

CASE REVIEW:

SUIT NO FHC/PH/639/2016 – WEST AFRICAN VESSEL SUPPLY SERVICES LTD. V. THE M.V. MDPL ANJALI & ANOR.

¹ Suit No. FHC/PH/639/2016.

Introduction

Disputes are inevitable in human (natural or artificial) interactions. When they arise, it is important to, among other things, carefully ascertain the basis of such disputes and channel same for resolution through appropriate dispute resolution mechanism(s) and have the proper and/or necessary parties answer to the claim(s) accordingly. A Claimant therefore must initiate an action for a claim, joining the proper/necessary parties to such action.

In [WEST AFRICAN VESSEL SUPPLY SERVICES LTD. v. THE M.V. MDPL ANJALI & THE MASTER OF THE M.V. MDPL ANJALI](#)¹ (the "Suit"), the Federal High Court ("FHC") of Nigeria (Port-Harcourt Judicial Division) was called upon to tackle the issue of privity of contract in a case involving claims for brokerage commission/fees against two (2) Defendants, under a charterparty agreement and a brokerage agreement which neither of the Defendants was a party to. In its well-considered judgment, the FHC agreed with the arguments lucidly canvassed by Bloomfield Law Practice on behalf of the Defendants, which aided the Court in reaching a clear conclusion that the claims lacked merits and deserved to be dismissed accordingly.

Background

Plaintiff's Position

The Plaintiff alleged that sometime in October 2015, it brokered the charter of a Vessel called MV PSV MDPL RANDEEP (this vessel was eventually found to be unavailable and was replaced by the 1st Defendant vessel being a sister vessel) to a company called "[TETHEYE PALNTEGERIA LIMITED](#)". It was alleged that [Party A](#) was the owner of the 1st Defendant Vessel and that it agreed to pay the Plaintiff the sum of Six Hundred US Dollars (US\$600) per day as brokerage fee/commission.

Consequently, the Plaintiff and Party A entered into a Brokerage Agreement dated November 13, 2015.

The Plaintiff argued that Party A had a contractual obligation to pay the Plaintiff its brokerage fee/commission at the commencement of the Brokerage Agreement but had failed to do so despite its receipt of payments for the charter of the 1st Defendant Vessel and despite the Plaintiff's repeated demands

Defendants' Position

On their part, the Defendants maintained that neither [MDPL ANJALI MI Limited](#), the disponent owners of the 1st Defendant nor the Defendants were parties to the alleged Brokerage Agreement between the Plaintiff and Party A.

The Defendants asserted that MDPL ANJALI MI Limited time chartered the 1st Defendant to [Tethys International Offshore Contractors Limited](#) pursuant to a BIMCO Time Charterparty for Offshore Supply Vessel dated October 21, 2015, with no reference to any brokerage agreement or commission payable to the Plaintiff or any third party at all. Based on this, the Defendants strongly argued that the Plaintiff's claim lacked merit and urged the FHC to dismiss the Suit and impose substantial costs on the Plaintiff.

Reliefs Sought

The reliefs sought by the Plaintiff were as follows:

- The sum of Forty Thousand, Two Hundred Dollars Only (US\$40, 200.00) being the outstanding brokerage fees and commission due to the Plaintiff for the charter of the 1st Defendant based on a charterparty dated October 21, 2015 from November 18, 2015 to January 24, 2016;



- 2 See *TEWOGBADE v. AKANDE (1968) N.M.L.R. 404 at 408 and Sections 131 and 132 of the EVIDENCE ACT 2011*
- 3 See *B.B APUGO & SONS LTD v. OHMB (2016) LPELR-40598(SC)*
- 4 See *CHEMICAL AND ALLIED PRODUCTS PLC v. VITAL INVESTMENTS LTD. (2006) LPELR-5434(CA)*
- 5 *Order 25 Rule 2(1), Federal High Court (Civil Procedure) Rules, 2019, NNPC v. CLIFCO NIG. LTD. (2011) LPELR-2022(SC)*
- 6 *Cap A5, Laws of the Federation of Nigeria 2004.*

- 2 Interest on the said sum of Forty Thousand, Two Hundred Dollars Only (US\$40, 200.00) at the rate of eighteen per cent (18%) per annum from January 24, 2016 till judgment and at the rate of twenty-one per cent (21%) per annum from the date of judgment until liquidation; and
- 3 The sum of Five Million Naira Only (N5,000,000.00) being the legal cost of this action.

Key Issue for Determination

The key issue formulated for determination by the FHC was whether the Plaintiff had tendered sufficient evidence to justify a grant of the reliefs sought. In essence, the FHC had to determine whether the Defendants could be bound by the terms of a contract which it was not a party to.

Decision of the FHC

The FHC ruled in favour of the Defendants and dismissed the Plaintiff's claims based on the following;

- (a) The only document admitted in evidence was the Brokerage Agreement which was between the Plaintiff and a third party, Party A which was not a party to the Suit.
- (b) Per the Brokerage Agreement, the only party with an obligation to pay brokerage commission and/or fees to the Plaintiff was Party A and not the Defendants.
- (c) The Plaintiff's second witness worked for TETHYS PLANTGERIA LTD who was not a party to the Suit.
- (d) The Plaintiff only had a contractual relationship with TETHYS PLANTGERIA LTD and had failed to produce any evidence showing that the Defendants were a party to the contractual relationship between the Plaintiff and TETHYS PLANTGERIA LTD.

Commentary on the FHC's Decision

Burden of Proof in Civil Cases

This case emphasises the settled position of law that the burden of proof in civil cases rests on the party, whether the Claimant or Defendant, who will fail assuming no evidence has been adduced on either side². The doctrine of burden of proof is an ancient rule encapsulated in the Latin maxim *ei qui affirmat non ei qui negat incumbit probatio*, which means "the burden of proof lies on one who alleges and not on him who denies". In this case, the burden of proving that the Defendants had an obligation to pay brokerage commission/fees to the Plaintiff rested on the Plaintiff and the Suit was dismissed because the Plaintiff failed to prove its case.

Privity of Contract

The FHC's decision underscores the elementary principle of privity of contract; that only parties to a contract can sue or be sued with regard to such contract³. It is only a party to a contract that can enjoy the benefits and/or acquire the obligations of the contract. A stranger cannot be called to answer for a contract he is no party to, even if such contract were made for his benefit.⁴

The sole document tendered in evidence in the Suit was a Brokerage Agreement between the Plaintiff and Party A which imposed an obligation on Party A to pay the Plaintiff. The Defendants were not parties to the Brokerage Agreement and owed no payment obligations to the Plaintiff under the Brokerage Agreement or any other agreement.

It is interesting to note that Party A, the contracting party with the Plaintiff was not a party to the Suit. More interesting is the fact that there was no evidence before the Court indicating that Party A is/was at any time the owner of the 1st Defendant Vessel.

What is more? The Plaintiff failed woefully to demonstrate that (i) the Defendants were parties to the Brokerage Agreement; and (ii) the 1st Defendant Vessel belonged to Party A, who was not a party to the Suit. It is settled law that a remedy will only follow the successful establishment of a wrong. The maxim is "*ubi jus ibi remedium*". Where a party is unable to establish a legal wrong, any claim (s) for a remedy is a futile pursuit. One cannot place something on nothing and nurse the expectations that it will stand! The FHC therefore applied the law correctly by the ultimate dismissal of the claims.

The Defendant's Entitlement to Cost

However, the application for cost of the suit made by Counsel on behalf of the Defendants was refused despite the case constituting a prime example of one where the Defendants were entitled to substantial costs against the Plaintiff. This is so considering the length of time (four (4) years) and resources unnecessarily dissipated into the defence of the action ought to have been compensated. Also, in light of the principle that the party who is in the right is to be indemnified for the expenses to which he has been unnecessarily put in the proceedings, as well as compensated for his time and effort in coming to Court.⁵

Wrongful Arrest

Following the Plaintiff's institution of the Suit, the 1st Defendant Vessel was arrested pursuant to the Order of the Court and remained under arrest and deprived of business opportunities for about seventy-six (76) days. As such, this was a case where the Defendants should have been entitled to due compensation in cost and also for wrongful arrest of the 1st Defendant Vessel by the Plaintiff in the Suit in accordance with the law on wrongful arrest in Nigeria.

The test for wrongful arrest under Nigerian law is set out in Section 13 of the Admiralty Jurisdiction Act⁶. A wrongful arrest is one which is occasioned "*unreasonably and without good cause*". The Admiralty Jurisdiction Procedure Rules, 2011 ("*AJPR*") highlights the procedures for applying for costs for wrongful arrest:

- (a) Order 11 Rule (2)(a) provides that the arrestor, following the dismissal of a suit involving a wrongful arrest, would be liable for damages for any loss, injury or expenses that the defendant may have sustained by reason of such arrest. However, the affected party must apply to the Court within three (3) months from the termination of the suit and the Court must be satisfied that there was no probable ground for instituting the suit.
- (b) Order 11 Rules 3(1) and (2) of the AJPR empowers the defendant to institute an action for wrongful arrest against the arrestor as long as the action is not based on the same grounds upon which the Court may have made award of compensation; and the defendant shall be awarded costs, damages, demurrage and expenses against the arrestor where the Court is satisfied that the arrest was occasioned unreasonably and without good cause.
- (c) Order 11 Rule 4 of the AJPR also empowers the Court to summarily determine the issue of wrongful arrest, granting or refusing damages, further to an oral application of defendant immediately after the judgement of the Court (in favour of the defendant) is read.



It is the view of the commentators that this is a suitable case for due compensation in cost and also for wrongful arrest of the 1st Defendant Vessel by the Plaintiff in the Suit.

Conclusion

The judgment of the FHC clearly emphasises the principles of burden of proof and privity of contract. Before instituting a case or raising an affirmative defence, it is important for parties to appreciate that the burden of proof lies on them and their case or defence will succeed only if they satisfy the legal requirements necessary to prove their case. The failure to do so can be detrimental and imminently lead to the dismissal of their action as in the instant case or the failure of their defence, regardless of whether the other party leads any evidence in the suit, with all time and resources spent in futility.

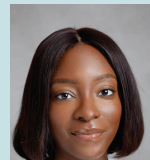
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