

IN THE HIGH COURT OF SIERRA LEONE
(FAST TRACK COMMERCIAL COURT)

BETWEEN:

CHRISTOPHER PEACOCK

- PLAINTIFF

AND

SIERRA LEONE COMMERCIAL BANK (SL) LIMITED - DEFENDANT

C. Peacock Esq Plaintiff in Person

R. Johnson Esq for the Defendant

JUDGMENT DELIVERED THE 26TH DAY OF MARCH 2018

The Plaintiff's case against the Defendant is contained in the Writ of Summons dated and filed on the 28th of October 2014 asking for the following reliefs to wit:

1. Damages for anticipatory breach of contract between the parties;
2. Interest of 20% per annum;
3. Special damages;
4. Any other reliefs as the court may deem fit and just;
5. Costs of the action.

On the 14th day of April 2016, the Plaintiff filed an amended list of issues in dispute for the determination by the court to wit:

1. Whether there was a binding contract between the Plaintiff and the Defendant?
2. Whether due to the Defendant bank's inability, refusal and/or inadvertence to perform its responsibilities or duties clearly spelt out under Annex "A" of the terms of reference and scope of services at pages 31-32 of the contract (i.e. Exhibit M1-46) made it quite impracticable for the

Plaintiff to have effectively and efficiently perform his duties as an Estate Agent under the contract?

3. Whether the Plaintiff by his enquiry letters to the top Management personnel of the Defendant bank did exercise due diligence in a bid to perform the said contract except that his efforts were frustrated by and paralysed by the non-cooperation of the Defendant bank through its personnel concerned?

SUBMISSIONS BY THE PLAINTIFF IN PERSON – CHRISTOPHER PEACOCK ESQ

1. The Plaintiff, Mr Christopher Peacock, gave evidence in chief on the 8th of December 2016. He informed the Court that he knew the Defendant bank in relation to a contract he entered into with it on the 29th of November 2012. He said that the purpose of the contract was to perform the role of an estate agent and mortgage administrator in respect of all mortgaged properties under its portfolio in Sierra Leone.
2. He told the Court that the contract was in writing and contained terms and conditions to be fulfilled by both parties. Mr. Peacock said that on three (3) occasions he had meetings with the Management team of the bank that comprised: Mr. Christian George, the Director then of Risk Management, Mr. Francis Davies Jr. the Estate Manager, Mr. Magnus Mansaray the Senior Manager then, Mr. Edward Sesay and Mr. Harold Buckle as representatives of the Procurement Department.
3. The purpose of the meetings according to Mr Peacock were to advise the bank on the procedure to be followed in getting the mortgaged properties finally sold to the public, with a view that the bank will recover its debts from defaulting customers. He requested and he was promised certain crucial documents such as the title deeds of customers, mortgage deeds, Judgments obtained and Court Orders granting leave to the bank to recover the mortgage properties for sale; in an attempt to perform his own side of the agreement. He said that he never received a response from the Defendant bank.
4. Mr. Peacock said that he had solicited fifteen (15) prospective buyers but lost them all due to the non-performance of the Defendant. He submitted that this stalemate continued throughout the currency of the contract until it expired on the 29th of November 2013. He said that he had another



meeting with the Management team of the bank and explained that he has been unable to perform his duties due to the non-cooperation of the bank and its retained solicitors. In response to this assertion he received a letter from the Corporate and Legal Officer informing him that the bank was considering renewing the said contract. This he said failed to materialise as shown in exhibit "V" which is a letter dated 20th January 2014.

5. Mr. Peacock asserted that as a result he suffered loss of commission expected in respect of the ten listed properties he was informed about; as shown in Exhibit Z dated the 13th August 2013 which is during the currency of the said contract. He pointed out that, mathematically, he would have expected Le 50,000,000 per property sold; and therefore he lost Le 500,000,000 of expected income.
6. Under cross-examination by Mr. Ransford Johnson, the Plaintiff, Mr. Peacock said that he would partially agree that he was to receive 5% commission on the successful sale on all mortgaged properties referred to him by the Defendant, Sierra Leone Commercial Bank. He also said that his brief was not limited to the sale of mortgaged properties for which the bank had received court judgments; but that it was the duty of the bank to furnish him with all the relevant documents including judgments to enable him perform his duties.
7. Furthermore, he pointed out that in Exhibit Z, the properties that are marked for which judgments were obtained were not given to him to perform his obligations and that no reasons were proffered by the bank. Mr. Peacock during cross examination explained how he was treated with contempt and levity. He said that he was reliably informed by sources within the bank that certain officials in the bank, deliberately thwarted the successful sale of properties that were to be assigned to him and that were listed.

Examination In Chief of Defence Witness – Jim Kellie Jalloh (Mr)

8. Mr. Jalloh informed the Court that he was a Banking Officer in the Special Assets Management of the Sierra Leone Commercial Bank (SL) Limited. He recalled making a Witness Statement dated 20th July 2016; in which he testified that the Defendant signed a contract with the Plaintiff dated 29th



November 2012 in respect of the sale of properties mortgaged to the bank for which the bank would have received a court judgment.

9. He recalled that when the contract expired on the 29th of November 2013, it was not renewed by the Defendant bank. He said that no mortgaged property was sold that necessitated the payment of the said 5% commission to Mr. Peacock.
10. Under cross-examination by Mr. Peacock, the witness, Mr. Jalloh agreed that he was never present during any of the meetings Mr. Peacock had with the bank or during the subsistence of the contract. He also submitted that he had no contact with Mr. Peacock at all.

SUBMISSIONS BY DEFENCE COUNSEL - RANSFORD JOHNSON ESQ.

11. Mr. Johnson urged the Court to dismiss the Plaintiff's claims against the Defendant because there is no valid claim. He said that the agreement/contract which is Exhibit M is void.
12. Counsel for the Defence argued that the Defendant's case is that the payment of the 5% commission to the Plaintiff would have resulted, if he had successfully sold any of the mortgaged properties requested to be sold by the Defendant; but that during the subsistence of Exhibit M, no mortgaged property was sold by the Plaintiff which would have warranted the payment of the 5% commission.
13. I shall continue to address the submissions made by Counsel for the Defence in the body of the decision.

DECISION OF THE COURT

14. The questions that arise are thus: (1) Was there a contract? What does a contract mean? The most basic definition of a contract is that it is a promise or set of promises which the law will enforce; Pollock, Principles of Contract 13th edition [1950] at p 1. Or 'a contract is an agreement giving rise to obligations which are enforced or recognised by law;' Trietel, The Law of Contract, 11th edition [2003] at p. 1.

15. I will not go into a lot of detail, since it is not contestable as to whether there was a contract between the Plaintiff and the Defendant, which gave rise to obligations on both parties that are recognised in law and enforceable by the court. Mr. Johnson in his submissions on the 1st of March 2017 admitted that there was indeed a contract dated 29th November 2012 between the Plaintiff, Mr. Peacock and the Defendant, Sierra Leone Commercial Bank (SL) Limited which is marked Exhibit "M." The core of the agreement was that the Plaintiff was engaged as an Estate Agent to perform the services listed in Annex A of Exhibit M; one of which was for the Plaintiff to sell properties mortgaged to the Defendant for which Court Judgments have been made and for a 5% commission on any successful sale.
16. It was implied in the contract that the Defendant would be supplied with relevant and affected mortgaged properties for which judgments would have been made for their sale.
17. Was there a breach of the agreement? What kind of a breach was it, if at all? The Plaintiff, Mr. Peacock argued that since the Defendant, Sierra Leone Commercial Bank failed to provide the necessary Court Orders, title deeds and other documents in compliance with the agreement exhibit "M" despite several requests to do so; it therefore constituted a fundamental breach of the agreement and/or an anticipatory breach.
18. Chitty on Contracts, Vol 1 General Principles, [2004] 29th ed., Sweet and Maxwell Publishers at p 806 paragraph 14-020 explains that, there are certain breaches of contract (fundamental breaches) which were so totally destructive of the obligations of the party in default that, liability for such a breach could in no circumstances be excluded or restricted by means of an exemption clause.
19. Also, a fundamental term underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates; Smeaton Hanscomb and Co. Ltd v Sassoon I. Setty, Son and Co. [1953] 1 WLR 1468. In: Karsales (Harrow) Ltd v Wallis [1956] 1 WLR at p 943(2) it was held to be part of the 'core' of the contract and however extensive the exception clause may be, it has no application if there has been a breach of a fundamental term.

20. From the evidence presented to the Court by Mr. Peacock where he wrote letters to the bank and where it is clear from all the submissions made that no evidence was adduced to show how the bank performed its own side of the agreement or reciprocated in any way; it is clear that a fundamental obligation of the Defendant was not performed. There is no shred of evidence that it carried out one of its obligations, which was to provide the Plaintiff with all relevant documents to enable him perform his duties. This was therefore a fundamental breach of the agreement by the Defendant.
21. The next question that follows is whether the non-performance by Sierra Leone Commercial Bank amounted to an anticipatory breach? An anticipatory breach of a contract is when, "if before the time arrives at which a party is bound to perform a contract, he expresses an intention to breach it or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part, this constitutes an anticipatory breach of the contract and entitles the other party to take one of two courses; " He may accept the renunciation, treat it as discharging him from further performance and sue forthwith or he may wait till the time for performance arrives and then sue; Chitty on Contracts, 29th edition, 2004, Sweet & Maxwell Publishers at p 1383 at para 24-021.
22. On the other hand, where the anticipatory breach takes a continuing form, the fact that the innocent party initially continued to press for performance, does not normally preclude him from later electing to terminate the contract, provided that, the party in breach has persisted in its stance up to the moment of termination.
23. From the evidence submitted to the Court by the Plaintiff, Mr Christopher Peacock, both documentary and orally in his testimony, ample evidence was adduced to suggest that there were acts by the Defendant bank such as, not responding to Mr. Peacock's enquiries and requests for the court orders and judgments amongst other things, that amounted to anticipatory breach of the contract. It was clear from the beginning with its dealings with Mr. Peacock that there was no true commitment to the agreement entered into. The acts and omissions by the Defendant bank

pointed to the fact that any reasonable person would arrive at a conclusion that, the Defendant did not want to fulfill its own side of the agreement; and that it constituted an anticipatory breach.

24. Furthermore, the anticipatory breach took a continuing form because the Plaintiff exhibited both by documentary and oral testimony in court that at different points in time, he maintained his requests for the Court Orders, title deeds and other relevant documents, to enable him conduct or perform his obligations under the contract, but was repeatedly ignored.
25. Mr. Johnson however argues that an anticipatory breach does not arise; which I refute. The Defendant by its actions and omissions indicated that it was not willing to perform its obligations under Exhibit M. I agree however, that there is no evidence before the Court to indicate that the Defendant sold any property mortgaged to it during the subsistence of Exhibit M.
26. However, the fact that he contacted the bank in writing and in person, on a number of occasions, the Defendant bank should have reciprocated in writing or otherwise just by way of information on the status of its mortgaged properties that were subject to foreclosure. Mr. Peacock was left expecting performance from the Defendant and he was treated with contempt. I am left with no doubt, from his dispassionate testimony in court that he was left embarrassed and dejected by the Defendant's conduct.
27. Counsel for the Defendant submitted that there could have been many reasons why the Defendant bank did not refer any mortgaged property, which was the subject of a Court Order for sale to Mr. Peacock. In my opinion, it was for the Defendant to inform him of what those reasons were; and not to ignore his enquiries repeatedly. It was not the duty of the Plaintiff, Mr. Peacock to find out from customers of the bank, whether they had met their debt obligations to the bank.
28. Mr. Peacock espoused that the Defendant entered into the contract in bad faith from the beginning. Should the law require that a party to a contract exercise his rights in good faith, whether the right in question concerns the creation of a contract or its performance? The modern view

is that, in keeping with the principles of freedom of contract and the binding force of contracts in English contract law, there is no principle of good faith of general application; Atiyah, 'Introduction to the Law of Contract' 5th edition [1995] at p 212.

29. Lord Justice Bingham in Interfoto Picture Library Limited v Stilleto Visual Programmes Limited [1989] 1 QB 433, 439 stated that "in civil law systems and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith.
30. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is simply 'playing fair' or 'coming clean'..... essentially a principle of fair open dealing. English law has characteristically committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."
31. I do not attach any weight to the issue of bad faith or unfairness raised by Mr. Peacock. This is because I would prefer to deal with the issues of a fundamental breach and an anticipatory breach of the agreement from a perspective of the common law.
32. Following from the above, it is natural to ask whether the contract was discharged by the breaches as stated earlier. One party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from his liability further to perform his own unperformed obligations under the contract, and from his obligation to accept performance by the other party if made or tendered.
33. The expression "discharge by breach" is used to describe the situation where one party is entitled to and does exercise the right to discharge himself from his liability further, to perform his own unperformed obligations under the contract; and from his obligation to accept performance by the other party if made or tendered.

34. The answer is in the affirmative; that there were both fundamental and anticipatory breaches of the contract; even though the agreement expired on the 29th of November 2013. I need not lay further emphasis on the reasons, since I have dealt with them already.
35. According to Mr. Peacock, after the many requests and meeting and there being no performance from the Defendant until the agreement expired, he then came to the conclusion that the agreement had been terminated by breach.
36. As a consequence of the discharge, Mr. Peacock became entitled to damages from the Defendant, Sierra Leone Commercial Bank, for its non-performance of its obligations under the agreement. This is in line with the decision in the case of Photo Production Limited v Securicor Transport Limited [1980] A C 827 where it was held that, where the innocent party elects to terminate the contract, that is, to put an end to all primary obligations of both parties remaining unperformed that, "(i) there is substituted by implication of law for the primary obligations of the party in default, which remain unperformed a secondary obligation to pay money compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (ii) the unperformed primary obligations of that other party are discharged; Foskett v McKeown [2001] 1 A C 102, 128 per Lord Diplock.
37. From the facts of this case, the agreement expired on 29th of November 2013 and up to the time the contract ended, the Defendant never fulfilled its own side of the bargain and neither could the Plaintiff, due to the non-performance of the Defendant bank. This situation entitles the Plaintiff, Mr. Peacock to damages for his expected loss.
38. The challenge however, is in ascertaining how much Mr. Peacock will be entitled to in damages; given that no property was given to him to sell. We know from Mr. Peacock's evidence that, he was aware of three (3) properties that the Defendant had Court Orders for sale for; but we do not know their value.



39. In: Heyman v Darwins Limited [1942] A C 356, 373 the court held that, in assessing damages, regard must be had as to the terms of the contract and what performance was promised in it; including performance which would have fallen due after the date of discharge. Effect must also be given, to the terms of the contract which, for instance, liquidate the damages recoverable or exclude or restrict the remedies otherwise available for breach; Chitty on Contracts, 29th edition, 2004, Sweet & Maxwell Publishers at p. 1398 paragraph 24-048.

40. I agree with Counsel for the Defence, Mr. Johnson, that Mr. Peacock has not proven that all the said 10 (ten) properties mortgaged to the Defendant, Sierra Leone Commercial Bank, were the subject of a Court Order for sale.

41. I also support the view of Mr. Johnson that Exhibit AA was not only prepared by the Plaintiff, Mr Peacock, showing that the Defendant had obtained court orders for the sale of five properties; but that since there was no evidence that the Defendant had approved it, its purpose was therefore, self-serving.

42. I also agree with Mr Johnson that it is extremely difficult to evaluate the total commission lost by the Plaintiff because there was no valuation report on the properties; and prospective buyers are not, actual buyers. There is no certainty that they would have purchased the properties and there is no evidence of the values of the properties.

43. Having established the above, I am of the opinion that the three properties shown in Exhibit Z stated as being the subject of Court Orders for sale should have been passed on to Mr. Peacock in accordance with Exhibit M, which is the agreement that was entered into with the defendant bank.

44. Also, I refute the argument that anticipatory breach does not arise in this matter. The defendant by its actions and omissions indicated that they were not willing to perform their obligations under Exhibit M. There is indeed no evidence before the Court to indicate that the Defendant sold any property mortgaged to it during the subsistence of Exhibit M.

45. However, the fact that Mr. Peacock had a strong suspicion based on insider information and the fact that he contacted the bank in writing and personally on some occasions in respect of the agreement; the bank should have at least reciprocated in writing or otherwise. Mr. Peacock was left expecting performance from the Defendant; and he was treated with contempt. I am left with no doubt that from his testimony in Court, he was left embarrassed by the Defendant.

46. Furthermore, I do not agree with Counsel for the Defendant that the agreement, Exhibit M was void since it was not registered in accordance with the Registration of Instruments (Amendment) Act 1964 and that as such, the Plaintiff cannot derive any benefit from it. Additionally, I am not of the view that a contract for the performance of obligations would be unenforceable due to an irregularity such as for lack of registration.

47. Order 2 rule 1(1) of the High Court Rules of 2007 buttresses this point by stating that, "where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, judgment or order therein."

48. Section 2 (1) of the said Rules states that " an application to set aside for irregularity, any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity." I see no such fresh step taken by Mr. Johnson after he became aware of the irregularity.

49. In a related matter dealing with estates, Thompson Smith and Johnson v G.B. Ollivant and Co. Limited ALR Sierra Leone Series [1928] P 69-75 Justice Sawey-Cookson held inter alia, that the failure to register a power of attorney to take out letters of administration in respect of an estate which consists of both realty and personalty, does not invalidate the grant of administration. I therefore reject Mr. Johnson's argument on these grounds and reiterate that the Defendant breached its agreement with Mr. Peacock and it never performed ~~any~~ of its obligations, express or implied under the contract.
50. Additionally, I agree with Mr. Peacock when he argued that the Defendant bank had the legal resources, such as in-house counsel and retained counsel, to have registered the agreement after he signed it and returned it to the Defendant; since the document was the property of the Defendant of which a copy was obliged the Plaintiff.
51. On the issue of special damages, I agree with Mr. Johnson's submission that, special damages consist of all items of loss which must be specified by the plaintiff before they may be proved or recovered. However, from the evidence presented by the plaintiff, Mr. Peacock, full particulars to show the nature and extent of the special damages he wants to recover, was no shown.
52. Having established the above, I am of the opinion that the three (3) properties shown in Exhibit Z stated as being the subject of Court Orders for sale, should have been passed on to Mr. Peacock in accordance with Exhibit M, which is the agreement that was entered into with the Defendant.
53. And having considered the above issues, these are my Orders:-
- (1) Damages of Le 100,000,000 (One Hundred Million Leones) to be paid to the Plaintiff, Mr. Christopher Peacock.
 - (2) Interest of 10% per annum
 - (3) No Order as to special damages



(4) Costs of Le 20,000,000 (Twenty Million Leones) to be borne by the Defendant, Sierra Leone Commercial Bank.

Badi 26/3/2018

Honourable Justice F. Bintu Alhadi J.

Justice of the High Court