THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCCS NO. 448 OF 2003

ATOM OUTDOOR LTD:: PLAINTIFF

VERSUS

ARROW CENTRE (U) LTD:: DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO

JUDGMENT:

The Plaintiff and the Defendant executed an advertising Agreement "the Agreement" on the 15/1/2002 by which the Plaintiff agreed to rent advertising space for the erection of the Defendant's bill board at Nakivubo Stadium, and 30 street signs at different locations in Kampala city.

The Plaintiff performed its part of the obligation, but alleged that the Defendant did not pay fully for its services. Consequently the Plaintiff filed the instant suit in this Court for recovery of Shs.6, 542,700- as the outstanding balance due, general damages plus costs. The matter was first referred for mediation to CADER under the Commercial Court Mediation Pilot Project Rules 2002. The claim was settled partly, and the monies paid. The only remaining issue is the Shs.3.Sm for printing the flexi face for the bill board under clause 4 of the Agreement which provides that:

> *"The land lord will print the flexi face for the bill board at a cost of Ug. Shs.3, 500,000- (in words) only. Atom will produce the vinlys for the street signs at no extra charge. The advertiser, Arrow Centre will provide art work ready for printing for the*

large sign only."

This is the cause of the controversy as to who should pay the Shs.3.5m under the Agreement. Mr. Obed Mwebesa, counsel for the Plaintiff contended that this was an extra charge which the Defendant was supposed to pay separately under the clause, read together with clause 3 which provided that:

> *"Payment under this agreement shall be Annual rental of Ug. Shs.15, 000,000- (in words) only for the .12 x 6m bill board and Ug. Shs. 19,500,000- (in words) only for all the 30 street signs. The grand total for both is Ug. Shs.34, 500,000- (in words) only, including VAT 17%"*

Mr. John Fisher Kanyemibwa, learned counsel for the Defendant held the opposite view. He contended on his part that the clause says the landlord (the Plaintiff) is the one who is to pay this cost. It does not say that the Plaintiff was to pass on the cost of the flexi face to the Defendant. The agreement would have been specific, if that was the case. It speaks for itself. It would be stretching the agreement beyond its limits if one is to read into it otherwise.

Alternatively, Mr. Kanyemibwa submitted that the Court should apply the contra proferentem rule and interprete the Agreement against the Plaintiff which drew the agreement.

The issue therefore requires the interpretation of clause 4 of the Agreement dated 15/1/2001. Chitty On Contract.... Edn paras 12 - 044 says:

> *"The common and universal principle ought to be applied, namely, that [an agreement] ought to receive that construction which its language will admit; and which will best effectuate the intention of the parties, to be collected from the whole agreement, and that greater regard is to be had to the dear intention of the parties than to any particular words which may have been used in the expression of their*

intent."

LS Sealy & RJA Hooley in their book — Text And Materials in Commercial Law Butterworths page 14 — 15 also give some guidelines on the interpretation of Commercial contracts. The text says:

> *"The Courts are often called upon to construe the terms of commercial contracts. How do the Courts, and particularly the Commercial Court, set about construing them? The issue was addressed by Sir Robert Golf (now Lord Goff) in a paper entitled "Commercial Contracts and the Commercial Courts published in [1984] LMCLQ 382. His Lordship states that (p. 388):*
>
> *…there is only one principle of construction so far as commercial documents are concerned and that is to make, so far as possible, commercial sense of the pro vision in question, having regard to the words used, the remainder of the document in which they are set, the nature of the transaction, and the legal and factual metrix. He continues (p.391).*
> *…In Commercial transactions, the duty of the Court is simply to give effect to the contract, and not to dictate to the parties what the Court thinks they ought to have agreed, or what a person (reasonable or otherwise) might have agreed if he had read the contract and addressed his mind to the problem which, in the outcome has arisen."*

A similar approach was used by Lord Diplock in the Antaos Cia Navera SA —Vs- Sale - Rederierna - AB, The Antaios [1985] AC. That case concerned the construction of a clause in a standard charter party. This is the relevant part of his address.

> *"We would say that if necessary, in a situation such as this, a purposive construction should be given to the clause so as not to defeat the commercial purpose of the*

contract."

That message is in line with the House of Lords approach in the case of Miramar Maritime Corpn —Vs- Holborn Oil Trading Ltd [11984] AC 676, which dealt with a bill of lading issued under a Charter party in Exxonvor, 1969 in the following speech:

> *"There must be ascribed to the words a meaning that would make good commercial sense if the Exxnonvoy bill of lading were issued in any of these situations, and not some meaning imposed upon a transferee to whom the bill of lading for goods afloat were negotiated, a financial liability of unknown extent that no businessman in his right senses would be willing to incur.*
>
> *I take this opportunity of restating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*

Keeping the above principles in mind, I find that the contract between the parties was a simple one. The Plaintiff described therein as the 'land lord' undertook to provide advertising space to the Defendant described as the "Advertiser". The Defendant agreed to pay rent for it, under clause 3. The parties agreed further under clause 4 that the Plaintiff would produce "the vinlys for the street signs at no extra charge" while the Defendant would provide the artwork for the large sign. The Plaintiff also agreed to print the flexi face for the billboard at a cost of Shs.3.5m. Now, it would not make commercial sense for the Plaintiff to print the flexi face for the Defendant's billboard and pay for it. This is the kind of financial liability referred to in the authorities cited.

The billboard belongs to the Defendant. Why would the Plaintiff pay for printing the flexi face for it?

The Defendant on the other hand stands to gain from the billboard. It is its property. It was also its obligation to provide the billboard for erection. The Defendant is the advertiser. The Plaintiff is the provider of the land. It makes its money from the rent and not from advertisement. To read into the agreement that the Plaintiff undertook to pay the cost of printing the flexi face for the Defendants bill board therefore would in my view lead to a conclusion that flouts business common sense, and must therefore yield to business common sense.

For that reason I rule that the Defendant is the one who is supposed to pay the Shs.3.5m for the printing of the flexi face for its billboard and not the Plaintiff.

As for costs, it is trite law, that costs follow the event. The Defendant shall therefore pay the costs of this suit (See S. 27 CPA).

M.S. Arach - Amoko
JUDGE
17/12/2004

Judgment delivered in the presence of:
1. Godfrey Humbaza holding brief for Obed Mwebesa for the Plaintiff.
2. Okuni - Court clerk.
3. Absent: Defendant & Counsel.

M.S. Arach - Amoko
JUDGE
17/12/2004