THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.0916 OF 2014

SECURITY 2000 LTD ..... APPELLANT

VERSUS

CUMBERLAND ..... RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF THE COURT

This is an appeal arising from the decision of *Hellen Obura J, (*as she then was) delivered on 27th August, 2014 in which she entered Judgment in favour of the respondent.

Brief background

The background to this appeal is set out by the appellant in the conferencing notes. The appellant was the defendant at the High Court. It was sued by the respondent for negligence of its employees, servants or agents. On 2nd September 2009, the appellant entered into an agreement with the respondent wherein the appellant was to provide guard services to the respondent's premises. On 27thSeptember 2009, the appellant's guards let in some unknown persons who broke into the respondent's premises and stole the respondent's property. The respondent sued the appellant for special damages for negligence and costs of the suit. Court awarded liquidated damages of Ug. Shs. 500,000/= (Five Hundred Thousand Shillings) with interest of 25% per annum, general damages of Ug. Shs. 50,000,000/= (Fifty Million Shillings) with interest of 11% per annum and costs of the suit to the respondent.

The appellant being dissatisfied with the decision of the trial Judge filed this appeal on the following grounds:-

1. *The learned trial Judge erred both in law and fact when she held that the defendant was vicariously liable for acts of their guards and ordered the appellant to pay both special and general damages to the respondent.*

2. *The learned trial Judge erred in law and fact when she ordered the appellant to pay Ug. Shs. 50,000,000/= (fifty million Shillings) to the respondent as general damages with interest whereas the agreement between the appellant and respondent limited the appellant's liability as held by the learned Judge.*

3. *The learned trial Judge erred in law and fact when she held that the exemption clause in the agreement only limits liability concerning special damages.*

4. *The learned trial Judge erred in law and fact when she ordered the appellant to pay Ug. Shs. 50,000,000/= to the respondent as general damages on the ground that the respondent had not been adequately compensated for by way of special damages which the exclusion clause limits to only Ug. Shs. 500,000/= and which the trial Judge had already awarded to the respondent.*

5. *The learned trial Judge erred when she awarded general damages as special damages which was not proved.*

6. *The learned trial Judge erred in law and fact when she ordered the appellant to pay Ug. Shs. 50,000,000/= as general damages which was excessive in the circumstances and without basis.*

Representations

At the hearing of this appeal *Mr. Max Mutabingwa* learned Counsel appeared for the appellant while *Mr. Kiwanuka Sebuliba* together with *Anthony Wabwire* learned Counsel appeared for the respondent.

Appellants' case

Mr. Mutabingwa submitted that, the contract signed between the appellant and the respondent contained an exemption clause, which read as*'all criminal or deliberate wrongful acts committed by a guard shall remain the guard's only responsibility and shall not constitute negligence on the part of the company*therefore because of the above clause, Counsel contended that, the appellant was neither negligent nor vicariously liable for the actions of its employees. He argued that the guards were criminally liable for their own actions but not the security company itself. He faulted the learned trial Judge for finding that the appellant was vicariously liable yet the contract contained an exemption clause and no evidence had been adduced to prove the alleged negligence. For the above proposition he relied on *Katumba Ronald vs Kenya Airways, Supreme Court Civil Appeal No. 9 of 2008.*

In respect of grounds 2 and 3, Counsel challenged the Court's finding and submitted that, the learned trial Judge erred for holding that the exemption clause protected the appellant only in so far as special damages were concerned and not general damages. He added that the exemption clause in the agreement was intended to protect the appellant wholly and totally in respect of both general damages and special damages.

On grounds 4, 5 and 6, he submitted that, the learned trial Judge relied on a wrong principle for awarding Ug. Shs. 50,000,000/=as general damages yet the respondent failed to prove them, more so the appellant's liability was limited to Ug. Shs. 500,000/=.

Counsel contended that, the learned trial Judge awarded special damages of Ug. Shs. 500,000/= which was a limit in accordance with the agreement but for special damages to be awarded they had to be proved. She had ruled that the respondent had failed to prove the special damages, but erroneously awarded Ug. Shs. 500,000/= without any evidence been adduced to prove them. Further, that the interest awarded exceeded interest at Court rate. For the above proposition, he relied on *Uganda Revenue Authority vs. Wanume David Kitamirike, Court of Appeal Civil Appeal No. 43 of 2010* (unreported).

Respondent's reply

Mr. Ssebuliba, opposed the appeal, supported the learned trial Judge's findings and asked Court to adopt the conferencing notes filed in Court on the 23rd day of November 2015. According to the conferencing notes, Counsel contended that there was enough evidence on record to prove negligence of the guards. The evidence of the investigating office together with the statements contained in Exhibits P2 and P3 proved that the appellant's guards were negligent while on duty. He contended that, the appellant was vicariously liable because the acts of the guards were done in the course of employment.

In respect of damages, he argued that the limitation of liability by an exemption clause can only go to limit the award of special damages. An exemption clause cannot limit the inherent powers of the Court in respect of general damages. General damages are awarded at the discretion of Court. Further that, general damages are compensatory in nature and are intended to make good the loss suffered by a complainant. They are recoverable for pecuniary loss arising from breach of contract as from a tort. The learned trial Judge awarded the damages because the respondent suffered loss and damage arising from breach of duty of care and contractual duty by the appellant's guards. Therefore the award of general damages with interest and costs of the suit was therefore not erroneous.

He asked Court to dismiss the appeal and uphold the learned trial Judge's findings.

Court's Resolution

We have considered the record of appeal, the conferencing notes and submissions by both parties to this appeal. We have also considered the authorities cited and relied upon by both Counsel.

This Court is required under *Rule 30* of the Rules of this Court to re-appraise the evidence of the trial Court and come to its own decision.See: *Fr. Narcensio Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002.*

We shall therefore reappraise the evidence and come to our own conclusion as required by law.

With regard to ground 1, the appellant faults the learned trial Judge for finding that the security company was vicariously liable for the negligent act of its employees. According to the Court record the guards (employees of the appellant) made statements contained in Exhibits P2 and P3, Tumusiime Herbert opened the gate of the respondent's premises. He accepted food and alcoholic beverages from the burglars, made no alarm and went with one of the burglars to buy drinks and beer. Komakech John stated that, he suspected Tumusiime to have aided the trespass by cutting a lock and letting in the criminals onto the premises. He further stated that Tumusiime had a long conversation with the burglars on the respondent's property. They did not make an alarm or alert the police.

The guards failed in their contractual duties to guard the premises. Komakech was likely negligent in his acquiescence, and Tumusiime was complicit in the burglary, showing evidence of tortuous negligence and criminal compliance.

The guards had a duty by contract to guard the premises, which they failed to do. While a guard's duty is not only to protect at any cost the premises of the respondent, more was required of them than taking bribes and allowing burglars to loot the pharmacy. The guards were very apparently negligent regarding their job duties and breached the contract.

The appellant relied on *Atyam Patrick & Anor vs Uganda Court of Appeal Criminal Appeal No.72, 1999* to undermine the validity of Exhibits P2 and P3, but this case is distinguishable and not relevant in the present case because that was a criminal case, in which the evidence in Court contradicts the witnesses' earlier the police statements. There are no such discrepancies in this case, and it seems odd to intensely scrutinize the statements of forthcoming guards who made self-incriminating statements regarding their contractual and legal duties.

Furthermore, the appellant has attempted to discredit the respondent's witness statements but does not go on to explain how the guards were competent in guarding the premises. The appellant merely contends that there was "no

evidence" to prove that the appellant's guards were negligent. The guards' actions of leaving the premises with criminals, drinking, allowing access to the respondent's premises and facilitating burglary is ample evidence of not only contractual breach but tortuous negligence and criminal liability, especially when no explanation of these acts has been posited by the appellant.

Regarding the contract, the guards had a contractual duty to protect the premises, which they did not do, thus breaching the contract.

Regarding tort, the elements for negligence are laid out in *Donoghue Vs Stevenson [1932] AC 362:*

> *"1) There existed a duty of care owed to the plaintiff by the defendant.*
>
> *2) The defendant had breached that duty.*
>
> *3) The plaintiff had suffered injury or damage as a result of the breach of duty."*

The guards had a general tort duty of care to not facilitate burglary of the Respondent's pharmacy. The guards also had a contractual duty of care to guard the premises.One of the guard acquiesced to the break-in and the other collaborated with and opened the premises to the burglars. Therefore, the guard(s) breached the duty owed the respondent by allowing and facilitating the burglary. The guard's breached their contractual duty, by failing to guard the premises.

The respondent lost valuable goods, the inconvenience of losing and replacing those goods, the effect on the respondent's business and the stress of knowing that burglars can and did break into their business are all harms caused to the respondent. The guards were a cause of the harm because they did not stop the burglars and facilitated the unlocking and entering for the burglars. Whether or not the burglary would have happened but for the guards' negligence is a matter of speculation, we are satisfied to say that they substantially contributed to the burglary, thus justifying liability. And, certainly, the issue likely would not have occurred if the guards had fulfilled their contractual duty of guarding the

premises. Therefore we uphold the learned trial Judge's findings that the Security guards were negligent.

Whether the appellant was vicariously liable for its employees as found by the learned trial Judge. The appellant contends that the acts of its employee show a criminal plot to rob the respondent and cannot be said to have been done in the course of their duty. The appellant asserts that their actions were "a frolic of their own" and therefore not acting on behalf of the company. We see no evidence of any "criminal plot" by the employee. The logical understanding of the course of events was that they were on duty under the employment of Security 2000 LTD when the burglars bribed one of them and he acquiesced to and facilitated the break-in of the Plaintiff's premises.

Employers are usually held vicariously liable for negligent acts or omissions by their employees. In determining whether an employer is vicariously liable for the acts of his/her employee, three elements need to be fulfilled to establish vicarious liability. These are the relationship between the employer and employee, tortuous act of negligence committed by the employee within the scope and course of employment. Employer- employee relationship falls under the doctrine of doctrine of respondeat superior. This doctrine holds employers to be responsible for the lack of care on the part of employees to whom the employers owe a duty of care. In applying the respondeat superior doctrine, the employee's negligence must occur within the scope of her employment.

Several tests are developed to examine the existence of employer-employee relationship, namely control test, the integration test and the multiple tests. Firstly according to the control test, a person is said to be a servant if his employer retains a right of control not only over the work he does, but also the way in which he does it.

Secondly, the integration test was first identified by Lord Denning in *Cassidy v Ministry of Health [1951]1 ALLER 574,* when he applied it while considering whether the doctor working within the NHS was an employee of the Health Authority. It was again referred by Lord Denning in the case of *Stevenson, Jordan & Harrison Ltd v MacDonald and Evans [1952]1 TLR 101,* in which he said:-

"It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man, and a newspaper contributor are employed under a contract for services. One feature which seems to me to run through the instances is that, under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it'.

And lastly the multiple test involves the analysis through a checklist of factors regarding the employment status. It amalgamates the control, and integration test. It recognises that the though each point is important, no single point to be determinative as employment relationship is far more complex.

Employers may also be liable under the common law principle represented in the Latin phrase, *qui facit per alium facit per se* (He who acts through another does the act himself). There is a parallel concept to vicarious liability and strict liability, in which one person is held liable in criminal law or tort for the acts or omissions of another. However, generally, an employer will not be liable for the acts that occur outside the scope and course of working hours.

It was the job of the appellant's employees to guard the premises, so their lapse of doing so creates a nexus between their acts and the job they were contracted to for. The act does not need to be on behalf of the employer, but merely in the course of employment. One of the guards facilitated the break-in and yet his job was to guard and protect. He left his post unattended and helped the robbers. So, there is a connection to his employment and therefore the appellant is vicariously liability for his acts.

A master may be liable for acts which are not authorised but so closely connected with the acts which the master has authorised that they might be regarded as modes or improper modes of doing them. The underlying assumption is that an employee acts for the benefit of his employer. An employer can be held liable for the criminal acts of an employee done for the benefit of the employer. In the

recent House of Lords decision in **Lister and others v Hesley Hall Ltd [2001] 2 All ER 769,** the question was whether as a matter of legal principle employers of the warden of the school boarding house, who sexually abused boys in his care, may, depending on the circumstances be vicariously liable for the torts of their employee. The warden systematically abused the boys through mutual masturbation, oral sex and buggery. The warden had complete control of the houses in terms of discipline, giving leave for trips outside the boarding house etc. He was charged, convicted and sentenced to 7 years imprisonment. An action was commenced against the boarding school for negligence and vicarious liability. The trial judge dismissed the action for negligence. The defendant admitted owing a duty of care to the boys and the court found that there was failure to report the harm meted on the boys which was a duty owed so as to take preventive action. The court found that the employer was vicariously liable for failure to report the acts of abuse. On appeal to the Court of Appeal per Waller LJ held that if the wrongful conduct is outside the course of employment, a failure to prevent or report the wrong cannot be within the scope of employment so as to make the employer vicariously liable. On appeal by the complainants to the House of Lords, Lord Steyn considered the principles upon which an employer can be held vicariously liable for the torts of employees. He held that historically vicarious liability was based on the acts of the employee in the course of employment. The concept that the act complained off should be done in the course of employment was narrower than the modern concept of vicarious liability. The principle was extended to include liability for authorised wrongful acts as well as a wrongful and unauthorised mode of doing an act authorised by the master. A master may also be liable for acts which are not authorised but so closely connected with the acts which the master has authorised that they might be regarded as modes or improper modes of doing them. It is an underlying assumption that an employee acts for the benefit of his employer:

> " Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is whether the warden's torts were so closely

connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability."

In the earlier case of **Lloyd v Grace, Smith and Company [1912] AC 716** a master was held vicariously liable for the fraud of an employee. The facts of the case were that a firm of solicitors allowed the clerk Mr. Sandles to conduct the business of the firm. In the course of conduct of that business the clerk dishonestly misappropriated the property of Mrs. Lloyd for his own benefit by fraudulently presenting documents for her to sign. His Lordship reviewed the law and noted that the general rule was that the master is answerable for every fraud of the servant or agent as is committed in the course of the service and for the Masters benefit though no express command or privities of the master is proved. It was however a very different proposition to say that the master is not answerable for the fraud of the servant or agent, committed in the course of the service, if it is not committed for the Masters benefit. His Lordship further reviewed the case of **Udell vs. Atherton** where it was held that a man who is himself innocent cannot be sued for a deceit in which he took no part and this is whether the deceit was by his agent or by a stranger. Lord Macnaughten agreed with this proposition as a good and general proposition of law. He went on to say that all deceits and frauds practised by persons who stand in the relation of agent, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal. The question to be asked was whether the situation was such as to bring the representation the agent made within the scope of his authority? The plaintiff's counsel relied on the general rule quoted from Story on Agency that "the principal is liable to third parties in a civil suit for the frauds, deceits, concealment, misrepresentations, tort, negligence, and other malfeasances or misfeasance and or omissions of duty of his agent in the course of his employment although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts,

or disapproved of them". Lord Macnaughten considered the just limitations to the above proposition of law:

> "But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine within its just limitations, that the tort of negligence occurs in the course of the agency. For the principal is not liable for the tort or negligence of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit."

He held that the principal Mr. Smith was liable for the fraud of his agent in that case because when Mrs. Lloyd put herself in the hands of the firm she did not know the exact position Mr. Sandles was in. Mr. Sandles spoke and acted as if he was one of the firm.

Having discussed the various elements that constitute vicarious liability, elaborated on the justification, its right and expedient for the respondent to be held jointly vicariously liable for the torts committed by its employee, the security company exercises control over its employees and the acts were committed during the course of employment, the guards were contracted to guard the premises, but they instead aided and abetted the burglary and were grossly negligent in the performance of their duties.

While resolving this issue the learned trial Judge stated as follows:-

> *"I have already reviewed the evidence regarding the events of the night of 27th September 2009 while resolving issue 2. I have carefully considered submissions of both Counsel. The legal position on vicarious liability was clearly stated in the landmark case of Muwonge V Attorney General of Uganda [1967] EA 17 where it was held (as per Newbold, P) that:-*
>
> > *"An act may be done in the course of the servant's employment so as to make his master liable even though it is done contrary to the orders of the master and even if the servant is acting deliberately, wantonly, negligently or criminally, or for his own benefit, nevertheless if what he*

did is merely a manner of carrying out he was employed to carry out then his master is liable"

It is not in disputed that the defendant's employees were deployed to guard the plaintiff's premises on the night of 27th September 2008 when the plaintiff's premises were broken into. It is so clear from the evidence on record (Exhibits P2 and P3) that the defendant's employees opened for and let strangers into the plaintiff's premises...

The security guards were in the course of their employment when they acted as mentioned above. I believe that one of the ways of carrying out their duties is to block or let in people into the premises they were guarding...

...I therefore find that although the security guards in particular Tumusiime, acted deliberately, wantonly and for his benefit, the defendant is vicariously liable for his actions..."

We entirely agree with the learned trial Judge, that the appellant was vicariously liable for the actions of its employees. In this case the guards were under the control of the appellant and the respondent put its property under the charge of the appellant. The guards were part and parcel of that fundamental charge to guard the property. If they chose to steal or collaborate with burglars, they would be in fundamental breach of the contract and their master who put them in charge without the control of the respondent. Secondly, it is the weight of legal authority, inherent justice, and policy that holds the appellant liable for the wrongs allowed and perpetrated by its employees. The negligence of the guards is apparent in the record, and the wrongful acts of the guards were committed in the course of their employment which makes the appellant vicariously liable. In the premises, ground 1 of appeal fails.

Grounds 2, 3, 4, 5 and 6 all revolve around the award of both general and special damages yet the contract between the appellant and the respondent contained an exemption clause. The construction of the contract with its limitation and exemption clauses, the inherent power of the Court to award general damages, the separate causes of action of contract and tort, and the nature of contractual breach are the essential ingredients of this appeal.

It is the appellant's contention that the clause applied to both general and special damages. However the purpose of the contract was to protect the respondent from loss and it is under this very agreement that the security guards not only allowed but facilitated burglary of the respondent's business. The exemption clause reads as follows:-

> *"Clause 8; "If pursuant to the provisions set out herein any liability on the part of the company shall arise (whether under the express or implied terms of this contract, or at common law or in any other) to the client for any loss or damage of whatever nature arising out of or connected with the provision of or purported provision of, or any failure in provision of the service covered by this contract, such liability shall be limited to the payment by the company by way of damages a sum which shall not in any circumstances exceed a total of Uganda shillings Five Hundred Thousand only (Shs. 500,000/=) in respect of all or any consecutive period of 12 months but the company shall not in any way be liable if investigations reveal that the client or his employees contributed to the circumstances causing the loss."*

While resolving this issue the learned trial Judge observed as follows:

> *"The exceptions to the above principle were stated in the case of Levison and Another v. Patent Steam Carpet [1978] 69 where it was held that the effect of an exemption clause is that it gives exemption for negligence but not for a fundamental breach of the contract and the onus of proof is on the party seeking to rely on the exclusion clause to prove that it was not guilty of fundamental breach and if it failed to discharge that burden then it cannot rely on the exclusion clause...*
>
> *...In conclusion of this issue. Although I have already found that the defendant is vicariously liable for the actions of its employees, I find that the exemption clause is enforceable as such the extent of the defendant's liability for special damages suffered would only be limited to the amount stated in clause 8 of the contract...*
>
> *...Having found in issue 4 above that the exemption clause under the contract is enforceable, I find that the plaintiff is entitled to Ushs. 500,000/=*

(Uganda Shillings Five Hundred Thousand Only) being the agreed sums under sums under the agreement for the liability of the plaintiff for negligence...

...I therefore find that he plaintiff has not strictly proved the special damages. Consequently, even if the defendant's liability had not been limited by the exemption clause in the contract this Court would have declined to award any special damages for lack of strict proof of the same."(Emphasis added)

From the above, we note that the learned trial Judge did not award any special damages; she awarded a contractual sum of Ug. Shs. 500,000/= as the agreed sum under the agreement for the liability of the appellant for negligence. The limitation clause was enforceable in respect of the damages clearly stipulated in the contract. The rule has long been established that special damages must be pleaded and strictly proved by the party claiming them, if they are to be awarded.In paragraph 8 (i) of the plaint the respondent averred that the motor cycles were valued at a sum of Shs. 10,900,000=. No proof of the same was availed. This definitely falls outside the ambit of special damages. This claim failed in the trial Court. We uphold the learned trial Judge's findings on the basis of the requirement to prove special damages.

The contractual element of exemption clauses was considered in **Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556** where it was held that that there was no rule of law that an exemption clause can be avoided where there was a fundamental breach of contract by the defaulting party seeking to rely on it. In that case, the Plaintiff company owned a factory and engaged the services of the Defendant to provide security services at the factory, including night patrols. In the course of a night patrol at the factory an employee of the Defendant's deliberately lit a small fire which got out of control and destroyed the factory and stock at valued £615,000. The Plaintiff sued the Defendant on the ground that they were vicariously liable for acts of the patrolman who caused the fire and hence the damage to the factory and stock which ensured. The Defendant relied on an exemption clause quoted in the law report which provided that:

"Under no circumstances shall [Securicor] be responsible for any injurious act or default by any employee of [Securicor] unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of [Securicor] as his employer."

No negligence was alleged against the Defendant for employing the employee and the trial judge upheld the exemption clause. On appeal to the Court of Appeal, the decision was reversed on the ground that there was a fundamental breach of the contract by Securicor and the Plaintiff was not bound by the exemption clause. On further appeal to the House of Lords, Lord Wilberforce reviewed the authorities on what he doubted was a rule of law relied on by the Court of Appeal. He noted that the question:

> *"... as to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract".*

He held that:

> *At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be.*
>
> *Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached: by repudiatory breaches, accepted or not, anticipatory breaches, by breaches of conditions or of various terms and whether by negligent, or deliberate, action, or otherwise.* ***But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law."*** (emphasis added)

He held that the duty of Securicor was to provide a service and there was implied an obligation to use care in selecting their patrolmen. The breach of duty lay in failure to discharge some obligations and the question is whether the exemption

clause applied. He noted that the exemption clause was drafted in strong terms and:

> *"... Whether, in addition to negligence, it covers other, e.g. deliberate, acts, remains a matter of construction requiring, of course, clear words. I am of opinion that it does and, being free to construe and apply the clause, I must hold that liability is excluded. On this part of the case I agree with the judge and adopt his reasons for judgment. I would allow the appeal."*

The holding of Lord Wilberforce was supported by Lord Diplock at page 565. He agreed that the so called 'rule of law' considered in **Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 All ER 225**, which seemed to find support in the reasoning in **Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61** had been rejected by the House of Lords and they held that there was no such rule of law. The so called rule of law was that a fundamental breach is one which entitles the party not in default to elect to terminate the contract. On his doing so the contract comes to an end together with the exemption clause and the party in fundamental breach cannot rely on it.

In further support of their lordships quoted above Lord Salmon also agreed that the exemption clause should be construed as contracts are construed. He held that:

> This appeal turns in my view entirely on certain words in the contract which read as follows "..."

What are the avenues of contract law? We agree that the beginning point of every determination on a contractual issue is the perusal of the contract itself. What does the contract provide about exemption of the Defendant or the limiting of the liability of the Defendant? Can the matter be resolved by a perusal of the contract itself?

The decision of the trial judge is based on clause 8 of the Contract. Firstly, the purpose of the contract is stipulated in clause 1 of the contract which provides that:

"The security guard provided to the client is intended only to reduce the risks of loss and damage to the Property and injury to persons to the extent that this is reasonably practicable."

The guards in this case were not only negligent but complicit in the burglary. They did not reduce the risk of theft but did the opposite by aiding and abetting the commission of the burglary. They did not do what was reasonably practicable.

Clause 3 of the contract makes the appellant liable where the loss was caused by the sole negligence of the employee. This is what it provides:

"The company in providing guard service pursuant to the purpose of the agreement herein shall not be responsible for any want of proper care on the part of the company itself in the selection or employment of employees put on and in charge of the guard service. Subject thereto the company shall not be responsible to the client under any circumstances whatever for deliberate wrongful act committed by any employee of the company in or with reference to such services or otherwise. The company shall so far as concerns any loss suffered by the client through burglary, fire or any other cause (to the extend only set below) be liable only if and so far as that loss is cause by the sole negligence of the company's employee acting within the course of their employment."

The above clauses have to be strictly construed in light of the law. The want of proper care referred to is in relation to the selection of employment of employees by the appellant company. On the basis of that the company is not liable for the deliberate wrongful act committed by their employee guards in or with reference to such services. There is no clear evidence as we noted in ground 1 that there was a deliberate wrongful act of the guards and what was established was gross negligence of the guards.

Secondly, under clause 3 quoted above, the appellant company is liable for loss caused by the *sole negligence of the employee*. What does this mean?

Clause 4 of the contract provides that the company is not liable for the deliberate wrongful acts committed by a guard which shall remain the responsibility of the

guard. The word sole negligence strictly construed includes gross negligence which negligence borders on criminal culpability. The evidence we have reviewed showed that there was complicity on the part of the guards but not hard evidence that the guard deliberately cut the lock to facilitate the burglary. The guard who did not participate was negligent and the sole purpose of the contract to provide guards was to reduce risk of loss such as through burglary.

There are no clear and unambiguous words excluding liability for negligent or grossly negligent acts of the guards. The primary duty of the appellant which can be implied from clauses 1 – 3 of the contract was to reduce the risk of loss of property and life at the premises.

Under clause 8 such liability is limited to Uganda shillings 500,000/=. The primary question is whether general damages are excluded since the judge awarded the contractual sum. We noted in ground 1 that the finding of vicarious liability for negligence of the guards is sufficient for the court to award general damages.

What is reasonable care of goods? In contracts of bailment, the custodian of the goods is bound under common law to take reasonable care to see that the chattel is in proper custody according to **United Service Co., Johnston's claim (1870) 6 Ch App 212**. The custodian is expected to seek to recover the stolen chattel if it is stolen according to the case of **Coldman v Hill [1919] 1 K.B. 443,** even where the theft occurred without the default of the bailee.

If a bailee gets involved in the theft, it would be a breach of a fundamental implied term of every contract where a custodian of goods is expected to take good care of the goods. A bailee is answerable for the manner in which the servant or agent carries out his or her duties according to the case of **Morris v C.W. Martin and Sons Ltd [1956] 2 ALL ER 725.** Lord Denning MR at page 731 held that where a man takes charge of goods for reward,

> "it is his duty to take reasonable care to keep them safe and if the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show—and the burden is on him to show—that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty".

He further held that in a contract to take care or to protect the goods, although there may be no bailment,

> "nevertheless circumstances often arise in which a person is under a contractual duty to take care to protect goods from theft or depredation". He is under an implied contract to take reasonable care for the safety of property brought into the house by a guest. If his own servants are negligent and leave the place open so that thieves get in and steal, he is liable ... *So also if they are fraudulent and collaborate with the thieves.* (Emphasis added).

The obligation to take care exists independently of contract and an action based on breach of obligation is an action founded on tort. In **Jackson v Mayfair Window Cleaning Co. Ltd [1952] 1 ALL ER 215** the Plaintiff had contracted with the second Defendant to overhaul her chandelier and five months later with the first Defendants to clean it. In the course of the cleaning the chandelier fell from the ceiling. The court held that the second Defendant had improperly carried out the work under her contract and that servants of the first Defendants had failed to exercise sufficient care in the cleaning and awarded the Plaintiff £90 damages against both Defendants. The Defendants contended that the Plaintiff's claim against the first Defendant, though framed in tort, was founded on contract, and that, therefore, under the County Courts Act, 1934, s 47(1) (b) (i), the Plaintiff, having recovered more than £40 but not more than £100, should be limited to the costs to which she would have been entitled if the action had been brought in a county court. The Plaintiff contended that the claim was founded on tort, and, therefore, that s 47(1) (b) (i) of the Act of 1934 had no application and costs on the High Court scale could be awarded.

BARRY J held at page 218:

> "on the evidence in this case, the Plaintiff would have been equally entitled to recover damages had the Defendants carried out this work gratuitously or had the contract for cleaning been made by some third party, not her agent, on which contract she could found no right of action. *In either of those hypothetical cases the Defendants would, I think, owe a duty to the*

Plaintiff—independently of contract—to take due care not to damage her property. Any breach of this duty would render them liable to an action for negligence. (Emphasis added).

In **Chesworth v Farrar and Another [1966] 2 All ER 107** the Plaintiff has been a tenant of an antique shop and dwelling house and then went absent for some time whereupon the landlord obtained an order for possession and for payment of arrears of rent. When the landlord took possession he became a bailee of her goods left in the premises in her absence. The Plaintiff alleged that antiques worth £2,291 17s 6d remained unaccounted after the landlord sold some to recover rent arrears. Edmund Davies J agreed with the principle that the alleged failure to take proper care as bailee of the Plaintiff's goods rested on the fact of the landlord's possession of the goods independent of the circumstances giving rise to that possession (such as contract) and was a cause of action in tort.

The law of tort can impose obligations on the appellant that are independent of contract and cased on the power of the court to administer justice. The Appellants in this case were in breach of a fundamental term and the exclusion clause itself when read in context of the express words in clauses 1, 3 and 10 of the contract as well as terms implied by law, the exclusion clause cannot purpose to limit liability for loss occasioned through the sole (and gross) negligence of the employees. The first guard saw goods being packed in a vehicle and his statement is at page 17 – 19. He had allowed some people in and went out to buy some provisions. It is not clear how he got tied up. He did not make any alarm.

The terms of contract allow liability for sole negligence and the law of tort imposes a duty of care which cannot be excluded by ambiguous contractual terms. To allow the appellant to escape liability would imply that the appellant company was not responsible even if it recruits thieves to come a steal while masquerading as guards. The entire purpose for the recruitment of guards to guard premises is defeated.

On the ground of the award of general damages, the general principle underlying the award of general damages is that the claimant is entitled to full

compensation for his losses, which is the principle of "*restitutio in integrum.*" See: *Livingston v Rawyards Coal Co (1880) 5 App Cas 25 at 35*, where Lord Blackburn stated:-

> *"I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation"*

General damages compensate the claimant for the non-monetary aspects of the specific harm suffered. This is usually termed 'pain, suffering and loss of amenity'. Examples of this include physical or emotional pain and suffering, loss of companionship, disfigurement, loss of reputation, loss or impairment of mental or physical capacity, hedonic damages or loss of enjoyment of life.

When there is a fundamental breach, some damages may be limited by a contractual clause, but general damages may not be limited in such a breach. This flows logically from our understanding of the balance of power between freedom of contract to limit damages and the power of Court to award damages. It seems that, on one hand, parties should not be able to completely limit the power of a Court to give damages by their out of Court bilateral arrangement. On the other hand, damage limitation may be an essential element over which the parties contracted, and parties are able to bargain away certain liberties.

Accordingly, it is an appropriate rule to allow for general damages when there is a fundamental breach of contract. When a breach is merely partial, it may be appropriate to limit all types of damages where a contractual clause clearly indicates thusly. But, when the parties have contracted for an agreement, they have not bargained over just damages, but the essential matter of the contract. The limitation clause has no specifics regarding damages. One cannot simply lay out broad terms and expect them to absolve one's self of liability because the loss must be anticipated by the parties. Burglary has been anticipated as evidenced in the contract, but types of damages are not anticipated, and so we

would construe this contract against the drafter. That is to say, the loss referred to in the contract only pertains to specific and not general damages, because there is no language stating such, and therefore no evidence of contemplation of the parties in the agreement regarding general damages. In our opinion, "any loss" is not sufficient to cover both types of damages. So, even if the fundamental breach did not already allow for general damages, they can still have been available by way of contractual interpretation and construction.

Furthermore, the Respondent can recover by way of tort damages. The contract limited damages flowing from the breach of contract but does not limit the separate cause of action found in tort law. The breach, causation, and harm have already been discussed above, and provide a sufficient basis for the loss flowing from the negligent action of the guards. It is important to note that the foregoing terms are applied differently in tort claims. In tort claims, "special damages" refer to actual damages that can be calculated accurately such as lost wages whereas "general damages" refer to other losses that can be difficult to determine such as pain and suffering. Contracting parties should take these differences into consideration when drafting limitation of liability clauses in contracts.

Therefore, general damages exceeding Ug. Shs. 500,000/= are justified though in our view the liability in such cases cannot be limited by an exclusion clause since it literally goes against the purpose for contracting in the first place. We held that the amount was justified on the ground that special damages were not proved. Secondly, there is the separate tort cause of action where the principle of *restitutio in intergrum* can be applied irrespective of and outside contractual terms.

Just to note, the respondent may have been able to sue the security company directly for negligence in hiring incompetent guards. Generally, the appellant failed in its duty of minimizing the risk of loss by employing persons without solid moral character who ended up doing the opposite of what he was deployed to do.

Perhaps it was left out because of the high costs of discovery and lengthy litigation, but the company itself may have been negligent itself rather than just

vicariously liable for the actions of its employees. Because of the fundamental breach, contractual interpretation, and separate actions for tort and contract, the learned trial Judge correctly held that the limitation clause only covered contractual damages. In relevant part, the Judgment of the trial Court read as follows:-

> *"...taking into account the fact that the plaintiff lost some property for which it has not been adequately compensated by way of special damages, I have decided to award the plaintiff general damages of Ug. Shs. 50,000,000/= (Fifty million Shillings) for the loss and inconvenience suffered."*

The appellant claims that the trial Judge awarded special damages under the guise of general damages. This is evidenced by the reference to lost property in the quote above. On this small and inconsequential matter we agree with the appellants, as it seems clear that the learned trial Judge awarded some general damages for lost property which should have been awarded under special damages. So, insofar as the trial Court awarded damages for lost property which had to be claimed as a special damage, the Judge erred on a matter of principle.

However, the learned trial Judge did not err in awarding general damages in part based on the breaches of law of tort and contract. The other basis for awarding general damages is for "loss and inconvenience suffered." It is fully within the discretion to award damages for inconvenience and other loss that is not lost property. Loss of business, stress, time, and inconvenience are all justification for an award of general damages. Uganda Shillings 50,000,000/= is not manifestly excessive because it is less than half of what the respondent claimed to have lost, and the respondent very well may have lost Uganda Shillings 50,000,000/= due to loss of business and other inconveniences. Furthermore, it fits well within the range of general damage awards in the precedents. Because the award is fully justified on the grounds of general inconvenience and loss, the award of the learned trial Judge was a proper use of discretion and should be upheld.

The trial Judge had a sufficient basis for general damages, regardless of awarding of damages for lost property, the award of Ug. Shs. 50,000,000/= is justified and should be awarded to the Respondent. Further the respondent is entitled to recover damages exceeding Ug. Shs. 500,000/= for three main reasons. First,

while limitation clauses can be enforceable, the exemption and limitation clauses are not definite and clear enough to justify limitation on award of general damages.

Secondly, the acts of the guards constituted a fundamental breach of contract which allows for recovery beyond the limited amount, if not by special damages, then by general damages.

Third, there is a separate cause of action for breach of contract and tort. Even if the contract liability limitation clauses are completely valid and enforceable, the cause of action in tort is a separate issue for which Security 2000 will be vicariously liable. The essential elements of a cause of action for tort are satisfied in the present action. Therefore, an award for compensatory tort damages is justified as it is not limited by the contractual clauses.

This appeal fails and is hereby dismissed with costs to the respondent.

Dated at **Kampala** this ..19th.. day of ..October.. 2018.

.....

Kenneth Kakuru
JUSTICE OF APPEAL

.....

Geoffrey Kiryabwire
JUSTICE OF APPEAL

.....

Christopher Madrama
JUSTICE OF APPEAL