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IN THE SUPREME COURT OF SIERRA LEONE

CORAM:

The Honourable Mr. Justice E. Livesey Luke, C.J. - Presidi
The Honourable Mr. Justice C.A. Harding, - J.S.C.
The Honourable Mr. Justice O.B.R. Tejan, - J.S.C.
The Honourable Mr. Justice S. Beccles Davies - J.S.C.
The Honourable Mr. Justice C.S. Davies - J.A.

SC. CIV. APP. No. 4/81

Falkenberg & Braun Ltd. - 1st Appellant
and E. Schmidli - 2nd Appellant

Vs.

Florence McGauran - Respondent

J.H. Smythe, Esq., Q.C. with him Manly-Spain, Esq. for Appellan
Miss Adelaide Dworzak for Respondent

JUDGMENT DELIVERED ON THURSDAY 7TH JULY, 1983

Beccles Davies, J.S.C.

Miss Florence Dworzak now Mrs. McGauran (hereinafter calle the respondent) entered the employment of Messrs. Falkenberg an Braun (hereinafter called the first appellants) on 2nd January, 1969 and continued in the service of the first appellants until her resignation from that service on 5th December, 1978.

The respondent's letter of appointment reads -

"26th November, 1968

Miss Florence Dworzak
P.O. Box 1324
Freetown

Dear Madam,

EMPLOYMENT

We refer to our various conversations and in particular to our meeting of 22nd November, 1968; we are, in fact, very glad to learn that you did accept our offer, and we, therefore, wish to confirm the following:

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Your position will be that of an assistant to the undersig and, as such, you will hold a highly confidential position. Therefore, no information whatsoever relating to any of our business activities are to be divulged to any person or organis tion etc. Further you shall abide and carry out the instructio and regulations of this company for the time being in force.

It has been agreed that you will commence work on 2nd January, 1969 and your hours of working will be as follows:-

Monday to Friday: 0830 - 1230 and 1400 - 1630
Saturday: 0830 - 1230

Further you will be entitled to one afternoon off per week the day to be determined as per mutual agreement.

We shall grant you one calendar month leave for each calendar year with full pay, the time of such leave to be mutually agreed.

May we confirm that it is our intention to grant you the right to sign letters for and on behalf of this company within a year's time as and when directed by the undersigned.

Your salary will at the rate of Le350.00 (three hundred an fifty leones only) payable in Sierra Leone monthly in arrear an in accordance with existing legislation, we shall have to deduc income tax from such salary which is at present Le30.03 (thirty leones and three cents) per month.

Please note that as from 1st January 1970 your salary will be at the rate of Le400.00 (four hundred leones only) payable i Sierra Leone monthly in arrear. Such salary is taxable and we shall have to make the necessary deductions per month as stipulated in the monthly income tax deduction table then being in force.

It has been agreed that we shall pay to you the sum of Le30.00 in cash monthly in arrear being car expenses and you are herewith requested to prepare and sign a cash voucher in the usual manner as and when such amount (thirty leones only) becomes due for payment.

For good order's sake we wish to put on record that this agreement may be terminated by either party by giving one month' notice in writing to be forwarded by registered mail at any time

Finally we wish to point out that any alterations in the terms of this agreement will have to be made in writing and it goes without saying that this agreement shall be construed in accordance with the laws of Sierra Leone.

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We should be grateful if you would kindly sign the attached carbon copy of this letter signifying your agreement to the terms and conditions mentioned therein, and we would further ask you to return such copy to us as soon as possible.

Your early reply will be appreciated and we remain,

Yours faithfully
per pro FALKENBERG & BRAUN
E. V. Eglin
Secretary."

The respondent worked for the first appellants under the above conditions until some of those conditions were altered because of her family commitments. The altered conditions were contained in a letter dated 25th Apri, 1972. That letter states -

"25th April 1972

PROPOSED NEW WORKING HOURS FOR MRS. F. McGAURAN
STARTING ON 1ST MAY 1972

Monday - Friday	8.00 - 1300	= 5 hours per day
		= 25 hours
Saturday	8.00 - 12.30	= 4½ hours
		29½ hours

These new hours are to be paid at a new rate of Le3.00 per hour.
Overtime to be tax free at Le3.00 per hour.
Car allowance to be at the reduced rate of Le15.00 per month.
Medical expenses to be increased to Le6.00 per month.

Mrs. McGauran will work full time whenever Mr. Huebscher is away at the same hourly rate as given above.

FOR FALKENBERG & BRAUN
B. Huebscher.

In 1978 the respondent said she was dissatisfied with the service of the first appellants. She tendered her resignation from their service by letter dated 5th December 1978. The respondent's letter of resignation reads -

"5th December 1978

The Managing Director
Falkenberg and Braun Ltd
P. Box 65
Freetown

Dear Sir,

It is with regret that I am tendering my resignation to Falkenberg and Braun at the close of my 10th year in your service. However, the unpleasant incident this morning was the proverbial final straw and, according to the terms of my contract, I hereby give the required one month's notice as from today's date.

It must be pointed out, however, that since Mr. Falkenberg himself together with Mr. Huebscher drew up my "new" conditions of service on 25th April 1972 those conditions have not been improved, with the exception of my car allowance being raised from Le15.00 - Le65.00 and medical expenses from Le6.00 - Le26.00 and this in 6½ years of rampant inflation; Requested increments or betterment of conditions were denied. In fact I am the only person in the entire Falkenberg and Braun establishment to hold this record: Over four years ago, at your request, I used my top level contacts in Liberia to get Falkenberg and Braun established there with their first contract It was very difficult and took two long arduous years of travelling to Liberia regularly etc. You promised me 1% of the contract value if it succeeded and you deducted Le10,000 off the cash of the works carried out at my house. To date, however you have not closed this Le10,000 'debt' to my account even though you have promised to do so on many occasions. To safeguard myself I have taken the precaution of having a certain signed document held in a lawyer's safe covering this matter. I trust you will now amicably settle this and I hope pay me a long-service gratuity although I am fully aware that this is at your discretion.

I must again mention my deep regret that I have to depart on such a sour note but I hope that it will not finally end unpleasantly for I should hate to look back on my 10 years with Falkenberg and Braun with bitterness.

Thank you

Yours faithfully
Florence J. McGauran."

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The first appellants, on the following day acknowledged receipt of the respondent's letter of resignation and promised to settle the matters raised in it by the respondent, within a few weeks. The first appellants letter states -

"6th December 1978

Dear Madam,

Re: YOUR RESIGNATION

We hereby acknowledge receipt of your letter dated 5th December 1978 and accept herewith your resignation of the service of our company as per January 4th 1978.

The outstanding matters as mentioned in your letter shall be settled within the next few weeks.

We take this opportunity to thank you very much, for the services rendered to our Company and remain, dear Madam,

Yours faithfully
for: FALKENBERB & BRAUN LTD
E, Schmidli
Managing Director."

The respondent was not paid a gratuity. On 4th April 1979 she issued a writ claiming "damages for breach of an agreement partly in writing and partly oral made between the Plaintiff (that is the respondent) and the Defendants, (the appellants) in November 1968". I shall set out the relevant paragraphs of the particulars of the claim. They are -

"3. On or about the 26th day of November 1968, after various conversations the Plaintiff entered into an agreement with the Defendants.

4. A letter dated 26th November 1968, and signed by the servant or agent of the Defendants contained some of the terms of the agreement of employment of the Plaintiff.

8. All employees leaving the company are paid a gratuity by the Defendants this also being a policy of the Defendants.

9. That relying on the previous custom or usage of the Defendants in their contracts of employment the Plaintiff is entitled by her contract to a gratuity.

11. By reason of the matters aforesaid the Plaintiff has suffered loss and damage."

The respondent gave evidence at the trial of the action. She told the Court that she had entered into her contract of employment with the appellants after various conversations and that the contract was partly oral and partly written. The respondent claimed that during the conversations she had with Mr. Eglin who was the appellants' secretary, the latter had expressed the hope that she would work for the first appellants for at least five years, and that if she did, she would receive a handsome gratuity. On the basis of what Mr. Eglin had said, she proceeded to serve the appellants for ten years. Mr. Eglin had died before the trial of the action.

The trial judge reviewed the evidence and found for the respondent that she was entitled to a gratuity.

The trial judge's reasons for finding in favour of the respondent are to be found in these words -

"Looking closely at the opening remarks of the letter of the 26th November 1968, I am bound to construe the words <u>"Our various conversations and in particular our meeting of 22nd November 1968"</u> are bound to suggest some 'collateral' arrangement ..... Is this collateral arrangement a warranty or condition?

> This is certainly a warranty. It cannot be otherwise. Even if there was not a collateral agreement to that effect there certainly was an implied term of the Contract that the Plaintiff would perform her duties diligently and that when she left the Company she would be paid a handsome gratuity..... There was clearly a warranty in my considered view and it could not be understood otherwise..... Even if this were not so, where a man makes a promise that another will be paid a handsome gratuity if that other works for him for five years and that other acting on this promise not only works for that period but egged on and so induced, works for ten years could the promisor at the end of the day be heard to say 'I did not mean what I said?' It is my considered view that handsome means what it says....."

The appellants then appealed to the Court of Appeal. That Court upheld the decision of the trial judge. In disposing of the point whether the agreement was partly oral and partly written, the Court of Appeal said -

> "We have carefully read Ex. A. There is nothing therein which rules out that there was never an oral agreement for payment of gratuity prior to the initialling of the document by the respondent. Ex. A states and refers to "various conversations"

before the letter was written and refers particularly to a meeting between the parties on 22nd November 1968."

The appellants have appealed to this Court conseque the dismissal of their appeal by the Court of Appeal. Th raised by the appeal were (1) Was there an oral collater agreement to the written contract entered into by the Re and the first appellants? (2) Was the trial judge righ refusing to award the appellants the costs of the actio In considering the full issue formulated above it is nec to examine the statement of claim. The indorsement clai damages for breach of a contract which was partly oral a partly written. Paragraphs 8 and 9 of the particulars a that it was a policy of the appellants to pay gratuities employees leaving their (the first appellants') service; that the respondent relying on the 'previous custom or us in contracts of employment entered into by the first appellants their employees, was entitled to a gratuity.

In the respondent's attempt to prove usage or custom had said -

"All senior employees were paid gratuity - even juniors - labourers were paid gratuity. These gratuities are not on the same scale. Junior workmen received union rates i.e. 27 days salary or wages for year. Senior Members: The last Administrative Manager got Le4,000 after 3 years as gratuity."

It is on the basis of this piece of evidence that the tria awarded the respondent Le12,000 as gratuity.

Quite apart from the assertion of the respondent that gratuities were paid to all workers leaving the appellants service, there was no proof of the appellants having paid gratuities to their workers. In the first place workers

who are entitled only are paid gratuities under the Joint Industrial Council agreements and secondly in the case of the Administrative Manager referred to in her evidence, the respondent did not show that the alleged payment of gratuity to him, was not a written term of his Contract. However, Counsel for the respondent during the course of her argument before us stated that she was not relying on custom or usage but on the partly oral and partly written nature of the agreement between the parties. That being the case, I shall proceed to examine the Contract and its implications.

The trial judge in his reasoning had considered three situations, any one of which entitled the respondent to succeed on her claim - namely (i) that the alleged oral part of the contract was a warranty, (ii) that it was an implied term of the written Contract and (iii) promissory estoppel. The Court of Appeal however held that there was nothing in the written agreement which ruled out "that there was never an oral agreement for payment of gratuity." They failed to state whether or not there was in fact an oral agreement concerning the payment of gratuity to the respondent.

In order to be able to determine whether there was such an oral agreement or not, one has to consider this evidence before the trial judge in its entirety. The respondent's letter of employment (Exh. A) referred to various preliminary discussions (or "conversations" as the appellants prefer to describe them) and confirmed the matters stated in it. On the respondent's resignation from the service of the appellants she had said inter alia in Exh. B -

> "To date, however, you have not closed this Le10,000.00 'debt' to my account even though you have promised to do so on many occasions. To safeguard myself I have taken the precaution of having a signed document held in a Lawyer's safe covering

this matter. I trust you will now amicably settle this and I hope pay me a long service gratuity although I am fully aware that this is at your discretion....." (Emphasis mine).

The respondent's answers under cross-examination on the agreement between herself and the first appellants are of some assistance in determining this issue. The respondent had replied -

"There was no provision for gratuity in my letter of appointment Exh. 'A', Exh. B made no provision for gratuity.... It is not true that I was clear in my mind that there was no provision for payment of gratuity..... I agree I said 'I hope pay me a long service gratuity although I am fully aware that this is, at your discretion.... I have continued to regard Exh. 'A' as containing the terms of employment with the defendant Company....." (Emphasis supplied).

Putting the respondent's letter of employment - Exh. 'A' side by side with her letter of resignation Ex. 'B' (with particular reference to that portion of Exh. B in which she expressed the hope of being paid a long service gratuity the knowledge that such a payment was within the first appellant's discretion) it is apparent that the language employed by the respondent was that of a suppliant rather than that of someone who knew she had a legal entitlement the implementation of which was being demanded. The respondent's answers under cross-examination which I have highlighted demonstrate that she knew she was not entitled to a gratuity under any agreement, be it oral or in writing, and that all the terms of her employment

were contained in Exh, 'A'. From the foregoing, I hold that there was no oral agreement between the parties to pay the respondent a gratuity in the event of her leaving the first appellants' service.

Assuming for a moment that Mr. Eglin, the first appellants agent had told the respondent during negotiations that she woul receive a handsome gratuity if she worked satisfactorily for five years in the first appellants' service, and that promise was not included in Exh. A - the letter of employment - does that make the promise a term of the agreement? The parties to a contract may make all kinds of statements whether in writing or orally leading up to the contract. Even in a case where it is established that certain statements were made by the parties it does not necessarily follow that all those statements are terms of the contract. It is the duty of the judge trying the matter to decide which statements are contractual and which are non-contractual, merely inducing the formation of the contract but not forming part of it. In other words the judge must determine which statements are mere representations and which ar really terms of the contract. The law on the point is stated in the 4th Edition of Halsburys Laws of England Volume 9 at paragraph 346 thus -

> "During the course of the formation of a contract, one of the persons who are to become parties to the contract may make representations to another such person. A representation is a statement made by one party (the representee) which relates by way of affirmation, denial, description or otherwise, to a matter of fact or present intention.

A representation of fact may or may not be intended to have contractual force; if it is so intended it will amount to a contractual term; if it is not so intended, it is termed a mere representation.

Except where a representation amounts to a representation of fact, it can normally have no effect on a contract between the representor and representee unless it amounts to a contractual promise. Exceptionally, however, a representation of intention may have an effect on the contract, notwithstanding that it does not amount to a contractual promise, by reason of the doctrines of waiver and equitable estoppel.

In determining whether a statement is a contractual term o a mere representation the primary consideration is the intentio of the parties. The test of intention is objective. The Court have had regard to certain factors as aids to arriving at the intention of the parties. These aids are set out in Halsbury's Law of England Vol. 9 at paragraph 347:

"Those factors should be regarded as vaulable, though not decisive tests:

The factors taken into account by the Courts are as follows:-

(1) If only a brief period of time elapses between the making of the statement and the formation of the contract, the Court may be disposed to hold that the statement is a term of the contract.

(2) Where the party to whom the statement is made makes it clear that he regards the matter as so important that he would not contract without the assurance being given, that is evidence of an intention of the parties that the statement is to be a term of the contract.

(3) Where the party making the statement is stating a fact which is or should be within his own knowledge and of which the other party is ignorant, that is evidence that the statement is intended to be a term of the contract.

(4) Where, subsequent to negotiations, the parties enter into a written contract and that contract does not contain the statement in question, that may point towards the statement being a mere representation, though there have been cases where it has been found that such a preliminary statement constitutes a collateral contract.

(5) Where the party making the statement suggests an independent survey or opinion that may show that no warranty was intended.

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(6) It has been said that the maker of a statement can rebut an inference of a warranty if he can show that he was innocent of fault in making it, and that it would not be reasonable in the circumstances to hold him bound by it."

The above factors were crystalised into three questions by the learned authors of the Seventh Edition of Cheshire and Fifoot's Law of Contract at pp. 107 and 108. They are:

(1) 'At what stage in the course of the transaction was the crucial statement made?'

If it was made only in the preliminary negotiations, it should not be regarded as contractual. See Routledge v McKay 1954 1 All E.R. 855 (1954) 1 W.L.R. 615. If the time between the negotiations and the contract is well marked and substantial, the answer would be that the parties did not intend the statement to form part of the contract. On the other hand if only a brief period of time elapses between the making of the statement and the formation of the contract, the Court may be disposed to hold that the statement was a term of the contract.

There is no evidence as to when the alleged statement was made by Mr. Eglin. There appear to have been 'various conversations' preceding the final 'conversation' on 22nd November 196 Test (i) therefore is not of assistance having regard to the lack of evidence as to when the alleged statement was made.

(ii) 'Was the oral statement followed by a reduction of the terms into writing?

If the oral statement was followed by a reduction of the terms into writing, and the writing does not contain the statement in question, that may point to the statement being a mere representation; though there have been cases in which such preliminary statements have been held to constitute a collateral contract.

In the instant case, there were "various conversations" ending 'in particular' with that on 22nd November 1968, when al the terms of the contract were undoubtedly settled. The argume was reduced into writing and dated 26th November 1968. It stipulated the financial aspects of the respondent's employment but significantly made no mention of her entitlement to a gratuity. On 25th April 1972, the respondent's hours of work and salary were altered respectively to meet her domestic commi ments, yet again no mention was made of her entitlement to a gratuity. If Mr. Eglin had made the alleged statement, it would have been so vital to the respondent that it is reasonable to expect that she would have drawn attention to its absence and insisted on an alteration of the terms of the contract at the earliest possible opportunity or at the latest in April 1972 whe the finanaial provisions of her contract were altered in writing

I hold that even if Mr. Eglin had made the alleged statemen it would have been nothing more than a mere representation. It was not a term of the contract.

and (iii) Had the person who made the statement special knowledge or skill as compared with the other party?

This test is inapplicable to the peculiar circumstances of this case.

Taking all the circumstances of this case into consideratio no reasonable man would expect that it was the intention of the parties that there should have been a term in the contract, whether oral or in writing, that the respondent would be entitle to a gratuity on the termination of her contract of service with the first appellants.

Counsel for the appellants submitted during his argument that negotiations prior to a matter agreement are not part of the contract. He referred us to Prenn v Simmonds 1971 3 All E.R. 237. 1971 1 W.L.R. 1381. The summary of that decision as it appears at page 238 of the report states -

> "Although in construing a written agreement the Court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the Court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. 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."

The legal issues involved in Prenn v Simmonds and those in this case are disimilar. In Prenn's case the issues turned on the interpretation of the terms of a written contract, and alternatively rectification. The issue in the instant case was whether or not there was an oral collateral contract to that in writing. If there was such an oral contract to that in writing then evidence will be entertained to put the entire contract in its proper perspective. The position is thus stated in Cheshir and Fifoot on Contracts 6th Edition at page 104 -

> ".....the exclusion of oral evidence is clearly inappropriate where the document is designed to contain only part of the terms - where, in other words, the parties have made their contract partly in writing and partly by word of mouth. The situation is so comparatively frequent as in effect to deprive the ban on oral evidence of the strict character of a 'rule of law' which has been attributed to it. It will be presumed in the words of a learned author 'that a document which looks like a contract is to be treated as the whole contract'. But this presumption though strong is not irrebutable. In each case the Court must decide whether the parties have or have not reduced their agreement to the precise terms of an all embracing written formula. If they have, oral evidence will not be admitted to vary or contradict it; if they have not, the writing is but part of the contract and must be set by side with the complimentary oral terms....."

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In my judgment Counsel for the appellants contention is misconceived. The effect of the decision in Prenn's case is that negotiations prior to the formation of a written contract are not admissible in evidence as an aid to the interpretation of a written agreement resulting from those negotiations. The is no authority to support the proposition that terms agreed upon during prior negotiations can in no circumstances form pa of a subsequent written contract. Indeed the law as postulate above is that the oral terms agreed upon during negotiations c form part of a written agreement. It is quite permissible to import oral terms into a subsequent written agreement.

Therefore it was quite proper for the trial judge and ind the Court of Appeal to consider evidence regarding the alleged oral term of the contract concerning the payment of gratuity t the respondent.

I now turn to consider the second issue raised in this appeal, namely, the failure of the trial judge to award costs o the action to the Second Appellant Mr. E. Schmidli who was Secretary to the First Appellants. The trial judge in disposin of the case against the second appellant said -

> "I find myself unable to find Mr. E.V.Schmidli liable as the second defendant to pay such damages and costs because he did not personally appoint Mrs. McGauran. If he did sign any letters he did so for and on behalf of Messrs Falkenberg and Braun be it a firm or a Company."

The second appellant was not dismissed from the suit by th trial judge after having found in his favour in the statement quoted above.

In dealing with the complaint of Counsel for the second appellant, on the trial judge's failure to award costs to his client, the Court of Appeal resolved the matter in these terms -

"Mr. Smythe has contended that the learned trial judge did not award costs to be paid by the respondent to the 2nd Appellant when the learned trial judge dismissed him from the suit. It appears that learned Counsel lost complete focus of the fact that the 2nd Appellant was the ostensible agent of the 1st Appellant and that the action was not <u>improperly</u> brought. Learned Counsel has also argued that the learned trial judge did not show good cause for not awarding the 2nd Appellant costs. In our view it was for learned Counsel to show on the evidence and the judgment that there was no good cause for him not to have awarded costs to the Appellant. It must not be forgotten that costs are at the discretion of the Court and that there could only be complaint if in exercising such discretion the Court did not do so judiciously. We find no substance on the ground relating to costs."

The trial judge made no order as to costs. The Court of Appeal however, refused 2nd Appellant the costs of his defence saying that Counsel for the Second Appellant had lost sight of the fact that the Second Appellant was the ostensible agent of the 1st Appellant and that the action had not been improperly brought. The Court of Appeal said further that it was for Counsel to demonstrate to that Court that there was an absence of good cause in refusing costs to the 2nd Appellant.

Order XLVI rule 1 of the High Court Rules provides -

"Subject to the provisions of any Act and these rules, the costs of and incident to all proceedings in the High Court ..... shall be in the discretion of the Court .....

Provided also that the costs shall follow the event unless the Court shall, for good cause, otherwise order."

The above rule undoubtedly gives the trial judge a discretion as to awarding costs. A discretion when confirmed implies that it "must be exercised according to the rules of reason and justice and not to private opinion, according to law and not to humour. The exercise of the discretion must not be arbitrary, vague and fanciful, but legal and regular." See Sharpe v Wakefield & Others 1886-1890 All E.R. Report: Pep.(1891) AC 173.

The Respondent had presumably relied on the provisions of Order XII rule 4 of the High Court Rules in joining the 2nd Appellant as a party to the proceedings. Rule 4 provides -

"All persons may be joined as defendants against whom the right to relief is alleged to exist, whether jointly, severally or in the alternative....."

The supposed right to relief against the Second Appellant is to be found in paragraph 7 of the respondent's particulars of claim. Paragraph 7 states -

"7. That in spite of repeated requests increments by the plaintiff these were denied by the second defendant personally as the servant/agent of the first defendant."

The respondents evidence connecting the Second Appellant with this case is to be found in the notes of evidence. She stated -

"..... 2nd Defendant is the Managing Director. ..... The Second Defendant refused to give any increase of salary. I approached him from time to time to increase my salary because of the soaring cost of living and he refused ..... In December 1978 when I went to the 2nd Defendant for monies owing to me, he did not give me the monies and could not pay me for the days I was away when my child was ill. The second defendant became Managing Director in 1973. It was in 1973 that increments were received by me. Prior to Mr. Schmidli joining Company in 1973 I did receive increments. I am claiming damages for breach of contract with the Company. I am also claiming damages against 2nd defendant as Managing Director of this Company."

Under cross-examination she said -

"The 2nd Defendant was not a party in any agreement with Falkenberg and Braun Ltd. and myself....."

The particulars of the respondents claim had declared that the 2nd Appellant was the servant/agent of the 1st Appellants. In her evidence, she said that she was claiming damages against the 2nd Appellant because, as the servant or agent of the 1st Appellants, he had refused her increments of salary. I fail to see how the claim against the 2nd Appellant was either 'joint several or in the alternative' to that against the 1st Appellant I hold the view that the Respondent's claim against the 2nd Appellant was frivolous.

The trial judge did not state any cause for refusing to award costs to the 2nd Appellant. The general rule is that costs follow the event. Taking the respondent's pleadings and evidence into consideration the respondent's claim against the 2nd Appellant was frivolous. In these circumstances the judge should have awarded costs to the 2nd Appellant. The judge did not exercise his discretion properly. I would allow the appeal of the 2nd Appellant on the issue of costs.

I would also allow the appeal of the 1st Appellants set aside the judgments of the Courts below, and enter judgment in their favour.

(Sgd.) Hon. Mr. Justice S. Beccles Davies, J.S.C.

I agree ..... (Sgd.) Hon. Mr. Justice E.Livesey Luke, C.J.

I agree ..... (Sgd.) Hon. Mr. Justice C.A. Harding, J.S.C.

I agree ..... (Sgd.) Hon. Mr. Justice O.B.R. Tejan, J.S.C.

I agree ..... (Sgd.) Hon. Mr. Justice Constant Davies, J.A.