words of Lord Wright in *Scammell v Ouston* (1941) 1 All ER 14 (HL). He said at pp 25-26:

> "The object of the Court is to do justice between the parties, and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not more form. It will not be deferred by difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of intention, however, is to be found in the words used. ... There are many cases in the books of what are called illusory contracts – that is, where the parties may have thought they were making a contract, but failed to arrive at a definite bargain. It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the Court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain."

In this case, the parties took the trouble to reduce their contract into writing. But it is necessary to emphasize, in view of certain arguments advanced by learned Counsel for the appellant, that the contract need not have been in writing, the reason being that since it was a contract to be performed within a year, it is not required by s 4 of the Statute of Frauds 1677 (which is the relevant statute applicable in Sierra Leone) to be in writing. And even assuming that it was a contract required by the Statute to be in writing, the document satisfied all the requirements of the section. It contains the names of the parties ie, George Beresford Cole and Sahr Labbie Mendekia; it states the subject matter of the agreement ie, the construction of a building, etc at Kissy Bye Pass Road; it states the consideration for the work ie, Le24,000; and it was signed not only by the party to be charged ie, George Beresford Cole, but also by the other party. With respect, it is therefore idle to argue that there was not a concluded or enforceable contract between the appellant and the respondent.

Learned counsel for the appellant laid much emphasis on the fact that a building plan had not been prepared when the document was signed. In fact the building plan is dated 11th December 1968 – eight days after the signing of the document. Learned counsel submitted that in view of this fact, there was not a concluded contract between the parties. But an examination of the facts would reveal that the submission is misconceived. It is important to emphasize that the building plan was prepared on the instructions of the appellant, with full knowledge of the terms of the document including the specifications, the unit costs and the total costs of the building. So one would expect the appellant as a reasonable businessman to prepare a plan that would comply with the specifications and at the same time keep within the unit costs stated and within the total cost of the building. If he chose to exceed the total figure agreed upon he has only himself to blame. Learned counsel relied on *Penn v Simmonds* (1971) 1 WLR 1381 (HL) for his submission. In that case it was held, *inter alia*, that in construing a written agreement evidence of negotiations or of the parties' intentions ought not be received by the Court, and that evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction. In my opinion that decision does not support the case for the appellant. The evidence adduced before the Court in the instant case was the document signed by both parties and evidence of the "genesis" of the transaction. No evidence was adduced of any negotiations or of the intention of the parties. In fact no such evidence was necessary in this case, because the result of any negotiations and the intention of the parties were reduced into writing and clearly set out in the document.

2. Consideration

Learned counsel for the appellant also submitted that no consideration flowed from the respondent to the appellant. With the greatest respect, I do not think that this submission has any merit. One is bound to ask, what did the appellant receive the sum of Le24,000 for? If it was not in consideration of constructing the building, what was it for? Quite clearly, the Le24,000 was the consideration flowing from the respondent to the appellant for the construction by the appellant of the building. I think that the position is so clear that any excursion into the law relating to consideration will be an unnecessary academic exercise.

3. Agency

It was also contended on behalf of the appellant that on a proper construction of the document the relationship between the respondent and the appellant was that of principal and agent, and not that of employer and contractor. Learned counsel for the appellant submitted that the appellant was an agent of the respondent to secure the services of some third party independent contractor to execute the work provided for in the contract. A reference to the pleadings would show that this submission is the result of an afterthought. In the Defence and Counterclaim the appellant averred, *inter alia*:

> "1. The defendant denies the allegations contained in paragraph 1 of the Statement of Claim, but says that following verbal negotiations, he agreed with the plaintiff on a friendly basis to help him with the construction of the said building as described. The defendant on the 3rd December 1968, gave the plaintiff a receipt for the sum of Fourteen Thousand Leones (14,000) and contracted and agreed to pay the balance on or before the 28th February 1968. ...
>
> 6. The defendant says that the plaintiff has failed to pay the necessary extra amount required to complete the Building and has rendered it impossible for the defendant to do so".

In my opinion what the appellant was alleging in the two paragraphs quoted above was, first, that he agreed with the respondent to help him with the construction of the building and, secondly, that the respondent had failed to pay the extra money required by him (the appellant) to complete the building and that the respondent had rendered it impossible for him (the appellant) to complete the building. There was no suggestion in those paragraphs, or indeed anywhere in the Defence and Counterclaim, of any agency, or that some third party, and not the appellant, was the contractor. The question of agency was raised for the first time in the final stages of the address of learned counsel for the appellant before the learned trial Judge. The learned trial Judge found that on a proper interpretation of the document and on the evidence, the relationship between the respondent and the appellant was that of principal and agent. With respect, the learned trial Judge went astray. Agency was not an issue before him. Besides, in paragraphs 1 & 6 of the Defence and Counterclaim, the appellant accepted that he, and not some third party, was to build the building for the respondent. But even assuming agency was an issue at the trial, the finding of the learned Judge was, in my opinion, erroneous. I have already stated what I consider to be the proper construction of the document. But in view of the finding of the learned Judge it is necessary to emphasize certain points. Admittedly, the word 'agent' was used in the body of the document, but in my opinion that was a mere description of the occupation of the appellant and not a statement of the capacity in which the appellant was making the transaction. At the very beginning of the document it is stated that the appellant received the sum of Le14,000 as part payment for the construction of a two story building to be built and constructed within a maximum period of six months, and nowhere in that part of the document, or indeed any other part, is it stated, or even suggested, that a third party was contemplated. And if a third party was not contemplated, the reasonable conclusion is that the appellant was the person under an obligation to construct the building. With regard to the

evidence, I think that even the evidence adduced on behalf of the appellant overwhelmingly disproves any case of agency. I need refer to only two pieces of evidence. First, in a letter dated 11th June 1969 (Exhibit 'E') written by the appellant to the respondent, the appellant demanded the payment of extra money to, in his own words, "enable me to complete construction as scheduled". (The emphasis is mine). Secondly, the appellant said in evidence that the independent third party engaged in the construction of the building was one Turner. The appellant tendered a file (Exhibit P1-181) which he claimed contained records of his expenditure on the building. But when the file is examined it is discovered that all the invoices for materials supplied were issued in the name of the appellant and not in the name of Turner. Furthermore the monthly wages sheets of the appellant show quite clearly that far from being an independent contractor, Turner was employed by the appellant as a daily waged artisan at Le2.25c a day. It is also important to state that the records show that Turner was not employed throughout the period of construction. In my judgment therefore, both on the construction of the document and on the evidence, the appellant was not an agent but the contractor who contracted to construct the building for the respondent.

4. Damages

The appellant did not complete the building within the time stipulated in the contract (ie, 2nd June 1969). He applied for and was granted a month's extension of time within which to complete the building. But up to the date of the issue of the writ of summons (ie, 13th October 1970), and up to the time of the trial, the building had still not been completed. In my judgment the failure of the appellant to complete the building by 2nd July 1969 (ie, the extended period) constituted a breach of contract. The Court of Appeal awarded the respondent the sum of Le14,085 as general damages and the sum of Le500 as special damages for breach of contract. The Court of Appeal based their assessment of the general damages on a valuation of the cost of completion of the building made in January 1971 by John David Thompson a Chartered Quantity Surveyor. Mr Thompson gave evidence at the trial. Learned Counsel for the appellant attacked the award of general damages on several grounds. He submitted that the Court of Appeal erred in failing to take into consideration the fact (as alleged by the appellant) that in addition to the sum of Le24,000 paid to him by the respondent, he had expended some Le6,000 of his own money on the building. What then is the proper measure is the cost of completing the building in accordance with the contract in a reasonable manner, and at a reasonable time. What is important is not the value of the building in its present state or the amount of money actually expended on the building, but the cost of completing the building. So even if the claim of the appellant that he had expended some Le30,000 on the construction of the building is true, he would still be liable in damages measured according to the cost of completing the building. If the appellant had in fact expended Le230,000, it was his misfortune for which the respondent should not be made to suffer. Ridley J stated the law correctly in *H Dakin & Co Limited v Lee* (1916) 1 KB 566 when he said at p 571:

> ".....that where there is a contract to do work for a fixed sum you are not simply to measure and value the work actually done; the proper course is to deduct from the contract price the cost of the work which had not been done."

Learned counsel for the appellant also submitted that the Court of Appeal erred in basing their assessment of January 1971 costs. He said that the assessment should have been based on the costs in July 1969 the time of the alleged breach. With respect, I do not agree with counsel's submission. A similar argument was advanced to and accepted by the English Divisional Court in *Mertens v Home Freeholds Co.* The question in that case was whether the measure of damages for breach of a building contract should be fixed in the year 1916 when the breach took place, or in the year 1919 when the employer was allowed to complete the work and by which time the price of all building materials, work, wages and labour had increased enormously. The Court of Appeal reversed the decision of the Divisional Court: see (1921) 2

KB 526. Dealing with the question of the proper time for fixing the measure of damages, Lord Sterndale MR said at p 534:

> "The Official Referee has given to the plaintiff the amount that it cost him when he was allowed to do the work in 1919. The defendants say that either he is entitled to nothing, or that if he is entitled to anything the measure of damages ought to be fixed in the year 1916. The Divisional Court have adoped the defendants' contention. I cannot agree with them. The first particular in which I differ from them is that I do not think they ever looked at the contract in the right way. They have considered the contract as if it were one to deliver goods in September 1916 – a contract to deliver a roofed house on the ground in September 1916 – and what they have said is, that all that the plaintiff is entitled to is the difference between the price of the work, in fact, done by the defendants through Lawrence and the price of a roofed house in September 1916. That is to say, they have treated the contract as if it were one for the sale of goods and have held that the measure of damages is the difference between the market price of the day of what the plaintiff ought to have had and what he got. In my humble opinion that is an entirely wrong way of looking at the contract. There is no contract to deliver goods, and there is no market price for a roofed house."

And he continued at p 535:

> "But the building owner must set to work to build his house at a reasonable time and in a reasonable manner, and is not entitled to delay for several years and then, if prices have gone up charge the defaulting builder with the increased price."

And Warrington LT said at pp 538-539:

> "The Divisional Court has substituted for the measure of damages adopted by the Referee what, with all respect, appears to me to be an incorrect measure of damages – namely, they have treated the contract as if it were one for the sale of goods and have held that the plaintiff is entitled to the difference between the value of the thing he got at the material time – that is to say, when the breach was committed – and the value of the thing which he would have got if the defendant had done his duty. In my opinion that is not the true measure of damages in a contract of this kind."

I think that these dicta state the right measure of damages and the proper time at which the damages should be measured in contracts such as the one in the instant case. Of course, what is reasonable time in which the employer should complete the work would depend on the circumstances of each case. What then were the circumstances in the instant case? The breach occurred in July 1969, but the appellant refused to hand over the keys of the building, and consequently the respondent could not gain access to the building. According to the evidence, up to October 1979 the keys were still in the possession of the appellant (see Exhibit 'N'), and up to 8th February 1972 when the appellant was being re-examined he admitted that some of the keys were still with him. It is not revealed by the evidence when some of the keys were handed to the respondent. But even assuming all the keys had been handed over in October 1970, three months (ie, up to January 1971) would in the circumstances be a reasonable time within which to complete the building. In my judgment, the Court of Appeal applied the right measure of damages, and therefore this Court should not interfere with the award.

Reported by Glenna Thompson