

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
CIVIL SIDE
BETWEEN

2004
No. 44

GEOSURVEY HOLDINGS LIMITED
ANDERS INTERNATIONAL SA

APPELLANTS

VS.

BSI (OVERSEAS) BAHAMAS LIMITED

RESPONDENT

Before: The Hon. Mr. Churaman, J.A.
The Hon. Mr. Justice Ganpatsingh, J.A.
The Hon. Mr. Justice Osadebay, J.A.

Appearances: Mr. Philip Davis for the Appellants
Mr. Thomas Evans Q.C. and Ms. Veronique Evans
for the Respondent

Dates: 5th April, 2005,
1st June 2005,
28th July, 2005

Reasons for Decision, given by Osadebay J.A.

1. At the conclusion of the hearing on the 1st June 2005, we dismissed this appeal against the decision of Lyons J. given on 30th April, 2004, in the Supreme Court with costs to the respondent to be taxed if not agreed. We stated that our reasons for so doing would be given in writing in due course. We now give our reasons.

Background Facts

2. A summary of the background facts is as follows: Dr. Kamel an Egyptian businessman and an entrepreneur was the chairman of the Board Directors and also the Financial Controller of Geosurvey Holdings limited (GHL) the appellant. He was also a forty percent (40%) shareholder in Dar Tardine Al Umma Limited (DTU), the beneficial owner of Umma Holdings Limited (Umma), a company which held fifty one percent (51%) of the shares in GHL. Dr. Kamel was also the beneficial owner of the shares in Continental Finance & Trading Corporation (CFT), a Panamanian company which in or about February, 1991, acquired the fifty one percent (51%) of the shareholding of Umma in GHL. Dr. Kamel held other beneficial interests in various other companies, including Anders International S.A.(Anders) the other appellant in this matter.

3. Dr. Gollmer was a director and the Chief Executive Officer of GHL. He was the beneficial owner of the shares of a company known as Shanaham Limited, which owned forty-nine percent (49%) of the shares of GHL. Dr. Gollmer was also the beneficial owner of the shares in Geosurvey International Limited (GIL), an Antiguan company, which beneficially owned the shares in Geosurvey GmbH, (GmbH) a German company. Dr. Gollmer in the 1970's through GIL and GmbH carried on advanced computerized geosurvey activities in Africa by a system which he had

invented whereby aerial photographs could be taken, converted into digital information and computerized for topography analysis as well as for navigational use. The whole invention had a potential geological and military use.

4. Dr. Gollmer secured contracts with the governments of Tanzania, Uganda and Guinea whose interest was to use the invention for prospecting for mineral deposits in their respective countries, which they hoped, in turn would bring in much needed foreign exchange.

5. Owing to internal political problems which later developed in those countries it became difficult for them to meet the payments due under their contracts. As a result of this Dr. Gollmer's companies encountered liquidity problem and were unable to meet their own financial obligations. GIL needed money to repay some Ten million dollars (US\$10,000,000) it owed to Equator Bank in The Bahamas.

6. At that time the government of Tanzania owed GIL the sum of Seventy-seven million two hundred and three thousand, nine hundred and fifty one (DM.77, 203,951) Deutsche Marks. By an agreement made the 22nd November 1984, between the Tanzanian government and GIL, the sum owed by the Tanzanian government to GIL was converted into an interest-bearing loan repayable by installments to GIL. A schedule of repayments was agreed.

7. It was also agreed that at the execution of the agreement GIL would hand over to the Tanzanian government all computer tapes and documents containing information gathered by GIL during its survey activities in that country.

8. The appearance of Dr. Kamel on the scene in 1983/84 was timely. He had secured some funds from some Middle East Investors. He was a prime client of BSI Overseas (Bahamas) Ltd (BSIO), the respondent bank in this matter.

9. In November, 1984, Dr. Kamel became acquainted with Dr. Gollmer and negotiated an advance of Ten million dollars (US\$10,000,000) to GmbH, one of Dr. Gollmer's companies, to pay off its indebtedness to Equator Bank. This advance

was to be repaid to Dar Tadine Tanzania Limited (DTT) one of Dr. Kamel's companies, or at its direction, out of the monies owed to GIL and GmbH by the Tanzanian government.

10. Dr. Kamel subsequently decided to invest in the business. By 31st December 1984, Dr. Kamel and his Middle East associates, Sheikh AL Wazzan and Sheikh Al Saedan, had acquired fifty-one percent (51%) of the shares in GHL which in turn had acquired all the assets of GIL and GmbH leaving them as "brass-plate companies." The assets included, inter alia, the outstanding receivables, which included the monies owed by the governments of the Republic of Tanzania and the Republic of Guinea to GIL and GmbH. Suffice it to say that the indebtedness of the Uganda government did not seem to have featured in the assets acquired.

11. The balance of forty-nine percent (49%) of the shares in GHL was held by Dr. Gollmer through Shanahan Limited, a Bahamian company beneficially owned by him.

12. It appeared that to facilitate the purchase of the shares in GHL and to assist the development of the mining project in Tanzania, Dr. Kamel had raised some twenty-five million dollars from various sources – Two million dollars of which he had borrowed from BSIO on his own, fifteen million dollars from the two Middle East associates – Sheikh Al Wazzan and Sheikh Al Saedan, and the other ten million dollars from other investors.

13. At first it appeared that the fifty-one percent (51%) of the shares in GHL acquired by Dr. Kamel and his Middle East associates was held or controlled as to forty-nine percent (49%) by the Middle East associates, Al Wazzan and Al Saedan, while the other two percent (2%) was held by Dr. Kamel.

14. The parties agreed to set up an escrow account into which the receivables coming from the respective governments, including the government of Tanzania, would be paid in. Payments would then be disbursed from that account. To facilitate

this arrangement an Escrow Agreement dated 15th April, 1985 was entered into between GHL, GIL and GmbH on the one part and BSIO on the other. BSIO by that agreement was constituted an Escrow Agent to receive the payments.

15. The parties agreed that out of the receipts 10.5 million dollars together with interest would first be paid to GHL as "buyer receivables." The balance of the receivables would be paid to GIL.

16. We do not find it necessary to recite or reproduce the whole of the Escrow Agreement. We recite only those parts that we consider relevant to this appeal. It is important however to note that in the Escro Agreement Banca Della Svizzera Italiana (Overseas) Limited, Nassau, Bahamas, known as "BSIO" was referred to as "BSI."

"ESCROW AGREEMENT

AGREEMENT, dated as of 15th April 1985, by and among Geosurvey Holdings Limited, a Bahamian Corporation having its registered office at Norfolk House, Nassau, Bahamas ("Buyer"), Geosurvey International Limited, an Antiguan corporation having its registered office at P.O. Box 159, Redcliffe Street, St. John's Antigua ("Seller"), Banca Della Svizzera Italiana (Overseas) Limited, Nassau, Bahamas ("BSI"), and Geosurvey GmbH, a wholly owned subsidiary of the Seller and a German corporation having its registered office at Maximiliansplatz 17, D-8000 Munich 2, West Germany ("GmbH").

W I T N E S S E T H:

WHEREAS, BSI is willing to serve as such escrow agent for a compensation specified in a separate document:

NOW, THEREFORE, in consideration of the premises and mutual agreements herein set forth, the Seller, the Buyer, GmbH and BSI hereby agree as follows:

2. ESCROW ACCOUNT FOR COLLECTIONS

BSI has opened in its books an escrow account (the "Escrow Account") in the names of the Buyer, the Seller and GmbH to

which it will credit any proceeds of the collection of the Overdue Accounts Receivable received by it and to which it will debit any disbursements made by it as escrow agent pursuant to the terms of Paragraph 4 hereof. The Seller and GmbH covenant that they will cause all payments made by the obligor with respect to Overdue Accounts Receivable to be made only to the order of BSI for the credit of such Escrow Account and shall in writing notify each obligor of the assignment to BSI hereunder.

3. BUYER RECEIVABLES

(a) In conjunction with the Escrow Account BSI shall maintain a notational accounting of moneys payable to Buyer ("Buyer Receivables") from collections with respect to Overdue Accounts Receivable in accordance with this Paragraph 3 and Paragraph 4 hereof.

(b) As of the date thereof, such Buyer Receivables total \$10,519,305 principal amount, as calculated pursuant to Exhibit D. Simple interest at the rate of ten percent (10%) per annum shall be calculated and payable in respect of the outstanding principal amount of Buyer Receivables and any interest so calculated and unpaid during each twelve-month period from the date hereof shall at the end of such twelve-month period be capitalized and treated as part of the principal amount outstanding for the succeeding twelve-month period.

5. PROTECTION OF ESCROW AGENT

(a) Where in its opinion acting or failing to act could expose itself to any liability to any party, BSI will be entitled to act, or refrain from acting, only on the joint instruction in writing of the Buyer and Seller and failing to receive such shall be entitled to apply to the court of competent jurisdiction in Nassau, Bahamas for instructions.

(b) BSI shall take no step regarding the collection or compromise of any of the Overdue Accounts Receivable except on written instruction jointly executed by the Seller and the Buyer and then only against suitable payment or indemnity for costs, expenses or liability.

- (c) The Seller and Buyer jointly and severally covenant to hold BSI harmless from any liability arising from the performance of its duties hereunder and to reimburse it for any expenses incurred by it **(in addition to the compensation separately agreed)** in the process of rendering its services hereunder. BSI shall have the right to debit its claims for any such sums referred to in this sub-paragraph (c) to the Escrow Account.
- (d) On thirty days prior written notice to the Buyer, GmbH and the seller, BSI shall be entitled to resign as escrow agent hereunder and shall deliver all property held hereunder to any new escrow agent designated by a joint instrument executed the Buyer, GmbH and the Seller or, in default of such appointment, as instructed upon application to a court of competent jurisdiction within the Commonwealth of the Bahamas.

6. **MISCELLENOUS**

This agreement shall be interpreted in accordance with the laws of the Commonwealth of the Bahamas and each other of the parties hereto submits to the exclusive jurisdiction of its courts.

....."

(Emphasis – Provided)

17. It would appear that Anders International S.A. (Anders) had entered into a separate arrangement with GIL to receive a proportion (Approximately 8 percent) of the receivable but BSIO was not a party to that arrangement if in fact such an arrangement existed. Anders claim in this matter against BSIO for accounting, which was not pursued, was based on that alleged arrangement.

18. After November 1984 the government of Tanzania continued to experience difficulty in meeting the payments due under the agreement of 22nd November 1984. By a subsequent arrangement, it issued Twenty-Four (24) promissory notes with payments to be made on certain dates.

19. By 1986 these promissory notes together with other documents relevant to the business were delivered to BSIO in accordance with the escrow agreement.

20. The first two payments under the promissory notes totaling Two million six hundred and ninety-nine thousand, nine hundred and thirty six dollars (\$2,699,936) were collected by Dr. Kamel and paid over to BSIO in accordance with the escrow agreement. No further monies were received by BSIO in respect of the promissory notes.

21. BISO did not deposit the monies received in a separate escrow account to be disbursed in accordance with the agreements between the parties. Instead, it deposited the monies in the general account operated by GHL, thus allowing the monies to be used by GHL in its general operation. Dr. Kamel, who was GHL's financial controller at the time was aware of the deposit but saw no reason to question it.

22. Subsequent contracts (the Eagle contracts) entered between GHL and the Saudi Arabian government for the use of the invention or technology developed by Dr. Gollmer did not prove financially lucrative or profitable for GHL.

23. A dispute later developed between Dr. Kamel and Dr. Gollmer as to the way in which the company GHL was managed. Dr. Kamel accused Dr. Gollmer and his legal adviser, Mr. Arnott of misappropriating up to eighteen million dollars (\$18,000,000.00) of GHL funds. He commenced criminal proceedings in Switzerland against Dr. Gollmer.

24. Dr. Gollmer on the other hand accused Dr. Kamel of fraudulently siphoning away the funds of GHL through the use of various service companies set up and beneficially owned by him. The inference was that these service companies were engaged and paid for uncertain services purportedly rendered to GHL.

25. Dr. Kamel moved swiftly in his capacity as Chairman of the board of directors to remove Dr. Gollmer from his position as a director and Chief Executive Officer of

GHL. In late 1988 Dr. Kamel summoned a meeting of the board of directors but was unable to achieve his purpose. It appeared that the five-member board of directors was unable to have a meeting as it lacked a quorum.

26. In the meantime, with the support of Mr. Arnott, another director, on his side, Dr. Gollmer solicited and obtained also the support of Sheikh Al Wazzan and Sheikh Al Saedan for the removal of Dr. Kamel from his position as Chairman/Director and Financial Controller of GHL.

27. Strengthened by the support of three of the other four directors, Dr. Gollmer summoned a meeting of the board of directors and shareholders of GHL for 12th October 1989, at 10 a.m. in Geneva, Switzerland. The subject of the meeting was the removal of Dr. Kamel from his position as Chairman/Director and Controller of GHL. Dr. Kamel was served with the notice of the meeting.

28. Rather than attending the meeting, Dr. Kamel flew to Nassau, Bahamas, to engage the assistance of an Attorney-at-Law in an attempt through an ex parte injunction by the Court to prevent the meeting from taking place.

29. By the time Dr. Kamel reached the court in Nassau, Bahamas, the meeting of GHL was over and Dr. Kamel had been removed from his position as Financial Controller, Chairman/Director of GHL. All other persons associated with him were also removed from their respective offices.

30. The government of Tanzania being aware of the ongoing dispute had stopped further payments on the promissory notes until the situation was clear.

31. With mission accomplished and Dr. Kamel removed from office, Dr. Gollmer and the board of directors of GHL made a direct approach to the government of Tanzania and were able to convince the government of Tanzania to resume payments on the promissory notes direct to GHL but not through BSIO. The government of Tanzania on the understanding that it was dealing with the proper board of directors of GHL, acceded to their request and directed all its further

payments on the promissory notes to be made to GHL. It is understood that some thirty six million dollars (\$36,000,000.00) approximately was further paid by the government of Tanzania in full satisfaction of the loan agreement and promissory notes.

32. At about the same time, the debt claim by GIL against the government of Guinea, which had resulted in an arbitration, was settled. Despite BSIO's claim and representation made to the Attorneys of the government of Guinea that it was the beneficial owner of the receivables of which the indebtedness of the government of Guinea was part of, approximately Thirty million dollars (\$30,000,000,00) was paid directly to GIL in settlement of that claim.

33. When the Eagle contracts were entered into between GHL and the government of Saudi Arabia, BSI (Lugano) the parent company of BSIO had executed performance bonds on behalf of GHL in favour of the government of Saudi Arabia to guarantee performance. In addition to this, GHL was heavily indebted to both BSI (Lugano) and BSIO for which they were holding what amounted to fifty-one percent (51%) of the shares of GHL as security by way of a pledge.

34. When BSI (Lugano) became increasingly concerned over GHL's indebtedness to it, it put up those shares for sale. They were subsequently purchased by Dr. Kamel through Continental Finance and Trading Limited (CFT) a Panamanian company owned and controlled by him.

35. By February 1991, Dr. Kamel was back in the saddle. He owned and controlled fifty-one percent (51%) of the shares in GHL. At the commencement of this litigation it was not certain whether Dr. Kamel had been registered as the holder of those shares.

36. By a letter dated 24th May 1991 written on behalf of GHL, GIL and Gmbh and addressed to BSIO the Escrow Agreement was cancelled. The effectiveness of the cancellation was called into question in this matter.

37. In summary therefore between 1989 and 1990, Dr. Kamel had been removed from his position as Chairman/Director and Controller of GHL, the Escrow Agreement of 15th April, 1984 with BSIO had been terminated by GHL, GIL and GmbH, approximately Thirty million dollars (\$30,000,000.00) had been paid to GIL by the government of Republic of Guinea in satisfaction of its indebtedness, approximately Thirty-six million dollars (\$36,000,000.00) had been paid directly to GHL by the government of Tanzania in satisfaction of its indebtedness, whatever monies were in the account of GHL, and GIL had been disbursed leaving them with no assets. In short they were "shell companies" or as Mr. Evans put it, "brass plate companies." GHL was still indebted to BSI (Lugano) and BSIO in the sum of Ten million dollars approximately which indebtedness had been personally guaranteed by Dr. Kamel alone.

38. Although it had been agreed by the parties that BSIO would be paid for its services as the Escrow Agent under the Escrow Agreement, no fees had been agreed. Sometime in 1990, BSIO rendered a bill to GHL for services rendered as escrow agent under the Agreement. The bill was not paid so it commenced proceeding for fees and commission it was entitled to under the Escrow Agreement.

The Proceeding Below:

39. A summary of the pleadings below has been succinctly and admirably set out by Lyons J. in his judgment as follows:

"(95) BSIO sued for fees and commissions due and owing under the Escrow Agreement.

(96) GHL and GIL defended. Initially the defendants pleaded that the Escrow Agreement had been terminated back in May of 1991. In any event, it was pleaded, all the debts receivable under the Escrow Agreement had been paid, but to the defendants independent of any efforts of BSIO. Counterclaims were mounted claiming, in effect, that BSIO's performance under the Escrow Agreement was such that it did not deserve to be paid. These of course, were defences pleaded when GHL was in the hands of Dr. Gollmer and his fellow directors. They were defences pleaded when GHL in the hands of Dr. Gollmer and his fellow directors they were defences pleaded during that time the five-year agreement to litigate against Dr. Kamel was in effect.

(97) Eventually Dr. Kamel, in getting control of GHL, took over the defence of GHL. The defence was amended. A counterclaim was also mounted. Anders also came into the action pleading that it was owed monies by GIL.

(98) As I have said GIL eventually decided not to appear. I was not in the least surprised that this was the case.

The Pleadings

(100) The plaintiff's pleadings are straightforward. The plaintiff (BSIO) sues for fees and commissions due to it as an escrow agent pursuant to the Escrow Agreement dated the 15 April 1985.

(101) The plaintiff pleads that, in the absence of a specific agreement as to the exact scale of fees to be applied, the amount due is to be calculated by reference to the general usage of custom of the banking business in The Bahamas.

(102) The plaintiff pleads (and it is agreed), that no fees have been paid.

(103) The first defendant (GHL) admits the agreement but pleads that by virtue of section 21 of the Bankers and Trusts Companies Regulations Act, the plaintiff is prohibited from charging fees have been expressly and specifically agreed upon.

(104) Alternatively GHL says that, if fees payable then BSIO should only be paid a reasonable fee for the work actually done.

(105) After several attempts, GHL finally filed its set off and/or counterclaim on the 5 March 2004.

(106) GHL's claim against the plaintiff (BSIO) is for damages for breach of contract, breach of fiduciary duties and for damages for negligence."

40. Anders' defence and counterclaim, which sought only an accounting of the funds received by BSIO under the Escrow Agreement, was in fact aimed at GIL. Anders later failed to take part in the proceedings to pursue its defence or counterclaim. As a result its claim against BSIO contained in its defence and counterclaim filed on 20th October 1999, was dismissed with costs.

41. In his decision Lyons J. found

- (a) That as it had been agreed by the parties as expressed in the Escrow Agreement, that BSIO would be paid for its services as Escrow Agent, BSIO was therefore entitled to fees for its services up till December, 1989.
- (b) He held that the Banks & Trusts Companies Regulation Act (BTCR Act) as amended on the 29th December 1989, did not completely prohibit or bar BSIO from claiming fees for its services as the Escrow Agent under the Escrow Agreement as the effect of the amendment was not retroactive.
- (c) BSIO was entitled to its fees and charges from 15th April, 1984, up to and including 29th December 1989.
- (d) In the absence of an agreed scale or quantum, BSIO was entitled to a "reasonable fee" based on the custom existing in the banking industry.
- (e) He ordered that judgment be entered for BSIO against GHL jointly and severally in the sum of US \$881.156.39 as fees for its services as Escrow Agent.
- (f) He dismissed GHL's and GIL's counterclaims against BSIO for damages for breach of contract, breach of fiduciary duty and for negligence.

(g) Anders claim against BSIO contained in its Defence and Counterclaim filed on 20th October, 1999,, was also dismissed.

(h) He ordered that GHIL and GIL do pay BSIO's costs to be taxed of not agreed.

42. On 10th June 2004, GHIL and Anders, the appellants, appealed against the decision of Lyons J. It was noteworthy that although judgment was given against GHIL, and GIL jointly and severally, GIL was not an appellant.

43. On 24th February 2005, the appellants filed an Amended Notice of Appeal in which they included particulars in support of their grounds of appeal.

44. Before us, Mr. Philip Davis (for the appellants) relied on three grounds as set out in the Amended Notice of Appeal as follows:

1. The learned judge erred in law and in fact in finding that the said Escrow Agreement had been terminated.
2. The learned judge erred in law and in fact in finding that the Respondent was entitled to any remuneration under the Escrow Agreement.
3. The learned judge erred in law and in fact in dismissing the counterclaims of the Appellants.

45. The position or the standi of Anders in the appeal was difficult to understand.

46. There was nothing in the evidence from the court below to indicate or show that Anders was a party to the Escrow Agreement on which this appeal was grounded. Although Anders was listed by GHIL as a defendant in its counterclaim against BSIO. Anders took no part in the proceedings to present its defence or to prosecute its so-called counterclaim against BSIO. At the hearing of the appeal

before us, no arguments were presented on Anders' behalf nor could any issues be raised on its behalf, which were not raised at the hearing below.

47. The Appellants at the trial relied exclusively on the evidence of Dr. Kamel their sole witness. Lyons J. found his evidence so unreliable that he commented:

“(19) When considering all of the evidence and from my observations of the witnesses and their general demeanor, I must say that overall, I preferred the evidence of the plaintiff and its witnesses. Where any differences existed, I accepted the plaintiff's version as opposed to that of the defendants.”

48. This he was entitled to do. Having seen the witnesses give evidence, the trial judge was in a better position to assess their evidence and was able to decide whom to believe.

The Appeal:

Grounds (1) and (2)

49. These grounds could be conveniently dealt with together.

50. In the first ground the appellants argued that the learned judge erred in holding that the Escrow Agreement had been terminated by the letter from GHIL and others to BSIO dated 24th May 1991. From its submissions it appeared that the reason for saying so was that BSIO had previously maintained that the said letter did not terminate the Escrow Agreement.

51. In our view the learned judge, in constructing the effect of the letter from GHIL and others to BSIO dated 24th May 1991 was not bound by the view held by any of the parties in the proceeding.

52. The evidence before the learned trial judge showed that the letter terminating the Escrow agreement was signed by or on behalf of the proper officers of GHL, GIL and GmbH. Dr. Kamel was neither a director nor an officer of any of those companies at the material time. There was no evidence advanced by the appellants to the effect that those officers who signed the letter of termination were not the proper officers entitled to sign the same. So Lyons J. was entitled conclude as he did:

(206) I do not consider that the Escrow Agreement is still effective. The evidence is that on the 24 May 1991 the, then, proper officers of GHL and the officers of GIL and GMBH terminated the agreement. It makes common sense to me that in the agreement of the nature of the Escrow Agreement, either party to it could, on proper notice, terminate that agreement. It would be non-sensical otherwise. It would lead to a situation that BSIO could just simply go on rendering fees up to the end of time.

(207)

(208) In that circumstance I am not persuaded that the Escrow agreement is still in effect."

53. We find no reason to disturb or interfere with the findings of the trial judge on this issue.

54. The gravamen of the appellants' second submission was that since there was no agreement on the amount to be paid to BSIO as fees or remuneration for its services as the, Escrow Agent on a proper construction of the Escrow Agreement,

BSIO was not entitled to be paid any fees or remuneration for its services, and therefore the award of US\$881,156.39 to BSIO as fees based on the usual custom in the banking business was wrong.

55. In the Escrow Agreement, it was expressly provided that BSI (i.e, BSIO) was willing to serve as the Escrow Agent for a compensation specified in a separate document. See: the recital and parag. 5 (c) of the Escrow Agreement.

56. Those provisions, without a doubt, showed an intention on the part of GHL, GIL and GmbH to compensate BSIO for its services as the Escrow Agent. They agreed to specify the compensation in a separate document. With that understanding between the parties BSIO went on to perform its duties as the Escrow Agent until the termination of the Escrow Agreement sometime in the middle of 1991.

57. At the time of the termination of the Escrow agreement, no fees or compensation payable to BSIO had been specified in a separate document by the parties as was agreed.

58. Evidence at the trial showed that BSIO's services as Escrow Agent was rendered at the request of GHL, GIL, and GmbH. Both sides in the Escrow Agreement assumed throughout their negotiations that BSIO's services as Escrow agent would be paid for hence it was so expressively provided for in the Escrow Agreement. BSIO's services had been performed in the way of business, not friendship. It was provided in the Escrow Agreement that such compensation to be paid would be specified in a separate document, though the parties failed to specify the compensation or fees as was agreed.

59. Lyons J. was therefore, right in concluding that in the absence of an agreed scale or quantum between the parties, BSIO was entitled to a "reasonable fee" based on the usual custom in the banking business in The Bahamas.

60. Mr. Philip Davis on behalf of the appellants also argued that on the true construction of the Escrow Agreement and the evidence the right to be compensated

could not be properly disassociated from the amount of compensation. He argued that section 21 of the Banks & Trust Companies Regulation Act operated to deprive BSIO of any entitlement to compensation for fees since there was no express and specific agreement in respect of compensation to be debited. In other words that provision in the statute although enacted by parliament in December 1989 the effect was retroactive to deprive BSIO of any right or entitlement to fees since no amount or quantum in respect of compensation or fees had been expressly stated in any document between the parties.

61. Section 21 of the Banks and Trust Companies Regulation Act (the Act) first came into effect on the 29th December 1989 as section 10B of the Act following its enactment by Parliament by way of an amendment to the Act. Following a revision of the statute in the year 2000 it became section 21 of the Act. It provides as follows:

"No Bank shall directly or indirectly charge or receive any sum of money for the establishment, maintenance or services of an account unless such charge is made by express and specific agreement between the bank and the customer."

62. In his decision Lyons J. ruled that BSIO was entitled to its fees and charges from 15th April, 1984, (when the Escrow Agreement was entered into) up to and including the 29th December, 1989. (when Section 21 of the Act came into force). BSIO was not entitled to fees and charges thereafter. In effect section 21 of the Act was effective to deprive BSIO of any entitlement to fees and charges (compensation) after 29th December 1989 in view of the fact that such fees and charges, which it had claimed, were not expressly and specifically provided in an agreement between the relevant parties in this matter.

63. It is a cardinal principle in the interpretation of statutes as is succinctly and concisely expressed by “Maxwell on the Interpretation of Statutes” that it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the statute, or arises by necessary and distinct implication.” (12th edn 1969 p.215.) See: **Hager vs. Orsbourne (1992) Fam. 94 at 99.**

64. Although this principle or rule may be regarded as a general presumption against retrospectivity, which may be displaced by some factors or intention of Parliament clearly, expressed in the Act or which arises by necessary and distinct implication.

65. In our view, this rule or principle of construction of statutes as expressed by “Maxwell on the Interpretation of Statutes” is also applicable in the Bahamas in the interpretation of statutes.

66. Prior to 29th December, 1989, Banks and Trust Companies conducted their business without such limitation or prohibition as now contained in Section 21 of the Act.

67. Parliament is presumed not to intend a legislation with retrospective effect, especially where a legislation inflicts a detriment, unless such an intention clearly appears in the statute in question or arises by necessary and distinct implication.

68. No doubt, section 21 of the Act construed retrospectively inflicts a detriment which before the enactment of that provision on the 29th December, 1989, did not exist under the Act.

69. A statute or legislation with retrospective effect is said to inflict a detriment “if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already past.” **Yew Bon Tew vs. Kenderaan Bas Mara (1983) A.C. 553, per Lord Brightman at p. 558.**

70. We found nothing in the Act or in the said section 21 of the Act in particular to lead to the conclusion that section 21 of the Act, when it was enacted and put into effect on the 29th December, 1989, was intended to operate retrospectively so as to deprive BSIO of its right to fees which it had become entitled to as the Escrow Agent up to the 29th December, 1989.

71. We found no reason therefore to interfere with the decision of Lyons J. on that issue.

72. Grounds 1 and 2 of the appeal therefore failed.

Ground 3

73. In this ground the appellants contended that the learned judge erred in law and in fact in dismissing the counterclaim of the appellants.

74. In the Notice of Appeal the appellants gave the following particulars in support of this ground:

Particulars

- (a) The Trial judge erred in finding that the counterclaim of the Appellant was afoul of the Limitation Act because the causes of action arise from the continuing obligations imposed by the Escrow Agreement.
- (b) The Trial Judge finding that the Appellant suffered no loss cannot be reconciled with the evidence and awarding judgment against GIL.
- (c) There is no evidence that the directors of the Appellants from 1990 with GIL and GMBH decided to circumvent the Respondent and the Escrow Agreement and deal directly.
- (d) An abundance of evidence points to the fact that the Appellant and the Respondent were **not** satisfied that Tanzania had paid off its indebtedness.

- (e) The Respondent assumed the responsibility for collecting the overdue account receivable. The Appellant relied upon that assumed responsibility for the protection of its interest in and to the overdue accounts receivables. (sic)
- (f) The assumption of the responsibility saddled the Respondent with the obligation to discharge the assumed responsibility with care. This it failed to do.
- (g) No step beyond a clerical nature was taken and at the circumstances required the respondent to take appropriate legal action."

75. Apart from (a) in the particulars the rest of the particulars appeared to be matters of fact on which the trial judge was entitled to make his finding after hearing from and observing the witnesses.

76. With regard to paragraph (a) of the particulars referred to above, the evidence showed, and it was so found by the trial judge that the Escrow Agreement which the appellants relied on for their counterclaim was in fact terminated by GHIL, the appellant, GIL and GmbH by a letter dated 24th, May 1991, which letter was said to have been received by BSIO on the 12th July 1991.

77. BSIO's duty and obligations as the Escrow Agent would have come to an end on the 12th July 1991, when that letter of termination was received.

78. GHIL and GIL having joined in the termination of the Escrow Agreement by their letter to BSIO dated 24th May 1991, could not therefore be heard to submit that notwithstanding their letter, the Escrow Agreement continued to exist. They could not approbate and reprobate: See. **Lissenden Vs. Bosch (1940) A.C. 412 at 417 - 418.**

79. The allegations or claims of breach of contract, breach of fiduciary duty and negligence by GHIL against BSIO were first raised in its pleadings by way of Defence

and Counterclaim filed on 4th June, 2003 – approx. eleven (11) years and eleven (11) months after the Escrow Agreement was terminated by GHIL and others.

The Limitation Act

80. The Limitation Act provides that an action in respect of a breach of contract, negligence or breach of fiduciary duty shall not be brought after the expiration of six (6) years from the date of which the causes of action accrued. (Section 5)

81. In order for the appellants to maintain actions such as a they sought to do by way of their counterclaims, such actions must not be based on any alleged default of BSIO not occurring before the termination of the Escrow Agreement on the 12th July 1991, when the letter terminating the Escrow Agreement was received by BSIO and the Escrow Agreement terminated.

82. Assuming that the causes of action as alleged by the appellants arose from the continuing obligations imposed by the Escrow Agreement, such continuing obligations would have come to an end on 12th July 1991, when the Escrow Agreement was in fact terminated by the appellant, GHIL, and others. Therefore, any possible cause of action, which the appellants would have, must have accrued on or before the 12th July 1991. Thus it was not possible for the appellants to bring or maintain any such action after 12th July 1997.

83. It followed that GHIL's counterclaim brought on 4th July, 2003, fell afoul of the Limitation Act.

84. Also neither GIL nor Anders could have brought or maintained any such action, as they have done, after 12th July 1997.

85. Paragraphs (b) to (g) of the particulars could be dealt with together.

86. In his decision, Lyons J. found that GHIL could not maintain an action against BSIO in that it was unable to show that it had sustained any loss through the default of BSIO.

87. In his finding on this issue the learned judge said:

“(153) This is an evidential and a question of onus of proof.

(154) Under the Escrow Agreement, GHL was to receive \$10,519,305.00 plus interest. This sum was to be paid out of money first received into the Escrow Account, whether from Tanzania or Guinea.

(155) The unchallenged evidence (I stress this) is that the directors of GHL for 1990 decided that the company (GHL) should join with GIL and GMBH to circumvent BSIO and the Escrow Agreement and proceed direct to deal with Guinea and Tanzania on the collections of debts due (the Overdue Receivables).

(156) The unchallenged evidence is that by the date of trial some thirty million dollars had been collected from Guinea as a result of the arbitration, and, that Tanzania had paid off its indebtedness to the satisfaction of GHL, GIL and GMBH.

(157) The unchallenged evidence is that (by the date of trial) GHL, through its directors of public record accepted that it had been paid in the full the amount due under the Escrow Agreement.

Originally (and before Dr. Kamel's interest took over GHL) this was supported by the pleadings.

(158) In other words, the unchallenged evidence is that GHL, in its corporate capacity has suffered no loss."

88. The Appellant challenged this finding.

89. This was a finding, which the learned judge was entitled to make from the evidence after hearing and observing the witnesses.

90. Lord Haldane in **Lennard's Carrying Co. Vs. Asiatic Petroleum Co. Ltd. (1915) A.C. 705** said:

" A corporation is an abstraction. It has no mind of its own anymore than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation." (at p. 713-714).

91. The Board of directors of GHL was the brain of that company. In this case GHL acted through its board of directors.

92. An act done by the board of directors on behalf of a company at a particular time does not cease to be the act of the company by reason of the fact that there has been a change in the composition of the board of directors of that company.

93. The learned trial judge found that BSIO wrote numerous correspondences to the governments of the Republic of Tanzania and the Republic of Guinea informing them that payment of the receivables should be made to BSIO as the Escrow Agent. GHL and GIL were able to persuade these governments to pay the outstanding receivables directly to GHL and GIL, which they did. The trial judge found that BSIO did all it could to collect the outstanding receivable but failed. By the terms of the Escrow Agreement BSIO could not commence any litigation in order to collect those receivables without the consent of GHL, GIL and GmbH. See: **clauses 5 (a) and 5 (b) of the Escrow Agreement.**

94. BSIO could not therefore be liable in damages for breach of its obligations under the Escrow Agreement, as claimed by the appellant.

95. We found no reason to interfere with relevant findings of facts which the trial judge made on the issues being challenged in this ground based on his assessment of the evidence of the witnesses before him. He had the opportunity, which we did not have, to see the witnesses give evidence and to assess their credibility.

96. In our view the challenge of the findings and decision of the trial judge under this ground has no merit.

97. It was for these reasons that the appeal failed and was dismissed with costs to the respondent to be taxed if not agreed.

Osadebay, J.A.