

IN THE SUPREME COURT OF SIERRA LEONE

CORAM:

Hon. Mr. Justice S. Beccles Davies - Ag. C.J.
 Hon. Mr. Justice S.C.E. Warne - JSC
 Hon. Mr. Justice E.C. Thompson-Davis - JSC
 Hon. Mr. Justice G. Gelaga-King - JA
 Hon. Mr. Justice A.B. Timbo - J.A.

SC. CIV. APP. 2/87

HARRY MASON - APPELLANT

V

OLATUNGI WILSON - RESPONDENT

Dr. Ade Renner-Thomas for Appellant
 Dr. H.M. Joko-Smart for Respondent

J U D G M E N T

DELIVERED THIS 14 DAY OF July 1995.

WARNE, J.S.C.

This is an appeal against the judgment of the Court of Appeal delivered on the 19th day of November, 1986.

The Appellant, being aggrieved with the judgment, filed two grounds of appeal namely: "(1) The Court of Appeal was wrong in resting its decision solely on a ground not set forth by the Appellant and without the parties having had sufficient opportunity of contesting the case on that ground.

(2) The several conclusions of the Court of Appeal on the question of illegality are wrong in law particularly having regard to the absence of evidence that the Plaintiff acted outside the law."

The Statement of Claim was that: "The Plaintiff's claim against the Defendant is for the sum of US 79620 dollars being money payable by the Defendant to the Plaintiff for money had

and received by the Defendant for the use of the Plaintiff, interest and costs."

The Particulars, inter alia, state:

"(21 On or about the 2nd day of October, 1984 at the request of the Defendant the Plaintiff paid the sum of US 79,620 (Seventy nine Thousand Six Hundred and Twenty United States Dollars) in the Defendant's Bank Account at Bank of Credit and Commerce International at 135 Earls Court Road London England for use in connection with the Plaintiff's said business."

The Plaintiff claims:-

- (1) The said sum of US 79620/00 Dollars.
- (2) Interest on the said sum of US 79620 Dollars at the rate of 22per centum per annum from the 2nd day of October, 1984 till payment or Judgment.
- (3) Further or other relief.
- (4) Costs."

I shall hereinafter refer in this judgment to the Appellant as Plaintiff and the Respondent as Defendant.

The Statement of Claim, in my view, is infelicitously worded. As a result, the Defendant sought further and better particulars. The Defendant, however, denied the claim. Issue was joined and the cause went to trial before Thomas J. He gave Judgment for the Plaintiff. Against that Judgment, the Defendant appealed to the Court of Appeal which consisted of Navo, Turay and Adophy JJA.

The facts of the case are simple. The Plaintiff is a precious metals Broker, Bullion Dealer and Refiner resident at 4 Prince Albert Street Brighton in England in the United Kingdom. In his field of business, he wrote to the Chamber of Mines in Freetown to find out about alluvial gold dealers in Sierra Leone. The copy letter was received in evidence and for ease of reference I will here quote the letter and the

reply which he received and were tendered in evidence.

The letter is addressed to -

"J.T. Nottidge Esq.,
Executive Officer
Sierra Leone Chamber of Mines
Spiritus House
Howe Street
Freetown

Dear Sir,

We are a gold purchasing company in the transaction of precious metals for a considerable number of clients, most of whom are situated in the United Kingdom.

We are currently involved in the implementation of a statistical study of certain countries located throughout the African Continent. It is appreciated by ourselves that your country is involved considerably in the production of gold, and we feel that because of our interest in alluvial gold, we would like to consider offering a precious metal purchasing and refining facility.

We would therefore ask for your assistance in providing full details, where possible, of individuals and companies who are currently involved in this field, and that might be willing, at least, to negotiate possible transactions.

There are a wide range of services that we can offer and we would like the opportunity to discuss this locally with interested parties, at some date in the near future.

We therefore look forward to receiving your reply. Any information given will of course, be treated confidentially, and your help in this matter is very much appreciated.

Yours sincerely
(Sgd.) H. Mason"

In reply the Plaintiff received Ex 'B' which is a list of authorised Alluvial Gold Dealers. In that list was No. 11 - Mr. Tungi Wilson - 35, Pademba Road Freetown Sierra Leone. There is no dispute that Mr. Tungi Wilson is the Defendant herein.

As a result the Plaintiff wrote to the Defendant a letter dated 12th July, 1984 which reads:

"Mr. Tungi Wilson
35, Pademba Road
Freetown
Sierra Leone.

Dear Sir,

We have been corresponding with the Sierra Leone Chamber of Mines, and Mr. J.T. Nottidge Executive Officer has stated that you are currently involved in purchasing alluvial gold.

However, as Sierra Leone is considerably involved in the production of gold, and because of our interest in this field, we would like to consider offering a precious metal purchasing and refining facility. We are obviously unsure of your existing arrangements, although we believe that a large percentage of the gold generated in your country is directed to Swiss Refineries. We realise that the only way to effectively commence business dealings, is to be given the opportunity to discuss locally all aspects with you. To this end, we envisage a visit to Freetown shortly, and therefore, we would welcome your comments in order that we can make arrangements for meeting with you to negotiate all considerations regarding the business.

Finally, any terms and conditions offered will ^{not} only be treated in strict confidence, but will be extremely competitive because of our good connection with the London Gold Market.

We therefore look forward to receiving your reply in the very near future.

Yours faithfully
(Sgd.) H. Mason"

The Defendant replied by letter dated 25/7/1984 and it was headed

"Tisco Enterprises

Bankers

Barclays Bank

Congo Cross

Our Ref.Your Ref.

35, Pademba Road

Tel. 23988

Telex 3520

Freetown

Rep. of Sierra Loene

Date 25/7/1984

Mr. H. Mason

4, Prince Albert Street,

Brighton

East Sussex

United Kingdom

Dear Sir,

Your letter reached me and all contents were well understood. I am involved in Purchasing Alluvial Gold.

Your request in Purchasing Gold from me is cordially granted. As you have stated in your letter the only way to commence business dealings with me is to make a visit to Freetown as soon as possible.

State by telex the date of your arrival so that I can meet you at the Air Port and arrange a meeting with you to negotiate all considerations regarding the Business.

I am looking forward to your arrival in Freetown. You are welcome at any time.

Bye for now.

Yours faithfully

(Sgd.) T. Wilson"

The Plaintiff by letter dated 31st July 1984 sought further

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details from the Defendant thus - current sales of alluvial gold i.e. volumes available, say on a monthly basis, how monetary values are transferred, bank(s) involved, and whether or not the Ministry of Mines is involved in assessing purity, levels.

.....
The Defendant promptly replied to part of the details required by telex dated 2nd August 1984. The Plaintiff did not travel to Freetown, he sent a representative, one Anthony John Powell. The Plaintiff had written to all the seventeen individuals or companies mentioned in the list sent to him by Mr. Mottidge. Suffice it to say, he was now negotiating with the Defendant.

Anthony John Powell was put in touch with the Defendant with whom he negotiated for the purchase of 10 Kilos of Alluvial Gold valued at 79620 US Dollars. This transaction was concluded as a result of several telegraphic messages between Anthony John Powell and Mr. Mason, the Plaintiff. Consequently, the 79620 US Dollars were paid into the Bank Account of Defendant at the Bank of Credit and Commerce International 135 Earls Court Road in London. The defendant agreed the money was paid into his account but contended he gave Anthony John Powell 8½ Kilos of Gold in exchange. There were several requests made for the refund of the 79620 US Dollars from Defendant, but to no avail.

The Court of Appeal considered the evidence in support of the claim and the submission of both Counsel, and before Judgment was delivered made this observation.

"Court. This was not made a ground of appeal. But pursuant to Rule 9 sub-rule 6 of the Rules of Court, we invite Counsel to address us on whether this transaction is not rooted, or its performance tainted with, illegality thus making the Maxim Ex Turpi causa ^{non} oritur actio applicable.

If so, can our Courts lend aid to either party in its performance or enforcement."

The whole appeal turns mainly on the question of Illegality. Dr. Renner-Thomas, Counsel for the plaintiff, has taken issue with

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that observation of the Court of Appeal. Counsel referred Court to Rule 9 sub-rule 6 of P.W. No. 29 of 1985 which provides:

"Notwithstanding the foregoing provisions of this rule, the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

Provided that the Court shall not rest its decision on an ground not set forth by the appellant unless the parties had sufficient opportunity of contesting the case on that ground" [Emphasis mine].

Counsel submitted that since the appeal had not been contested on the ground of illegality, the parties should have been given sufficient opportunity to argue that ground. He submitted, that was not so. He argued that Counsel for the defendant had completed his argument when the observation was made by the Court of Appeal. He urged the Court to give the word "sufficient" its ordinary meaning.

Counsel submitted that Counsel for defendant had completed his argument when the question of illegality was put to him.

In my view, this submission is not tenable. The record is quite clear. When the question of illegality was posed by the Court, Counsel for plaintiff replied thus:

"I submit that there is nothing illegal to buy gold in Sierra Leone. It could be illegal if the person selling is not a licensed dealer. I submit that where a statute provides that a person could not enter a contract except he is licensed to do so then the effect of not being licensed, will depend on the construction of the statute or the intention of Parliament. Re Mamoud Ispahani (1921) K.B. 716, Rep. 217 St John's Shipping Corporation v Joseph Rand Ltd. (1957) 1 Q.B. 267; 1956 3 W.L.R. 870".

The foregoing shows clearly that Counsel replied to the observation of the Court of Appeal. Was Counsel given sufficient opportunity to contest the ground of illegality? I will first of all give sufficient opportunity its ordinary meaning and then

decide if such opportunity was given to the parties.

According to the Concise Oxford Dictionary - "Sufficient means: sufficing, adequate; and Opportunity means: a good chance, a favourable occasion, a change or opening offered by circumstances, good fortune."

Did the Court give Counsel an adequate opportunity to contest the question of illegality. In my view, Counsel was given sufficient opportunity to contest the issue of illegality. If more time was needed by Counsel, he should have applied to the Court for such time to answer the point.

Counsel contends that Counsel for defendant replied to the ground of illegality when replying to his submissions. I see nothing wrong in this procedure.

In fact, Counsel for defendant justly and rightly disposed of the issue of illegality in his reply. This was what Counsel for defendant said in his submission:-

"By excluding contract the Defendant was denied such legal Defence as might be open to him. I submit further that even so the Trial Court could of its own motion have raised the question of illegality. Bull v Chapman (1853) 8 Lich 444 22 L.J.E. at 257 Snell v Unity Finance Co. Ltd. (1964) 2 Q.B."

In my view the record is quite clear. Both parties had sufficient opportunity to contend the ground of illegality.

The complaint of Counsel for the Plaintiff is unfounded and that ground of appeal fails.

Having disposed of this ground I will now turn my attention to Ground 2 of the Grounds of Appeal. This is more substantial and creates greater difficulty in resolving.

Counsel on both sides have been of considerable help to the Court by furnishing the Court with some useful authorities

Counsel for plaintiff has made the following submissions: that there was no evidence of illegality in the contract. There was no burden on the Plaintiff to prove that he was an authorised dealer in gold. Counsel, however, conceded that even though neither party to the dispute may have raised the question of illegality, the Court suo moto, can raise.

it if the contract is tainted with illegality. Counsel submitted that before the Court can do that several conditions should be fulfilled before the Court can raise the issue. In support of that submission, Counsel cited several legal authorities, among them were North Western Salt Co. Ltd. v. Electrolyte Co. Ltd. H.L. (1914/1915) A.E.R. 752 at 756, 759, 760, 761 and Peterson v Tuboku-Metzger (1964/1966 A.L.R. (SL) 442 at 449 and Chitty on Contract Vol. 1, 24 Edit. Para. 1059.

Counsel finally submitted that there is no evidence to support the findings of the Court of Appeal and that the conclusions are wrong and the Judgment of the High Court be restored.

In response to the submissions of Counsel for the plaintiff Counsel for the defendant has urged the Court to adopt one of the courses -

- (1) If the appeal is dismissed that is the end of the matter
- (2) If allowed, the Judgment of High Court cannot stand; if so, then
- (3) The case has to be remitted to the Court of Appeal for rehearing, because the Court of Appeal did not decide the case on the substantive grounds of Appeal. Counsel cited the case of North Western Salt Co. Ltd. (supra).

I have already disposed of Ground (1) of the Grounds of Appeal and will now consider the submissions of Counsel in reply to Ground (2). Counsel submitted there was evidence before the Court that the Plaintiff was not an authorised dealer.

Counsel contended that both vendor and purchaser should be authorised dealers and he refers to the Exchange Control Act. Cap. 265 Section 3 (1). Counsel submitted further that if the name of the Plaintiff is not on the list of authorised dealers, he is not an authorised dealer and has cited the case of Nabieu Amadu v. Aiah Sidiki (1972/1973 A.L.R. (S.L.) 42.

Counsel submitted that the whole transaction was shrouded in secrecy as a result the Plaintiff sued in quasi-contract. Counsel urged that the laws of Sierra Leone were violated and the whole purpose of the legislation was to combat smuggling and tax evasion. Counsel finally submitted that it was irrelevant by what term the transaction is called.

What I have to consider are the following points -

- (1) Was there a contract between the plaintiff and the Defendant?
- (2) If there was a contract, was it an illegal contract ab initio?
- (3) If it was an illegal contract ab initio, can it be enforced by either party?
- (4) Can an innocent party sue on such an illegal contract to recover money had and received?
- (5) Was there any evidence on which the Court of Appeal based its decision?

I will endeavour to resolve the points posed supra.

In order to determine if there was a contract between the parties, I must go back to the correspondence between the parties. Money was alleged to have been transferred to the defendant. Before the plaintiff came into contact with the defendant, he wrote a letter to the Executive Officer, Chamber of Mines identifying his line of business and said he needed assistance in meeting interested parties with a view to offering a range of services in that line of business - gold and precious metals. In reply, he received a list of authorised alluvial gold dealers. In that list, was the name of the defendant. As a result the plaintiff wrote to the defendant. It will be pertinent to refer to the letter plaintiff wrote to the defendant (EX'C') hereinbefore mentioned.

The defendant promptly replied. In the end the plaintiff sent a representative to the defendant. After some negotiations between the defendant and the representative of the plaintiff the sum of 79620 US Dollars was sent to the defendant, ^{by the plaintiff for the} ~~agreed that there~~ purchase of 10 kilos of alluvial gold. ^{The defendant agreed that there} was a transaction for the sale of gold to the representative and

the quantity was about 8½ Kilos or a little over for the price of 79620 US Dollars. Subsequently defendant received the purchase price which was 79620 US Dollars. However, he insisted that the gold was given to the representative of the plaintiff. The Court of Appeal held that "This is a clear case of a contract entered into on behalf of the plaintiff (a disclosed Principal), by Powell his Agent and the defendant". I agree, There was, no doubt, a contract between the plaintiff and the defendant.

The Court of Appeal, however, having found that there was contract between the parties had this to say per Navo J.A.

"In the light of the above submission and indeed the entire circumstances of this case, I make bold to say that in my view the agreement to pay the sum of 79620 United States Dollars into the Bank Account of the Appellant Wilson, which agreement was contracted by the Appellant and the Respondent through his Agent Anthony J. Powell and performed by the Respondent Mason by paying the amount into the Bank of Credit and Commerce International Ltd. at Earls Court Road London for 10 Kilos Alluvial Gold was a deliberate and calculated device to eclipse and by-pass the Exchange Control Regulations cited earlier by Mr. T.S. Johnson, thus depriving this country of much needed foreign exchange. The transaction call it money had and received or what you like is clearly not only illegal is also against Public Policy and thus making the Maxim Exturpi causa non oritur actio applicable."

/Emphasis Mine/

The Court of Appeal having made such positive findings disturbed the findings of fact made by the High Court. An Appellate Court ought not to disturb findings of fact of a lower court unless the findings are clearly wrong and cannot be supported in law - Benmax v. Austin Motor Co. Ltd. (1955) All E.R. 326

In that case Viscount Simmonds at p. 327 said:

"In such a case a distinction should be made between facts deposed to by witnesses and found by the Court; and inferences of facts drawn therefrom by the Court".

In the instant case, the positive findings of fact were made the High Court as a result of the ^{facts} deposed to by the witnesses. These were the findings of the Judge in the High Court. The Learned trial Judge said among other things:

"Has the defendant been unjustly enriched at the plaintiff's expense? A finding of fact is called for here. From the evidence adduced on both sides about the delivery or non-delivery of the gold, the issue one way or the other must be resolved by the relative weight to be attached to the evidence on each side. It is all a question of credibility. I have carefully watched the demeanor of the witnesses when testifying the mode of response to questions as they were put to them in examination in chief or cross examination. I have also considered the content of the exhibits along side the oral testimony of the witnesses, whether there were inconsistencies in the evidence of the one side and whether such inconsistencies are material. I have also taken great care not to be influenced by extraneous matters and irrelevant pieces of evidence, but to weigh and consider ^{adequately} ~~adequately~~ the evidence in its entirety. I hold the plaintiff and his witnesses as credible witnesses. The defendants' evidence cannot be relied upon because of material inconsistencies in his evidence."

The learned trial Judge then highlighted several passages of the defendant's evidence which he considered were inconsistencies.

The Judge went on to say "On the other hand the plaintiff and his witness in my view, told a consistent story". He accordingly spelt out these several passages in the evidence.

Finally, the learned trial Judge said "Having considered the case as a whole I hold that the plaintiff has proved his case on a balance of probabilities".

There was no evidence on which the Court of Appeal made its findings.

I see no reason to disturb the findings of fact made by the learned trial Judge. Having said that, I will now consider the law under which the Court of Appeal grounded its decision.

It is the Exchange Control Act, Cap. 265 of the Laws of Sierra Leone as amended. The title is "An Act to confer power and impose duties and restrictions, in relation to gold, currency payments, securities, debts, and the import, export, transfer and settlement of property and for purposes connected with the matters aforesaid". The Act ^{does} not create an offence per se. It confers powers and imposes duties and restrictions.

In this regard, the Court of Appeal referred to the Exchange Control (Amendment) Act, ^{No 27} 1965, Section 3 (1) which provides:

"Except with the permission of the Minister no person other than an authorised dealer shall in Sierra Leone, and no other person resident in Sierra Leone other than an authorised dealer, shall, outside Sierra Leone, buy or borrow any gold or currency of a Non-Scheduled territory from or ~~sell~~ sell or lend any gold or currency of a Non-Scheduled Territory to any person other than an authorised dealer."

The Court of Appeal having invoked in aid the Exchange Control (Amendment) Act, ^{No 27} 1965, more particularly section 3 (1), the learned justices, with respect, misapplied the law. The contract between the plaintiff and the defendant was executed in Sierra Leone (Emphasis mine). The contract therefore is governed by the laws of Sierra Leone. Section 3 (1) of the said Act of 1965 refers to dealings in "gold or currency of a Non-Scheduled Territory". Sierra Leone is listed as one of the Scheduled Territories in the First Schedule of the Act. - Section 3 (1) refers.

In the light of the correspondence between the plaintiff and the defendant, can the Court lend its aid to the plaintiff I think it can.

After the initial correspondence between the plaintiff and defendant which created the contract, there were several others which show that nothing was, "shrouded in secrecy", on the part of the plaintiff as counsel for the defendant urged the Court to believe.

The following communications passed between the plaintiff, defendant and the representative of plaintiff and the son of plaintiff and defendant, respectively

(1) "84-08-2, 17.07
877173 Syss E.C. 9
3550 P.S. NT SL
JGX
TLX 877173
ATTN MR. MASON

TLX Received to your second letter dated 31st July, 1984. Volume available 10-15 weekly basis purity 92 - 93 per cent

I will be travelling to Europe so I will be in Freetown on the 1st week in September.

Regards

T. Wilson".

(2) 8.10.84
877173 Suss ec 9
3520 VISINT SL
Representative Opowell to H. Mason
Good Evening

Thank you for your recent TLX for the convenience of our transaction. Pls. can you when transferring funds credit us Dollars. Tungi has been operating his figures on an exchange rate of USD 1 pound Sterling. Please confirm acceptability. Calculate

figure to be USD 79630. When transferring funds pls. request Tungi's Bank to advise direct of credit made to account. Tony" "Please read USD 1.2. one pound sterling 977172 SUSSED 9 3520 visint sl.

(3) "H Mason to Powell 1.10.84

Thank you for your telex and am fully aware of the situation. I am prepared to arrange funds to Mr Wilson's Account in London providing that when I do so, you physically have the material in your possession

Regards.

Harry"

(4) Harry Mason to Powell 1.10.84

Very pleased to speak to you on the telephone this morning. Latest gold price was 280.00 sterling. Hope you can arrange a deal with Mr..Wilson. Keep me informed. How you want payment made and any other further developments. Looking forward to meet you both on Friday. Keep up the good work.

Regards

Harry"

1.10.84

(5) "Powell to Harry Mason

Our telephone conversation this morning refers. We are to purchase material gross weight 10.00000 Kilos based on a price 280 sterling per oz (90002.00 per kilo). 206.39 (6635.00 per kilo). Total value of 66350.00 sterling. Can transfer funds to this value. You have bank details. Due to change of plans I will be returning to U.K. with Tungi

B. Cal departing here Friday 5th October.....

Kindest regards

Tony"

(6) "H. Mason to Powell

1.10.84

Thank you for your letter and am pleased that you have concluded a deal with Mr. Wilson. Am arranging transfer of funds A.S.AP. Confirm by return if this consignment can be sold on tomorrow. Fix as price has slightly dropped. Please telephone me

Regards

Harry".

2.10.84

(7) Mason to Powell

Thank you for your latest telex received this morning. We accept the fact that Mr. Wilson wants the transaction in US Dollars and am arranging for USD 79620 to be transferred to Mr. Wilson's A/C in London.

As we have to purchase dollars this will take a day or two. But the sum will definitely be in his account by Thursday and his Bank will confirm.

Urgent you confirm by return telex in order that we can sell forward and arrange transfer of funds

Regards

Harry"

In a subsequent telex from H. Mason to Powell he said:

Please confirm gross weight of consignment.

As previous telexes as state 10.5 Kg. we understand the figure of USD 79620 was based on the gross weight of 10.5 Kg.

We have arranged transfer of funds

Regards

Harry".

Powell to Mason

2.10.84

(9) ".....
.....

However clarification as requested. Reaffirm gross weight of consignment 10 kilos.

(Le 321.5 ozs).

Regards

A.J.P."

Mason to Powell

2.10.84

- 10. "Telex received and understood. Have arranged Transfer of USD 79620 to Mr. Wilson's Account. Necessary action on re-affirmed figures.

Regards

Harry"

Powell to Mason

4.10.84

- 11. "In view of delay can you please telephone your Bank and request that they ~~advise~~ advise time of credit to Mr. Wilson's A/C in London. It is imperative that we have this information A.S.A.P.

.....
Regards

A.J.P."

Mason to Powell

- 12. "On information received by my Bank Funds were transferred at Approx 15.30 hrs. BST today.

Regards.

Harry"

H. Mason to Powell

- 13. "This is to reaffirm that the sum of USD 79620 was credited to Mr. Wilson's Account with the Bank of Credit & Commerce International at Approx. 15.39 hrs. BST on Tuesday 4th Oct. If he was not informed of this the blame lies entirely with the Bank due to their incompetence

.....
Regards
Harry"

Powell to Mason

15.10.84

"Telex received. I will make my own way home from Gatwick. I will speak to you during the day. No further communication please unwind deal with chess. You are to be re-imbursed.

Regards"

Mason to Powell

15.10.84

15. "Have you watertight and 100 per cent guarantee that I will be re-imbursed for my money.

Your comments by return telex will be appreciated.

Harry"

MASON TO POWELL

16 "You still have ^{is} guaranteed how I am going to get my money back.

Harry"

17. Mason to Wilson 23.10.84

"We now understand that the funds made available in have now been transferred to Freetown. When will it be convenient for us to collect the outstanding consignment (10Kg.) We will also like to purchase a further consignment and on this occasion we will have funds with us.....

.....

N.B. Mr. Larmie, if you are ~~there~~ please could you acknowledge receipt of this information so that we get an immediate feed back on how well we have been received".

18. Wilson to Mason

7.11.84

"Got your message from Mr. Larmie, After my last telephone conversation with you was unable to collect my Jeep from the garage. Have got it now and proceeding today will contact you from Guinea.

Regards

Tungi Wilson"

19.

14.11.84

Wilson to Mason

"Please phone me at Hotel Gbesia Conakry
Tel Nos. 46-47, 46-40-40, 46-40-45 you may also
TLX No. 2112 Attn. Mr. Coum Bassa for Tunji Wilson.

Regards

Tunji Wilson"

20. Mason to Wilson

14.11.84

"Due to the uncertainty of your intentions I
have decided to send my son Michael and Tony to
Freetown to clarify the position. They will be
arriving Thursday morning 15 November. It would
be appreciated if you could have them met at the
airport.

Best wishes.

Harry Mason".

21. Wilson to Mason

14.11.84

"Come down in Guinea immediately I have
committed myself with some people who have
40 of G.A. am in hotel Gbessia Conakry Guinea.
Am trying to cover up the buisness. Explain
details when you arrive in Guinea.....
.....

R.G.T. Wilson"

22. Michael Mason to Wilson

5.12.84

Dear Tunji

Please confirm by return your intentions
for arriving in England and when you expect
the situation to be resolved.

Regards

Michael Mason

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23. Wilson to Mason

7.12.84

"I should have travel this week to see you but unfortunately all the flights are completely booked unless after the Christmas Vacation.

I will call you from Antwerp.

Regards.

T Tisco".

24. Mason to Wilson

10.12.84

"Thank you for your Telex. Regret you are unable to see us before Xmas. However we look forward to our meeting after the holidays

.....
.....

Harry Mason and Family".

25. Secretary to Mason for his attention

7.1.85

"Mr. Wilson is not coming to the office this week because he is very ill and unable to work".

Regards

Secretary"

As a result of this message from the Secretary of defendant the plaintiff sought other means of getting through to the defendant. In his evidence, plaintiff said "I telephoned the defendant from the U.K. about the refunding of my money 79620 U.S. Dollars. I got to know the defendant telephone number because it is stated in his letter head. The defendant was in Freetown when I made the telephone call. I personally dialled the defendant's number, a girl answered the telephone. I asked for the defendant, he came on the line. I said first "what happened to my gold? or words to that effect. The reply came don't worry you will be refunded. I replied

"when?"

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Then he said, I have diamonds which I can sell which will enable me to refund the money. After that, I did not hear anything for a week or two. I phoned him again and he promised to send the 10 Kilos to me by a Mr. Kakay who would be travelling on a B.CAL flight.

These telephone conversations took place after Mr. Powell had returned to London without the gold.

After the telephone conversations I received a Telex about the arrival of Mr Kakay in London."

This telex was tendered in evidence and it was dated 26.10.84 and reads:

"Attn. Mr. Tony Powell

Pl. meet Mr Kakay (the gentleman who took you to the airport) at Gatwick airport on Friday Nov. 3. He will be arriving by BCAL.

Regards

Tasco Enterprises".

.....

The plaintiff's evidence continues "Mr. Kakay did not ARRIVE IN London as expected. I then sent my son and Mr. Powell to Freetown to see what was going on. I have ^{heard} of a Mr. Larmie from whose office the defendant used to send telex messages to me. I do not know a Mr. Leopold. I have heard of him.

I spoke to someone on the telephone who identified himself to me as a Mr. Leopold. I spoke to him about the 10 Kilos of gold".

As can be seen from the evidence the situation was becoming very desperate for the plaintiff. How did he come to know about Mr. Kakay? It was through the defendant and Mr. Powell. Both Powell and Michael Mason had met Mr. Leopold in London at his Leopold's request. In his evidence Michael Mason said "I also know one Mr. S. Leopold. He is not in Court. I came to know him in London. Before I came to Freetown last year he telephoned to say he wanted to meet Mr Powell and myself. I met him in Hackney in London sometime

in October, 1984. I am aware that my father and his partners were involved on a transaction with the defendant. He asked Mr. Leopold about the money 79620 U.S. Dollars owed to Mr. Harry Mason by the defendant. He said he would look into the matter as he was related to the defendant somehow. I believe Mr. Leopold was married or getting married to the defendant's mother. Mr. Powell was present at the time".

Mr. Powell in his testimony also referred to this meeting with Mr. Leopold and also the expected arrival of Mr. Kakay in London with the 10 Kilos of gold. The plaintiff was informed of this encounter with Mr. Leopold vis-a-vis his business transaction with the defendant. Mr. Powell said "I told Mr. Leopold about the background of the transaction with the defendant. Mr. Leopold said we need not worry, we would get the gold, suggesting that defendant would perform his own side of the agreement ultimately; Mr. Leopold said that he knew the defendant's mother very very well."

The plaintiff felt he could seek the assistance of Mr. Leopold to recover his money. He therefore sent him a telex dated 18.1.85 which reads:

"Attn. Mr. Leopold

The situation with Mr Wilson has still not been resolved. We have not received any gold or refund for the money which was deposited in his London Account last October. As we understand your company was involved in transferring the funds from London to Freetown. We respectfully request your help and cooperation in settling this matter.

Kindest regards
Marry Mason".

In reply, Mr. Leopold sent a telex message to Mr. Mason, the plaintiff, which to say the least, is devastating. It is dated 21.1.85. This is the telex.

"ATTN MR. HARRY MASON - 21.1.85

Many tks yr TLK of Jan 18 we are indeed surprised to learn that your business with Mr. Wilson has still not been concluded. Tony and yr son were here sometime last November and phoned us from their hotel but e never made any personal contact with us since then we have not heard from them and assumed that everything was O.K. You have been misinformed about our involvement in transfer of yr money. It is important that we inform you that Mr. Wilson authorised his bankers in London to transfer the amount you made available to him to a local merchant Mr. Mohamed Gebara's account with the Soho Branch of Barclays Bank. Mr. Mohamed Gebara in turn paid Mr. Wilson here in Freetown in Leones at double the official Bank rate of exchange. Pls feel free to ascertain the fact of the transfer from your bankers. Our company was certainly never RPT never involved with any transfers. Nevertheless, we shall contact Mr. Wilson immediately to find out the position and revert soonest.

Sincere regards
S.L. 'Leopold".

On the 26.10.84 the defendant had sent a telex to Powell in England to meet Mr. Kakay, at Gatwick airport on Friday November 3 who will be arriving in England by BCAL.

This is the evidence Powell gave: "I should meet Mr. Kakay on 3/11/84 at Gatwick. The purpose was to meet Mr. Kakay to receive the 10 kilos of gold at the airport. I know this from a telephone conversation with the defendant

on 15/10/84. I informed the plaintiff about the telex and the plaintiff's son Michael accompanied me to Gatwick in the hope of meeting Mr. Kakay at the airport".

As I see it, Powell knew the ~~man~~ he was going to meet Gatwick on 3rd November.

Powell continued his evidence by saying:-

"Mr. Kakay did not arrive on the flight according to information received from the BCAL computerise reservations at Gatwick. As far as I know Mr. Kakay did not arrive in London at all."

The evidence of the plaintiff and Powell show clearly that the defendant was not willing to fulfil his side of the contract.

The defendant admitted in evidence, that he received 79620 US Dollars. What did he receive the money for? I have no doubt in my mind that it was the purchase price for the 10 kilos of gold agreed upon by both parties. For a clearer picture, I will quote the evidence of defendant - he said:- "I eventually received the 79620 U.S. Dollars in the form of Leones in Freetown. I received the equivalent in Leones of 79620 US Dollars at the end of October 1984. I received the equivalent in the sum of Le440,000.00 or thereabouts. The said sum of Le440,000.00 was received by me at the Barclays Bank Wilberforce Street. I now say that the 79620 US Dollars were paid by my bank in London to Mr. Mohamed Gebara of Wilberforce Street who in turn gave me their equivalent in Leones in Freetown".

This bit of the evidence of defendant confirms the content of the telex of Leopold to Mason that the ~~defendant~~ defendant had indeed received the equivalent in Leones of the 79620 US Dollars

In spite of this overwhelming bit of evidence, the Court of Appeal made findings of fact which were not supported by the evidence. The Court of Appeal allowed the appeal on the ground "that the transaction between plaintiff/respondent was entered into or tainted with illegality thus making the maxim 'Ex turpi

causa non-oritur actio applicable". I do not agree with the findings of the Court of Appeal. The Communications between the parties and agent of the plaintiff and the son of the plaintiff show clearly that the plaintiff was an innocent victim of a well thought out-scheme to deprive him of his money with impunity. In such a case, the innocent victim is entitled to recover whatever consideration passed under the contract. The judgment of the Court of Appeal was delivered on the 19th November 1986. It is interesting to note that the Court based its decision on Public Notices that had been revoked - that is to say PN No. 47 of 1973 and PN No. 57 of 1974. The current PN is No. 5 of 1977.

The object of the Exchange Control Act. is "to confer powers, and impose duties and restrictions in relation to gold". The maxim was invoked without justification.

In the instant case, there was a legally binding contract between the plaintiff and the defendant. There is abundant evidence that the defendant failed to fulfil his side of the contract; that is to say to hand over the 10 Kilos of gold agreed upon for the price of 79620 United States Dollars to the plaintiff or to refund the said amount. In fact, there is evidence that the defendant received double the exchange rate for the dollars in leones. There is evidence that the defendant attempted to get more money from the plaintiff, in order to effect other business transactions to enable him to get funds to reimburse the plaintiff.

In my opinion, the plaintiff dealt with the defendant in an honest and business like manner, albeit, through his agent Powell. On the contrary, the defendant was not honest in his dealings with the plaintiff. He wove a web of deceitful communications to deprive the plaintiff of his money. I am satisfied there is no moral turpitude on the part of the plaintiff to prevent him from recovering the sum of 79620 US Dollars from defendant.

Ground II of the appeal therefore succeeds.

I will therefore allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the High Court. The defendant shall pay to the plaintiff the costs occasioned by this appeal and the costs in the court below, such costs to be taxed.

Sydney Warne
Sydney Warne

Justice of the
Supreme Court.

J. Archd. 17/11/1913

P. H. ...
Comptroller
17/11/13