



IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT

CASE NO: FTCC 119 /16

ATLAS COMMUNICATIONS PCS LTD

HAROLD THOMAS

-PLAINTIFFS

AND

FIBANK (S/L) LTD

ANTHONY NWOKEUKWU

-DEFENDANTS

REPRESENTATION

MICHAELA K. CONTEH (MS)

-COUNSEL FOR THE PLAINTIFF

MARIAMA DUMBUYA (MS)

-COUNSEL FOR THE 1ST DEFENDANT

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA J.A
JUDGMENT DELIVERED ON THE 1ST DECEMBER, 2016

1. The Plaintiffs/Applicants (hereinafter referred to as the "Plaintiffs") applied to this Court by Judge's Summons dated 14th May, 2016 for the following orders:-
 - 1) That this Honourable Court grants liberty to the Plaintiffs to enter final Judgment against the Defendants/Respondents (hereinafter referred to as the "Defendants") in the sum of USD \$ 80,059.53 pursuant to the provisions of Order 16 of the High Court Rules, 2007.
 - 2) That this Honourable Court grants interest on the sum of USD \$ 80,059.53 mentioned in paragraph 1 above at such rate and for such period as the Court may deem just pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act, Cap 19 of the Laws of Sierra Leone, 1960.
 - 3) Any further or other Orders that this Honourable Court may deem fit and just in the circumstances.
 - 4) Costs.
2. The Application was supported by the Affidavit of Mohamed Serry sworn to on the 4th May, 2016 together with the exhibits attached thereto.

BACKGROUND

3. By a Writ of Summons witnessed on the 15th April, 2016, the Plaintiffs claimed the following against the Defendants:-
 - Recovery of the sum of USD \$ 80, 059.53 being money deposited into an Escrow Account No. 0011201723903 of the 1st Plaintiff held with the 1st Defendant.
 - Interest on the said sum.
 - Damages for breach of contract/trust.
 - Any further Orders or relief (s) that this Honourable Court may deem fit and just.
 - Costs.
- On the 25th April, 2016, the firm of Lambert and Partners entered appearance on behalf of the 1st Defendant herein.
- The Plaintiffs filed the present application on the 4th May, 2016.
- The firm of Lambert and Partner filed a defence to the Writ of Summons on the 6th June, 2016.



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7. On the 7th June, 2016, Mr. Elvis Kargbo entered an appearance for the 2nd Defendant.
8. The present action is predicated on a Ruling of this Court delivered by the Hon. Justice V. M Solomon JA. (as she then was) delivered on the 28th day of September, 2011 in the matter CC 13/2011 between Comium (SL) Limited -v- Atlas Communications Ltd (the 1st Plaintiff herein). Relevant to this action is paragraph 7 of the said Order in which Her Ladyship ordered "The Defendant therein (the 1st Plaintiff herein) to pay the sum of USD \$ 80,000/00 which said sum is to be deposited in an interest bearing account in any commercial bank and the said account is to be operated by the Solicitors for the Parties."
9. On the 8th December, 2014, the said matter CC 13/11 was struck out on the ground that it was vexatious and an abuse of due process and obviously unsustainable, as it was based on a contract which could not be enforced in law.

THE PRESENT APPLICATION

10. The present application was made by Ms Michaela Conteh acting for and on behalf of the Plaintiffs herein. The application was opposed by Ms Mariama Dumbuya acting for and on behalf of the 1st Defendant herein. Though Mr. Elvis Kargbo had entered appearance for and on behalf of the 2nd Defendant, no Affidavit in Opposition was filed on his behalf nor was he represented at the hearing of this application.

AFFIDAVIT IN SUPPORT

11. This Affidavit was sworn to by Mr. Mohamed Serry who deposed as follows:-
 - a) That pursuant to the Order of Her Ladyship, Hon. Justice V. M. Solomon JA (as she then was) the escrow account numbered 00112017239-03 was opened by the 1st Plaintiff herein and with the 2nd Defendant herein.
 - b) That the 2nd Defendant was the sole signatory to the said Escrow Account and the 2nd Plaintiff personally made a remittance of the sum of USD 80,059.53 from the PNC Bank in the United States of America to the said Escrow Account on the 18th November, 2011. A Photostat copy of the "full Detail wire Activity Report was exhibited as "MS3".
 - c) That the matter cc 13/11/2011 No 4 was struck out on the 8th December, 2011.



d) That while the matter CC 13/2011 was sustaining in Court, the 1st Defendant herein in breach of its duty to the Plaintiffs herein granted access to the 2nd Defendant herein who made several transfers from same contrary to the Order dated 28th September 2011 leaving a closing a balance of USD 904.05.

A Photostat copy of the statement of Accounts was exhibited as "MS5".

e) That despite various letters written to the 1st Defendant herein on behalf of the Plaintiffs herein dated 24th February, 2016 and 29th March, 2016 respectively; the 1st Defendant refused or failed to restitute the said sum of USD 80,000/00 to the Plaintiffs.

f) That the 1st Defendant's conduct has caused severe financial loss and damages to the Plaintiffs.

g) That he verify believed that the Defendants had no defence to the action.

AFFIDAVIT IN OPPOSITION

12. The Affidavit in Opposition was sworn to by Abdul Rahman Abass-Kamara who deposed as follows:-

a) That the Escrow Account of the 1st Plaintiff into which the sum of USD 80,059 was transferred was opened with the 1st Defendant by the 2nd Defendant herein who was at the time the Managing Director of the 1st Plaintiff.

b) That contrary to what was stated in paragraph 6 of the Affidavit in Support, the said account was opened by the 2nd Defendant with no specific mandate and the 2nd Plaintiff was certainly not the sole signatory to the Escrow Account or any other account which the 1st Plaintiff operated with the 1st Defendant.

c) That the money in the Escrow Account at all times belonged to the 1st Plaintiff which had opened the account in its own name. Exhibited was the statement of Accounts marked ARR1.

d) That the 2nd Plaintiff did not personally pay the money into the Escrow Account of the 1st Plaintiff. The money was transferred to the Escrow Account of the 1st Plaintiff by Atlas Communication PNS INC and not the 2nd Plaintiff.



- e) That on diverse days between 2nd April, 2014 and 20th January, 2015, the 2nd Defendant in his capacity as Managing Director and CEO of the 1st Plaintiff made several requests that certain amounts in the Escrow Account be converted into Leones and transferred to the 1st Plaintiff's current account with the 1st Defendant. These requests were granted.
- f) That the 1st Defendant had since entered appearance and filed a statement of Defence to the action.
- g) That it would amount to unjust enrichment for the Plaintiffs to claim the same money which it had already received on the written instructions of the 2nd Defendant who was CEO of the 1st Plaintiff at the relevant time.
- h) That the mandate of the 1st Plaintiff in respect of all its accounts in the 1st Defendant was for either the 2nd Defendant or the 2nd Plaintiff to sign.
- i) That the 1st Defendant had good defence to the action here.

SUBMISSIONS OF COUNSEL

COUNSEL FOR THE PLAINTIFF

- 13. Ms Michaela Conteh argued that the Bank by giving the 2nd Defendant access to the Escrow Account whilst the Order of Justice V. M. Solomon JA (as she then was) dated 28th September 2011 was subsisting amounted to a breach of that Order and a breach of the 1st Defendant's duty to the Plaintiffs. In her submission, she described an escrow account as a temporary pass through account for which the 1st Defendant was expected to act as a neutral third party.
- 4. Ms Conteh referred to the Memorandum and Articles of Association of the company and a resolution of the Board. The said M & A did not give authority to the 2nd Defendant to withdraw funds from the Escrow Account or any accounts to the 1st Plaintiff. She concluded it appears to me that the 2nd Defendant acted outside his authority as an agent of the Plaintiff which will make it a breach of trust for the 1st Defendant to honour his requests for the transfer of funds. On this point, I agree with her. The requirement of the case however goes beyond that. It includes a determination of whether an escrow account was created.

COUNSEL FOR THE 1ST DEFENDANT

5. Ms Mariama Dumbuya, Counsel for 1st Defendant began her submission by stating the conditions under which a Court would grant of Summary Judgment. The Court should not shut down a Defendant who could show that there were triable issues contained in the Affidavit in Opposition.
6. In her submission, Ms Dumbuya contended that the said Escrow Account was opened in the name of the 1st Plaintiff and was to be operated by either the 2nd Plaintiff or the 2nd Defendant. There was no specific mandate. The withdrawals were made by the 2nd Defendant who was the Managing Director of the 1st Plaintiff and transfers were made into its accounts. It appears to me that Counsel was submitting that an escrow account had not been created.
7. Ms. Dumbuya referred to paragraphs 1-10 of the Affidavit in Opposition and submitted that the 1st Defendant had a good defence to the action.
8. There was also Exhibit ARK 3. This was an Order of Court dated 21st December, 2015 by which the 2nd Defendant was authorized to continue to act as the Managing Director of the 1st Plaintiff. This placed in the position of a signatory to the accounts under the terms of its operation.
19. Ms. Dumbuya referred this Court to Halsbury's Law of England volume 2, at page 295 at paragraph 377 to establish that the 1st Defendant did not behave negligently in allowing the 2nd Defendant to withdraw funds from the Escrow Account. The 1st Defendant did not act also arbitrarily or capriciously in making the transfer.
20. She also referred this Court to Paget's Law of Banking 12th Edition to establish that the 2nd Defendant was acting as a Director of the Company and had instructed the 1st Defendant to transfer the funds to the accounts of the 1st Plaintiff and not to a personal account.
21. The second Plaintiff was not a party to the action for which the Order was given.
22. Ms. Dumbuya finally referred to the provisions of Order 16 (1) of the HCR, 2007 and the English Supreme Court Practice page 172, paragraph 14/4/3 under the heading

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"Defendant showing Defence on Merits". She submitted that the Affidavit in Opposition clearly and concisely stated the 1st Defendant's case.

REPLY OF COUNSEL FOR THE PLAINTIFFS

23. Ms. Conteh stated by reinforcing her initial submission that the 1st Defendant could not use a defence that had not been filed.
24. She submitted that all the authorities cited by Counsel for the 1st Defendant related to ordinary accounts and not to escrow accounts. Ms. Conteh contended that the 1st Defendant had actual or constructive knowledge of the purpose of accounts. For this she referred this Court to Paget's "Law of Banking" under the rubric "knowing receipt" and "dishonest assistance" to establish that a constructive trust may be implied in circumstances where a bank had acted with such a degree of complicity in a breach of trust that it would be fair to state that the bank should be held liable to account to the trust."
25. Ms. Conteh finally submitted that the 2nd Defendant was not mandated to sign as a signatory.

ISSUES IN DISPUTE

26. a) Whether paragraph 7 of the Order of the Hon. Justice V. M. Solomon JA (as then was) and the subsequent transfer of USD 80,059.00 into Account Number 00112017239-03 created an Escrow Account.
- b) If the answer to 1 is in the affirmative, whether the 1st Defendant was right in law to allow the 2nd Defendant to withdraw money from the said account without an Order of Court authorizing it to do so and or in the absence of an expressed mandate in the terms of the escrow.

THE LAW

27. An Escrow is a Common Law principle used in Civil and Commercial practices. Because it enhances trust among trade dealers and secures the performance of contracts, the term is

not only widely used, but has been greatly developed as a complete legal system. There are various types of escrow. These are Escrow Accounts, escrow letters of credit, Escrow contract and Escrow Agreement. An Escrow Account is the most used application of escrow in business transactions.

28. It is important to note that a bank (normally called a depositary) is not a party to the Escrow Agreement, but rather a custodian of the deposit who has no right to alter the terms of the agreement or prevent parties from altering them if they so agree. The only agreement a depositary must make is to hold the deposit, subject to the terms and conditions of the agreement.
29. It should be noted that Courts are strict in their requirement that the terms of the agreement be completely performed before the deposit is released. A reasonable amount of time must generally be allotted for performance. If there are no terms, the bank will not be so bound. Conversely, the Court would be reluctant to declare an account as an escrow where the necessary conditions had not been fulfilled.

CONDITIONS TO BE FULFILLED

30. Before a deposit of money in an account could be treated as an escrow should be fulfilled:-
 - a) It must be created by an agreement of the parties or by Order of Court for 'specified purposes'.
 - b) As an ancillary to (a) above, the Agreement or Court Order must clearly state the purpose or purposes for which the accounts had been created and how it should be operated.
 - c) The opening of the Account by the Bank will be deemed to be acceptance by the said Bank of terms of the escrow.
31. If the foregoing conditions are not fulfilled, the Accounts opened would be treated as any other type of accounts existing in the bank's portfolio.

APPLICATION OF THE LAW TO THE FACTS

32. It is important to note that any further determination of this matter would be dependent upon whether an escrow account was created by paragraph 7 of the Order of Justice V. M. Solomon JA(as she then was) on the 28th September 2011.

ORDER DATED 28TH SEPTEMBER 2011

33. Paragraph 7 of the Order of Hon. Justice V. M. Solomon dated 28th September, 2011 ordered as follows:-

“The Plaintiff/Applicant herein to pay the sum of USD 80,000/00 which said sum is to be deposited in an interest bearing account in any commercial bank and the said account is to be operated by solicitors for both parties.”

This Order was exhibited as “MS2”.

34. On this issue, Counsel for the Plaintiff argued that the said account was opened by the 1st Plaintiff herein with the 1st Defendant herein. It was sworn to in the Affidavit of Mohamed Serry sworn to on the 4th May, 2016 that the 2nd Plaintiff was the sole signatory to the referred escrow account and he (2nd Plaintiff) personally made a remittance of USD 80,059 into the said accounts from PNC Bank in the USA. The deponent exhibited a Photostat copy of the “full Detail wire Activity Report” as “MS3”.
35. The 1st Defendant, on the other hand argued that the accounts opened was done in the course of normal banking transactions with no specific mandate regarding the purpose of the said deposit, no board resolution neither a disclosure of the Court Order nor the signatures of either solicitors in the aforementioned action were given or provided to the 1st Defendant. Counsel for the 1st Defendant further submitted that the amount was not personally remitted by the 2nd Defendant but was done by Atlas Communications PCS INC. The 2nd Plaintiff therefore had no locus standi in the action. She further contended that the funds were transferred to the Leones Accounts of the 1st Plaintiff.

CONCLUSION

36. The manner in which the 2nd Defendant went about complying with the Order of the Court dated 28th September 2011 fell far short of the requirements of that Order. The Order called for the establishment of an interest bearing account with both solicitors as operators of the said account. The 2nd Defendant proceeded to open the said account with himself and the 2nd Plaintiff as signatories. No objection was raised by the solicitors for the Plaintiffs therein (that is CC 13/2011). That structure remained in place until the accounts was dissipated. It is my view that the failure of the solicitors therein to fully comply with the Order dated 28th September, 2011 constraints this Court from holding that the opening of the said account was consistent with the Order of this Court dated 28th September 2016 or that an escrow account had been opened. It follows that it would be difficult to determine whether the rules relevant to escrow accounts would apply in this case without further evidence.

37. To my mind, the transfer of funds into the Account No: 00112017239-03 was in the nature of a current account. It was settled in FOLEY-V-HALL (1848) 2 HL cas. 28 that the purely debtor and creditor position excludes any element suggesting of trusteeship or fiduciary relation in the Banker in relation to a current account. The Account created by the 2nd Defendant herein was a credit account. Funds were transferred by a Bank in the United States supposedly in compliance with the Order dated 28th September 2011. The Bank received the money into an account without any reference to the Order. Counsel for the Plaintiff submitted that on the deposit of the funds, the bank became a Trustee of the Plaintiffs. For a bank to be liable as a Trustee, the following conditions have to be met:-

38. The general presumption of the relationship between the banker and its customer is of debtor-creditor. To prove that banker was liable as trustee, Plaintiffs have to show the presence of those facts which can dispel the general presumption of debtor-creditor relationship.

39. The following are the various circumstances under which the banks have been fastened with liability of trustee. These are as follows:-

a) Trust funds

- b) Special purpose: The Quistclose Trust. This is a situation when money is entrusted with the bank for a special purpose, until the fulfillment of the same; the funds remain with the bank in its capacity as trustee. This was the principle enunciated by the English House of Lords in the case of Barclays Bank Ltd -v- Quistclose Trust.
 - c) Money received with special instructions.
 - d) Constructive Trustee.
40. The issue of whether a Trust was created cannot be properly determined at this stage. Evidence would have to be led to determine the nature of the relationship between the bank and the Plaintiffs.

DECISION

41. Based on the foregoing conclusion, it is my decision that there are triable issues in this matter that would warrant a trial.
42. I therefore Order as follows:-
- 1. That the application for Summary Judgment is hereby refused.
 - 2. That the matter proceeds to a pre-trial settlement conference as required by Rule 5 (1) of the Commercial and Admiralty Court Rules, 2010 within 3 days from the date of this Order.
 - 3. That the matter is adjourned to Thursday, 15th December, 2016 for the Pre-trial settlement conference to commence.
 - 4. No Order as to costs.



Hon. Justice Sengu M. Koroma JA