

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE GAMBIA COURT OF APPEAL

B E T W E E N :

MOHAMED B. A. BENSOUDA

Appellant

- and -

ROXY CINEMAS LIMITED

Respondents

CASE FOR THE APPELLANT

Record

10

1. This is an appeal from a Judgment and Order of the Gambia Court of Appeal holden at Banjul (Adeyinka Morgan, President, Sir Phillip Bridge J.A., and Cole J.A.) dated the 30th day of November 1973, allowing an appeal by the Respondent herein and dismissing an appeal by the Appellant herein from a Judgment of the Supreme Court of the Gambia (Nithianandan J.), dated the 27th day of June 1973, and the Order of the said Supreme Court that the Respondents total damages be assessed on the basis of D 3, 318 per month for the period of 9 months but having failed to take steps to mitigate their loss the Respondents would only be able to recover damages for the period of 4 months and 15 days making the damages payable to the Respondents the sum of D 14, 931.00 and the costs of the suit.

20

pp. 69

30

2. The Appellant's Petition was presented in pursuance of an Order of the Gambia Court of Appeal granting the Appellant Final leave to appeal to the Judicial Committee of the Privy Council which Order was made on the 18th day of November 1974 and it was ordered that the Appellant should before the expiration of a period of thirty days from the date of this order provide a bond in the sum of D 2, 500.00 for the due prosecution of the appeal and payment of all such costs as may become payable to the Respondents in the event of the appeal not obtaining an Order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution or of the Judicial Committee of the Privy Council ordering the Appellant to pay the Respondents the costs of the appeal.

It was further ordered that the sum of D 14, 923. 00 deposited in Court by the Appellant be paid to the Respondent upon the latter providing a bond in the said sum of D 14, 923. 00 with two sureties in the same sum to refund the said sum of D 14, 923. 00 to the Appellant if his appeal was allowed.

pp. 125

3. The facts briefly are as follows:

(i) The Appellant is a businessman cinema proprietor and owner of four cinemas in the Gambia called the Arts Cinema situated in Gunjur, Brikana, Serekunda and Bakau. The Respondents are a limited company incorporated under the Company Act 1955 on the 9th October 1968. 10

(ii) This is a dispute that arose as a result of an allegation by the Respondents of a breach of contract by the Appellant, such contract (hereinafter referred to as the Agreement) having been entered into under hand on the 18th March 1971 whereby the Respondents agreed to supply the Appellant with 35mm films for projection at his four cinemas and the Appellant agreed to pay to the Respondent half of the gross receipts for each performance. The Agreement was expressed to be for a period of two years but contained no provision for the termination of the said Agreement by either party before the expiration of the contract term of two years. As a result of the parties entering into this said Agreement the Respondents acquired the sole monopoly in supplying films to all the cinemas in The Gambia. 20 30

pp. 76

(iii) By clause 16 of the said agreement it was provided that the Agreement would come into effect as soon as the Appellant advised the Respondents of the receipt and installation of 35mm projectors with complete equipment in the said cinemas with the exception of the Arts Cinema, Gunjur, and by a letter dated the 14th July 1971 the Appellant advised the Respondents of the installation of the 35mm projectors in all four cinemas and requested that the Respondents supply the Appellant with a list of available films in order that the Appellant could make his selection. Thereafter the contract became operative by the 24th July 1971 and the Respondents supplied films and advertising for the cinemas in pursuance of 40

pp. 78

pp. 81

clause 3 of the Agreement

pp. 77

- 10 (iv) By a letter written on the 26th October 1971 by counsel on the instructions of one Abdul Latiff Bensouda, who was in charge of the Appellant's business whilst the Appellant was abroad, the Respondents were accused of a breach of contract and were warned that unless the Respondents complied fully with the terms of the Agreement the Appellant would seek to terminate the Agreement.
- 20 (v) On the 21st December 1971 the Appellant, who had returned to The Gambia, instructed counsel to write a letter to the Respondents stating that despite several letters having been sent by the Appellant to the Respondents there had been no replies forthcoming and accordingly this letter was being written on the basis that if new films were not supplied forthwith, the Appellant would have to resort to breaking the Agreement and further that if the Respondents were not in a position to supply new films, then they should take the said letter as being one month's notice on behalf of the Appellant to terminate the Agreement commencing the 1st January 1972. By clause 12 the Agreement provided that the Appellant should realise that Respondents imported all the films into The Gambia and were subject to shipping delays in which case the Appellant was not to protest at the failure of the inclusion of new films in the daily programme.
- 30 (vi) The Respondents replied to the Appellant's letter by a letter dated the 28th December 1971 in which one R. I. Raidar, the Managing Director of the Respondent Company, stated that he had asked the Appellant on several occasions to come to the Respondents' store and make selections on the arrival of new films. The letter concluded "our contract is bi-lateral and we have to meet each other all the way. There are films and you can make your selections but it should be clear that you will not wriggle out of your undertaking without cause."
- 40 (vii) On the 6th June 1972 the Respondents through their agent mistakenly delivered the film "Karin" and posters relating thereto to the Appellant's cinema in Bakau whereas it had been intended to deliver the said film and posters to another cinema in Bakau not under the control of the Appellant. On discovering the said mistake the Respondents directed their agent to

Record

remove the film "Karin" and the posters from the Appellant's cinema and replace the said film with another film. This incident caused annoyance to the Appellant.

- (viii) Further, in June 1972, the Respondents' agent supplied two films to the Appellant's cinema in Brikana, one of which was not what had been advertised, and as a result the Appellant directed his employee in Bakau not to accept films commencing the 6th June 1972 but the Appellant revoked his order and commenced accepting films for the Bakau cinema again. 10
- (ix) The Respondents did not refuse to supply any films during the days the Appellant failed to accept films.
- pp. 85 (x) By a letter dated the 13th June 1972 the Appellant gave the Respondents one month's notice commencing the 14th June 1972 to terminate the Agreement on the grounds that the Respondents had always failed to comply with the conditions of the Agreement. The Respondents replied by a letter dated 29th June 1972 indicating that if the Appellant refused to accept films from the 13th July 1972 the Respondents would issue proceedings against the Appellant. 20
- (xi) The Appellant declined to accept films for all four cinemas as from the 14th July 1972 and the Respondents commenced these proceedings by a Writ issued on the 6th January 1973. 30
- pp. 2 (xii) In the Respondents' Statement of Claim it was alleged that by virtue of the Appellant's termination of the Agreement the Appellant was in breach of the said Agreement and as a consequence thereof the Respondents suffered loss.
- pp. 4 (xiii) The Appellant in his Defence denied that he had been in breach of the Agreement and further alleged by virtue of the failure by the Respondents to provide new films in order to maintain the Appellant's clientele, and by virtue of the removal of the films from the Appellant's cinemas at Bakau and Brikana on the 6th June 1972 and thereafter for a period of eight days, the Respondents failed to supply films and accordingly 40

the Respondents were in breach of the said Agreement and claimed damages by way of a Counterclaim based upon the alleged breach.

(xiv) The Respondents by their Reply averred that the film removed from the Appellant's cinema in Bakau was removed because it had been sent in error to the said cinema and the Respondents further averred that the Appellant thereafter refused to accept films at the said cinema for a period of seven days. In respect of the Appellant's cinema at Brikana the Respondents averred that a different film from the one removed was supplied to the said cinema and was shown thereafter throughout the month of June 1972. pp. 11

10

20

30

4. The matter came up for hearing in the Supreme Court of The Gambia on the 7th day of March 1973. The managing director of the Respondents gave evidence concerning the creation of the Agreement and that by virtue of the Agreement the Respondents became the sole supplier to all theatres in The Gambia. The witness gave evidence denying that he was obliged to produce a list of films and that he had given the Appellant permission to come to the Respondents' premises and make a selection of films therefrom. The witness further gave evidence of the events that led up to and occurred at the cinemas at Bakau and Brikana on the 6th June 1972 and was supported by the evidence of the witness Salim Kasmi Saab. The witness testified that other companies within the group of companies, of which the Respondent company was one, had agreements with cinemas in Sierra Leone and Monrovia and continued by testifying that at no time had he refused to supply films to the Appellant. The witness testified that he claimed damages for breach of contract being the loss of profit for a period of 9 months amounting to D 29, 862. pp. 27
pp. 22-23
pp. 34
pp. 24
pp. 27

5. Evidence was also given on behalf of the Respondents by Henry Musa that when Mr. Musa went on the 13th July 1972 to the Appellant's cinemas in Serekunda and Bakau to deliver the Respondents' films for showing at the said cinemas, the Appellant's agents refused to accept the films.

40

6. The Appellant was the first witness to give evidence for the Defence. He testified to the formation of the Agreement and that he only showed films in accordance with the Agreement. The Appellant testified as to the events at both Bakau and Brikana on the 6th June 1972 and that after the 6th June 1972 the Appellant did not take films for his cinema at Bakau until the 14th June 1972 and that he wrote the letter to the Respondents dated the 13th giving one pp. 42
pp. 45
pp. 46, 85

Record

pp. 49	month's notice of the termination of the Agreement from the 14th June 1972. In cross-examination the Appellant agreed that he instructed his staff not to accept films at any of his cinemas on the 13th July 1972. None of the other witnesses who gave evidence on behalf of the Appellant gave evidence that is material to this appeal.	
pp. 70	7. On the 27th June 1973 the learned trial Judge gave judgment for the Respondents in the sum of D 14, 931 with costs, counsel for the Appellant having conceded that the counter claim could not be maintained.	10
pp. 65		
pp. 61-66	8. In his reserved judgment, the learned trial Judge reviewed the evidence and isolated the issues of liability, which had been agreed between counsel during the trial, as being	
pp. 19, 27	A. Was the Appellant entitled to terminate the Agreement for a specified period when there is no provision in the Agreement for termination before expiration of that period?	20
	B. Did the Respondents refuse to supply the Appellant with films (as set out in paragraph 6 of the Counter Claim) if so did this entitle the Appellant to terminate the Agreement?	
pp. 69	9. The learned Judge answered both questions in the negative and found that the refusal of the Appellant to accept films from the 14th July 1972 constituted a breach of contract.	
pp. 66		
pp. 67	10. The learned Judge then proceeded to assess the general damages due to the Respondents and found on the basis of Exhibit 7 that the monthly average takings in all four of the Appellant's cinemas based upon 30 days was a gross sum of D 6, 636, and that by virtue of Clause 1 of the said Agreement which provided for the parties sharing the takings on a 50:50 basis, the Respondents were entitled to D 3, 318 per month for the remaining period of nine months making a total of D 29, 862.	30
pp. 88		
pp. 68	11. The learned Judge continued by making reference to a number of cases concerning the assessment of damages and in particular referred to the principle contained in the speech of Lord Haldane in <u>British Westinghouse Co. v. Underground Electric Railways</u>	40
pp. 69	<u>[1912]</u> AC 673 at page 689, and thereafter considered	

whether the Respondents had taken any steps to mitigate their loss and concluded that there was no evidence of any such steps. The learned Judge further considered that the Respondents could have mitigated their loss by marketing their goods and that despite the Respondents having a monopoly in this trade in The Gambia and that their market in The Gambia was saturated, the Respondents nevertheless had a duty to prospect for a market in the neighbouring countries in order to mitigate their loss. This the Respondents had failed to do and upon this basis and the basis that the Respondents had not instituted proceedings in respect of the breach which had occurred on the 14th July 1972 until 6th January 1973 the learned Judge awarded damages for half the aforementioned period of 9 months at the rate of D 3, 318 per month making the total of damages awarded to the Respondents the sum of D 14, 931.

12. On the 3rd September 1973 the Respondents appealed to The Gambia Court of Appeal against the quantum of damages awarded and on a date subsequent thereto the Appellant also appealed to the said Court against the whole decision of the trial Judge and prayed that judgment be entered in favour of the Appellant. By an Order of The Gambia Court of Appeal made on the 28th November 1973 both appeals were consolidated and the appeals heard by the said Court. On the 30th November 1973 The Gambia Court of Appeal allowed the Respondents' appeal and dismissed the Appellant's appeal with costs.

pp. 90

pp. 92

pp. 94

pp. 97-100

13. It is respectfully submitted that so much of the Judgment and Order of The Gambia Court of Appeal that allowed the appeal of the Respondents was wrong. In particular, it is submitted that the learned Justice of Appeal (Sir Phillip Bridges) was wrong in concluding that the Respondent could not mitigate their loss since because of their monopoly in The Gambia they could hardly market their own goods to themselves, and further that the Respondents ought not to be compelled to undertake overseas trading operations because of the breach of contract by the Appellant.

14. The Appellant therefore respectfully submits that this appeal should be allowed with costs, that the decision of The Gambia Court of Appeal should be set aside, and that the judgment of Nithianandan J. should be restored, for the following among other

R E A S O N S

1. BECAUSE there were no grounds on which the original Judgment should have been reversed.
2. BECAUSE the trial Judge correctly assessed the principles whereby the damages owing to the Respondents were mitigated, and correctly applied those principles in arriving at the amount of damages he awarded to the Respondents. In particular the trial Judge correctly considered that the Respondents should have utilised their business connections outside The Gambia to mitigate their loss and further that there was no evidence of any steps taken by the Respondent company to mitigate its loss. 10
3. BECAUSE of the other reasons in the Judgment of Nithianandan J.
4. BECAUSE The Gambia Court of Appeal did not consider whether the Appellant had a monopoly of showing films in The Gambia and that therefore the Respondent company could have supplied the films intended for showing in the Appellant's cinemas to other cinemas not under the control of the Appellant both in The Gambia and elsewhere. 20
5. BECAUSE there was no evidence that the supply of films in other English-speaking countries exceeded the demand, for example, as in Sierra Leone, where the Respondent company through Raidar Ibrahim Raidar had interests and connections in the cinema industry and that therefore it was possible for the Respondent company to carry out its duty to mitigate its loss by prospecting for a market in the neighbouring countries to The Gambia. 30

BRIAN JUBB

No. 11 of 1980

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

O N A P P E A L

FROM THE GAMBIA COURT OF APPEAL

B E T W E E N :

MOHAMED B. A. BENSOUDA Appellant

- and -

ROXY CINEMAS LIMITED Respondents

CASE FOR THE APPELLANT

Philip Conway Thomas & Co.,
61 Catherine Place,
London, SW1E 6HB.

Solicitors for the Appellant.