THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KANPALA

CIVIL SUIT NO. 424 OF 1994

OYESTER INTERNATIONAL LTD:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: PLAINTIFF

- versus -

AIR GUIDE SERVICES LTD:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: - HON. MR. JUSTICE J.H. NTABGOBA - PRINCIPAL JUDGE

RULING

This is an application for directions brought under order 1 rule 18 of the Civil Procedure Rules by the defendant in HCCS. NO. 424 of 1994 following a third party notice issued under order 1 rule 21 on behalf of the defendant, Air Guide Services, Ltd upon one of its directors, named Taremwa Barnabas (hereinafter referred to as the respondent).

The facts disclosed in the affidavit of Ms. Edith Byanyina sworn on 4th May 1995 and the address to me of Mr. Bruce Kwarisiima, Counsel for the applicant, are that the respondent who was and still is a Director of the applicant Company Contracted work in the name of the Company but for is personal and private benefit. He committed or is alleged to have committed a breach of the Contract as a result of which HCCS. No. 424 of 1994 was instituted against the applicant Company by N/S. Oyster International Agencies, Ltd (hereinafter to be referred to as the plaintiff Company).

The applicant Company is seeking an order of indemnity against Barnabas Taremwa (to be referred to as the respondent) for whatever decretal award the Plaintiff Company may obtain against the defendant company. Under the suit the plaintiff company is seeking a sum of shs. 13,879,000/= plus interest at the bank rate from the date of the cause of action till payment in full, plus general damages and costs of the suit. The defendant/applicant company is seeking in this application to be indemnified by the respondent in respect of whatever relief the plaintiff may obtain against the defendant.

The argument of Mr. Tumusingize, Counsel for the respondent is that, for this application to succeed, the applicant must prove that there was a Contractual relationship between the applicant and the respondent, and that the cause of action in the application against the respondent must be the same as the cause of action by the plaintiff against the defendant. Counsel Tumusingize referred me to the case of LUTAAYA - vs - WAMBARALI [1972] ULR. 118. Indeed, in that case it was decided, interalia, that the applicant (defendant) had not clarified whether the claim for indemnity arose out of an express contract or implied contract; that neither had been proved and therefore, no order for indemnity would be made. From that decision, it cannot be conclusively said that a contract between an applicant/defendant and a respondent/third party is the only basis for indemnity.

I am fortified in this view by the words of the Privy Council in the case of EASTERN SHIPPING CO. - vs - QUASH BENG KEE [1924] A.C. 177 at page 182 that:-

> "A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnify need not arise from a contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him. It may arise (to use LORD ELDON's words in WARING - vs - WARD: a case of vendor and purchaser), in cases in which the court will independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the Vendor against the personal obligation of the vendor. These considerations were all dealt with by the Lord Justices in BIRMINGHAM AND DISTRICT LAND CO. –vs- LONDON AND NORTH WESTERN RLY CO."

Arising from the above words of LORD ELDON, it is safe to conclude that the instant case falls under the cases in which the defendant would be entitled to indemnity from the respondent both

in equity but also under the doctrine of fiduciary relationship between a Director and his Company. (See PARMER - vs - LEWIS (1873)8 Ch. App. 1035; BOSTON CO. - vs - ANSELL (1883) 59 Ch. D 359 and EDEN -vs- RISDALE (1889) 23 QBD. 568.

It is to be remembered that in the instant case, the relationship between the applicant Company and the respondent that of Director and his Company. It cannot be said that the Company and its director, pursuant to Article 54 of the Company's Articles of Association, are not bound by a contract of indemnity since there is no express or implied provision to that effect in the article. Though it has been stated that the respondent is a director of the applicant Company the memorandum and articles of association handed in to Court disclose only that he is one of Company's promoters and a shareholder. Since, however, the respondent or his advocate has not disputed the allegation that he is a director of the applicant company, he must be taken to be one.

On the contract providing f or indemnity, article 54 of the Articles of Association of the applicant Company, which is word for word as Article 156 of Table A of the First Schedule to the Company's Act, provides that:-

> "Every Director, Managing Director, agent, auditor, Secretary and other Officer for the time being of the Company shall be indemnified out of the assets of the Company, against any liability incurred by him in defending any proceedings whether Civil or Criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under section 405 of the Act in which is granted to him by the Court."

If the articles of association of the applicant company form a contract between the company itself and the respondent director, and they do, there is no explicit provision therein to the effect that a director has an obligation towards the company to indemnify it, in certain circumstances, such as in the instant case where the director is alleged that he entered into a contract with the plaintiff company in the name of the defendant (applicant) company but for his own benefit. Whereas article 54 of the company's Articles of' Association provides for the company to indemnify a director, it does not provide that the director should or can indemnify the company. In that case therefore, for the director to indemnify the company there must be other relationship than contractual between the two under which an indemnity is available to the company in the

case of the instant nature. I must state again that here I am dealing with a situation where the respondent director is being required to indemnify the applicant/defendant company for any relief that may be awarded to the plaintiff company against the applicant/defendant company, arising out of a suit instituted against the applicant/defendant company by the plaintiff company as a result of a breach of contract between the plaintiff company and the respondent/director in the name of the applicant/defendant company but for the benefit of the respondent director. I think the relief lies in the principle of equity whereby a director stands to his company in such a fiduciary relationship that he must account to the company for any benefit that accrues to him through his dealings with third parties in which he deals with them purportedly on behalf of his company.

That principle is to be found in the statement of law repeated in the three 19th Century Cases already cited, namely, PARKER - vs - LEWIS; BOSTON DEEPSEA FISHING AD ICE CONPANY - vs - ANSELL, (1888) 59 Oh. D. 599 and EDEN -vs- RISDALE (1889) 23 QBD. 568. The principle applicable and common to all the three cases is that “any secret benefit obtained by a director by reason of his position, or in the course of the Company’s business, whether it takes the form of a Commission, or of a qualification shares, or a sum of cash or of any other sort of benefit, renders the director accountable to the company for the value of the benefit. ‘ (See also Palmers Company Law, Vol.1, 22nd Edition, Paragraph 60 - 09 at p.678).

If in the instant case the respondent director, in his business dealings with the plaintiff company, purportedly on behalf of or in the name of the company, obtained for himself some benefits, the defendant company would be entitled, under the above principle, to that benefit. What about the present situation where, in the course of his business, in the name of the defendant company, with the plaintiff company, purportedly for the benefit of the company, but in fact for his own benefit, he commits a breach of the contract and the plaintiff sues the defendant, who would be liable to pay the decretal amount in the event judgment is given for the plaintiff against the defendant? In fairness, at law and in equity, the defendant company should successfully apply to this Court to be indemnified by the respondent.

The defendant company should be able to turn to the respondent director and say: Look, you contracted in my name but for your own benefit, you must be responsible for the mishap that befell you in the process of your dealings with third parties.

In my view, it is futile looking for any contract that may have existed between the applicant and respondent. It has been said to me that the instant case is a case where the applicant company is required by the plaintiff company to pay damages, but that upon authorities, including Edward Kironde Kaggwa - vs - L. Gostaperaria & Another [1963] E.A 213 and Birmingham and District Land Company - vs - London and North Western Railway Company (1887) 34 Ch. D. 261, a right to damages is not a right to indemnity as such It is necessary to cite the words of Bowen, L.J. in the Birmingham & District Land Co. case where he said:-

“I think it tolerably clear that the rule, when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract: by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do.

I say in nine cases out of ten, for there may possibly be a tenth. Thus there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied. But it is quite clear to my mind that a right to damages, which is all that the defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such as given by the original bargain between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract” (underlining’s for emphasis).

There is nothing at Variance between Bowen L.J.’s pronouncements above and the company law doctrine enunciated in the three 19th Century Cases I have cited above. This is because when a person becomes a director of a company, he must be presumed to be entering an original bargain with the A company that he will be bound by the company law principles, including the principle that he will indemnify the company for any secret benefits tie will earn by contracting with third parties in the name of the company. In that case there is the original bargain and there is an assumed or implied contract to so indemnify as well as to make the necessary account.

In light of this, I would and do rule that in the event HCCS. No.424 of 1994 is decided against the defendant applicant, the respondent will satisfy the judgment and decree by way of indemnity.

J.H. NTABGOBA
PRINCIPAL JUDGE
12/06/95