CIV.APP. 1/2001

IN THE SUPREME COURT OF SIERRA LEONE

BETWEEN

ERIC JAMES
(CARRYING ON BUSINESS AS JAMES INTERNATIONAL ENTERPRISES) - APPELLANT

AND

SEABOARD WEST AFRICA LIMITED - RESPONDENT

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| THE HONOURABLE JUSTICE DR. ADE RENNER-THOMAS | - | CJ |
| " " | JUSTICE SIR JOHN MURIA | - | JSC |
| " " | MR. JUSTICE E.C. THOMPSON-DAVIS | - | JSC |
| " " | MS. JUSTICE U.H. TEJAN-JALLOH | - | JA |
| " " | MR. JUSTICE A.N.B. STRONGE | - | JA |

A.F. SERRY-KAMAL Esq. for the Appellant

A. Tejan-Cole Esq. with him M.B. Michael Esq. for the Respondent

Judgment delivered the 11th day of October 2006

RENNER-THOMAS C.J.

This is an appeal by Eric James (carrying business as James International Enterprises) (hereafter referred to as the Plaintiff/Appellant) against a decision of the Court of Appeal for Sierra Leone dated 12th January 2001 setting aside a Judgment of the High Court given in favour of the Plaintiff/Appellant on the 2nd day of August 1986.

In his statement of claim the Plaintiff/Appellant pleaded *inter alia* as follows:-

a. By an agreement dated the 27th day of June 1985 between the defendant company of the one part and the plaintiff of the other registered as number 126/85 in volume 38 at page 105 in the Book of Miscellaneous Instruments kept in the office of the Registrar General for Sierra Leone the defendant appointed the plaintiff as Distributor of its "Life Flour" in Sierra Leone on the following terms:

*"(1) Seaboard appoints James sole Distributor of "Life Flour" in Sierra Leone and hereby undertakes not to sell "Life Flour" to any other person at anytime during the currency of the agreement subject to the terms and conditions hereafter set forth".*

*"(2) Seaboard shall sell an initial number of 100,000 bags of 50 pounds each of "Life Flour" to the Distributor during the currency of this agreement and the Distributor agrees to buy the first 100,000 bags of such flour milled by Seaboard after* [the] *date hereof".*

*"(3) Seaboard shall sell "Life Flour" at the government approved price to the Distributor and the Distributor shall pay 3 U.S. dollars as the price per bag based on the current official exchange rate to a bank account as designated by Seaboard the remainder of the price shall be paid in Leones as directed by Seaboard".*

*"(4) The distributor shall take delivery and collect daily from Seaboard's premises Cline Town the bags of flour in such quantities as Seaboard shall from time to time mill".*

*"(5) The distributor shall pay to Seaboard the price herein before mentioned in the manner..... hereinbefore described on or before it collects and takes delivery of the bags of flour from Seaboard".*

*"(6) Upon the request of the distributor made at any time before the distributor shall have taken delivery and paid for ninety thousand bags of "Life Flour" Seaboard agrees to sell to the distributor a further one hundred thousand bags of flour on the same terms and conditions as the original one hundred thousand bags of flour after the distributor has taken delivery and paid for one hundred and ninety thousand bags since the inception of this contract, Seaboard will discuss with the distributor if the distributor so desires the sale of and additional quantity of flour under the terms and conditions as se herein".*

*"(7) Any variation of the terms of this agreement shall be valid provided such variations is made in writing and mutually agreed to by the parties".*

*"(8) If any dispute or difference shall arise between Seaboard and the distributor with regard to this agreement then in every such case the dispute shall be referred to an Arbitrator in the case of the parties mutually agreeing on one otherwise three Arbitrators are to be appointed one by each party and the third who shall be chairman appointed by the two appointees of the parties the award of the Arbitrator or Arbitrators shall be binding on both parties".*

*"(9) This agreement shall be governed by the laws of Sierra Leone".*

*"(10) Either party shall have the right to terminate this exclusive arrangement upon any default by the other party not cured within ten days or by written notice".*

b. That sometime in 1986 the said agreement was varied to allow the parties to agree to the price of flour to be paid in leones or dollars.

c. That the Defendant, the Respondent in this appeal, in breach of the agreement proceeded to recruit other distributors. The Plaintiff/Appellant elected to keep the agreement alive and agreed to accept in lieu a commission paid by the Respondent for all flour produced and sold through various distributors.

d. That subsequently on or about September 1992 the Respondent stopped supplying flour to the Plaintiff/Appellant and refused to pay the Plaintiff/Appellant any further commission.

In his prayer the Plaintiff/Appellant claimed:-

I. Arrears of commission already earned before the breach of the revised contract;

II. Loss of commission or profit from September 1992 until payment;

III. That an account be taken of all bags of flour sold by the Defendant since the revision of the contract;

IV. Specific performance of the revised agreement;

V. Any further of other relief; and

VI. Costs.

In the defence filed on behalf of the Respondent it was contended *inter alia* that:-

a) The Plaintiff/Appellant in fact breached the agreement by failing to pay U$3/00 per bag of the flour as required by clause 3 of the agreement and by failing to pay in advance for flour supplied to the Plaintiff/Appellant by the Respondent as required by clause 5 of the agreement;

b) That there was never any variation of the agreement as alleged or at all;

c) *"As regards paragraph 4 of the statement of claim, the defendant denies that the said Mr. Leslie Thompson acted in breach of the agreement as*

*alleged and will contend that the said Leslie Thompson was led to continue to pay commissions to the Plaintiff because he was led to believe that there was a variation of the original contract in the terms indicated to him by the plaintiff and did so only out of abundance of caution, but when he discovered that no variation (though suggested) was accepted by the defendant, he stopped paying commissions";*

*d) "The primary consideration for concluding the said contract was to afford foreign exchange to the defendant and by failing to do so, the very basis of the said contract was destroyed by the plaintiff";*

That Plaintiff/Appellant joined issue with the Respondent on the several contentions raised in the defence.

On the 24th day of March 1995 the Respondent was granted leave to amend the defence filed by adding new paragraphs 10 and 11 which read as follows:-

*"10. The Defendant will aver that as a result of the sale of an initial number of 100,000 bags of 50 pounds each life flour to the Plaintiff as provided for in Clause 2 of the agreement and the sale of a further 100,000 bags of flour as provided for by Clause 6, the Defendant had discharged his obligations under the said Agreement.*

*11. Further and in the alternative that as a result of several breaches of the agreement on the part of the Plaintiff, the Defendant was exonerated from further performing any of his obligations under the said Agreement by reason of the said breaches.*

*PARTICULARS OF BREACHES OF THE AGREEMENT*

a. *The Plaintiff failed to pay the U$3 (Three United States Dollars) of the price per bag as required by clause 3 of the Agreement.*

b. *The Plaintiff failed to pay to the Defendant on or before it collected and took delivery of the bags of flour for the Defendant as required by Clause 5 of the Agreement. Further that the Plaintiff on several occasions paid to the Defendants cheques which were not honoured by the Plaintiff's Bankers.*

c. *That the Plaintiff failed to take delivery and/or to collect the bags of flour from the Defendant".*

It was on the basis of the above pleadings that the matter proceeded to trial.

During the course of the trial the Plaintiff/Appellant gave evidence as PW4 he having been interposed during the cross-examination of PW3, Frederick Chrispin Jones. During the cross-examination of the Plaintiff/Appellant by Counsel for the Respondent the learned trial judge recorded the following responses:-

*"As Eric James carrying on business as James International Enterprises I had no staff.*

*Sho Cole was never employed by Eric James carrying on business as James International Enterprises but he was working for J.I. enterprises Ltd.*

*I now say that in fact there were three entities i.e.*

*(1) ERIC JAMES CARRYING ON BUSINESS AS JAMES INT. ENT.*

*(2) JAMES INT. ENT.*

*(3) JAMES INT. ENT (LTD).*

*I was involved in all three of them.*

*James Int. Ent. was a business name.*

*It has now been incorporated into James Int. Ent. Ltd.*

*In fact, there are now only two of these entities because James Int. Ent. has now ceased to exist. It ceased in 1985. It was registered in 1974. I do not know whether the registration has been cancelled.*

*It was a business name used by several business including James Int. Ent. Ltd.*

*Eric James carrying on business as James Int. Ent. was registered in Germany in 1970.*

*It was never registered in Sierra Leone".*

These answers were in fact given on the 31st January 1995. Thereafter, the case for the Plaintiff was closed. The case for the Defendant was opened on 5th May 1990 and closed on 12th January 1996. One of the witness called by the Defendant was Esther Massallay who gave evidence as DW4 on the 15th November 1995 and had this to say:-

*I am a clerk at the Administrator and Registrar-General's office. Some of my duties are to keep record of registered documents. I am also custodian of documents relating to business registration.*

*I was served with a subpoena dated 6th day of November, 1995. I was asked to produce the record of business registration of Eric James carrying on business as JAMES INTERNATIONAL ENTERPRISES.* [emphasis mine]. *I do not have the record that I was requested to produce, I searched for it but I found no record."*

Counsel for the Defendant, the Respondent in this appeal, commenced his address on 31st January 1996. During the course of this address, Counsel for the Defendant had this to say:-

> *"I submit that there was no entity known as Eric James carrying on business as James International Enterprises in Sierra Leone. Easter Massallay then also said that she never found any business known as Eric James carrying on business as James International Enterprises.*
> *I would ask the court to draw the inference from the evidence that Eric James purported to carry on business under the business name of James International Enterprises and in doing so he acted illegally and in breach of the business name registration Act."*

On 11th March 1996, to be precise, a Motion was filed on behalf of the Defendant seeking leave to amend the amended defence filed on 24th March 1995 by adding the following new paragraph 12:-

*"That the contract which is the subject herein cannot in law be enforced"*

On 21st March 1996 the learned trial judge gave a Ruling refusing the application to amend and eventually, as stated above, gave judgment for the Plaintiff/Appellant.

As part of his judgment the learned trial judge held that the words "carrying on business of James International Enterprises" added to the name Eric James of the Plaintiff/Appellant did not constitute a business name which ought to be registered under the Business Names Registration Act, Cap 257.

As a result, in the amended Notice of Appeal to the Court of Appeal the Defendant contended as follows:-

> *"That the learned trial judge failed to consider sufficiently or at all the submissions that James International Enterprises Limited and Eric James (Carrying on Business as James International Enterprises) were separate and distinct entities in law.*

*The learned trial judge was wrong in law in:-*

*(a) holding that Counsel for the plaintiff ought not to have addressed them on the non-registration of the plaintiffs/respondent's business.*

*(b) His interpretation of the Business Names Registration Act Cap. 257 of the Laws of Sierra Leone 1960.*

*(c) In refusing the Plaintiff/Appellant's (defendant's application to amend their defence by Notice of Motion dated 11th March, 1996.*

(d) *Holding that James International Enterprises is not a business name and consequently wrong in failing to consider the effects of non registration thereof under the Business Names Act Cap. 257 Laws of Sierra Leone 1960.*

In dealing with these grounds of appeal Alhadi J.A. delivering the judgment of the Court of Appeal, had this to say:-

> *"It is not in dispute that the plaintiff/respondent were* [sic] *carrying on business in this country as a sole proprietor under the name of the title of the action herein. There is evidence the business was not registered as*

*required in the statute. The agreement, exhibit "A" was entered into by the plaintiff/respondent by that name"*

He continued by asking:-

*"What then is the effect of non-registration? It cannot be doubted that a party who is guilty of a breach of a statutory provision which is mandatory cannot recover any benefit arising from transaction entered into in that business name. For such proprietor lacks the legal status or capacity to institute any such proceedings. For he suffers the full impact of the maxim ex turpi causa non oritur actio and all the remedies in law are denied to him.*

*The position will be otherwise were an individual carrying on business in a name or style other than his own when he could be sued in his own name followed by the words "trading as A.B. or in his business name followed by the words ("a trading name") see Mason & Sons v. Mogridge (1892) 5TLR 805.*

*In this case the Plaintiff/Respondent was under a legal obligation to register the business under Cap 257 in the manner provided for in Sections 3,4,5 and 6. Non-compliance is punishable on summary conviction to* [sic] *a fine. Since a violation of these statutory provision is attendant with criminal sanctions <u>any transactions conducted by it in that name is tainted with illegality</u> (emphasis mine) and therefore unenforceable since the court will not lend its aid to it."*

The learned Justice of Appeal then cited the case of *Nabieu Amadu v Aiah Sidiki* (1972-73) ALR (SL) 421 in which the Privy Council held that possession of diamond by the Plaintiff/Appellants in contravention of Section 67 of the Minerals Act, Cap 196 of the Laws of Sierra Leone 1960 was an illegality which deprived the Plaintiff/Appellant of a claim for either the return of the diamond or for the payment of the proceeds of its sale without relying on the illegal possession. According to the Board "*in these circumstances the fact that the illegality was not pleaded not argued at this trial is of no consequence*". Alhadi J.A. also cited the case of *Strongman (1945) Limited v. Incock* (1955)2 QB in which Denning M.R. expressed the view that the plaintiff could not sue on a contract for work done which was done in contravention of the Defence Regu;ations 56A as it was a work carried out without proper license which makes it a criminal offence.

These two cases, according to Alhadi J.A., were similar to the instant case in that violation of statutory provision was made a criminal offence punishable with imprisonment or fine.

Alhadi J.A. then went on to refer to the refusal of the learned trial judge to allow the Defendant to amend its defence "*by pleading non-registration of the plaintiff/respondent pursuant to the above provision of the law*".

He continued by stating that:

"*The issue therein raised was of a fundamental nature as it goes to the jurisdiction of the court to adjudicate on the matter before it. For this was a non-compliance with mandatory statutory provisions which renders the proceedings void and a nullity. Also this was an opportunity for the judge to have adjudicated*

*on this all important issue instead of abdicating his responsibility by holding that the words "(carrying on business as James International Enterprises)" are descriptive of Eric James where there is glaring evidence that the words represent a business name used in all the business entities set up by him".*

The learned Justice of Appeal finally had this to say about the refusal of the leave to amend by the learned trial judge:-

> *"In my view if the amendment had been granted, which I am of the view ought to have been the plaintiff/respondent would have availed himself of his undoubted right to lead evidence of registration of the business, an attempt which was unsuccessfully made before us to tender fresh evidence of such registration and was refused by us that the issue of non-registration was already a Ground of Appeal in these proceedings.*
> *The learned trial judge ought to have allowed amendment. His refusal in my view was wrong. The Appeal on this ground is allowed".*

In the Notice of Appeal to this Court against the decision of the Court of Appeal the Plaintiff/Appellant canvassed several grounds of appeal but none against the findings of the Court of Appeal that the learned trial judge should have allowed the application of the defendant to amend his defence so as to raise the issue of non-compliance with the Business Names Registration Act, Cap 257 of the Laws of Sierra Leone 1960.

Despite this apparent concession on the part of the Plaintiff/Appellant it is pertinent to note that the Respondent did not avail itself of the opportunity afforded it during the hearing of this appeal to apply for leave to amend the defence to raise the issue of non-compliance with Cap 257.

Indeed, it was strongly contended by Counsel for the Respondent before this Court that non-compliance with the relevant provisions of Cap 257 not only rendered the agreement in the instant case unenforceable but rendered it illegal and therefore a nullity. Counsel for the Respondent submitted that the Court must take notice of any illegality in a contract on which the Plaintiff/Appellant is suing, if it appears on the face of the contract or from the evidence brought before it by either party; although the Respondent did not specifically plead it.

Counsel for the Respondent relied on the following cases:-

*Gedge v. Royal Exchange Assurance* (1900) 2 QB.214
*North-Western Salt Co v. Electrolytic Alkali Co* (1914) A.C. 461
*Re Robinson's Settlement Grant v. Hobbs* (1912) 1 Ch. 724; and
*Lipton v. Powell* (1921) 2 K.B. 5

He also relied on passages to be found in Chitty on Contract, 22nd edition, paragraph 845 at page 368 under the rubric "*Contract illegal or void by statute – statutory voidness distinguished from common law voidness.*"

Before reviewing the relevant authorities and expounding on the state of the law governing unenforceable contracts I think this is a convenient stage to set out the provisions of the Business Names Registration Act, Cap 257 of the Laws of Sierra Leone 1960. The relevant provisions are contained in Sections 3, 4, 5, 7 and 12 of the Act and are expressed as follows:-

" *3. The following proprietors and firms shall be registered in the manner directed by this Act -*

(a) every proprietor having a place of business in Sierra Leone and carrying on business under a business name which does not consist of his ordinary name without any addition thereto;

(b) every firms having a place of business in Sierra Leone and carrying on business under a business name which does not consist of the ordinary names of all the partners in the firm without any addition thereto;

(c) every proprietor or firm having a place of business in Sierra Leone who or a partner in which has either before or after the coming into operation of this Act changed his name, including any proprietor or partner who, being a woman, has changed her name in consequence of marriage;

Provided that-

(i) where any addition to the ordinary name of proprietor or the ordinary names of the partners in a firm carrying on any business merely indicates that the business is carried on in succession to a proprietor or firm formerly carrying on the same business that addition shall not of itself render registration necessary;

(ii) where two or more partners have the same surname the addition of the letter "s" at the end of that surname shall not of itself render registration necessary; and

(iii) where the business is carried on by a receiver or manager appointed by any Court, registration shall not be necessary.

4. Every proprietor or firm required under this Act to be registered shall furnish to the Registrar General a statement in writing in the prescribed form signed by

*the proprietor or by all the partners in the firm and containing the following particulars-*

*(a) the business name of the business in respect of which the proprietor or firm is required to be registered;*

*(b) the general nature of the business;*

*(c) the principal place of business;*

*(d) all other places at which the business is carried on;*

*(e) the usual residence and any other business occupation of the proprietor, or of every partner in the firm, and where the proprietor or any of the partners in the firm has either before or after the commencement of this Act changed his name, or, being a woman, has changed her name in consequence of marriage, any name by which the proprietor or partner was formerly known;*

*(f) if the business is commenced after the coming into operation of this Act Ordinance, the date of commencement of the business.*

*5. The particulars required to be furnished under this Act shall in the Act comes into operation be furnished within fourteen days after the commencement of the business, which this Act comes into operation, within three months from that date.....*

*7. If any proprietor or firm fails to comply with any of the provisions of ~~section 4~~, section 4 or section 6 the proprietor or every partner in the firm, as the case may be, shall be liable on summary conviction to a fine of five pounds for every day during which the default continues, and the Court by which the offender is tried shall order a statement of the required particulars to be furnished to the Registrar General within such time as may be specified in the order.*

*12. Where any proprietor or firm required under this Act to furnish a statement of particulars or of any change in particulars makes default in so doing the rights of the proprietor or firm under or arising out of any contract made or entered into by him or it or on his or its behalf at any time while he or it is so in default, in relation to the business in respect of which the statement of particulars is required, shall not be enforceable by action or other legal proceedings either in the business name under which the business is carried on or otherwise:*

*Provided that-*

*(a) the proprietor or firm in default may apply to the ~~Supreme~~ High Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was due to accident or inadvertence or that on other grounds it is just and equitable to grant relief, may grant the relief applied for either generally or as respects any particular contract and on such conditions as the Court impose;*

*(b) if any action or proceeding shall be commenced by any other party against the proprietor or firm in default to enforce the rights of that other party in respect of the contract, nothing herein contained shall preclude the proprietor or firm from enforcing in that action or proceeding by way of counter-claim, set-off or otherwise, such rights as he or it may have against the other party in respect of the contract."*

The above provisions of Cap 257 are very similar to, if not identical with, the provisions contained in the English Business Names Act 1916. Cases decided by the English Courts in which the latter statute has been interpreted and applied are

therefore of great assistance in interpreting the provisions of Cap 257 that I have cited above.

One such case is *Hawkins and Another v. Duche* (1921) K.B.D., in which Section 8 of the 1916 Act, in the same terms as Section 12 of Cap 257, was considered by McCardie J. who was in that case dealing with the circumstances under which the Court could grant relief to a defaulting proprietor or firm as stipulated in the proviso to Section 8 of the 1916 Act and S.12 of our Cap 257. He compared and contrasted the provisions in the English Statute of Frauds 1688 and section.4 of the English Sale of Goods Act 1893 on the one hand and Section 8 of the 1916 Act on the other and then went on to state as follows:-

> *"The Statute of Frauds and Section 4 of the Sale of Goods Act 1893 give no power to any Court to grant relief against non-compliance with those provisions. Here the question is as to the extent of the wide relieving power given by the Act of 1916 itself. I point out also that s. 4 of the Sale of Goods Act, 1893, says that the "contract" shall not be enforceable, whereas s. 8 of the Act of 1916 says that the "rights" of the defaulter under the contract shall not be enforceable. <u>The contract itself is in no way invalidated by the Act of 1916</u>* [emphasis mine] *and subheads (b) and (c) of the first proviso are well worthy of attention."*

I am also of the opinion that a contract entered into whilst one of the party continues to be in default of the relevant provisions of Cap 257 is in no way invalidated by Section 12 of that Act, and I so hold.

The effect of non-compliance with the provisions of Section 12 of Cap. 257 is to be distinguished from that of non-compliance with the provisions of certain other

statutes such as the Minerals Act, Cap. 196 which was dealt with in *Nabieu Amadu v. Alah Sidiki* (supra) or the English Money Lenders Act 1900 (see *In Re Robinson's Settlement* (supra); *Lipton v. Powell and another* (supra); of *London and Harrowgate Securities Ltd. v. Pitts* (1975) QBD). The distinction is that in the cases relied on by Counsel for the Respondent and cited above the statutes make non-compliance with the requirement for a license or registration illegal and provide no relief in the event of non-compliance with the relevant statutory provision.

Not only does Section 12 our Cap. 257 make it possible for a defaulting party to apply for relief against the disability imposed by the Section but by virtue of proviso (b) to Section 12 the defaulting party may maintain any rights he may have against the other party in respect of the contract *"by way of counter-claim, set-off or otherwise"*. In the light of such express provision I fail to see how it could be said, as the Court of Appeal held, that non-compliance with the provision of Section 12 of Cap 257 rendered the contract in the instant case illegal, void and of no effect. I disagree and hold that despite the criminal sanction imposed by Section 7 of Cap 257 the Act could not operate to invalidate a contract made in violation of the relevant provisions of the Act. (see Chitty on Contracts 28th edition, vol. 1, paragraph 1-041 under the rubric: "*Unenforceable Contracts*"; see also *Cope v. Rowland* (1836) 2 M+W 452; *Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277; and *Yin v. Sam* [1962] A.C. 304).

What then is the effect where a party to a contract is in default as provided for in Section 12 of Cap. 257? In what circumstances must the court give effect to the sanctions provided by Section 12(1) of the Act?

First, it must be emphasized that the default envisaged by Section 12(1) is non-compliance with the provisions of either Section 4 or Section 6 of the Act. The latter Section is clearly not relevant in the instant case. In my view, what is relevant here is Section 4. This Section imposes an obligation on any person or firm required by Section 3 of the Act to register a business name under the Act to *"furnish to the Registrar-General a statement in writing in the prescribed form signed by the proprietor or by all the parties in the firm"* and containing the particulars listed in Section 4 of the Act.

Clearly, these particulars are required to enable the Registrar-General register the business name. However, this registration process must be distinguished from that required under the provisions of the Business Registration Act, No. 13 of 1983. A proprietor or firm that is not required by Section 3 of Cap 257 to register a business name and as a consequence need not furnish the particulars set out in Section 4 of Cap. 257 still needs to be registered in accordance with the Business Registration Act, No. 13 of 1983. In the latter case there is no exemption.

Further, according to Section 5 of Cap 257 there is a grace period for the furnishing of the particulars required by Section 4 of the Act. For those businesses which were in existence at the time Cap 257 came into effect in November 1954 the requirement must be fulfilled within three months from that date. In the case of a business commenced after November 1954 the required particulars are to be furnished "within fourteen days after the commencement of the business". (emphasis mire).

Upon a proper construction of Section 7 and 12 of Cap 257 it is only after these periods have elapsed that the criminal liability envisaged by Section 7 and the

civil sanction envisaged by Section 12 could be suffered by the defaulter. Indeed, for the purposes of Section 12, it is possible for a proprietor to commence business and enter into a contract before the end of the grace period under Section 5 without first furnishing the particulars required under Section 4 and without attracting the sanction envisaged by Section 12.

For a party to a contract to attract the sanction envisaged by Section 12 of Cap 257 it must be shown that:-

1. There was a requirement to register a business name under Section 3 of the Act;
2. That the relevant grace period under Section 5 had elapsed; and
3. The contract must have been entered into by or behalf of the party to suffer the sanction whilst that party was in default of furnishing the particulars required by Section 4 of the Act.

In my considered opinion these are materials fact which must be pleaded in one way or the other and there must be evidence led in proof of these fact before there could be said to be default under Section 12 of the Act. Positive evidence is required here not just facts from which an inference could be drawn.

It is clear from the following cases where the English Registration of Business Names Acts 1916 and 1927 were considered that the defendant who wished to invoke sanctions similar to the one envisaged by Section 12 of Cap 257 had pleaded the fact. In *Watson v. Park Royal (Caterers) Limited* [1961] QBD in considering the question of relief under Section 8 of the 1916 Act, which is more or less, identical to Section 12 of Cap. 257 Edmund Davies J. had this to say:-

*"It has already been demonstrated by the correspondence and other documents that from the outset and long before these proceedings were begun, the defendants were taking the point that there had been no registration and were giving due notice of their intention to rely on that plea* [emphasis mine] *were any proceedings instituted which they in due course did. The plaintiff must therefore be held to have been amply warned and fully aware of the statutory requirement."*

In one of the correspondence referred to in the above and relied on by Edmund Davies J. the defendant's Solicitor had this to say:-

*"I have caused enquiries to be made from which I am satisfied that the name of "Brays" is not registered pursuant to the provisions of the Registration of Business Names Act, 1916, and I respectfully submit that this fact alone provides the defendants with a complete defence to this action"*

In *Hawkens and another v. Duche* (supra) one of the defences to the action was that the M and B Taper to whom the goods were sold was not a partnership consisting of Mayer and Bernard but was Mayer trading alone under the style of M. and B Taper; that Mayer had neglected to register his business name as required by Section 1 of Registration of Business Names Act, 1916; and that as he was in default the plaintiffs were precluded by Section 8(1) of that Act from enforcing Mayer Taper's rights under the contract by action.

McCardie J. in dealing with the issue of how wide is the discretion given to the Court to grant relief in case of such default as alleged in that case had this to say:-

> *"... that the fair administration of justice as between party and party require a construction of the Act which gives the High Court a power to grant relief as well after as before action ..... It would, I feel, be deplorable if at the very close of a long and costly litigation a defendant should manage to elicit a trivial and inadvertent breach by the plaintiff of the [1916] Act and thereby defeat the whole action which was well founded".*

(See also *J+H Cook & another v. Alban Expanded Metal and Engineering Company Limited* [1969].)

Finally, on this issue I hold that it was incumbent on the defendant to plead reliance on the fact of non-compliance with the express provisions of section 12 (1) of the Act and to have ensured that there was clear and positive evidence of such default. I find that the available evidence is not conclusive of the fact of non-registration of the business name of the plaintiff as opposed to the non-registration of the business carried on under the business name.

Secondly, I share the view of Alhadi J.A. that if the defendant had sought and obtained leave to amend as the Court of Appeal had rightly held they were entitled to this would have availed the Plaintiff/appellant of *"his undoubted right to lead evidence of the registration of the* [business name]. "

Thirdly, although the Plaintiff/Appellants also failed to renew their application to lead fresh evidence of registration this could not be held against them as the issue of non-registration of the business name had not been satisfactorily raised by the Respondents herein.

The next question to be determined is whether the Respondent has acted in breach of the agreement which, according to the contention of the Plaintiff/Appellant, had been varied so as to entitle him to receipt of commission for all flour produced and sold by the Respondent. The breach complained of was the summary termination of the relationship between the parties and the refusal to make any further supplies of flour or pay any outstanding or further commission to the Plaintiff/Appellant.

The Respondent denies that there was any variation of the agreement, Exh A, as alleged by the Plaintiff/Appellant or at all. In paragraphs 4, 5, 6 and 7 of the amended defence it contends as follows:-

> *"4. As regards paragraph 4 of the statement of claim, the Defendant denies that the said Mr. Leslie Thompson acted in breach of the agreement as alleged and will contend that the said Leslie Thompson was led to continue to pay commission to the Plaintiff because he was led to believe that there was a variation of the original contract in the time indicated to him by the Plaintiff and did so only out of an abundance of caution, but when he discovered that no variation (though suggested) was accepted by the Defendant, he stopped paying commissions.*
>
> *5. The Defendant further contends that the primary consideration for concluding the said contract was to afford foreign exchange to the Defendant and by failing to do so, the very basis of the said contract was destroyed by the Plaintiff.*

*6. As regards paragraph 5 of the statement of claim, the Defendant asked the Plaintiff in March 1992 to vacate the office of the Defendant, since the Plaintiff has no further business with the Defendant to justify the occupation of the Defendant's premises but the Defendant never stopped supplying flour to the Plaintiff, provided the Plaintiff paid in advance for the flour before taking delivering thereof.*

*7. As regards paragraph 6 of the statement of claim, the Defendant contends that the Plaintiff has never acted in accordance with the agreement and that there was no variation to the said agreement."*

It is common ground that the agreement tendered by PW1 as Exh "A" was dated 27th June 1985 which presumably was the date it came into effect. The acts of the Defendant which the plaintiff claimed constituted a breach of contract occurred sometime in August 1992. What transpired in the interval is of great significance for the outcome of this appeal.

The evidence relied on by the Appellant for the contention that the agreement was varied is both oral and documentary. As to what took place in the few years after the execution of the agreement we have first the evidence of the Plaintiff himself PW4. Whose testimony was interposed whilst PW3, Fredrick Chrispin Jones was still giving evidence.

After testifying as to the circumstances that led to the signing of the agreement, that is, the dire need of the Defendant/Respondent for foreign currency which risked crippling its business he deposed that he made an initial payment of U$250,000/00 to the Defendant/Respondent. He then continued as follows:-

*"It was after that we entered into this agreement Exh "A".*

*This agreement was entered into on the 27th of June 1985. I signed this document myself I can see my signature at page 2. The agreement was prepared by Wright and Jusu-sheriff who acted for both of us. The agreement was implemented. The Defendant supplied me with flour according to the agreement until sometime mid-way 1990.* [emphasis mine]

*In this exhibit "A" I was described as Eric James carrying on business* [as] *James International Enterprises. Under this title I carried on business as an entrepreneur. It was a one man business. I was the same person.*

*My address on Exh "A" is 28 Savage Street. That was where I was living and operating the business.*

*I subsequently incorporated this enterprise into a private limited liability company.* [emphasis mine]

According to the available evidence this incorporation took place very early in the relationship with the Defendant. The Certificate of Incorporation, part of bundle of documents marked as Exh "T" and tendered by PW3, is dated 22nd July 1985. It is not surprising therefore that PW3 whose evidence is crucial for this aspect of this judgment testified after tendering Exh "T" under cross-examination by Counsel for the Defendant as follows:-

*"I haven't got the Registration Certificate of Eric James carrying on business as James International Enterprises.*

*I was not the General Manager of the firm i.e. Eric James carrying on business as James International..... We have a Company called*

*James International Enterprises Limited which is a Company registered under the Companies Act. I am the General Manager of this Company.*

*I am not aware of the firm named Eric James carrying on business as James International.*

*I am also not aware of a firm by the name Eric James carrying on business as James International Enterprises".*

The further evidence of PW4 is to the effect that sometime after the implementation of the agreement, Exh "A" and, in my view, certainly after the incorporation of the sole proprietorship the nature of the business relationship with the Defendant changed. This is how PW4 put it:-

*"The payment for the flour by me was made on a day to day basis. They would supply us the flour and we would pay for it.*

*Both the M/D Sea Board and I consulted each other and then agreed on the selling price which changed from time to time. The price at which I sold to the public was also agreed upon by me and the M/D of the Defendant Company.*

*We continued this modus operandi up to the arrival of Mr. Leslie Thompson in April 1991".*

After the arrival of Mr. Leslie Thompson further changes took place. Some of these changes are evidenced in a series of correspondence between PW3 on behalf of James International Enterprises Limited and the Defendant Company. These include the following:-

1. Exh "B" - letter dated 25th February 1992 from Leslie Thompson to "Mr. Eric James Principal James International Enterprises Limited";

2. Exh "C" – letter dated 3rd march 1992 from Leslie Thompson to Eric James;
3. Exh "H" – letter dated 28th February 1992 from PW3 to Mr. Leslie Thompson;
4. Exh "J" – letter dated 6th March 1992 from PW3 to Leslie Thompson; and
5. Exh "M" – letter dated 11th August 1992 from Leslie Thompson to "Eric James, Chairman, James International Enterprises Limited".

In my opinion, what can be gleaned from this series of correspondence is that the business of sale of flour produced by the Defendant Company and the payment of a commission was by 1992 being conducted with James International Enterprises Limited, the company, and not with Eric James, the sole proprietor, carrying out business as James International Enterprises.

My view of this change is reinforced by the testimony of PW3 in the following words:-

> *"Exh "H" was written by me on behalf of my Company, James International Enterprises Limited. So were* [exhibits] *J, L, O, R, S.*
> *All the flour that was bought from Seaboard was by James International Enterprises Limited. What was paid by Seaboard [in respect of] the flour was paid to James International Company Limited, the Company".* [emphasis mine]

What then is the inference to be drawn from the above evidence as to the change in the relationship between the parties to the original agreement? What is the legal effect?

Counsel for the Appellant contends that it was a mere variation of the original agreement as a result of which the Company, James International Enterprises Limited, was merely acting as the agent of Eric James, the sole proprietor. On the other hand, Counsel for the Respondent contends that the original agreement had been discharged by performance (though such performance had not been quite satisfactory on the part of the Plaintiff/Appellant) and had not been varied.

Before I deal with the legal effect of the incorporation of the sole proprietorship in July 1985 on the business carried by Eric James prior to that date I wish in passing to say a few words about the legal effect of the changes in the nature of the business relationship of the Respondent whether with the Company on its own behalf or with the Company as agent of Eric James as contended by and/or on behalf of the Appellant.

Did the changes tantamount to a variation of the agreement on Exh "A" as contended by the Plaintiff/Appellant? In order to answer this question in the context of the instant case it must be pointed out that there is a distinction between variation and novation.

In the case of variation, the parties to the contract agree to modify or alter its terms. The agreement which varies the terms of an existing agreement must be supported by consideration. In many cases consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other. The main feature of a variation is that the original contract continues to exist but in an altered form.

The distinction between a variation and a novation is thus explained by the editors of Chitty on Contracts, 28th edition, Volume 1 at paragraph 23-031 under the rubric: "*Novation*":

> [Novation is a generic term which signifies] *"that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties: the consideration mutually being the discharge of the old contract. In particular,r it denotes the recission of one contract and the substitution of another in which the same acts are to be performed by different parties"*.

Novation may thus be used to describe a species of transfer of rights and obligations where two contracting parties agree that a third, who also agrees, shall stand in relation of either of them to the other. There is a new contract for which the consent of all the parties is required. According to Chitty (supra) at paragraph 20-085/6:

> *"Most of the reported cases in English law have arisen either out of the amalgamation of companies, or of changes in partnership firms, the question being whether as a matter of fact the party contracting with the company or the firm accepted the new company or the new firm as the debtor in the place of the old company or firm. The acceptance may be inferred from acts and conduct, but ordinarily it is not to be inferred from conduct without some distinct request.....*

*It should, however, be noted that the effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract and replace it by a new one".*

In the instant case, from the totality of the evidence, one can safely conclude that by the conduct of the parties they did effect a complete extinction of the first and original agreement evidenced in Exh "A", and did not merely effect an alteration which left that original agreement subsisting. The changes went to the very root of the contract. As a result, I hold that there was not a mere variation but a novation that ensued soon after the execution of the original agreement.

The next and crucial question is whether there was a valid consideration for this new agreement and whether the Plaintiff/Appellant was a party thereto.

The Court of Appeal took the view that there was no consideration for this new agreement nor was it made under seal. In that Court's view the basis of this new agreement was contained in Exh "B" dated February 1992. With respect to the learned Justices, this does not correctly reflect the state of the evidence. The new agreement arose partly by conduct when the Respondent agreed to supply its products to the new Company on terms different from that contained in Exh "A" i.e. the payment of U$3/00 per bag before delivery. Under the new agreement there was the sale of flour in leones leaving a margin for the distributor on the one hand and on the other hand the purchase of produce by the Company with money advanced by the Respondent to generate foreign currency for the Respondent as evidenced in Exh "C". This arrangement was of mutual benefit to both parties and that constituted valuable consideration. (See *Currie v Musa* (1875) LR 10 Ex 153) (*Williams v Roffey Bros & Nicholls* (Contractors) Ltd

[1991] 1 Q.B. 1 at 23) (*Guinness Mahon & Co Ltd v Kensington & Chelsea Royal* B.C. [1998] 2 All E.R. 272)

The second question to be answered is this: who were the parties to the new agreement? The contention of the Plaintiff/Appellant is that he continued to be the contracting party throughout the relationship with the Respondent and that James International Enterprises Limited was merely his agent. In my considered opinion, implicit in that contention is an admission that performance of the obligation due to the Respondent was by James International Enterprises Limited but the benefit of the agreement was that of the Plaintiff/Appellant.

Such a relationship between "vicarious performance" and "agency" is considered in paragraph 20-082 of Chitty (supra) in the following passage:-

> *"..... in the case of vicarious performance the original contracting party remains liable on the contract. There is nothing to prevent a person contracting on such terms that he is entitled either to perform the contract himself, or to secure performance by making a new contract with a third party as agent of the other contracting party".*

But in the instant case was James International Enterprises Limited merely an agent of the Plaintiff/Appellant or was it in fact the real contracting party?

Since as far back as 1897 when the House of Lords pronounced its decision in the all too familiar case of *Solomon v. A. Solomon & Co Limited* [1897] AC. 22 (H.L) it has been generally accepted as trite law that once a company is legally incorporated it must be treated like any other independent person with its rights

and liabilities separate to itself. According to Lord Herschell in Solomon's case *"the motives of those who took part in the promotion of the Company are absolutely irrelevant in discussing what these rights are"*.

Like Mr. Eric James, Mr. Solomon had converted his one man business into a limited liability company. When the company failed it was sought to make Mr. Solomon liable for some of its debt by arguing that the company was Mr. Solomon in another guise, that he had used the company as an alias and had employed the company as its agent. In dealing with the legal effect of incorporation of an existing business in the Solomon case Lord Macnaghten stated in this oft-quoted passage that:-

> *"The company is at law a different person altogether from the subscriber to the memorandum and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them".*

In the same case, on the issue of agency, Lord Halsbury LC, at page had this to say:-

> *"I observe that the learned Judge (Vaughan Williams J) held that the business was Mr. Solomon's business; and no one else's; and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that the very learned judge becomes involved by the very argument in a very singular contradiction. Either the limited company was a legal entity or it was not.*

*If it was, the business belonged to it and not to Mr. Solomon; If it was not there was no person and nothing to be an agent of at all; and either that there is a company and there is not ……."*

I adopt the above passages for the purposes of the instant case and hold that based on the totality of the evidence, particularly the testimony of PW3 cited earlier, Mr. Eric James, the sole proprietor is not and could not have been a party to the new agreement for the simple reason that the sole proprietorship had ceased to exist since July 1985 and had been superceded by the new Company. A fortiori, the Company could not therefore have been acting as agent of the Plaintiff/Appellant as contended on his behalf.

In view of the above, I hold that the Respondents could not be liable in the circumstances for the alleged breaches as contained in the statement of claim and as set out above. As the action has been brought in the name of the wrong plaintiff I do not feel compelled to go on any further in this judgment to consider whether there was in fact any breach of contract for which the Respondent may be liable and whether it is in fact under any obligation to render an account as prayed for by the Plaintiff/Appellant.

Before I conclude I must state for the purpose of completeness of this judgment that I have adverted my mind to the provisions of Order XII, particularly Rules 3 and 11 of the High Court Rules to see whether it could be of any assistance to the Plaintff/Appellant even at this late stage. The Rules states as follows;

*"Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court may, if satisfied that it has been so commenced*

*through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just"*

Taking into account the circumstances of the instant case and upon a proper construction of the above provision I have come to the conclusion that this provision could not be of any assistance to the Plaintiff/Appellant for the following reasons:-

First, Unlike Rule 11 of Order X11 which enjoins the court to ensure suo moto the joinder or substitution of any non-party whose presence is necessary before the court for the purpose of adjudicating on the matters in dispute between the parties before it Rule 3 of that Order envisages an application by the party who wishes to substitute or add a new plaintiff. The court cannot do it *suo moto* as under Order XII Rule 11because under Rule 3 the applicant, *inter alia*, needs to satisfy the court that the mistake was bona fide. In the instant case there was no such application at the trial nor before the Court of Appeal nor before this Court and this despite the fact that the need for such an application should have been obvious to Counsel for the Plaintiff/Appellant after the answers given under cross-examination by PW3, Mr. Jones Besides, throughout the trial the issue of the entitlement of the Plaintiff/Appellant to sue had been made an issue in one form or another. (See *Performing Rights Society Limited v. London Theatre of Varieties Limited* [1924] A.C. 1)

Secondly, I doubt whether an application to this Court to substitute or add the Company as plaintiff would have succeeded as the authorities all seem to establish that the court would be reluctant to allow a new plaintiff to be substituted or added where the action if commenced at the date of the order to substitute or add would have been statute-barred under the relevant provision of the enactment governing limitation of the particular type of action before the

court. (See *Attorney-General v. Pontypridd Waterworks Company* [1908] 1Ch 388; *Mabro v. Eagle Star* [1932] 1KB 485).

For the above reasons the Appeal cannot succeed and is therefore dismissed. For entirely different reasons I would uphold the orders made by the Court of Appeal in setting aside the Judgment of the High Court. I order that each party bears its own costs of this Appeal.

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**(Hon. Justice Dr. Ade Renner-Thomas - Chief Justice**

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**Hon. Justice Sir John Muria - J.S.C.**

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**Hon. Mr. Justice E.C. Thompson-Davis - J.S.C.**

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**Hon. Ms. Justice U.H. Tejan-Jalloh - J.A.**

.....
**Hon. Mr. Justice A.N.B. Stronge - J.A.**

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