

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT

BETWEEN:

DR. OLAF GRABOWSKI - PLAINTIFF/RESPONDENT
KOLLEH LANE
GODERICH
FREETOWN

AND

GERMAN DRILLING GROUP - 1ST DEFENDANT/APPLICANT
18 CHARLOTTE STREET
FREETOWN

ABDUL HAMID FAWAZ - 2ND DEFENDANT/APPLICANT
18 CHARLOTTE STREET
FREETOWN

ARCHIBALD ARCUTE - 3RD DEFENDANT/APPLICANT
C/O 18 CHARLOTTE STREET
FREETOWN

SOLICITORS:

MR. A. SHOWERS OF - FOR THE DEFENDANTS/APPLICANTS
FORNAH-SESAY, CUMMINGS, SHOWERS
& CO

MR. I. S. YILLAH OF - FOR THE PLAINTIFF/RESPONDENT
TEJAN-COLE, YILLAH &
BANGURA & CO

RULING DELIVERED THIS 17TH DAY OF JULY 2017 BY THE HON. MS.
JUSTICE F. BINTU ALHADI J.

The Plaintiff's action commenced by a Writ of Summons filed on the 16th of December 2016 against the Defendants for the following Orders to wit:-

1. An Order that the Court ratify and confirm the legal status of the Plaintiff as the majority shareholder in the 1st Defendant holding 35% shares in the 1st Defendant company by virtue of a Shareholder Agreement executed on the 24th day of May 2016 between the Plaintiff and the 2nd and 3rd Defendants respectively.
2. That the Defendants herein render a full financial/management account of the activities of the 1st Defendant company herein from the 12th of September 2016 to date.
3. That the Court appoint a Receiver to superintend over the affairs of the 1st Defendant company.
4. An Order that the Court order the sale of the 1st Defendant company and the proceeds of sale be shared proportionately among the shareholders as stated in the Shareholder Agreement.
5. Any other Order(s) or relief(s) that the Court may deem fit and just.
6. Costs.

Appearance was entered by the Defendants and filed on the 6th of January 2017.

Further to that, an application by way of Notice of Motion was filed by the Plaintiff, Dr. Olaf Grabowski, on the 6th of January 2017 asking for the following Orders to wit:-

1. That the Court appoint an Inspector of the 1st Defendant Company pursuant to section 268 of the Companies Act of 2009 pending the hearing and determination of this action.
2. In the alternative, that the Court grant an Order for the appointment of a Receiver of the 1st Defendant Company pursuant to Section 332 of the Companies Act of 2009, pending the hearing and determination of this action.
3. Any other Order the Court deems fit and just.
4. That the costs of the application be borne by the 2nd Defendant herein.

Additionally, on the 10th of February 2017 another Notice of Motion was filed by the Defendants/Applicants asking the Court to determine the following questions without a full trial of the action:

1. a) whether the Plaintiff is a shareholder of the 1st Defendant company, in that he was not an initial subscriber at the incorporation of the Company and no share was transferred to him by the shareholders of the 1st Defendant company?
2. b) whether, in light of the (a) above, the Plaintiff has the capacity to institute and maintain this action since he is not a shareholder of the company ?

3. That if the above questions are answered in the affirmative, judgment be given in favour of the Defendants herein.
4. Any other Order(s) that the Court deems fit and just.
5. Costs.

All the applications described herein were supported by the affidavits of the respective applicants.

SUBMISSION BY COUNSEL FOR THE DEFENDANTS/APPLICANTS

Mr. Adewale Showers, Counsel for the Defendants/Applicants submitted that the said Notice of Motion dated 8th February 2017 for and on behalf of the Defendants/Applicants was made pursuant to Order 17 Rule 1 (1) Paragraphs (a) and (b) of the High Court Rules of 2007. He postulated that the said questions posed in his application were suitable for determination without a full trial of the action and that the determination would deal with the action in its entirety. He submitted that Exhibit AS 3, which is the Memorandum and Articles of Association of the 1st Defendant company, German Drilling Group Limited, and in particular at page 15 thereof, illustrates who the subscribers are; that is, Fawaz Building Materials Company Limited and Infinity Consulting Limited. He said that since the said shareholders are legal entities in their own right, they must give their consent to transfer in any share in the 1st Defendant company. He told the court that there was no board resolution or power of attorney given to anyone to execute a deed of transfer or transfer of shares.

Mr. Showers also pointed out that the Articles of Association of company, which makes provision for the transfer of shares at Articles 5-16 was not followed; and as such no evidence was adduced in court to show that the procedures were followed. He said that the Shareholders Agreement which the Plaintiff/Respondent has relied on as transferring shares in German Drilling Group to him, does not constitute document evidencing a transfer of shares. He emphasized that section 126 of the Companies Act of 2009 is very clear on how to transfer shares; and in particular the 1st Schedule of the Companies Act of 2009.

On the issue of the Agreement, Mr. Showers espoused that the 2nd and 3rd Defendants/Applicants did not execute the Shareholders Agreement and that they had no authority to do so; even though they were directors on the Board of the 1st Defendant/Applicant. He therefore said that, "assuming that they signed the Shareholders Agreement, they had no authority to do so."

Also, Mr. Showers submitted that the Shareholders Agreement, which is exhibited as "OG 2" in the Affidavit in Opposition, bears no witness signature and which is also indicative that there was no independent witness to verify the execution of Shareholders Agreement, no factual witness and there was nothing to go to trial for.

Mr. Showers informed the Court that, the 1st Defendant company was a going concern; that no assets have been sold or will be sold; and that he undertakes that the position/status of the assets will remain the same. He said that there has been no movements of assets from Vimetco Mining site and redeployment to other places and that everything had been accounted for and there were no concerns.

Counsel for the Plaintiff/Respondent accepted the undertaking from the Defendants/Applicants and their Counsel, Mr. Showers, thereof and told the Court that he relied on the credibility of Mr. Showers.

SUBMISSION BY COUNSEL FOR THE PLAINTIFF/RESPONDENT

Counsel for the Plaintiff/Respondent, Mr. I. S. Yillah, commenced by stating to the Court his acceptance of complying with Order 17 of the High Court Rules of 2007 as applied for by Counsel for the Defendants/Applicants, Mr. A. Showers.

He submitted that the Plaintiff/Respondent relies on the entirety of the content of his Affidavit in Opposition in that, in particular, a Shareholders Agreement was entered into between him and the Defendants/Applicants herein on the 24th of May 2016; in which it was agreed that the 1st Defendant/Applicant, German Drilling Group would be restructured to the Plaintiff/Respondent being given a 35% stake in the 1st Defendant/Applicant company, German Drilling Group, the 2nd Defendant/Applicant would take 32.5% and the 3rd Defendant/Applicant 32.5%; making the Plaintiff/Respondent the majority shareholder of the 1st Defendant/Applicant, German Drilling Group.

Mr. Yillah argued that the Plaintiff/Respondent was the majority shareholder of the German Drilling Group; that he was not a mere employee of the said company as alleged; and that contrary to the factual assertions that he did not pay for his shares, he did by purchasing machinery and equipment and by making bank transfers to the 3rd Defendant, who is also one of the shareholders of the 1st Defendant/Applicant company, German Drilling Group. He made reference to Exhibit "OG 2" which is the Shareholders Agreement and more particularly section 3 of the said Agreement dealing with 'Financing.'

Counsel maintained that the 2nd paragraph of section 3 of Exhibit "OG 2" contemplates that the parties can pay for the shares by the purchase of equipment, spare parts etc especially given the nature of the work, which is to drill boreholes. He pointed out that this also comports with sections 114-116 of the Companies Act of 2009.

Mr. Yillah referred to Exhibits "OG 3A to OG 3Y, which are copies of payments to suppliers for various machinery and to the 3rd Defendant as part of the Plaintiff's contribution or payment of his shares in the German Drilling Group. He also drew the court's attention to Exhibit "OG 4A to OG 4YY", which are copies of the invoices received from suppliers of the machinery that the Plaintiff bought and invested in the German Drilling Group by way of shares. He also submitted that no evidence was adduced to controvert the Plaintiff/Respondent's assertions that he indeed paid for machinery and equipment with his own money, in order to acquire shares in the company. He said that the Exhibits "AS 5 A to OO, make no reference to the Plaintiff receiving any money from the 1st and 3rd Defendants as alleged.

On the issue of signatures of the shareholders, Mr. Yillah argued that even though they signed the agreement, they are also pleading non-compliance. He submitted that the Plaintiff/Respondent was entitled to presume regularity in accordance with section 56 of the Companies Act of 2009 and that the Defendants/Applicants should be stopped from denying the fact that they as shareholders had no authority to enter into the agreement and sign on behalf of the company.

MR. SHOWERS' REPLY

Counsel for the Defendants/Applicants, Mr. A. Showers opined that by virtue of the relationship that had existed between the Plaintiff and the 1st Defendant, he had actual knowledge that the subscribers were a limited liability companies; and therefore authority had to be given by these companies to individuals to act on their behalf. As such the presumption of regularity as stipulated in section 56 (a) and (b) of the Companies Act 2009 does not apply in these particular circumstances.

Lastly, he submitted that the Plaintiff/Respondent did not pay or render any service in respect of the purported shares allotted in the Shareholders Agreement. He said that all of the equipment and machinery bought by the Plaintiff/Respondent, Dr Olaf Grabowski, were bought in the name of the company, German Drilling Group, using funds from the shareholders and the 1st Defendant's funds. Furthermore, that the invoices that the Plaintiff is relying on were sent to him as an agent of the company.

DECISION

In order to assist the court in coming to a decision, the following considerations ought to be taken into account:

Firstly, what is the status of the Articles of Association of a company? The Articles of Association is the basic constitutional document of every company. In legal terms, it automatically binds the company and its members; although the members are only bound by the terms of the

articles in their capacity as shareholders of the company and not in any other capacity. Furthermore, they contain various provisions concerning the internal regulation of a company; John Birds et al, 'Boyle & Birds' Company Law [5th edition, 2004] Jordan Publishing Limited at p 102.

The articles of association is registered with the Companies Registration Office, in this case, with the Corporate Affairs Commission; and any changes thereto must be submitted to the Corporate Affairs Commission within 14 days of such change in accordance with section 70 (2) of the Companies Act of 2009. Accordingly, the said articles is a public document which is open to inspection by the public.

It is sometimes argued that, the articles of association can be drafted in such a way so as to deal with matters which one would typically find in a shareholders' agreement. Whilst this is correct, there are certain important reasons why shareholders more often choose to regulate their relationship between one another as shareholders, by means of a shareholders' agreement rather than by means solely of the articles of association.

Secondly, did the parties to the agreement draft a supremacy clause into the contract? An examination of the agreement does not show this. There was no supremacy clause. One such reason is that, a shareholders' agreement may contain sensitive details that the parties to the shareholders' agreement may not wish to be made public; and it would be most undesirable to be forced to file the shareholders' agreement in the Companies Registration Office. To avoid this, it is generally advised that the supremacy clause be drafted to provide that the parties to the shareholders' agreement agree between themselves as parties to the shareholders' agreement, that in the event of a conflict between the shareholders' agreement and the articles of association, they will agree to be bound by the interpretation in the shareholders' agreement and that they will use their voting powers as shareholders to amend the articles of association to remove the inconsistency.

Thirdly, what is the status of a share-holders agreement? A shareholders' agreement is essentially a contract between some or all of the shareholders in a company and frequently the company itself. The basic purpose of a shareholder' agreement is to provide how the company is to be managed and as far as possible, to prospectively address issues that might otherwise become divisive in the future if not agreed in advance.

Fourthly, at the time of signing the shareholders agreement, was the Plaintiff/Respondent a shareholder of the 1st Defendant company, German Drilling Group? If not, did he become a shareholder after signing the agreement?

Section 64 (1) of the Companies Act 2009 defines a member/shareholder of a company as the subscribers to a company's memorandum, who shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members. Section 64 (2) of the said Act says that every other person who agrees in writing to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

Judging from the Memorandum and Articles of Association of the 1st Defendant company, German Drilling Group and from the law as it stands, the Plaintiff/Respondent, Dr. Olaf Grabowski, was not a shareholder/subscriber of the said company at the time of its incorporation or registration; and even though the Register of Members of German Drilling Group was not exhibited, the fact that the Plaintiff/Respondent's name was not registered disqualifies him from asserting to be a shareholder of the company legally. What is clear however, is that the Plaintiff/Respondent signed an agreement with the Defendant, agreeing to take shares but that his name was not later entered in the company's Register as a member nor his membership registered at the Companies Registry. He was therefore not certified to be a shareholder/member of the 1st Defendant company, German Drilling Group.

Mr. Showers in his argument postulated that the 2nd and 3rd Defendants were not authorized by the company to sign the agreement. An assertion, I disagree with because, the 2nd and 3rd Defendants/Applicants are the minds and the directors of the 1st Defendant company, German Drilling Group. By signing that agreement, the company gave its consent.

Fifthly, what does entry on the shareholders/members Register mean? As stated above, the persons who are members are those who have agreed to take shares and whose names are entered in the register; Boyle & Birds (supra) at p 349. Even if they are not so entered, if there is complete agreement between them and the company, they will not escape liability, since the register can be amended, while the company is a going concern. However, the entry in the register of the name of a person does not make him a member if he never agreed to become one, and his name can be removed in the same way; Boyle

& Birds (supra) at p 350. It is possible for the court to make an order for removing his name retrospectively in order to free him from liability as a contributory, if that name has remained on the register when it should have been removed or vice versa; Boyle & Birds (supra) at p 350.

In other words, the court is empowered to order the Plaintiff/Respondent's name to be entered on the Register of Members, amend the Articles of Association and register this at the Corporate Affairs Commission.

In Re Nuneaton Borough Association Football Club [1989] BCLC 454 the Court of Appeal in considering how else an agreement can be made to become a member, the court held that, the phrase 'agrees to become a member' is satisfied where someone assents to become a member. It does not require that there be a binding contract between the person and the company..... For instance, there may be contracts to take shares which are not in writing, for a person may agree with the company by word of mouth, or even by conduct, to become a member. An agreement for value to take up shares in a company, if called upon is enforceable notwithstanding the death of the person making the contract.

In: Vodafone International Holdings BV v Union of India (2012) 6 SCC 613 it was observed inter alia that a breach of a shareholders agreement which does not breach the articles is a valid corporate action but the parties agreed can get remedies under the general law for breach of any agreement and not under the Companies Act. In other words, even though the provisions of an affirmative vote are not incorporated in the articles, and though the action of the company in providing for a rights issue would be valid under the Companies Act, such an action will still be in breach of the shareholders agreement for which the aggrieved shareholder can pursue an action for breach of contract.

From the evidence presented to the court, the Plaintiff/Respondent, Dr. Olaf Grabowski, showed the financial contribution he made to the 1st Defendant company in accordance with the agreement entered into on the 24th of May 2016. In his supplemental affidavit sworn to on the 22nd of June 2017 he showed the transfers he made from his bank account he owned jointly with his wife to purchase machinery and equipment for German Drilling Group, the 1st Defendant/Applicant, various amounts were made to the benefit of the company, which indicated that the 1st Defendant company, German Drilling Group benefitted.

The Defendants showed the exhibits attached to their Supplemental Affidavit of 21st of June 2017 and affidavit in support of 2nd February 2017 did not show any nexus between its expenditure and the purported payments made to Dr. Olaf Grabowski to purchase the said machinery and equipment for the company. The Defendants therefore have not been able to satisfy the court that, Dr. Olaf Grabowski did not spend his own money but that of the Defendants.

The sixth question that arises is: was the Plaintiff/Respondent misled into believing that he was a shareholder in the company and relying on the words and conduct of the Defendants/Applicants expended money? Can it be said that there has been a renunciation of the contract by the Defendants/Applicants? Chitty on Contracts Volume 1, General Principles, 29th Edition, 2004, Sweet and Maxwell at p 1386. When establishing whether or not there has been a renunciation of the contract, there is no distinction between the tests for what is an anticipatory breach and what is a breach after the time for performance has arrived. It follows therefore, that where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he does not intend to fulfil his obligations under the contract when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith.

The court is of the view that, strictly in terms of contract law, there has been a breach of the contract entered into between the Plaintiff/Respondent and the Defendants/Applicants.

Was the Plaintiff/Respondent misled into believing that he was a shareholder in the company and relying on words and conduct of the Defendants/Applicants expended money? Has there been a renunciation of the contract by the Defendants/Applicants? If so, is the Plaintiff/Respondent to be restituted? Bearing in mind that, ultimately a shareholders' agreement is a contract one party can sue another party for damages of breach of contract or, in appropriate cases, for injunctive reliefs restraining certain actions that would be a breach of the shareholders' agreement or an injunction seeking a mandatory injunction requiring certain things to be done.

The Court is of the view that, strictly in terms of contract law, there has been a renunciation of the contract; since the conduct of the 2nd and 3rd Defendants who also represent the 1st Defendant, the promisors herein, are such as to lead a reasonable person to the conclusion that they did not intend to fulfil their obligations under the contract by performance. That is, since the contract was

entered into, no evidence has been adduced to show that the 2nd and 3rd Defendants intended to register the Plaintiff/Respondent as a shareholder/member of the 1st Defendant company, German Drilling Company.

An agreement to that effect was signed but no registration or amendment to the company's articles was carried out or exhibited to this court. The Plaintiff, Dr. Olaf Grabowski is entitled to treat this conduct as a renunciation of the contract and sue for damages forthwith. He is not obliged to wait for the time for performance because the renunciation, together with the acceptance of the renunciation, renders the breach legally inevitable and the effect of the doctrine of anticipatory breach is precisely to enable the innocent party to anticipate an inevitable breach and to commence proceedings immediately; Universal Cargo Carriers Corporation v Citati [1957] 2 Q.B. 401,438.

The Plaintiff/Respondent, Dr. Olaf Grabowski has been able to prove to the court by Exhibit attached to the supplemental affidavit sworn to on the 22nd of June 2017 that payments were made out of his bank account to purchase machinery and equipment for the benefit of the 1st Defendant company, German Drilling Company.

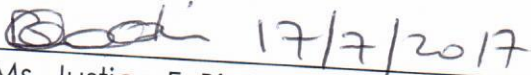
None of the Defendants have been able to prove to this court that it was their money or that of the 1st Defendant Company that the Plaintiff/ Respondent utilized to purchase the machinery and equipment. I requested from the Defendants to file in court evidence to show that they had transmitted money to the Plaintiff/Respondent for the benefit of the 1st Defendant/Applicant company. A supplemental affidavit was filed on the 21st of June 2017 showing sums such as travelling expenses, etc for Dr. Grabowski but nothing to show substantial sums being paid over to him or transmitted to his bank account to purchase the relevant machinery and equipment for the said German Drilling Company.

CONCLUSION

Having considered the above points, the Court is of the view that :

1. The Plaintiff/Respondent, Dr. Olaf Grabowski, is not a shareholder in the 1st Defendant company, German Drilling Group for the reasons stated above; that is he was not registered in the company's Register of Members/Shareholders and his membership/shareholding was not registered at the Corporate Affairs Commission.

2. The Plaintiff/Respondent has no capacity to institute an action against the 1st Defendant company as a shareholder/member of the company; but he has capacity to institute proceedings/action against the 2nd Defendant/Applicant, Mr. Abdul Hamid Fawaz; and the 3rd Defendant/Applicant, Mr. Archibald Arcute on a breach of the contract entered into on the 24th of May 2016.
3. In order to assist the Court in establishing a true and fair assessment of the investment made by the Plaintiff/Respondent and the amount of profit that has been generated by the 1st Defendant company from the 12th of September 2016 to date. It is incumbent on the Court to invoke Section 268 of the Companies Act No. 5 of 2009. I therefore make the following Orders as an interim measure pending the Final Judgment:
- (i) The affairs of German Drilling Group Limited is to be investigated by a competent inspector to be appointed by the Court in accordance with Section 268 (2) (a) (c) and (d) of the Companies Act No. 5 of 2009.
 - (ii) The appointed inspector is to submit the investigation report to the Court by the 15th of September 2017.
 - (iii) That in addition to the powers conferred on the Inspector by Section 270 of the Companies Act (supra), the Plaintiff and the Defendants are to give full statements of accounts as investors in German Drilling Group Limited, of all accounts and transactions of the company as well as statements and production of inventories of the assets of the company from 26th May 2016 to date. This includes detailed account in respect of all monies, profits, machinery, equipment and materials received by the company during the period May 2016 to date.
 - (iv) An injunction restraining all parties herein, their privies, assigns, servants, agents and representatives from dealing or transacting in, disposing of, transferring, assigning or in any other way interfering with the assets of the company, inclusive of its liquid/cash assets, bank accounts, equipment, gadgets and machinery of the company pending the determination of the recommendations of the Inspector's Report by the Court.
 - (v) Costs in the cause.

Signed:  17/7/2017
Hon. Ms. Justice F. Bintu Alhadi, J.