IN THE SUPREME COURT OF SIERRA LEONE

SC.CIV.APP.1/2018

BETWEEN:

MOHAMED BANGURA - APPELLANT

AND

DALIAN SHENGAI OCEAN FISHING CO. - 1ST RESPONDENT
ABIE ARUNA KOROMA - 2ND RESPONDENT
MONZA FISHING COMPANY - 3RD RESPONDENT

CORAM:
Hon. Justice E.E. Roberts, JSC
Hon. Justice G. Thompson, JSC
Hon. Justice A.B. Halloway, JSC
Hon. Justice Sengu Koroma, JSC
Hon. Justice E. Taylor-Camara, JA

REPRESENTATIONS:
MR. E.T. KOROMA Esq., counsel for the 1ST Appellant
MR. UMARU NAPOLEON KOROMA ESQ., counsel for the 1ST Respondent.
MR. AFRICANUS SESAY & MS. SADIA BAKARR, counsels for the 2nd and 3rd Respondents.

JUDGMENT

DELIVERED ON THE 29TH NOVEMBER, 2019.

1. My Lords, for the reasons given by my noble and learned friends, Roberts JSC and Thompson JSC. **I TOO, WOULD ALLOW THE APPEAL.** I also agree with their narration of the facts and treatment of the issues in this appeal' I would, however like to add my thoughts on the principles governing the assessment of damages for breach of an agency agreement and inducing a breach of contract.

A) **The Agency Agreement**: The principle is that where an agent (as in this case), makes a contract which is not reduced to writing, the question of whether he contracted personally, together with his principal or solely in his capacity as an agent is a question of fact. See. Bowstead and Reynolds on Agency, paragraphs 9 - 041, Article 103, PAGE. 585. An Appellate Tribunal may be more reluctant to interfere with the findings of facts as to oral contracts, and in many cases an appeal only lies on point of law (supra paragraph 9 - 042).

2. In the instant case, the Learned Trial Judge found that there was an agency relationship between the Appellant and the 1st Respondent. This conclusion was rejected by the Court of Appeal for reasons I cannot easily discern. As I have stated earlier, the findings of the Trial

Judge as to the existence of an oral agreement can only be appealed against on a point of law which was not the case in the Court of Appeal. What the Court of Appeal, with respect, failed to appreciate was that the reasoning behind the doctrine of apparent authority involves the assumption that there is in fact no authority at all. This statement was given judicial fiat in the case of RAMA CORPORATION -V- PROVED TIN and GENERAL INVESTMENTS (1952) 2 Q.B. 147 AT 149. This doctrine dictates that where a principal represents, or is regarded by law as representing, that another has authority, he may be bound as against a third party by acts of that persons within the authority which that person appears to have, though he had not in fact given that person such authority or by instructions not made known to the third party. This ostensible or apparent authority has been defined in HELY - **HUTCHIN SON -V- BRAY HEAD LIMITED** (1968) 1 Q.B. 549 at page 583. These principles were aptly applied by Lord Diplock in the case of FREEMAN & LOCKYER -V- BUCKHURST PARK PROPERTIES (MANGAL) LTD & ANOR (1964) 2 Q.B. 2 Q.B. 480.

3. Thus apparent authority is not concerned with the full consequences of the principal - agent relationship rather it is primarily concerned with question whether the principal is bound.
4. Of importance to note is that. the doctrine of apparent authority is often said to be based on estoppel which generally operates only between two parties and their privies.
5. In this case, the first Respondent was the principal, Mr. Wang the agent and the Appellant the third party. Mr. Wang as agent of the 1st Respondent created an agency relationship between the said 1st Respondent and the said Appellant.

6. I am also in agreement with the findings of the Learned Trial Judge that there was a ratification of the agency agreement by the 1st Respondent. The reasoning for the inference that there was ratification was competently dealt with by Thompson JSC in her judgment and would therefore need not repeat them here.
7. Having agreed with the Learned Trial Judge that there was an agency agreement between the Appellant and the 1st Respondent created by the apparent or ostensible authority of Mr. Wang, I shall now consider whether the Learned Trial Judge was right to order specific performance of the said agency agreement. It should be noted that the Learned Trial Judge also awarded damages.

8. Specific performance is a specialised remedy used by the courts when no other remedy (such as money) will adequately compensate the other party. If a legal remedy will put the injured party in the position he or she would have enjoyed had the contract been fully performed, then the court will use that option instead. The common reason courts grant specific performance is that the subject of the contract is unique, when it is not merely matter of money or where the amount of the damage is unclear. Where a contract is for the sale of a unique property, for instance, mere money damages may not remedy the purchaser's situation.
9. An order for specific performance is at the discretion of the court.
10. In the instant case, the Learned Trial Judge made Orders for both specific performance and damages. This is not, with respect, the correct approach. Damages are

usually ordered in lieu of specific performance. The reason for this is that damages are a "substitutional" remedy, while specific performance is a 'specific remedy'. The remedy for specific performance is granted by way of exceptions. The rule is based on the uncertainty of calculation of damages, in cases where they cannot be based on anything, but conjecture or surmise. Thus, where A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare Chinese vases, A may compel B specifically to perform this contract, for, there is no standard for ascertaining the actual damage which would be caused by non-performance. By claiming damages for breach of contract, the plaintiff disentitles himself, on account of his own election, from claiming specific performance of the same contract as an alternative case.

11. In the Sierra Leone High Court decision in CHARAF (Trading as C.J. CHARAF -V- MICHEL, Beoku-Betts J (as he then was) had this to say: ''In an action for specific performance, the court. would not make an order which cannot be carried out". This principle has some support in the decision of the Supreme Court of Sierra Leone in AGIP V ABASS ALIE & CIV.APP.10/73 In the instant case, the 2nd and 3rd Respondents were alleged to have induced a breach of the contract between the Appellant and the 1st Respondent. In fact there was a new Agency agreement between the 1st Respondent and the 2nd and 3rd Respondents to the exclusion of the Appellant. The agreement took effect and so ordering the specific performance of the agency agreement would lead to confusion. The contract would have involved the performance of a continuous duty which the court cannot supervise. The difficulty of supervision by the court is the main reason why due

performance of this type of contract cannot be specifically enforced.

12. Having held that specific performance is not an appropriate remedy; can damages be awarded in lieu?

13. Where a breach is by the Principal, the measure of damages will be the amount that the agent might reasonably have earned under the contract had he not been prevented from continuing to act. Further and additionally, the agent can claim to be indemnified and reimbursed for outlays, expenses and losses incurred in the performance of his agency. Although the amount and the extent of this indemnity may be difficult to calculate, it is not to be classified as damages; it is implied contractual indemnity, an implied liability on the contract - MCGREGOR ON DAMAGES, 18TH ED, PARAGRAH 30 - 003 and foot note 3 of page 1125.

14. This passage is in effect providing for two related claims, to wit:

    i. Loss of earnings; and

    ii. reimbursement.

15. It can be concluded from the foregoing analysis that the Appellant is entitled to damages for breach of contract in lieu of specific performance. This can be assessed based on the cooperation agreement dated 1st April, 2015 between the 1ST Respondent and the 3rd Respondent. By clause 6 of the said agreement, the 1ST Respondent was to pay $500 per vessel per month to the 3rd Respondent as agency fee. The said agreement was in force until 5th October, 2015. Had there not been any inducement by the 2nd and 3rd Respondents, the Appellant would have earned $24,000 from the 1st Respondent. As I have rejected the Order for specific performance made by the Learned Trial Judge, I shall Order that the 1ST

Respondent pays to the Appellant the sum of $24,000 as damages in lieu.

16. As regards loss of earnings/remuneration, it is imperative to note that an agent is only entitled to remuneration for his services as an agent by either the express or implied terms of the agency contract, if any so provide or he has a right in restitution to claim remuneration on a quantum merit. Secondly an agent cannot claim remuneration other than in accordance with the terms of the agency contract and thirdly, in deciding what terms are to be implied, the court will have regard to all the circumstances of the case, inter alia, the nature and length of the services, the express terms of the contract and the customs and usages of the particular trade.

17. In the light of the above, it is evident that an agent's claim to remuneration emanates from a contractual claim. In the case of REEVE -V- REEVE (1858) 1 F & F, 280, it was held that apart from claims of restitution, the rendering of services, however long continued, creates no right to remuneration unless the agency expressly or impliedly makes provision for such payments. If no such provision exists, terms providing for remuneration will only be implied where the circumstances are such as to indicate that the parties intended that there should be remuneration. This was what was referred to as Agency and promoter fee in both the pleadings and the Judgment of Alusine Sesay, JA.(as he then was)

18. In the said judgment, Sesay JA had this to say:

> "Loss of Agency and Promoter fee for the months of November, 2013 - February, 2016

At the rate of US $6,000 per month:
= US $96,000''

19. His Lordship continued "In respect of the loss of agency and promoter fee for the months of November, 2013 to February, 2015, the Plaintiff - PW.1 testified that this was what was agreed between himself and the 1st Defendant. This was the term of the agreement. The Courts are not reluctant to hold that binding contracts have been made despite the lack of final written and signed documents. I shall refer counsel to the case of AIR STUDIO (LYNDHURST) LIMTED T/A ENTERTAINMENT GROUP -V- LOMBARD NORTH CENTRAL PLC (2002) EWHC 3162 U.B. The Plaintiff is entitled to claim this amount as loss of agency and promoter fees against the 1st Defendant."
20. The Court of Appeal on the other had rejected the existence of an agency agreement and could therefore not have allowed any claim for Agency fees.
21. Having agreed with the Learned Trial Judge that an agency agreement existed between the Appellant and first Respondent, I uphold his award of the Promoter and Agency fee. The Learned Trial Judge awarded US$126,000. However, a perusal of the pleadings would reveal that the Appellant claimed US$96,000 as Promoter and Agency fees and additionally claimed US$30,000 as incidental expenses. The Learned Trial Judge disallowed the later. In his testimony, the claim of the Appellant amounted to US$ 64,000.00.Following the principle that an award should be based on pleadings and evidence, I will award US$ 64,000 as Promoter and agency Fees.

B. INDUCEMENT:

22. I agree with my Learned Sister and brothers in upholding the Learned Trial Judge's judgment that there was an inducement by the 2nd and 3rd Respondent but would add the following:-

23. The origin of the tort is often given as LUMLEY -V- GYE C118 ER 784 (1853) in which one theatre owner induced a performer to breach her contract with a competitor and sing instead, at his venue. The English Court (Justices Erle and Wightman) described the tort thus:

> "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether is a joint wrongdoer, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of... It was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortuous act of the defendant maliciously to procure her to do so".

Justice Macnaughten, over 100 years ago, in Quinn v Leathem (1970) AC 495 wrote:

"(A) violation of a legal right committed knowingly is a cause of action.... It is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

24. In TORQUAY HOTEL V. COUSINS (1969) 1 ALLER 522 at 530, Denning J. suggested an expansion of the tort when he wrote:

"The time has come when the principle should be further extended to cover deliberate and direct interference with the execution of a contract without that causing any breach."

25. In POSLUNS V. TORONTO STOCK EXCHANGE (46 DLR 2d) 210 (1964) Gale J. of the Ontario High Court of Justice wrote:

"While a contract cannot impose the burden of an obligation on one who is not a party to it, a duty is undoubtedly cast upon any person, although extraneous to the obligation, to refrain from interfering with its due performance unless he has a duty or a right in law to so act. Thus, if a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That wrong does not rest upon the fact that the intervener has acted in order to harm his victim, for a bad motive does not per se convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal relations existing between others".

26. In the 2007 OBG Ltd. V. ALLAN (2007 UKHL 21 The House of Lords held:

"To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must

actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."

27. Based on these principles, I am clear in my mind that the Learned Trial Judge was correct in holding that the 2rd Respondent was liable for inducing a breach of contract between the Appellant and 1st Respondent. The issue is how the Learned Trial Judge arrived at an award of $120,000/00. In determining this; I shall dwell on the law governing the assessment of damages for inducing a breach of contract.

28. According to **MCGREGOR ON DAMAGES** paragraph 40 - 004 page 1634. Although damage is the gist of the action (inducing breach of contract) little exact detail can be given as to the measure of damages, as the courts have consisting endorsed Lord Esher's pronouncement in **EXCHANGE TELEGRAPH Co -v- GREGORY** (1896) 1 Q.B. 147 C.A. at 153 that "it is not necessary to give proof of special damage" because "the damages are damages at large"

29. Neville J in **GOLDSOLL -V- GOLDSOLL** (1914) 2 Ch. 603 stated the position in somewhat more details. The "damage" he said,

> "May be inferred, that is to say that the breach which has been procured by the defendant has been such as must in the ordinary course of business inflict damage upon the Plaintiff, then the Plaintiff may succeed without proof of any particular damage which has been occasioned him"

30. The type of damage that is likely to be inferred by the Court is loss of profits. This may be the profit

in Sierra Leone by the eight vessels namely Shengai 1-8 for the period 1st June, 2015 when the inducement was instigated to October, 2015 when the cooperation contract between the 1st Respondent and the 2nd and 3rd Respondent terminated. This will in effect be damages to be paid by the 2ND and 3RD Respondent to Appellant for inducing the breach of contract between the said Appellant and the 1ST Respondent

34. I have rejected the award of U$120,000. As damages for inducing breach of contract not only because it is supported by both law and fact but it is unconscionable and in the nature of punitive damages. The law on awarding punitive was clearly not followed by the Learned Trial Judge.

JUDGMENT IN FOREIGN CURRENCY:

Having upheld part of the judgment of the Learned Trial Judge stated in the United States Dollars, the question arises as to the law governing judgments in foreign currencies.

35. The law is that English Courts and Mutatis Mutand is the Courts of Countries which have inherited the common law of England, can only give judgment in their own currencies. This has however been somewhat modified in England and Wales in recent times.

36. In **SCHORSCH MERIR GMbH -V- HENNIN** (1975) QB 416 at 423, Lord Denning M.R. pointed out that as early as 1605 English Courts had held in **RASTELL -V- DRAPER** (1605) Yelv. So that:

> **"The debt ought to be demanded by a name known and the judges are not apprised of Flemish**

money: and also when the Plaintiff has his judgment, he cannot have execution by such name, for the Sheriff cannot know how to levy the money in Flemish."

37. His Lordship went on to say'

"For that time forward it has always been accepted that English Court can only give Judgment in Sterling..."

38. Lord Denning himself in 1961 said in **RE-: UNITED RAILWAYS OF HAVANA and REGLA WAREHOUSE LIMITED** (1961) A C. 1061 at pp. 1068, 1069 "And if there is one thing clear in our law, it is that the claim must be made in Sterling and the judgment given in Sterling."

39. Almost as equally well established was the accompanying rule that a debt in foreign currency should be converted into English currency as at the date on which the debt was payable, or in the case of damages arising from breach of contract or tort, as at the date the breach occurred or the damages in relation to which compensation claimed were suffered. This principle, known as the "breach - date" rule was of relatively more recent origin. This rule was first laid down authoritatively by the English Court of Appeal in **DI FERNINANDO -V- SIMON, SMITS and COMPANY LIMITED** (1920) 3 KB 409 in relation to damages for breach of Contract, was affirmed by the House of Lords in SS **CELIA -V- SS VOLTURNO** (1921) 2 AC 544 in relation to damages for tort.

40. The two related principles were applied by the Supreme Court of Sierra Leone in the case of **CASTROL OIL LIMITED -V- JOHN MICHAEL MOTORS** (supra) where the

Learned Chief Justice, Renner-Thomas JSC delivering the judgment of the Court remitted the matter to the High Court to determine the exchange rate of the Pound Sterling to the Leones at the time the breach complained of occurred. Since the time of this Judgment, the Banking system has become more sophisticated and so the Bank of Sierra Leone should be in the position to provide the exchange rate of the Leone to the Dollar at the time of the breach

41. The principle established in the CASTROL OIL case is that though a party could claim in foreign currency, the Court in delivering judgment would have to determine the Leone equivalent of that currency and state the award in Leones. I have found no reason to depart from this principle and would accordingly apply it.

INTEREST.

For completeness, I agree with Roberts and Thompson, JJCS, that interest should be paid on the Agency and Promoter fee of U$ 64,000.00 at the rate of 9% from the date of commencement of this action until Judgment.

Hon. JUSTICE SENGU MOHAMED KOROMA JSC.