

INDUSTRIAL FINANCE COMPANY LIMITED v JACQUES AND PARTNERS
(1981) Z.R. 75 (H.C.)

HIGH
SAKALA,
28TH FEBRUARY, 1980
(1977/HP/752)

COURT
J.

Flynote

Tort - Negligence - Professional Negligence - Lawyers - Duty to protect client where instructions are given.

Civil procedure - Judgment - Entry of judgment- Consequence of not opposing entry.

Headnote

The plaintiff, brought an action against the defendants for professional negligence.

The plaintiff and Kentwood Investment Limited had signed a contract for the sale of assets. A misunderstanding arose and the plaintiff stopped payment of a cheque payable to Kentwood. Consequently Kentwood wrote to the District Registry at Kitwe, claiming the amount payable on the cheque. The cheque was dishonoured. An attempt was made by the parties to settle the dispute out of court. It was agreed that the misunderstanding leading to the stop payment would be made good and the plaintiff's lawyers would hold the payment in transit for Kentwood. After the plaintiff had made one payment, another misunderstanding arose, this time with their advocates.

Kentwood obtained a summary judgment against the plaintiffs. In the meantime, the plaintiffs, whose advocates were Jacques and Partners wrote them informing them that they had changed advocates to Chuula and Company, who had applied to court to set aside the summary judgment. However, it was Jacques and Partners who appeared on behalf of the plaintiff and they did not oppose the summary judgment. The plaintiff therefore brought an action against the defendants - Jacques and Partners for not complying with their written instructions. It was held on a balance of probabilities that the defendants did not fail to comply with any specific written instructions as at that point in time, there were no such instructions.

Held:

- (i) Where a lawyer has instructions, he has a professional duty to protect his client so that where it is shown that the advocate has failed to exercise his duty to the cost of his client, the lawyer must make good and pay for that damage.
- (ii) Where a party to the proceedings of this nature is given time and ample opportunity to oppose entry of judgment, and does not do so, so as to disclose a defence whether that defence is acceptable by the court or not, the other party is entitled to have the judgment entered in his favour.

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Case referred to:

(1) Otter v Church Adams, Tatham and Company [1953] Ch. 280.

For the plaintiff: A.J. Nyangulu Esq, Fitzpatrick Chuula and Company.

For the defendant: A.P. Annfield Esq, Annfield and Company.

Judgment

SAKALA, J.:

The plaintiff's claim is for damages for professional negligence arising out of the defendant's failure to comply with the plaintiff's specific written instructions dated the 19th December, 1975, and 5th January, 1976, to the effect that the defendant should defend the action between Kentwood Investments Limited and the plaintiff, in case number 1975/HK/379. The plaintiff further claims the sum of K87,944.21 as special damages. (In my judgment, I will refer to the plaintiff as IFC and **10** Kentwood Investments Limited wherever it appears as simply Kentwood).

The background of this action as can be ascertained from the pleadings, documents and evidence is that on the 31st March, 1975 the plaintiff and Kentwood of Kitwe signed a contract for the sale of assets. In the course of the contract after both parties had complied with the terms a misunderstanding between them arose. In consequence of the misunderstanding the plaintiff **15** stopped payment of a cheque dated 30th September, 1975, payable to Kentwood in the amount of K85,997.92. The circumstances leading to the stop payment of this cheque are set out in a letter dated 22nd October, 1975, to which I will be making reference later in my judgment. As a result of this action taken by the management of IFC Kentwood issued a specially endorsed writ in the District Registry, Kitwe on the 15th October, 1975, against IFC in cause number 1975/HK/379 **20** claiming for K83,997.92 in respect of the cheque dated 30th September, 1975, drawn by IFC on National Commercial Bank Limited, Lusaka in favour of Kentwood. This cheque had been dishonoured on presentation. The notice of dishonour had been given to IFC A.E. Clark and Company of Kitwe represented Kentwood and Jacques and Partners of Lusaka represented IFC. On the 23rd October, 1975, IFC entered appearance in that case. From the documents before this court **25** it is clear that after appearance was entered in cause number 1975/HK/379 there were detailed discussions and meetings between the parties aimed at settling the dispute out of court. This is evidenced by the contents of documents numbered 12, 16, 18 and 19 of the defendant's bundle. I will again be making reference to these documents later in my judgment. But at this stage it is significant to observe that the contents of these documents were reduced into a supplementary draft **30** agreement (P2 & P4) between IFC and Kentwood intended to supersede the original agreement. For reasons which emerge from the evidence the draft was not executed. A significant point that emerged from the various discussions, meetings and correspondence between the parties is that it was agreed that the alleged shortfall in the rock crushed which was the cause of the misunderstanding leading to stop payment would be made good and I.F.C.'s lawyers would hold the **35** payment in trust for Kentwood until the rock had been crushed. After I.F.C. made one payment

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but before the draft agreement was executed they were not contented with the arrangements. This **40** led to another misunderstanding this time with their own advocates leading to a complete confusion (see documents numbered 23 and 26 in the defendant's bundle.) In an attempt to clarify the misunderstanding Jacques and Partners sought clarification from F.C. (document number 27

defendant's bundle). This led to a document numbered 29 in the defendant's bundle but numbered 4 in the plaintiff's bundle. This is a letter from the General Manager of I.F.C. dated 5th January, 1976. 45 This letter clearly brings out the mood of I.F.C. as by that date. They were going back to the position prior to the negotiations 10 and draft supplementary agreement. Unfortunately for I.F.C., their General Manager the central figure in the negotiations with Kentwood, was suspended on the 6th January, 1976. From that date there appears to be no further correspondence between IFC and their advocates until after Kentwood obtained judgment under order 13. On the 23rd January, 15 1976, Kentwood in the district cause obtained leave to sign judgment under order 13 in the sum of K83,997.92. Before Kentwood obtained garnishee order Jacques and Partners wrote to I.F.C. twice documents No. 36 & 37). Document No. 37 is dated 16th March, 1976. It is not clear from the documents whether IFC made any reply. But on 17th March, 1976, a day after a letter from Jacques and Partners I.F.C. wrote them informing them that they had changed advocates (document No. 39). This time they engaged Fitzpatrick Chuula and Company. Chuula and Company applied to court to 5 set aside the summary judgment obtained by Kentwood in the district cause on the 23rd January, 1976, (document number 5 in the plaintiff's bundle is a ruling by the District Registrar). The proceedings in the district cause resulting into summary judgment are not part of these proceedings and were not produced. But the ruling of the District Registrar (document No. 5) produced in this court shows that Mr Lubamba of Jacques and Partners appeared on behalf of I.F.C. According to the 10 contents of document numbered 5 in the bundle of the plaintiff did not oppose the application for summary judgment. The present action therefore is that Jacques and Partners are guilty of professional negligence in that as advocates of IFC in the district cause they did not comply with the written instructions of I.F.C. 15

The foregoing is the history of this action. I have given the full history at the beginning to enable a quick grasp of the issues as presented by the pleadings and the evidence on account of the many documents and voluminous evidence on record.

The plaintiff has pleaded in paragraphs 5-10 of the statement of claims as follows: 20

"5. That sometime between September and October 1975, the plaintiff was sued by Kentwood Investments Limited for damages in the sum of K83,997.92 allegedly being in respect of a dishonoured cheque issued by the plaintiff and payable to the said Kentwood Investments Limited; 25

6. That between the said September and October, 1975, the plaintiff instructed and retained the defendants who agreed to act as

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advocates for the plaintiff in defending a claim on behalf of the plaintiff brought against them (the plaintiff) by the said Kentwood Investments Limited; 30

7. That on the 23rd of October, 1975, the defendants in compliance with the plaintiffs instructions entered appearance to the Writ of Summons issued and served on the plaintiff by the said Kentwood Investments Limited;

8. That in the premises it was an implied term in the said agreement and it was the duty of the 35 defendants that the defendants would exercise all due care, skill and diligence in and about the prosecution of the said defence on behalf of the plaintiff in the said action brought

- against them by Kentwood Investments Limited;
9. That in breach of the said term or the said duty or by reason of the negligence on the part of the defendants, their servants or agents the defendants after entering appearance on behalf of the plaintiff in the action as aforesaid failed to further exercise any or any duty, care, skill or diligence in or about the prosecution of the said defence to the said claim;

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PARTICULARS

- 20 (a) Failing to communicate to the advocates of the said Kentwood Investments Limited the new developments with regard to the agreement between the plaintiff and the said Kentwood Investments Limited; 45
- (b) Failing on the part of the defendants' Kitwe office to make due or proper or indeed any application for an adjournment to enable them to obtain instructions from their Lusaka office when they appeared on behalf of the plaintiff herein before the District Registrar in Chambers at the High Court in Kitwe on the 23rd January, 1976, during the hearing of summons under Order 13;
- (c) On the part of the defendants' Kitwe office submitting on behalf of the plaintiff on the said 23rd January, 1976, to the Court that "since there had been a delay of seven weeks it was difficult for him to oppose the plaintiff's application for judgment" which submission was not the plaintiff's instructions;
- (d) Failing to oppose the action brought by Kentwood Investments Limited against the plaintiff in accordance with the plaintiff's instructions to the effect as impliedly stated by the said plaintiff to the defendants in a letter dated 19th December, 1975, and also the letter dated 5th January, 1976, which defence according to the letter dated 19th December, 1975, was to the effect that the plaintiff's cheque dated 30th September, 1975, for the sum of K83,997.92 intended for 5 10

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payment to Kentwood Investments Limited for alleged crushed stones was stopped on the grounds that after issuing the said cheque the plaintiff quickly discovered that not sufficient stone had been crushed by Kentwood Investments Limited to complete the work of crushing the stone according to Clause 7a of the agreement to the satisfaction of the plaintiff herein before the payment could be effected for the same; 15

(e) Conducting the said action between the plaintiff and Kentwood Investments Limited in such a manner that on the said 23rd January, 1976, by order of the District Registrar for the Kitwe High Court, the said Kentwood Investments Limited obtained summary judgment in the said sum of K83,997.92 with costs in default of defence: 20

10. By reason of the matters aforesaid, the plaintiff lost all prospects of defending the action in the said sum of K83,997.92 claimed by the said Kentwood Investments Limited and the plaintiff were thereby deprived of the chance of success in the said action and they have thereby suffered loss and damages." 20
- The special damages amount to K87,944.21. 20 25

In their defence the defendants have pleaded in paragraphs 3-4 as follows:

"3. The defendants aver that subsequent to the said Memorandum of Appearance the defendants

with and on the instructions of the plaintiff by its then General Manager Goodwin Yoram Mumba were engaged in negotiations with the said Kentwood Investments Limited and its advocates in reaching agreement to settle the matters raised in the said writ amicably but that following the suspension by His Excellency the President of the Republic of Zambia on the 6th January, 1976, of the said General Manager of the plaintiff the plaintiff failed to provide the defendants with any or any adequate instructions to allow them to properly defend the said action;

4. Further or in the alternative if, which is denied, the defendants were negligent and judgment was so obtained then the plaintiff suffered no damage as the amount claimed by Kentwood Investments Limited was due to them by the plaintiff."

They have also pleaded a counter-claim of advocates and client's costs.

The plaintiff called four witnesses in support of the claim. The defendants called only one. The evidence adduced from these witnesses which is quite detailed is on record. It is not my intention to set out the full details of the evidence but I propose to set out the evidence which is very relevant to the main issue. PW1 Sam Chikwanda, the deputy general manager of City Radio, testified that he worked for the plaintiff company, which has now gone into liquidation, from 1974 to 1976 as its

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administrative manager. Mr Goodwin Yoram Mumbo was its general manager. He knew a company by the name of Kentwood Investments Limited. They had a contract with them regarding the crushing of stones at Baluba quarry. The contract had laid down procedures to be followed. But Kentwood insisted on advance payment. He said this was contrary to the terms of the agreement. He explained that during the contract the plaintiff paid a certain sum of money on being made to believe that Kentwood had crushed stones equivalent to that amount. But after IFC engaged independent surveyors it was discovered that the stone equivalent to the amount paid was not crushed. Consequently a cheque in the sum of K83,997.92 intended for payment to Kentwood Investments was stopped. On the 15th October, 1975, he wrote a letter to Jacques and Partners (document number 3 defendant's bundle) enclosing a specially endorsed writ from Kentwood. This letter was followed by a letter from George Matanga dated 27th October, 1975, (document number 8 defendant's bundle). This letter was also followed by a letter dated 19th December, 1975, from the chief accountant (document number 29 defendant's bundle). Mr Chikwanda further testified that the supplementary agreement referred to in the letter dated 16th December, 1975, from Jacques and Partners was not executed. Consequently the original agreement continued. He stated that Kentwood issued a specially endorsed writ against IFC claiming K83,997.92 in respect of a cheque dated 30th September, 1975. He explained that the cheque was not dishonoured but payment was stopped. But to protect the rights of IFC he wrote Jacques and Partners on the 17th October, 1975, informing them of the action against IFC and promising them further information later. He said his letter of 17th October, 1975, meant that the claim by Kentwood was being disputed. He told the court that Jacques and Partners did not defend the action to its conclusion nor did they withdraw from acting for IFC while the case was going on. He testified that at the time of the judgment being entered in favour of Kentwood IFC was not aware. They became aware when their account was debited in the sum of K83,997.92 and credited to Kentwood. He did not agree with the judgment taking into consideration the facts submitted to Jacques and Partners. He was certain that Kentwood

was not entitled to the amount because they did not crush the stone equivalent to that amount. This fact, he said, was communicated to Jacques and Partners. He said Jacques and Partners did not put IFC's defence before court. **30**

When cross-examined Mr Chikwanda told the court that he did not take part in the conclusion of the original contract between Kentwood and IFC. But he was personally aware of the circumstances that led to the agreement as he was present in the board meeting that considered it. He did not take part in the signing. He was not present when it was signed. He further stated that Kentwood did not personally informed that they required advance payment. **34**

He stated that at the quarry there was based a representative of IFC. He conceded that some rock was crushed pursuant to the agreement. **40**

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He further conceded that the cheque was paid on the basis of the information by Kentwood that crushed stone was worth the amount of the cheque. But a report of the surveyors revealed that a lesser amount of stone had been crushed. He testified that after the letter of 17th October, 1975, to Jacques and Partners he was still involved in the case but the matter was left to the lawyers to act and defend them. There was however no communication between him personally and Jacques and Partners until after IFC's account had been debited. He did not personally speak to Mr Mung'omba. He conceded that after the writ was issued and appearance entered the communication between IFC and Kentwood resulted in the supplementary agreement which was not executed. He did not himself take part in the negotiations leading to the supplementary agreement. The witness further explained that after the writ was issued it was Mr Mumba who dealt with Mr Mung'omba. He conceded that he was not aware that Jacques and Partners and A.E. Clark and Company were in communication until when Mr Mumba was suspended. PW1 agreed that Mr Mumba, the general manager, was the individual dealing with Kentwood and also the individual who dealt with Mr Mung'omba regarding the supplementary agreement. He further agreed that Mr Mumba would have been the right person to swear an affidavit defending the allegation by Kentwood but not the only person in the company. He could have done it himself. He testified that Mr Mumba was suspended with effect from 6th January, 1976, and has never worked for IFC since then. He said the effect of the suspension was that Mr Mumba never came back to the office again. He said Mr Mung'omba was not able to obtain instructions from him because he was in Livingstone for business. But the chief accountant was present. He said he never got any single message from Mr Mung'omba at his office. He also stated that IFC did not continue operating normally immediately after Mr Mumba's suspension until the end of January, 1976, when a Mr Moyo was Brought in as an acting general manager. The witness also told the court that after the judgment was entered he decided to take the matter to Mr Nyangulu because Mr Mung'omba, had informed him that it was too late to appeal. He did not himself believe that it was too late. He testified that at the application to set aside the judgment he made an affidavit but he could not recall stating in his affidavit that at the time of the judgment IFC was under investigations. He also could not remember suggesting in his affidavit that Jacques and Partners neglected their duties. Asked whether he still thought Jacques and Partners were negligent in their duties after he had gone through the evidence, Mr Chikwanda told the court that he would rather reserve his comments on that question. **5**
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After cross-examination Mr Chikwanda was recalled to testify on the expenses and fees paid to Chuula and Company when they represented IFC. He also told the court that he left IFC in February, 1977.

PW2 testified that on the 1st August, 1977, he was appointed liquidator of IFC. He said in the course of the administration of the

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estate he came to know that there was a dispute between IFC and Kentwood. The dispute related to crushed stones under an agreement between Kentwood and IFC. He said the dispute arose as a result of an allegation that insufficient stone had been crushed by Kentwood. He testified that as far as he was aware there was one agreement between the parties. But there were also negotiations concerning a second agreement. He was not aware that that was concluded. When cross-examined he agreed that he found a draft of an agreement on the telex. But he did not check the contents of the telex.

PW3 testified that he was the chief accountant of IFC from 2nd May, 1975, until August, 1977. He was responsible for all the financial matters of the company. He knew Kentwood Investments Limited. There was an agreement between Kentwood and IFC. He also knew something about the cheque in the sum of K83,977.92. He said he did not sign the cheque himself. It was signed by Mr Chikwanda and Mr Mumba. He did not make the stop payment of the cheque himself and he did not know that it was stopped. The witness further testified that when Mr Mumba was suspended Mr Moyo took his place. The auditors also came in and the office was a bit in chaos from that date. When cross-examined he testified that he spoke to Mr Mung'omba before Mr Mumba, was suspended. He said he remembers making a remark that "the matter had become political." He said he did not know anything about the dishonoured cheque as well as the writ by Kentwood. He further testified that after the suspension of Mr Mumba, Mr Mung'omba was trying to get hold of Mr Chikwanda but when the operator rang Mr Chikwanda's extension somebody always said he was not in. He said Mr Chikwanda wandered from one office to the other. He personally asked Mr Chikwanda to see Mr Mung'omba. He further explained that when Mr Mumba was suspended the investigators went directly into the Kentwood affairs and collected all the documents relating to the case. The auditors took a lot of the documents and only returned some of them in April or May to prepare the accounts.

PW4, Goodwin Yoram Mumba, testified that he was the general manager of IFC from 1st January, 1976. He was the chief executive of the company responsible to the Board of Directors. The company was a lending institution. He knew Kentwood Investments Limited. He testified that Kentwood entered into a management agreement in 1975 to crush stones at Baluba quarry. There were problems afterwards. He explained that Kentwood were not honest. They did not crush all the stones. He admitted that some stone was crushed and payment made in accordance with the terms of the agreement. But when the first payment was due a valuer was sent to the site to make a report on the crushed stone. It was discovered later that there was a shortfall in the stone crushed and that they had paid more money than they were supposed to. He took Kentwood to task. But it was mutually agreed that Kentwood would crush further stone to offset the shortfall. After some time

they were informed that Kentwood had crushed a certain amount of stone equivalent to K83,000 plus. He promised to send an 20

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independent valuer to ascertain the amount of stone crushed. But before that he was summoned to the office of the Chairman, Mr Munkonge where he found a representative of Kentwood. He was 25 instructed to pay the K83,000 plus to Kentwood. Mr Munkonge, informed him that any delay in effecting payment would force Kentwood to sue IFC. Mr Mumba stated that he was in doubt whether at that stage stone equivalent to that amount had been crushed. When he wanted to ascertain whether the stone had actually been crushed Mr Munkonge, the chairman, insisted that payment should be made and the ascertainment of whether stone had actually been crushed to be 30 made later. He said the Chairman's interest was to see that the matter was not taken to court. He said he agreed in the presence of the Chairman that payment would be effected. After leaving the office of the Chairman he instructed the chief accountant to issue a cheque to Kentwood. But after the representative of Kentwood left he instructed the chief accountant to stop payment of the cheque because his conscience was not clear as to whether stone had been crushed. He stated that he had agreed to the instructions of the Chairman to effect payment because he did not want to disappoint 35 him right away. He said the accountant stopped payment of the cheque. As a result Kentwood reacted bitterly. They approached their lawyers. The Chairman informed him that Kentwood had complained bitterly to him against his reaction. He said he explained to the chairman that they could go ahead with whatever they planned. He stated that they were prepared to defend themselves. They wanted to obtain an independent valuer before making payment. He testified that Kentwood went ahead with the action. He explained that the cheque was not dishonoured but 40 stopped. He said if the cheque had not been stopped it would have been honoured as they had funds at the material time. He also explained that upon receipt of the writ he sought advice of Mr Mung'omba. He told Mr Mung'omba the whole story. He testified that as Mr Mung'omba was studying the case there were a lot of things happening. Kentwood appealed to the Chairman. They also told him that they had seen the Minister of Finance so that the matter would be settled out of court. He told them that he was seeking legal advice. He explained that Mr Mung'omba visited him at his office advising him on the matter and on any point that was not clear. But after some time Mr Mung'omba suggested that since the Chairman did not want the matter to be heard in court it would be settled out of court. IFC insisted that the crushed stone should be inspected. By then the cheque had already been stopped But he agreed to accept Mr Mung'omba's advice. Accordingly it was arranged that payment be made to Jacques and Partners to hold the money for Kentwood to be released when he had satisfied himself that stone had actually been crushed. Subsequently he received a letter from Mr Mung'omba advising him that they should make the cheque payable to 5 Jacques and Partners to be put into client's account. The witness explained that he did not understand this. He did not know whether Mr Mung'omba meant their account or Kentwood's account. He said he told the chief accountant to write to Mr Mung'omba to explain to him that Kentwood had not crushed the stone and there was a shortfall of the amount of stone required at that particular time. He told 10

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the court that the last communication he had with Mung'omba on the matter was on the 5th January,

1976. He said he remembers Mr Matanga writing to Jacques and Partners explaining the problems they were encountering with Kentwood. He also testified that he remember signing a second 15 agreement but he did not honour it because he was not satisfied at the bottom of his heart. He explained that he signed it because the Chairman used to press him. He said at the time he was the general manager he was thinking of withdrawing the case so that the matter would be settled out of court.

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When cross-examined, he told the court that after Kentwood commenced the action negotiations took place. He had two meetings with Mr Munkonge on the issue. The negotiations ended up with supplementary agreement. This was intended to settle the dispute. As a result of these negotiations a cheque in the sum of K37,000 was paid. This was in pursuance to the supplementary agreement. The balance of K83,000 was to be held by Mi Mung'omba until approved that the stone was 25 crushed according to the supplementary agreement. He testified that each time Mr Mungtomba sought instructions he contacted him as the one handling the affairs. He explained that there were other people who could give instructions with his consent. Among them were the chief accountant, the company secretary and Mr Matanga. He explained that after he was suspended he never went back to his office. He said up to the time of his departure he was the one mostly involved in the negotiations and nobody else would have known anything because they were not present at the 30 meetings. Mr Mumba told the court that if he had been at the office he would have given instructions to enable the action to be defended. In re-examination he told the court that if Mr Mung'omba approached the chief accountant he would have given him instructions. He testified further in re-examination that in the absence of somebody being appointed as the general manager, the chief accountant would have taken over. He explained that the acting general manager should have been approached failure and to answer the questions the chief accountant or Mr Chikwanda 35 would have helped if approached. When asked by court, he said he had no opportunity to hand over the office and brief any one on the outstanding matters. He also stated that after he left the office nobody approached him on any matter at all.

On behalf of the defendant, DW1, Mr Willa Mung'omba, testified that at the end of October, 1975, 40 he was a partner in Jacques and Partners. On the 17th October, 1975, he received writ of summons. A memorandum of appearance was entered by his Kitwe offices. After the appearance was entered it was necessary for him to obtain instructions from IFC if he was going to defend the case properly. He got in touch with the general manager, Mr Mumba. He invited him to his office to discuss the matter. The general manager suggested to him that it would be useful if he came with the chief accountant to IFC. The meeting took place attended by a representative of Kentwood. The matter was discussed in detail resulting in all agreeing that there was going to be a supplementary agreement which was in a way to supersede the

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original agreement between the parties. It was agreed at the meeting that a sum of K125,000 plus would be payable to Kentwood but that before the amount was paid, Kentwood would be required to satisfy IFC that they (Kentwood) had crushed enough stones equivalent to the money that IFC 5 was to pay. At the same meeting it was agreed that funds were going to be paid to Jacques and Partners to make final payment when the justification had been done and that once final payment was made that would be the end of the action commenced by Kentwood. Mr Mung'omba stated that

he remembers that everybody left his office feeling satisfied and the representative of Kentwood was returning to Kitwe to instruct their advocates to draw up the supplementary agreement which 10 was to supersede the original agreement. Soon after he was in receipt of the draft supplementary agreement which he took to his client. He testified that the draft of the supplementary agreement was put to him by Mr Cornwell of A.E. Clark and Company by telex. He said that in pursuance to the agreement he received a cheque in the sum of K37,000 payable to Jacques and Partners as 15 advocates of IFC to be paid to Kentwood. He said it was agreed that the balance of K83,000 would be paid later. He stated that it was stipulated in the agreement that Jacques and Partners would act as trustees. Hence he insisted to receive the money from IFC so that he would make payment after Kentwood had crushed the shortfall in the stones. He testified that the cheque of K83,000 was made 20 payable to Kentwood. He objected to this because according to the arrangement they had been appointed trustees of Kentwood. Hence the cheque had to be made in the name of Jacques and Partners. Mr Mung'omba, told the court that he never took any single step in the matter without consulting Mr Mumba, the then general manager of IFC. He said after receiving a letter from the chief accountant he felt that IFC had departed from the spirit of the supplementary agreement and also departed from the original instructions. In this connection he wrote to IFC expressing surprise 25 and indicating that it seemed that the matter had taken a different course at that stage and that he had no instructions to defend that new course. He explained that he was not able to obtain any instructions from Mr Mumba after the 6th January, 1976, when he was suspended. But he felt that he was still acting under instructions. He testified that until the 5th January, 1976, when he received a letter from Mr Mumba it had been understood that there was absolutely no defence by IFC to the action. He said after Mr Mumba was suspended he endeavoured with a lot of effort to obtain 30 instructions to defend the proceedings. He personally went to IFC offices to find out if there was any other person other than Mr Mumba, who could give him instructions. He saw a Mr Moyo who was then the acting general manager. Mr Moyo told him that he was fresh in the office and that he did not have the opportunity to talk to Mr Mumba before he left and therefore he could not help him. Mr Moyo then suggested to him to see Mr Hall who was then the chief accountant. He saw Mr 35 Hall. But Mr Hall told him that the matter had become seriously political. Mr Hall told him that the files had been seized by the Investigator General and as an expatriate he was reluctant to deal with the matter any more. He referred him to see Mr Chikwanda. He testified that for

nearly two months from the time Mr Mumba left the office to the time of judgment he never saw Mr Chikwanda. Every time he inquired about him he was never in the office to give him instructions. He explained that he made a note on the 19th January, 1976, stating that he had spoken 45 to Mr Cornwell of A.E. Clark and Company asking him to withhold any execution in the matter and that he had spoken to Mr Hall, the chief accountant of IFC and that the matter was in the hands of the Investigator - General. He testified that had he received instructions he would have applied to have the judgment set aside. But that would have involved someone from IFC to swear an affidavit. He did not have that someone. He explained that if Mr Mumba had not been suspended on the 6th January, he would have contacted him as he worked with him on the matter almost constantly. He told the court that there was pressure on him to have the matter settled out of court as a result of meetings between himself, Mr Mumba and Kentwood were held. Mr Mung'omba also told the court that IFC has not paid Jacques and Partners for all the work done in the matter.

When cross-examined, he told the court that up to the time when the judgment was entered in the matter of Kentwood and IFC he did not receive any instructions from IFC to withdraw from acting on their behalf. He said that after the middle of December it was clear to him that instructions had become ambiguous. It was necessary for him to get instructions in order to proceed. He said he did not himself give IFC any notice to withdraw. He told the court that he had been acting for IFC from the date of its inception hence he would have been glad to see its death. He told the court that he was never given instructions on the ground of dishonesty. Mr Mung'omba further told the court that he did not advise Mr Lubamba to ask for an adjournment or to withdraw from acting because he still hoped that he could obtain instructions. But there was nobody to help.

The foregoing is the summary of the plaintiff and the defendant's evidence. At the end of the defence both learned counsel made detailed submissions. Counsel for the plaintiff in addition to oral submissions tendered written submissions. I have very carefully addressed my mind to the evidence as well as to the submissions of both learned counsel.

The material facts are not in dispute. It is common ground that IFC instructed Jacques and Partners to represent them in an action which they were being sued by Kentwood. In this connection they entered appearance on behalf of IFC. It is also common cause that Mr Mung'omba then partner in Jacques and Partners was involved in negotiations which were aimed at settling the matter out of court.

The question for the determination of this court is whether Jacques and Partners failed to comply with IFC's specific written instructions to defend the action in cause number 1975/HK/379 to render them (Jacques and Partners) guilty of professional negligence in this cause.

The general principle of law as rightly pointed out by Mr Annfield, counsel for the defendant, is that where a lawyer has instructions he has

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professional duty to protect his client so that where it is shown that the advocate has failed to exercise his duty to the cost of his client the lawyer must make good and pay for that damage. Thus in a non-contentious case *Otter v Church Adams, Tatham & Company* (1) Upjohn, J., at p. (285) stated as follows:

"The law upon the duty of a solicitor who undertakes to advise client may be summed up in one sentence which I take from the well-known passage in the speech of Lord Haldane L.C. in *Nocton v Ashburton* (Lord): "My Lords, the solicitor contracts with his client to be skilful and careful." For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him."

This statement of law in my view should equally be applicable to contentious matters. Be that as it may I find no dispute on the law in the instant case.

To resolve the issue of whether Jacques and Partners failed to comply with IFC's specific written

instructions it is imperative to critically scrutinise the actual written instructions themselves and the steps taken by Jacques and Partners at each stage of the written instruction. In this connection it will be more convenient to set out the relevant documents in full.

Before the critical scrutinisation of the written instructions, it is convenient at the outset, for purposes of avoiding any misunderstanding of the judgment to clear the status of the document referred to as a supplementary agreement between the parties produced in these proceedings and marked exhibit P4. The document was produced by PW1 on behalf of IFC. In my judgment I have 5 all along so far for obvious reasons, deliberately referred to this document as a supplementary "draft" agreement. I used the word "draft" because from an examination of the document itself supported by oral evidence I am not satisfied that the document was properly executed. While it was signed on behalf of IFC it does not appear to me to have been signed on behalf of Kentwood. With regards to this supplementary draft agreement Mr Nyangulu on behalf of IFC has argued that 10 it created no contractual relationship between the parties and hence was not valid and not enforceable in law. In the alternative he submitted that the defendant cannot rely on it as they did not specifically plead it. In my opinion, as will be seen later in my judgment, it matters not whether this supplementary agreement is enforceable in law or not because independent of this agreement there are other documents clearly setting out what the parties orally and partly writing intended to do. 15 Furthermore there is ample evidence that despite the agreement not having been executed the parties did fulfil certain parts of the various documents. In any case the agreement was produced on behalf of IFC and not Jacques and Partners hence it cannot be said they should not rely on it because they did not plead it. In addition no objection to the production of any document in these proceedings was 20

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raised. This court is therefore entitled to examine all the documents both bundles which I must assume were agreed. 25

Messrs Jacques and Partners,
Kafue House,
P.O. Box: 275,
Lusaka.

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For the attention of Mrs W. Mung'omba

Dear

Sirs,

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re: Kentwood Investments and Industrial Finance Company Limited

The contract between IFC and Kentwood Investments Limited of Kitwe was signed on the 31st March, 1975, for sale of assets (photocopy of the agreement is enclosed for your perusal). 40

Below is an outline of events that led IFC management to make a "stop-payment" of the K83,997.92 cheque payable to Kentwood

Investments:

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1. On the 30th June, 1975, (after the contract had been signed in March, 1975) IFC made payment of K110,000.00 being the first payment for 24 000 cubic metres of crushed stone believed to have been crushed during the months of April, May and June, 1975.

2. Mid July, 1975 IFC hired the services of an independent surveyor from John Burrow & Company of Ndola to measure the quantity of the crushed stone at the quarry (taking into consideration of all the sales since 1st April, 1975) and it was discovered that the quantity fell short by 4 000 cubic metres, so that at the time when IFC made the first payment of Kentwood, the latter did not actually have the 24 000 cubic metres of crushed stone as should have been the case. So we discovered that we have over-paid Kentwood by K20,000. Kentwood accepted this fact and agreed that they would crush the 4 000 cubic metres 5 shortfall at no extra charge (1st breach of contract).

3. In July there had been no production at the quarry. The only activity going on was the recrushing of the 6" stone which had already been crushed and paid for in the first payment. So that at the end of July IFC made no payment partly due to the fact that Kentwood had 10 already made a breach.

4. In September, payment of K83,997.92 cheque was made payable to Kentwood Investments being payment for stone purported to have been crushed for the period of July, August, and September, 1975. Before the cheque went through, IFC found out that 15 Kentwood had not actually crushed the stone worth the payment made to them. Instead of crushing 8 000 cubic metres for each of the months involved they only crushed 1 799 cubic metres for July, 1 791 cubic metres for August and 2 074.5 cubic

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metres for September (up to 13th September, 1975, i.e. 2nd breach of the contract) and the reason given by Kentwood for not crushing the required amount of stone was that Mr G. Mumba, (IFC General Manager) had given verbal instructions to Trans Ocean Limited to repossess the machinery being used by Kentwood at the quarry (on hire). But there is no validity in their statement because IFC (including Mr Mumba) never knew that the 25 machinery which were being used by Kentwood at the quarry were on hire from Trans Ocean Limited until after Trans Ocean repossessed their machinery in September, that was when IFC became aware of the hire deal.

5. Furthermore, Kentwood lied to IFC (see contract paragraph 10) that at the end of the contract the equipment would be passed over to IFC when in the actual sense the equipment 30 did not belong to Kentwood but to Trans Ocean Limited.

Therefore, in the light of these facts IFC had no alternative other than making a stop payment to the cheque in question and we would like this contract be void because we feel that the other party has not been very straightforward with us.

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Any further information required in this cause please contact Mr G. Mumba, General Manager of IFC or Mr G. Matanga (Assistant to the General Manager).

Yours faithfully,
(sgd): G. Matanga
Assistant General Manager

cc. The General Manager - IFC **40**

In this letter IFC has set out the circumstances that led them to make the stop payment of the cheque payable to Kentwood in the sum of K83,997.92. They were disputing the amount of stone crushed by Kentwood. They point out that Kentwood crushed less stone than the amount paid. This fact appears later to be admitted by Kentwood. From the contents of this letter I accept and hold **45** that IFC had given adequate instructions to Jacques and Partners on which they were disputing payment and why they stopped payment of the cheque. It is therefore safe and fair to assume that proceeding from the instructions contained in the document numbered 8, Jacques and Partners entered appearance (document number 5, defendant's bundle) on behalf of IFC on the 23rd October, 1975. Up to this date in the proceedings I am satisfied that it cannot be seriously argued that Jacques and Partners failed to comply with the written instructions.

After appearance was entered it is not clear what happened new to the proceedings. But according to a letter dated 24th November, 1975 (document number 13, defendant's bundle) from advocates of Kentwood they were by this date serving summons on Jacques and Partners under O. 5

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XIII. On the other hand, on the 26th November, 1975, Kentwood wrote the general manager of IFC (document number 12, defendant's bundle and exhibit P5). The letter reads as follows: **10**

The General Manager,
Industrial Finance Company Ltd.,
P.O. Box 3091,
Lusaka

Attention: Mr G. Y. Mumba **15**

Dear Sir,

Further to our meeting on the 26th November, 1975, we confirm herein the following points resulting from this meeting:

(1) In consideration of IFC paying over to Kentwood Investment Limited the sum of K125,816.68, Kentwood Investment Limited is prepared to crush at no extra charge for IFC **20**
19 305.74m³ of rock as per our letter of 20th September, 1975.

(2) The crushing plant and equipment presently removed by us will be re-sited and installed at Kencast by no later than Monday, the 1st December, 1975, in order to resume the crushing. **25**

(3) That the termination of contract of sale existing between IFC and Kentwood Investment Limited be recognised as having been terminated by Kentwood as at 31st October, 1975, and the only outstanding commitment by Kentwood to IFC shall be the crushing of the above mentioned rock shortfall. **30**

(4) Kentwood has no objection to the abovementioned contract of sale being assigned or transferred to any other company.

(5) All previous High Court writs that have been issued or agreed herein to be cancelled. **35**

Yours faithfully,
Kentwood Investments Limited
(sgd): L.R. Seegers
Managing

Director **40**

This letter reveals that there was a meeting on the same day between the parties. Among other things it also reveals that Kentwood acknowledges a shortfall in the rock crushed and were prepared to make good on certain consideration. Kentwood agreed to cancel all writs issued. After this letter the situation is not clear again. But the telex message (document number 16, defendant's bundle) shows that prior to the message Mr Mung'omba and Mr Munkonge had a discussion which led to the advocates of Kentwood to make a draft agreement of what was discussed and perhaps agreed. According to the text of the telex the draft agreement was supplementary to the original. The terms of the draft agreement as per telex are exactly as those proposed in document number 12 (a letter from Kentwood to the general manager of IFC). There were several

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other telex messages between A.E. Clark and Company of Kitwe, advocates for Kentwood and Jacques and Partners advocates for IFC in which advocates of Kentwood were seeking clarification in the telex supplementary draft agreement. One of the telex messages is document number 19, defendant's bundle. It reads:

To: Jacques and Partners, Lusaka
From: A.E. Clark and Company, Kitwe
Attention: Mr Mung'omba
Without Prejudice

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Please advise:

1. Has the cheque for K37,083.32 from IFC been deposited and cleared?
2. Have you paid same amount into my client's account, i.e. Kentwood Investments Ltd, Grindlays Bank, Lusaka?
3. Has G. Y. Mumba signed, or is he now prepared to sign, the supplemental agreement? **15**
4. Has G. Y. Mumba put into your trust, with irrevocable instructions to pay when 19 000 cubic metres, less 4 500 cubic metres already crushed, the cheque for K83,997.92?
5. What arrangements have been made to pay the difference between the October statement of K41,818.76 and the cheque for K37,083.32. i.e. K4,735.44?

I confirm my client's willingness to crush 19 000 less 4 500 cubic metres of stone when the above matters have been satisfactorily settled. **20**

J. Conway
A.E. Clark and Co., Kitwe

On the 9th December, 1975, another telex message was sent to Jacques and Partners by A.E. Clark and Company (document number 21, defendant's bundle). This reads as follows: **25**

Jacques and Partners

Attention: Mr Mung'omba **30**

If IFC has signed, or is now willing to sign, the supplementary contract, my clients, Kentwood Investments Ltd agree to crush the full 19 000 cubic metres, and they do not insist on the figure in my previous telex, i.e. 19 000 less 4 500.

What instructions have you received from your clients concerning the other points in my previous telex? **35**

Please telex or telephone, the matter is now urgent.

J. Conway

A.E. Clark and Company, Kitwe

From the foregoing, I am satisfied in my mind that after Jacques and Partners entered appearance on behalf of IFC they also entered into negotiations with the advocates of Kentwood. Thus it would appear **40**

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that up to the 9th December, after summons under Order XIII were served it was a general consensus between the respective advocates presumably as a result of instructions that the matter would be settled out of court. Thus on this point Mr Chikwanda, PW1 testified in cross examination that after IFC's letter of 17th October, the matter was left to Jacques and Partners to act and defend. He admitted again in cross-examination that he was not aware that there was communication between Jacques and Partners and A.E. Clark and Company. Mr Mumba, PW4, confirms the various meetings and discussions where Mr Munkonge was ever persuading him to pay the money in dispute and settle the matter out of court. The evidence of Mr Mung'omba is that after appearance was entered he contacted Mr Mumba to obtain proper instructions in order to defend the case. This he did. Mr Mumba confirms this in his evidence. **5**

Although Mr Mumba told the court that he agreed to the instructions of Mr Munkonge under pressure, I am satisfied that all the parties to the dispute as well as their advocates understood the position as by 9th December, that the case is being settled out of court. Consequently I am further satisfied that all the instructions before 9th October, must have been superseded. It is also safe to assume that by this date the court proceedings between Kentwood and IFC must have been **10**

adjourned *sine die* or for a longer period. That parties had agreed to a settlement out of court is confirmed by the letter dated 16th December, 1975, (document number 25, defendant's bundle) to IFC which reads:

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The General Manager,
Industrial Finance Company Limited,
Permanent House,
Cairo Road,
Lusaka

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Dear

Sir,

Re: *Kentwood, Investments and Industrial Finance Co., Ltd*

We return herewith the cheque for K83,997.92 which is payable to Kentwood after 23rd January, 1976. Our understanding of the conversation between yourself and our Mr Mung'omba was that the cheque would be made payable to Jacques and Partners but that Jacques and Partners would not release that sum to plaintiff until the plaintiff had done certain things contained in the supplementary agreement between IFC and the plaintiff.

Kindly amend the date so that the cheque would be paid into our clients' account at once or else we do not accept the responsibility imposed upon us by the agreement that we act as trustees. We confirm that a sum of K37,083.32 has already been paid into the account of Kentwood in Lusaka.

We look forward to hearing from you.

Yours faithfully,
Jacques and Partners
(sgd):

W.D.

Mung'omba

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My understanding of this letter is that prior to it IFC pursuant to the negotiated arrangements or agreement sent to Jacques and Partners cheque in the sum of K37,083.32 payable into the account of Kentwood. In addition they sent to Jacques and Partners a cheque in the sum of K83,997.92. I am satisfied that this cheque was intended as a replacement of the cheque earlier stopped. Unfortunately the endorsements on the cheque, namely, payee and date were contrary to the earlier arrangements. Consequently, Jacques and Partners returned the cheque for correction. Unfortunately for the parties the letter led to a complete about turn and breakdown on what had been so successfully achieved after a tough bargain. There was now a complete misunderstanding, not between IFC and Kentwood but between IFC and Jacques and Partners, their lawyers.

The misunderstanding is prominently brought out in three documents. The first one dated 19th December, is a letter (document number 26 defendant's bundle) from the chief accountant of IFC to Jacques and Partners for the attention of Mr Mung'omba. This letter was a reply to a letter by Mr

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Mung'omba returning the cheque for correction. The letter reads:

Messrs Jacques and Partners,
Kafue House,
Cairo Road,
Lusaka

Dear

Sir,

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We are in receipt of your letter dated 16th December, 1975, and in reply would like to explain why it is not possible for IFC to comply with the demand contained therein namely, that the cheque in the value of K83,997.92 date be changed so that it can be paid into "your client" account at once.

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According to the agreement between Kentwood Investment Ltd. and ourselves, Kentwood did undertake to produce crushed stones at a value of K4.50 per m³ equivalent to or exceeding, K37,083.32 per month. On this condition being fulfilled then the Industrial Finance Company Ltd., was honour bound to pay to Kentwood Investment Ltd., the said sum of K37,083.32. All sales monies were to be paid into the account of IFC Limited.

The fact is since June 1975 IFC has paid to Kentwood a total sum of K148,083.32 made up as follows:

	K	
Transfer from Grindlays Bank Ltd June, 1971	11,000.00	
Cheque NCB December, 1975		
	<u>37,083.32</u>	25
		<u>K148,083.32</u>

For this amount therefore, Kentwood must show that since April, 1975, they have crushed

K148,083.32 = 32907.40m³ of stones.

4.50

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This of course can only be proved if all-deliveries to customers is taken into consideration plus amounts of crushed stones unsold. Kentwood have also transferred from sales receipts an amount of K19,995.68 to their account. They must be made to pay this amount back to IFC since it does not belong to them because its from sales for which IFC is responsible and all crushed stones belong to IFC Ltd.

As for verifying the amount of stones crushed since April may we suggest that a firm of auditors be consulted.

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Yours faithfully,

(Signed): L.A.J. Hall
Chief Accountant
cc. General Manager, IFC

Mr Mung'omba testified that on receipt of this letter from the chief accountant he felt that IFC had departed from the spirit of the supplemental agreement and also departed from the original instructions. I entirely agree with Mr Mung'omba's interpretation of the chief accountant's letter. Mr Hall and Mr Mumba admitted before this court that they did not know what was meant by "our client's account" in the letter of Mr Mung'omba dated 16th December, 1975. It may well be that had they understood what it meant we might not have been sitting here. 5

Although there is no direct or circumstantial evidence as to what happened to the cheque of K83,997.92 returned to IFC by Jacques 25 and Partners, it is safe to assume from the events that followed that IFC did not send it back to Jacques and Partners. Mr Mung'omba's reply to Mr Hall is a letter (document number 27 defendant's bundle) dated 30th December, 1975. The letter reads: 10

The General Manager,
Industrial Finance Company Limited,
Permanent House,
Cairo Road,
Lusaka

Dear Sir, 15
Re: *Kentwood Investments Limited and IFC*

We refer to the letter addressed to us by the Chief Accountant with regard to the above 20
action. We must confess that we are completely at a loss as we do not seem to have
instructions from yourselves.

40 Surely the matters contained in the above letter, are matters which ought to have been disclosed to us at the time when we were advising you to sign the agreement which appeared to be a settlement agreement. The agreement was signed by the General

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Manager and by the other side. Certainly that agreement did not take into account the 25
matters which you are raising now. We can only hope that you have now employed a firm of
auditors to make the necessary checks and that you are perhaps a further correspondence
with Kentwood Investments in order to have these matters sorted out without recourse being
had to court.

No doubt you are aware that there is already an action in court, which action was cancelled,
on understanding that the last agreement would go through. It is very likely that the 30
Advocates for Kentwood Investments Limited will be instructed to proceed.

Perhaps you would wish to confirm that we have instructions to accept service and to continue acting herein.

We look forward to hearing from you. 35

Yours faithfully,
W.D.

Mung'omba

In my view Mr Mung'omba's sentiments as per his letter were the most apt in the circumstances in particular his use of the word "firm". I am satisfied on my part that taking into account all that transpired and happened the chief accountant's letter was certainly confusing. Mr Mung'omba 40 however did not give up. Thus he said in his letter - "perhaps you would wish to confirm that we have instructions to accept service and to continue acting herein." The reply this time was a letter (document number 29 defendant's bundle) dated 5th January, by the General Manager himself. The letter reads:

Mr W.D. Mung'omba,
Jacques and Partners,
Kafue House,
Cairo Road,
Lasaka

Dear Mr Mung'omba,

Kentwood Investments and IFC

Reference is made to your letter of 30th December, 1975, in connection with the above. 10

Apparently the Settlement Agreement was signed by the General Manager of IFC on the understanding that everything had been sorted out. You will appreciate, of course, that this Agreement was done in a hurry, there was not much time for IFC to check all the facts, hence, it was prudent for IFC to delay payment of the K83,997.92 to Kentwood as stipulated in the so called Settlement Agreement. 15

The latest correspondence from our Chief Accountant bears an authentic development of the issue. It should be realised that the Chief Accountant acted on the instructions of the General Manager

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to ascertain the financial position of IFC as a result of terminating this agreement. As you can see from the said letter, if IFC pays out K4.50 per cubic metre and brings in the same amount of money per cubic metre, it is bound to come out even, if it comes out less than what is expected, there is a strong reason to believe that something is wrong somewhere and we are therefore entitled to ask for verification from the parties concerned. It does not matter 25 at what time we do it. We are expecting our advocates to advise us to act not out of fear and

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not to fear to act. It is for this reason that our Chief Accountant's letter should be taken as additional instruction to our advocate so that they act and continue to act more effectively for the benefit of IFC.

Furthermore, we had hoped that you were in constant touch with the advocates of Kentwood Investments and that you have therefore told them of the new developments with regard to that agreement. We wish you to do so if you have not done so.

Yours faithfully,
(sgd): G. Y. Mumba,
General Manager

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This letter despite the unfortunate admission of lack of seriousness on the part of the IFC management with regards to business negotiations, it also confirms that they were incapable of giving "firm instructions" to their lawyers. But with fairness to the General Manager he concedes in his letter that at that point in time there were "new developments with regard to that agreement." But earlier on in his letter he describes the Chief Accountant's letter "as additional instruction." The question is: additional to what? In my view the "settlement arrangement or negotiations which were acted upon by both parties had overtaken all that had gone before them. Hence the Chief Accountant's letter and that of the General Manager presented complete new situation which demanded fresh instructions. Did Mr Mung'omba obtain fresh firm instructions? Mr Hall's letter and that of the General Manager were in essence saying that despite the "settlement agreement" they wanted someone to verify the stone crushed. If one takes into account what had gone on and negotiated it was certainly not Mr Mung'omba's business to certify the amount of stone crushed. Regrettably IFC management itself appeared not to have known what stone had been crushed, even at that late stage. Above all they entered into the settlement agreement still ignorant of the stone crushed. In my view Mr Hall's letter and that of the General Manager did not present "firm instructions."

The crux of the matter however is whether Jacques and Partners failed to comply with specific written instructions? On the 6th January, 1976, Mr Mumba was suspended. He never returned to his office again. The evidence of Mr Hall is that after the suspension of Mr Mumba there was "chaos" at the office, things did not operate normally, the investigators seized all the files relating to the case between Kentwood and

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IFC. The files were only returned in April, for purposes of accounts. The evidence of Mr Mung'omba is that he made frantic efforts to obtain instructions. Kentwood was pressing to go ahead with the action. He said when he contacted Mr Hall, Mr Hall remarked that the matter had become political and as an expatriate he did not want to be involved in the matter any longer. Mr Mung'omba testified that Mr Hall referred him to Mr Chikwanda. But Mr Chikwanda was impossible to find. Mr Hall confirmed that it was not possible for Mr Mung'omba to contact Mr Chikwanda. On a consideration of the totality of the oral and documentary evidence I am satisfied that up to the time when Mr Mumba, the General Manager of IFC was suspended Jacques and Partners adequately represented IFC in all the meetings, discussions and agreements which from the

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documents available were intended to settle the matter out of court. As a matter of fact a settlement out of court had been reached. Despite the misunderstanding it would appeal to me that had Mr Mumba not been suspended this case would not have arisen. I am further satisfied and find as a fact that after Mr Mumba's suspension there were no instructions given to Jacques and Partners written or oral on which they could have acted.

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It is common ground that on the 23rd January, 1976, Kentwood obtained leave to sign judgment under Order XIII for the sum of K83,997.92. On the 19th February, 1976, Mr Mung'omba wrote to IFC (document number 36, defendant's bundle) informing them that Kentwood were insisting on executing judgment through their lawyers A.E. Clark and Company. He asked for Mr Hall for a meeting to be held at 1500 hours on the 28th February, 1976. The meeting did not take place. On the 15th March, 1976, Mr Mung'omba had a telephone conversation with Mr Chikwanda of IFC. The conversation was followed by the letter dated 16th March, 1976, (document number 37, 25 defendant's bundle). In that letter Mr Mung'omba advised Mr Chikwanda that it was too late to appeal against judgment. But indicated that they were prepared to take further instructions if there were any new developments. On the 17th March, 1976, Mr Chikwanda replied that they had decided to change advocates by engaging Fitzpatrick Chuula and Company (document number 39 defendant's bundle).

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This court has not been afforded an opportunity of pursuing the proceeding that led to the judgment in the cause in which Kentwood suing IFC. In the circumstances I am unable to make any specific finding with regards to the conduct of Jacques and Partners each time they appeared for IFC. The new advocates in the cause applied to set aside the summary judgment of 23rd January. The actual proceedings at the hearing of that application have not again been produced. But the learned District 35 Registrar's ruling is part of IFC's bundle of documents (numbered 5). The ruling was delivered on 16th July, 1976. In his ruling the learned District Registrar pointed out that at the time of application for summary judgment Mr Lubamba who appeared for IFC had submitted that there had been a delay of seven weeks and that it was difficult for him to oppose the plaintiff's application for judgment. It is also stated in the

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ruling that Mr Nyangulu had submitted that IFC had a defence which Jacques and Partners ignored and failed to oppose the entry of summary judgment. The learned District Registrar then stated as follows:

"As a result of Jacques and Partners' failure to oppose entry of summary judgment, judgment was entered and garnishee order was obtained and subsequently made absolute. 45 The defendant has also applied to have the garnishee order annulled. Where a party to the proceedings of this nature is given time and ample opportunity to oppose entry of judgment and does not do so, so as to disclose a defence whether that defence is acceptable by the court or not, the other party is entitled to have the judgment entered in his favour. In this case Jacques and Partners had every opportunity to carry out their client's instructions but according to the new lawyers they (Jacques and Partners) have not done so. The important point is that the defendant does not say that Jacques and Partners were not acting for them at the material time, but that they neglected to obtain and act on proper instructions. So the

alleged neglect of duty by the former advocates Messrs Jacques and Partners in acting contrary to their client's instructions cannot now be put as a ground to set aside the judgment, even if there had been a defence.

It is not for me to advise the defendant on what remedy he had against his former lawyers."

I am not prepared to speculate what evidence was before the learned District Registrar in the application to set aside the summary judgment and I am not also prepared to speculate the nature of the proceedings before the learned District Registrar in which Mr Lubamba appeared. But that application was dismissed. I consider it unfortunate that Mr Mung'omba who had seen IFC from its inception and who was prepared to see its death did not advise Mr Lubamba to ask for an adjournment more so when he was personally aware of the new developments at IFC following the suspension of its general manager. Whether an adjournment would have been granted is another thing. But any court properly appraised of the mess at IFC would in my view have given a favourable consideration to such an application.

In my opinion the fact that Mr Lubamba did not oppose the application is not the issue. The issue is that even at that point in time Jacques and Partners had no instructions which could be said to have been neglected. This I find as a fact. My answer to my question for determination is that on the balance of probabilities Jacques and Partners did not fail to comply with any specific written instructions to defend IFC in an action in which they were sued by Kentwood. Accordingly I find as a fact and hold that the defendant are not guilty of professional

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negligence. The plaintiff's claim is accordingly dismissed with costs. There being no dispute on the counter-claim I enter judgment in favour of the defendant on the counter-claim.

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Claim dismissed

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