

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT DIVISION]

CIVIL APPEAL NO. 16 OF 2014

(Arising from Mengo Civil Suit No. 895 of 2011)

BETWEEN

TIGHT SECURITIES LIMITED:::::::::::::::::::::::::::::::::APPELLANT

AND

1. CHARTIS UGANDA INSURANCE COMPANY LIMITED}

2.BRAZAFRIC ENTERPRISES LIMITED}:::::::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

This appeal was brought by the Appellant against the judgment and orders of the Chief Magistrates' Court of Mengo awarding the 1st Respondent who was the insurer of the 2nd Respondent UGX 5,786,190/= and USD \$7,061 as special damages under the theory of subrogation, and awarding the 2nd Respondent UGX 4,500,000/= as general damages for breach of contract plus interest at 20% p.a. from date of filing the suit and date of judgment respectively until payment in full.

Case Background

The Appellant is a limited liability company providing security services. The 1st Respondent is an insurance company who insured the 2nd Respondent. The 2nd Respondent is a limited liability company dealing inter alia in coffee.

The Appellant entered into a Security Guard Services Standard Contract (hereinafter called the Guarding Contract) with the 2nd Respondent on 25th March 2009, wherein the Appellant agreed to provide security services to the 2nd respondent at its business premises in Bugolobi, Plot 28 A Binayomba Road. The 2nd Respondent was insured by the 1st Respondent under two insurance policies at page 19-41 of the record of appeal. One policy was an All Risks Policy and the other was a Burglary and House Breaking Policy.

On the night of 5th or 6th June 2010, at unknown time, while an employee of the Appellant named Sunday Ronny ID No. 7468 undertook guarding of the 2nd Respondent's premises, thieves broke into the premises of the 2nd Respondent and stole various properties. The guard disappeared from the premises and abandoned his uniform and gun there.

After insurance loss assessors Protectors International Limited made a loss assessment of the premises, the 1st Respondent was duly advised and made payment to the 2nd Respondent. The Appellant also issued a credit note prior to the filing of the suit to the 2nd Respondent in the amount of UGX 500,000/= pursuant to Clause 9 (b) of the Guarding Contract (discussed at length below). After the filing of the suit, the Appellant issued a cheque to the 1st Respondent in the sum of UGX 2,000,000/= thereby bringing the total to the limit of UGX 2,500,000/= set out in clause 9 (b) of the Guarding Contract. The Appellant claims no liability of any additional sums (See Record of Appeal page 248).

The 1st Respondent filed a suit in the lower court against the Appellant for recovery of the sums paid to the 2nd Respondent under the theory of subrogation. The 2nd Respondent also

claimed for general damages being the difference between what was paid to it by the 1st Respondent and the value of the lost property.

In response, the Appellant claimed that they were exempted from liability to the Respondents for any sum exceeding UGX 2,500,000/= because the Guarding Contract limited their liability to only that sum of money.

The Guarding Contract was signed by both the Appellant and the 2nd Respondent, and each page, including the page containing the limitation of liability, was initialed by the client. The Record of Appeal at p. 233, Part 9 included several limitations of liability. Clause 9 (a) provided an exemption clause as follows:

“(a) The Company shall not be held liable in contract, negligence, or otherwise for any loss or damage to the property being guarded by its employees or for bodily injury sustained by the client or his family members residing with him or his servants or employees or agents unless it is clearly established by the Client that such loss/damage/injury was directly or indirectly caused due to the negligence (willful or otherwise) or with the connivance of one or more employees of the Company, while such employee(s) was/were present in the process of discharging his/their normal duties on the premises of the client. PROVIDED ALWAYS that any such liability shall not under any circumstances extend to any consequential or indirect loss sustained or purported to have been sustained by the Client or his/her servants or employees.”

This clause purported to exempt the Appellant of liability except in the case of Appellant’s negligence or connivance. It also limited liability by exempting consequential or indirect loss.

The second clause in contest is 9 (b), which stipulated a limitation of liability as follows (bolded text in original):

*“(b) Liability as in **9(a)** above shall be limited in any case to **Ug. Shs.2, 500,000/= (Uganda Shillings Two Million Five Hundred Thousand)** only. However, any claim*

by the Client under this clause for an amount of Ug. Shs. 250,000/= or less shall not be entertained by the Company nor would any other liability attach under this clause.

In a joint case scheduling conference memorandum filed in the lower court, four issues were proposed, namely;

1. Whether the Defendant (Appellant) breached the security guard services agreement between itself and the 2nd Plaintiff.
2. Whether the 2nd Plaintiff (2nd Respondent) is entitled to compensation from the defendant in excess of the sum of UGX 2,500,000/= set out in the limitation clause contained in the security guard services agreement.
3. Whether the 1st Plaintiff (1st Respondent) is entitled to claim from the defendant in respect of the burglary and theft incident under the doctrine of subrogation in respect of the security guard services agreement made between the 2nd Plaintiff (2nd Respondent) and the Defendant (Appellant).
4. Remedies

However, when the matter came up for hearing, both counsel informed court that they had agreed not to call oral evidence but they would instead file written submissions on only one legal issue, namely; whether the 2nd Plaintiff (2nd Respondent) is entitled to compensation from the defendant in excess of the sum of UGX 2,500,000/= set out in the limitation clause contained in the security guard services agreement. Written submissions were accordingly filed and the trial Chief Magistrate, His Worship Vincent Emmy Mugabo determined the matter on that basis and entered judgment in favour of the plaintiffs (Respondents) based on his finding that the exemption clause in 9 (a) did not exempt the Appellant from liability due to negligence and connivance of the Appellant's employee, who committed the theft while in the course of his employment. Therefore, under the provision for negligence and connivance in the exemption clause, the Appellant was found liable for the 2nd Respondent's loss. The trial Chief Magistrate found further that since the Appellant had fundamentally breached his contract with the 2nd Respondent when the theft by employee Sunday Ronny occurred, the Appellant could not rely on the limitation clause in 9 (b), which limited liability to UGX 2,500,000/=.

On the 4th issue of remedies, the trial Chief Magistrate then turned to examine if the 1st Respondent was entitled under the theory of subrogation to the payment of subrogated sums from the Appellant. Subrogation is the right of an insurer who has paid for a loss to receive the benefit of all the rights and remedies for the insured against the third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. See: ***Suffish International Food Processors (U) Ltd & Anor v Egypt Air Corporation SCCA No. 15 of 2001 as per Oder, JSC (RIP)***. The trial Chief Magistrate found that the principle of subrogation applied and awarded the 1st Respondent the amount it had paid to the 2nd Respondent under the two insurance policies, in the sums of UGX 5,796,190/= and USD \$7061. These amounts were subject to 20% p.a. interest from the date of judgment until payment in full.

After examining the appropriate remedies for the 2nd Respondent and considering the unpaid loss to it based on the loss assessment report, the trial Chief Magistrate awarded to the 2nd Respondent UGX 4,500,000/= in general damages plus interest at 20% p.a. from date of judgment till payment in full. Costs of the suit were also awarded to the Respondents.

Grounds of Appeal

The five grounds of this appeal as set out in the Memorandum of Appeal are that;

1. The learned trial Chief Magistrate erred in not finding that the breach if any upon which the Respondents based their claim against the appellant was expressly covered by the exemption clause in the Security/Guarding Contract, namely Clause No. 9 of Exhibit P3 or D1 of the Security/Guarding Contract.
2. The learned trial Chief Magistrate erred in fact and in law in holding that there was a fundamental breach of the Security/Guarding Contract between the 2nd Respondent and the Appellant which entitled the 2nd Respondent to exercise its right to repudiate the contract.
3. The learned trial Chief Magistrate erred when he failed to properly evaluate the evidence on the Court Record and thereby came to the wrong decision entering Judgment for the Respondents.

4. The learned trial Chief Magistrate erred in fact and in law in granting the 1st Respondent damages in excess of the sum of Shs. 2.5m set out in the Security/Guarding Contract and already settled by the Appellant at the time of the Judgment.
5. The learned trial Chief Magistrate erred in fact and in law in granting the Respondents the reliefs set out in the Judgment.

At the hearing of this appeal, Ms. Atukunda faith appeared for the appellant and Mr. Patrick Alunga appeared for the 1st respondent. There was no appearance for the 2nd respondent. Both counsels filed written submissions which I have duly considered in this judgment. Counsel for the Appellant in his submission states that the above grounds of appeal can best be summarized into one issue as was framed in the lower court, namely; whether the 2nd respondent is entitled to compensation from the appellant in excess of the sum of UGX 2,500,000/= set out in the Guarding Contract. In that regard, he argues that the 2nd Respondent is not entitled to compensation from the appellant in excess of the sum of UGX 2,500,000/= as set out in the limitation of liability found in the Guarding Contract. Furthermore, that the 1st Respondent is not entitled to recovery under the principle of subrogation to any amount in excess of this sum.

The Appellant's first contention is that the trial Chief Magistrate erred, when, on page 4 of his Judgment line 13-19 (Record of Appeal at p.268), he found that the defendant admitted that the burglary and theft occurred as a result of the connivance of the staff of the Appellant's employee Sunday Ronny. The Appellant's counsel argues that there was no such admission that the theft and burglary occurred as a result of the connivance of the Appellant's employee and contends that the trial Chief Magistrate was not entitled to decide a case on matters not agreed upon or on issues not framed and canvassed by the parties, and the decision should therefore be set aside.

The Appellant's 2nd contention is that even if there had been an admission on the record that the Appellant's guard had been involved in the theft, that the theft did not constitute a fundamental breach of the contract. Therefore, the limitation of liability under the Guarding

Contract should limit the Appellant's liability to no more than UGX 2,500,000/=. The Appellant makes several arguments in support of this contention.

It is argued firstly, that for the respondent to rely on the doctrine of fundamental breach, it had to be established through evidence that the appellant had totally failed in its primary duty and obligation of deploying guards at the premises for all the time that the contract was in subsistence and on the night of the theft.

Secondly, that the trial Chief Magistrate failed to correctly draw a distinction between exemption and limitation clauses, and relied heavily on exemption clauses in his decision thereby making wrong conclusion. Counsel argued that what appears in clause 9 (a) and (b) is not an exemption clause but rather a limitation clause which court is required to consider with more sympathy in a manner promoting and respecting a business and commercial sense. Counsel for the Appellant argues that the 2nd Respondent freely engaged in the Guarding Contract and had the ability to hire another security company that did not have the same limitation on liability.

Thirdly, that while subrogation is a valid principle, the 1st Respondent was not entitled to any amount in excess of the amount contracted between the 2nd Respondent and the Appellant of UGX 2,500,000/=. The Appellant notes that both insurance policies were made after the Guarding Contract was entered into, and that clauses 1 and 8 of the Guarding Contract enjoined the 2nd respondent to reduce and minimize its risks and loss by taking out insurance cover.

I will now proceed to consider the single issue canvassed in this appeal but I will break it down into sub-issues for ease of discussion. As I do so, I am well aware of the role of this court as the 1st appellate court as was discussed by Mulenga JSC (RIP) in **Fr. Narsensio Begumisa and Ors v Eric Tibebaga S.C.CA No. 17/2002**. He stated thus:

“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact

as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions”.

Sub-issue 1: Whether the Trial Chief Magistrate erred in finding that the burglary and theft occurred as a result of connivance of the Appellant’s employee.

The Appellant in its arguments urges this court to find that it made no admission of liability due to either negligence or connivance for the acts of its employee Sunday Ronny. In line with this argument, the Appellant states that the only agreed fact was that at the time of the theft and the burglary, the premises were being guarded by the defendant company. It is therefore contended that the trial Chief Magistrate was wrong in making assumption of facts and importing facts into the record which had not been agreed upon yet, and the issue he had been called to adjudicate on was a question of law and not of fact. The Appellant cites the case of *Nairobi City Corner v. Thabiti Enterprises Ltd (1995-98) EA 231*, which states that the court has no jurisdiction to decide a case on matters not agreed upon. The court in that case stated: “A judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended”.

In reply, the Respondents rely on *Oriental Insurance Brokers Ltd. v. Transocean (U) Limited SCCA No.55 of 1995*, which states that judges are given discretion to frame issues. Based on that authority, it was submitted for the Respondents that it is settled law in Uganda that a trial judge may frame and/or amend issues as may be necessary for determining the matters in controversy between parties and come to a correct decision.

In determining this issue this court has looked at the lower court’s judgment to see the basis of the trial Chief Magistrate’s finding that the Appellant admitted that its employee connived with the thieves. To that end, I have looked at the Record of Appeal and at page 269 thereof I note that the trial Chief Magistrate stated at page 5 of his judgment as he concluded on the issue as follows:

“When clause 9 is properly analyzed it is to the effect the exemption is effective unless there is negligence, connivance of employees while the employees were discharging their normal duties. The guard by his actions of abandoning the site leaving there his uniform and ammunition are clear indications that he connived with other people and actively participated in the burglary and theft. The provision to the exemption clause therefore makes the company liable.

The defendant was contracted to provide security guard services to minimize the risk of theft and burglary and unfortunately its staff perpetuated the occurrence of the risk occasioning loss and damages to the 2nd plaintiff. On the authority of SDV Transami (U) Ltd (supra) to permit the defendant to get away with it would defeat the purpose for which the contract was made and result into injustice.”

The above excerpt from the judgment gives the basis of the trial Chief Magistrate’s conclusion. The question is therefore whether he erred in coming to that conclusion. In answering this question I found very informative a letter signed by Omino Eguyu, the Appellant’s Investigations Coordinator, dated 11th June 2010 addressed to the 2nd Respondent. It is found at page 48 of the Record of Appeal. Parts of the letter, so far as it is relevant to this issue, states as follows:

*“Management of Tight Security Ltd. Would like to report to you that the above mentioned incident which took place in the night of 5th – 6th of June 2010 at unknown time in which our guard ID7468 **Sunday Ronny colluded with yet unknown person(s), broke into the offices/Stores at your location whereby they stole various merchandise and office equipments.***

The incidence was discovered at about 0400am when our night Patrollers arrived at the location for the second check, only to find the gate wide open and the guard was nowhere to be seen. He had abandoned the Company uniform and the gun at the location.

We have given to the police, Biodata of the guard indicating his home in Pader District, Aruu County, Atanga Sub County, Pungole Parish and Laraba Village.

We are also liaising with sister Security Organization in Pader District for his possible arrest and prosecution.

...

We sincerely apologise for the incident.” [Emphasis added].

It is clear from the above letter that the Appellant did acknowledge its employee's involvement in breaking into the offices of the 2nd Respondent and stealing various merchandise and office equipment therein. My understanding of the letter is that the author came to the conclusion that the Appellant's employee colluded with the thieves because of his conduct of abandoning the duty station leaving his gun and uniform there. It is the same reason for the trial Chief Magistrate's conclusion.

The words “collusion” and “connivance” are synonym. It is therefore my firm view that the letter clearly established that the 2nd Respondent's loss was directly caused due to the connivance of the employee of the Appellant while he was present in the process of discharging his normal duties on the premises of the client as stipulated by clause 9 (a) of the agreement. I believe the Appellant paid UGX 2,500,000/= to the 2nd Respondent because it had accepted liability for its employees action on that basis. In the circumstances, I do not agree that the learned trial Chief Magistrate assumed facts and imported them into the records as contended by the Appellant. Rather, the conclusion was based on the documentary evidence on record and logical reasoning as indicating above. In the premises, I find that the

Trial Chief Magistrate did not err in coming to the same conclusion. Therefore, this issue is answered in the negative and the related ground of appeal must fail.

Sub-issue 2: Whether the Trial Chief Magistrate erred in law and in fact in awarding damages to the 1st Respondents in excess of the UGX 2,500,000/= set out in the Guarding Contract.

What is contested in this issue is the award of damages over and above the sum of UGX 2,500,000/= to which the Appellant's liability was limited under the contract. Therefore, the question is whether or not the court should enforce that limitation of liability clause. In order to address this question, I will first determine whether conduct of the Appellant's employee amounted to a fundamental breach of the Guarding Contract. Then, I will turn to address both the exemption clause and limitation clause found in the Guarding Contract, to determine if a fundamental breach nullifies the limitation of liability. In examining these issues, I will construct the contract as a whole to determine whether or not the limitation of liability clause should be enforced. Finally, I will address the issue of remedies, including the rights of the 1st Respondent insurance company against the Appellant under the principle of subrogation.

Fundamental Breach

The first question is whether or not the Appellant committed a fundamental breach of the contract when its employee participated in burglarizing and stealing from the store of the 2nd Respondent. In a factually similar case to the present appeal, ***Llyods Forex Bureau v. Securex Agencies (U) Ltd. Civil Suit No. 358 of 2012***, it was held that a fundamental breach occurred when a guard hired to provide security services robbed the plaintiff. The court found as follows:

“The plaintiff has proved that it lost a sum of Uganda shillings 77,142,000/= through the acts of the defendants servants. It could have been argued that the defendant's servant was on a frolic of his own. However because the defendant's firm provides security services and is

*supposed to prevent robbery of the plaintiffs assets i.e. money, **the robbery was a fundamental breach that went to the root of the contract and the defendant is responsible for recruiting upright guards to work at such facilities.** In the circumstances, the defendant is liable for the loss caused to the plaintiff.”*

Just as the defendant’s employee in **Llyods (supra)** robbed the client when he was under contractual obligation to protect the client’s property from robbery, the Appellant in the present case conceded that its employee colluded with the thieves and broke into the premises of the 2nd Respondent thereby stealing from the client. That employee was under contractual obligation to provide guarding services to prevent property damage and loss. Therefore it goes without saying that just like in the **Lyods** case (supra), the actions of the guard in this case also went to the root of the Guarding Contract.

The Appellant has urged this court to find that it only contracted to “minimize” the risk of loss or damage. For that position, Clause No. 1 of the Guarding Contract found at page 149 of the Record of Appeal was relied upon. It states as follows:

“.....Where the Company provides Security Guards.....and their job shall be to minimize the risk of loss or damage by fires, theft, burglary, or malice. Tight Security Ltd recommends that the client use a combination of Electronic Remote Alarm Systems and guards to minimize the risk of loss or damage by fires, thefts, burglary or malice. This, however, does not preclude the Client from insuring his premises.”

I agree that the guarding service provided by the Appellant was merely to “minimize” the risk of burglary because it is obviously not possible to completely eliminate risk. However, I must point out that judging from the conduct of the guard on duty on the fateful night, he did not only fail to minimize the risk but he instead increased it by joining the thieves in breaking into the premises and participating in the robbery. This means that the Appellant failed in its duty of minimizing the risk of loss by employing a person without solid moral character who

ended up doing the opposite of what he was deployed to do. In the premises, it is my finding that there was a fundamental breach because the Appellant failed to minimize the risk of loss for his client which was the core of the contract.

Exemption Clause

This court has already made a finding under sub-issue 1 that the burglary and the theft occurred due to connivance of the Appellant's employees. Clause 9 (a) of the Guarding Contract provided that the exemption would not apply if there is connivance by the employee of the Appellant. It therefore follows that since the Appellant conceded that its employee colluded with the robbers who are still at large the exemption clause cannot apply in this case. That leads me to consider the effect of the limitation clause on the Appellant's liability and if indeed the trial Chief Magistrate erred in awarding damages over and above the limitation.

Limitation Clause

Clause 9 (b) of the Guarding Contract stated that "in any case," all liability under the Guarding Contract was limited to UGX 2,500,000/=. As I consider this clause the most central question would be whether or not the limitation clause in this case should be enforced, even when there is a fundamental breach. In doing so, I will examine some cases which dealt with the principles applicable to limitation clauses which are similar in many respects to the standard used in analyzing the validity of exemption clauses.

I have had the benefit of reading the decision in the case of *L'Estrange v. F. Graucob (1934) ALL ER at page 16*. The principle stated in that case is that when a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

Lord Denning MR observed in *Levison and Another v. Patent Steam Carpet [1978] 69* that effect should not be given to an exemption clause, if it is unreasonable, particularly in

standard form contracts where there is inequality of bargaining power. He then stated from pages 78-79 in reference to the facts of that case as follows:

*“The conditions were at the back of the standard form. The customer was asked to sign them without being given any opportunity of considering them or taking objection to them. It is a classic instance of superior bargaining power, to which Lord Diplock drew attention in **Instone v. A Schroeder Music Publishing Co. Ltd. [1974] 1 W.L.R. 1308, 1316:***

“This [standard form contract] is of comparatively modern origin. It is the result of concentration of particular kinds of business in relatively few hands....The terms...have not been the subject of negotiation between the parties to it, or approved by any organization representing the interest of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: ‘If you want these goods or services at all, these are the only terms which they are obtainable. Take it or leave it.’”

I have also had the privilege of reading **Petrocity Enterprises (U) Ltd. v. Security Group (U) Ltd. HCT – 00 – CC – CS – 869 – 2004**, at page 10 to 11, where Kiryabwire, J (as he then was) examined the legal effect of a limitation clause which limited a security guard company’s liability to UGX 800,000/= and stated thus:

*“According to **Cheshire, Fifoot & Furmston’s Law of Contract 14th Edition at page 174;***

If a document is to be regarded as an integral part of the contract, it must next be seen if it has, or has not, been signed by the party against whom the excluding or limiting term is pleaded. If it is unsigned, the question will be whether reasonable notice of the

term has been given.”

Black’s Law Dictionary 7th edition at page 1087 defines notice to mean;

“A legal notification required by law or agreement or imparted by operation of law as a result of some fact (such as recording of an instrument) definite legal cognizance actual or constructive of an existing right or title.

A person has notice of a fact or condition if that person

- 1. has received a notice of it*
- 2. has actual knowledge of it*
- 3. has reason to know about it*
- 4. knows about a related fact*
- 5. Is considered as having been able to ascertain it by checking an official filling or”*

He then held from pages 10 to 11 in reference to the facts of that case as follows:

“A party to a contract can only seek the protection of an excluding or limiting clause if adequate notice of it was brought to the attention of the other party. A review of the service order contract shows that provision is made on both sides of the said document for both parties to sign. The flip or back side of the contract contains the contractual small print which has item 4 as the limitation of liability clause. This flip/backside has a provision for signature which none of the parties has signed. In such a situation the limitation of liability clause is ineffective as against a claim of vicarious liability.”

In ***SusseAtlantiqueSocieteD’armement Maritime SAV vs RotterdamscheKolenCentrale (1966) 2 ALL ER 61***, the Court upheld the principle of freedom of contract and stated that an exemption clause cannot be nullified merely because it exempted or limited a fundamental

breach. The Court noted that in each case, the purpose of the contract as a whole must be considered while determining whether or not to uphold an exemption clause. **Viscount Delhorne stated;**

*“In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract and in the older cases I can find no trace of it. **In each case, not only have the terms and scope of the exempting clause to be considered but also the contract as a whole** (emphasis mine). In the cases that I have cited above, I think that on the construction of the contract as a whole, it is apparent that the exempting clauses were not intended to give exemption to the consequences of the fundamental breach. Any clause that does so must be expressed in clear and unambiguous terms..... It must be apparent that such is its purpose and intention.”*(Emphasis added).

In the latter case of **Photo Production Ltd vs Securicor Transport Ltd (1980) 1 ALL ER 556**, the House of Lords reviewed their earlier decision in the **SusseAntlantique** case (supra) and upheld their earlier decision that:

“[I]n commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated but there is everything to be said leaving the parties to apportion the risk as they think fit and for respecting their decisions.”

Further that:

“There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties’ position when there was a breach of contract (whether fundamental or not) or by which

*an exception clause could be deprived of effect regardless of the terms of the contract because the parties were free to agree whatever exclusion or modification they of their obligation they chose and **therefore the question whether an exception clause applied when there was a fundamental breach of a contractual term or any other breach, turned on the construction of the whole of the contract and because the parties were free to reject or modify by express words both their primary obligations to do that which they had promised and also any secondary obligations to pay damages arising on breach of the primary obligation.***” (Emphasis mine).

In the ***Photo Production Ltd*** case (supra), the House of Lords overturned the Court of Appeal decision where it had found that there had been a fundamental breach of the contract and the defendants (Securicor Ltd) were precluded from relying on the limitation of liability clause. The House of Lords upheld the exception clause upon construing it vis-a-vis the whole contract.

Lastly, I find persuasive another decision by Kiryabwire, J 9as he then was) in ***Thunderbolt Technical Services Ltd vs Apedu Joseph & K.K Security (U) Ltd; HCCS No.340 of 2009***, which applies the standard as set out in ***Suisse Atlantique*** (supra) and ***Photo Production Ltd*** (supra). In this case, a private security guard abandoned his uniform and identification, which were found on the premises where the theft had occurred. While there was found to be a fundamental breach of the contract due to the theft by the security company’s employee, the limitation of liability clause was found to be valid. Citing ***Suisse Atlantique*** (supra), the trial Judge found as follows:

“On the whole, I find that the limitation of liability clauses were clear and brought to the attention of the plaintiff at the time of signing the contract. In such circumstances a prudent person would have to insure their premises against such risk, I find that the limitation of liability clause is applicable and enforceable.”

While the trial Judge in that case found the limitation clause to be enforceable and only awarded special damages of UGX 550,000/= as stipulated under the contract, with respect to general damages he took a slightly different approach and awarded the sum of UGX 15,000,000/= to compensate the plaintiff for his loss due to theft by the defendant's employee.

In summary, standard form contracts may be enforceable when there is adequate notice and signatures by the parties. In specifically addressing the enforceability of a clause that places limitation on liability, the contract as a whole must be considered to see where the parties apportioned the risk. The existence of a fundamental breach does not in every instance nullify a limitation of liability clause if the agreement as a whole clearly contemplates the breach in advance and apportions the loss.

In the case at hand, while the Guarding Contract was a standard form agreement, the 2nd Respondent initialed each page of the Guarding Contract and signed the last page. Further, the Guarding Contract used a bolded font for parts of 9(b), bolding the phrases "9(a)" and "Ug. Shs.2, 500,000/= (Uganda Shillings Two Million Five Hundred Thousand)." These facts are distinguishable from those in ***Petrocity (supra)*** where the trial Judge found that the limitation of liability clause was not effective because the parties had not signed and because the clause was in fine print on the back side of the document. Furthermore, unlike the conditions printed on the back of the form in ***Levison and Another (supra)***, where the customer was not given opportunity to review the terms, there is no evidence indicating that the 2nd Respondent lacked the ability to review the terms of the Guarding Contract in this case which were clearly spelt out at page two thereof which bears the signature of the 2nd Respondent's representative. I therefore find that the 2nd Respondent was well aware of the limitation clause at the time it signed the Guarding Contract.

Regarding the issue of bargaining power, I find that while the Guarding Contract is clearly designed to cater for the interest of the Appellant, this did not prevent the 2nd Respondent from seeking to amend the terms of the agreement or from seeking the services of another guarding company that offered their services on different terms. Unlike an average consumer,

the 2nd Respondent is a business and cannot therefore be said to have such limited bargaining power that enforcing the standard form contract against it would be unreasonable. Business entities are free to engage in contracts as they see fit, and it is not for the court to interfere with freedom of contract.

Having dealt with the exemption clause and the limitation clause as above, I will now turn to consider whether the limitation of liability clause in the Guarding Contract in this case is enforceable given the fundamental breach by the Appellant. In order to do this, I will continue to examine the contract as a whole to see where the parties originally apportioned the risk in the case of the fundamental breach that occurred, namely a theft by the very security guard employed to protect the premises.

The limitation clause has been sufficiently outlined above, and indicates that the 2nd Respondent was aware that any “loss/damage/injury” caused by negligence or connivance by employees would be limited in any case to UGX 2,500,000/=. Theft and burglary committed by an employee would fall squarely under connivance by an employee resulting in loss. After seeing the bolded text indicating that such loss would be limited to UGX 2,500,000/= and initialing the bottom of the page, the 2nd Respondent was put on notice that even in the case of negligence or connivance the recovery would be limited to that amount.

Additionally, the Guarding Contract recommended to the 2nd Respondent in Clause 1 thereof to “use a combination of Electronic Remote Alarm Systems and guards to minimize the risk of loss or damage by fires, thefts, burglary or malice. This however, does not preclude the client from insuring the premises.” (See page 232 of the Record of Appeal). Under Clause 8 titled “Insurance” on page 233, the clause states that:

“The Client shall adequately insure and keep insured for the duration of this Contract, with reputable insurers, any premises and items of property therein as are of insurable nature to be protected against loss or damage by fire, theft, burglary, failure of alarm systems and such other reasonable risks. At the request of Tight Security Ltd or any of its Directors the Client

is under an obligation to produce the policy/policies of insurance in connection therewith.”

The 2nd Respondent took heed of the insurance cover requirement in the Guarding Contract, and purchased two insurance policies. One was an All Risks Policy and the other a Burglary and Housebreaking Policy. (See pages 1-13 and 12-23 of the Record of Appeal). These policies were intended as cover for the type of loss incurred by the 2nd Respondent, and the 1st Respondent duly compensated the 2nd Respondent for their loss as per these policies after loss assessors made an assessment.

Because the Guarding Contract specifically and clearly limited liability to UGX 2,500,000/= and recommended and required insurance cover that would insure the premises in the case of theft, I find that the contract specifically apportioned the risk of loss in the case of theft to the 1st Respondent on any amount in excess of UGX 2,500,000/=. Therefore, the limitation clause is enforceable because both parties were aware of the risk of loss by burglary and theft at the time the contract was signed, and the 2nd Respondent in cognizance of that took out two insurance cover policies. In the premises, it is my finding that despite the fundamental breach of the contract by the Appellant, the contract as a whole anticipated this and assigned the first UGX 2,500,000/= in loss to the Appellant, and any additional loss to the insurer who is the 1st Respondent.

I now turn to consider the principle of subrogation upon which the trial Chief magistrate based his decision to award special damages to the 1st Respondent.

Subrogation

The entire basis of the principle of subrogation is founded on a “binding and operative contract of indemnity.” *Suffish International Food Processors (U) Ltd & Anor v. Egypt Air Corporation SCCA No. 15 of 2001 Justice Oder (RIP)*. Subrogation only provides a third party insurer with the rights and remedies available to the insured party.

*“According to the doctrine of subrogation, the insurer is entitled only to those remedies, rights or other advantages which are available to the assured himself.” See **Halsbury’s Laws of England, Vol. 25 (4th Ed)**, para 317. And it was held in the case of **Castellain v Preston (Supra) at P 388, that,***

“insurer is subrogated to any claim of any character which the assured is entitled to bring in proceedings against a third party to diminish his loss.”

X-Tel Limited and Insurance Company of East Africa (U) Limited v. Security 2000 Limited, HCT – 00 – CC – CS – 163 – 2004.

The instant case would be an appropriate application of the subrogation principle, because the 2nd Respondent and 1st Respondent had an indemnity relationship, whereby the 2nd Respondent was insured by the 1st Respondent under two insurance policies. However, as concluded above, the rights, remedies, and advantages of the 2nd Respondent as against the Appellant were limited to recovery of UGX 2,500,000/= as per the limitation clause. Therefore, under the theory of subrogation, the 1st Respondent is only able to seek from the appellant up to UGX 2,500,000/= to compensate for the amount that it paid to the 2nd Respondent under the insurance policies. To allow the 1st Respondent to recover more than the amount expressly agreed upon between the 2nd Respondent and the Appellant would accord more rights to the 1st Respondent than were present in the original agreement. Furthermore, the 1st Respondent insured the 2nd Respondent subject to the Guarding Contract between the 2nd Respondent and the Appellant, since the Guarding Contract preceded the insurance policies. In so doing, the 1st Respondent assumed the same level of risk as the 2nd Respondent under the Guarding Contract. It is appropriate therefore to limit the 1st Respondent’s rights to those originally contemplated between the 2nd Respondent and the Appellant.

In conclusion, it is my finding that despite the presence of a fundamental breach by the Appellant, the limitation clause should be upheld in light of construction of the Guarding

Contract as a whole, and therefore the total recovery under the Guarding Contract should be limited to the UGX 2,500,000/= which is not in dispute that the Appellant has already paid to the 2nd Respondent. Therefore, there is nothing recoverable from the appellant under the principle of subrogation the entitlement having been fully paid to the 2nd Respondent. In the circumstances, the trial Chief Magistrate erred in awarding special damages to the 1st Respondent in the amounts of UGX 5,796,190/= and USD \$7,061 under the principle of subrogation. This answers the 2nd sub-issue in the affirmative and so ground 4 of the appeal must succeed. The order for special damages is accordingly set aside.

Sub-issue 3: Whether the Trial Chief Magistrate erred in awarding general damages to the 2nd Respondent.

I note that on page 6 of the trial Chief Magistrate's judgment found at page 270 of the Record of Appeal, he awarded general damages for breach of contract to the 2nd Respondent. It is trite that general damages are meant to compensate a party for the loss, damage or injury he or she has suffered. Upon considering that principle and the fact that the Appellant fundamentally breached the Guarding Contract thereby causing injury to the 2nd Respondent, I find that the trial Chief Magistrate did not err in awarding the general damages as this case merited the same. Therefore, I uphold the award of general damages of UGX 4,500,000/= to the 2nd Respondent with interest of 20% p.a. from the date of judgment till payment in full.

Costs

Considering that some of the Appellant's grounds of appeal failed, I will award 50% of the taxed costs of this appeal and in the lower court to the Appellant. Since the 2nd Respondent did not participate in this appeal and its award in the lower court was not affected, the 50% costs of the appeal awarded to the Appellant shall be borne by the 1st Respondent alone.

I so order.

Dated this 13th day of November 2015

Hellen Obura

JUDGE