

The United Africa Company, Limited - - - - - Appellants

v.

Saka Owoade - - - - - Respondent

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1954

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*Present at the Hearing:*

LORD OAKSEY

LORD KEITH OF AVONHOLM

MR. L. M. D. DE SILVA

[*Delivered by* LORD OAKSEY]

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This is an appeal from a judgment of the West African Court of Appeal dated 15th May, 1951, allowing an appeal by the respondent from a judgment of the Supreme Court of Nigeria (Judicial Division of Lagos) dated 30th March, 1950, in favour of the appellants for £4,732 13s. 4d. The West African Court of Appeal gave judgment for the respondent. It is also an appeal from an order of the West African Court of Appeal dated 19th November, 1951, refusing the appellants final leave to appeal to His late Majesty in Council from the judgment of 15th May, 1951. Special leave to appeal to Her Majesty in Council against both the judgment and the order was granted by Her Majesty at a Council held on the 9th April, 1952.

The appellants are general merchants in Lagos and elsewhere in West Africa. The respondent owns lorries and is a transport contractor. In February, 1948, the respondent came to the appellants' premises and saw certain of their employees and solicited employment to carry goods from Lagos to the appellants' branches up country. He introduced to the appellants' employees two men whom he said were his driver and clerk and stated that when the appellants had goods for him to carry they should give them to the driver and clerk. The clerk in question attended at the appellants' premises on two occasions in March and April, 1948, and on each occasion was given certain goods namely, cigarettes and brandy the total value of which was £4,777 9s. 4d. for carriage to two branches up country. The goods were never delivered to the two branches up country and the lorry driver and clerk were subsequently convicted of stealing them.

The appellants issued their writ on the 2nd March, 1949, claiming £4,777 9s. 4d. the value of the goods. The statement of claim was delivered on the 11th April, 1949, and the defence on the 22nd April, 1949. The case came on for hearing on the 27th February, 1950.

The appellants' counsel in opening the case said that the appellants put their case in two alternate ways, first they said that the respondent was a common carrier who had failed to deliver the goods and secondly they said that he was liable on the basis of *respondeat superior*. This phrase was used both by counsel and by the trial judge as covering a conversion or detention of the goods by the respondent's servants acting in the course of their employment and for which it was claimed

by the appellants that the respondent was liable. The appellants called two witnesses who established the facts already recited. The case was then adjourned to the 14th March. When the hearing was resumed counsel for the respondent elected to call no evidence and submitted that he had no case to answer since the appellants had not proved that the respondent was a common carrier and he alleged that no other case was open to the appellants on the pleadings. The trial judge, Mr. Justice Reece, reserved judgment and his reserved judgment was given on the 30th March, 1950. The judge held that the goods had been delivered to the respondent's servants in the course of their employment and stolen by them in such capacity, and gave judgment for the appellants for £4,732 13s. 4d. There is nothing in the judgment to show why this figure was substituted for £4,777 9s. 4d., but it appears probable that this was due to some oversight. Upon the question of the pleadings the judge said that the pleadings should contain and contain only the material facts relied upon and not contentions of law and that the statement of claim did contain allegations of the facts material to their alternate case for conversion.

The respondent appealed to the Court of Appeal and the case was heard on the 15th May, 1951, by Sir John Verity the Chief Justice, Mr. Justice Lewey and Mr. Justice De Comarmond. The Court of Appeal held that the form of the pleadings was such that the appellants were only entitled to rely upon non-delivery by a common carrier and that as they had not proved that the respondent was a common carrier their case must fail. The Court of Appeal therefore gave judgment for the respondent.

As the sum involved exceeded £500 the appellants were entitled, under the provisions of the relevant Order in Council, to appeal to His late Majesty in Council subject to fulfilment of certain conditions one of which was the provision of such security for the respondent's costs as should be fixed by the Court of Appeal. The Court of Appeal on the 2nd July, 1951, fixed the security at £500 and also ordered the appellants to pay £50 into court to cover the costs of the preparation of the record. Pursuant to this order the appellants, within the time stated in the order of the Court of Appeal paid into Court to the credit of the appeal the sum of £550. The relevant portion of the Order of the Court of Appeal giving conditional leave to appeal was in the following terms:—

“It is ordered that conditional leave to appeal in the above matter to His Majesty's Privy Council be granted to the United Africa Company Limited the plaintiffs/appellants upon fulfilment within three months from the date hereof of the following conditions.”

“(A) that the plaintiffs/appellants the United Africa Company Limited do deposit in Court the sum of £50 for the preparation of the record of Appeal and for the despatch thereof to His Majesty's Privy Council.

(B) that the plaintiffs/appellants the United Africa Company Limited do enter into good and sufficient security to the satisfaction of the Court in the sum of £500 for the due prosecution of the appeal and the payment of all such costs as may become payable to Saka Owoade the defendant/respondent . . .”

The respondent took the point that paragraph (B) of the order could only be fulfilled by the provision of a bond and that payment of the sum of money mentioned, namely, £500 into Court was not a compliance with the order.

This matter came before the Court of Appeal and the judgment of the court was given on the 19th November, 1951, by Mr. Justice Jibowu. The judgment was that the payment into Court was not a compliance with the order and the Court of Appeal therefore refused leave of appeal to His late Majesty in Council.

The appellants petitioned for special leave to appeal to Her Majesty in Council against both the substantive judgment of the 15th May, 1951, and also against the order of the 19th November, 1951, refusing leave

to appeal from the said judgment. On the 9th April, 1952, the appellants were granted special leave to appeal to Her Majesty in Council against both judgment and order.

As the substantive appeal turns almost entirely upon the form of the pleadings it is necessary to set them out in full. They are as follows:—

“No. 1.

Suit No. 51/49.

CIVIL SUMMONS.

Between

THE UNITED AFRICA CO. LTD. . . . . Plaintiff

and

SAKA OWOADE . . . . . Defendant.

To Saka Owode of Alade Street, Isale Ijebu, Ibadan, or c/o John Holt & Co. Ltd., Ibadan (Produce Department).

You are hereby commanded in His Majesty's name to attend this Court at Tinubu Square, Lagos, on Monday the 28th day of March, 1949, at 9 o'clock in the forenoon to answer a suit by The United African Co. Ltd., of c/o Messrs. Irving & Bonnar, Barclays Bank Chambers, Lagos, against you.

The plaintiff's claim against the defendant is in the sum of £4,777 9s. 4d., whereof £4,732 13s. 4d. is value of 40 cases of Guinea Gold Cigarettes and £44 16s. is cost of 4 cases of Jules Charrent Brandy delivered and accepted by the defendant's clerk and Lorry Driver on behalf of the defendant on or about 15th March, 1948, and 13th April, 1948, as common carriers for transporting to the plaintiff's Station at Ilorin which he has failed to deliver.

Issued at Lagos the 2nd day of March, 1949

	£	s.	d.
Summons . . . . .	25	0	0
Service . . . . .		5	6
	<hr/>		
	£25	5	6

(Sgd.) FRANCIS H. BAKER,

Senior Puisne Judge.

TAKE NOTICE: That if you fail to attend at the hearing of the suit or at any continuation or adjournment thereof, the Court may allow the plaintiff to proceed to judgment and execution.”

“No. 2

STATEMENT OF CLAIM

STATEMENT OF CLAIM

1. The plaintiffs are a limited liability Company carrying on the business inter alia of wholesale suppliers of goods in Lagos and elsewhere. The defendant is a Produce Assistant to Messrs. John Holt & Co. Ltd. in Ibadan, and also owns lorries and carries on a road transport business as a common carrier.

2. In February, 1948, the defendant introduced his clerk and a lorry driver to the clerk to the plaintiffs who deals with despatch of goods up country and also introduced the said clerk and lorry driver to the plaintiffs' storekeeper. The defendant requested at the same time that the plaintiffs should entrust him with freight of their goods to stations up country.

3. In March, 1948, the plaintiffs entrusted goods to the value of £4,777 9s. 4d. to the clerk to the defendant for carriage and delivery to places up country.

4. The said goods were never delivered to their destinations and the said clerk and lorry driver to the Defendant were later convicted of the theft of the said goods.

5. The defendant is liable as a common carrier to make good to the plaintiffs the value of the said goods but has failed to do so.

Whereof the plaintiffs claim as per writ of Summons.

Dated at Lagos this 11th day of April, 1949.

(Sgd.) IRVING & BONNAR,  
Plaintiffs' Solicitors."

" No. 3.

DEFENCE

#### STATEMENT OF DEFENCE

1. The defendant denies paragraphs 2, 3, 4 and 5 of the plaintiffs' statement of claim and puts the said plaintiffs to their very strict proof.

2. The defendant admits paragraph 1 of the plaintiffs' statement of claim save and except the averment that he is a common carrier which he denies and puts the said plaintiffs to their strict proof.

3. The defendant says that the person alleged to be his clerk in paragraph 3 was not and has never been his clerk is one who touts for passengers and loads to be carried to certain places and is in no way an agent of the defendant.

4. The defendant became aware of paragraph 4 after the prosecution of his driver and the said tout Simeon Dejo.

5. The defendant avers that he is not a common carrier.

6. The defendant says that his driver did not have the said defendant's consent before the said goods of the plaintiffs were entrusted to him, nor was it done with this knowledge.

Dated at Lagos this 22nd day of April, 1949.

(Sgd.) JOHN TAYLOR,  
Defendant's Solicitor."

The Court of Appeal in their judgment held that the writ did not comply with the provisions of order 2, rule 2, of the Supreme Court (Civil Procedure) Rules which laid down that a writ of summons should state briefly and clearly the subject matter of the claim and the relief sought for. In their Lordships' opinion the writ did do both these things since it was clearly shown that the appellants' complaint was that they had entrusted goods to the value of £4,777 9s. 4d. to the respondent's servants and that they had never been delivered and it also showed the relief claimed, namely, judgment for the value of the goods. However, even if this were not so, any defect in this respect was cured by the statement of claim.

So far as the statement of claim is concerned in their Lordships' opinion the trial judge was correct in stating that the pleadings need only state facts and not contentions of law.

Paragraphs 2 and 3 contain all the allegations of fact necessary to establish that the goods were delivered to the respondent's servants acting in the course of their employment for delivery to the appellants' premises up country. In paragraph 4 it is stated that the goods were never delivered to their destination and the clerk and lorry driver of the respondent were later convicted of the theft of the said goods. In the judgment of the Court of Appeal it was suggested that this pleading did not comply with order 22, rule 8, of the Civil Procedure Rules the material part of which reads:—

"Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts they shall be stated as far as may be separately and distinctly."

The alternate cases submitted on behalf of the appellants at the trial were not founded on separate distinct facts. The facts were the same, namely that the goods had been delivered to the respondent's servants acting in the course of their employment and had not been delivered but had been stolen by the said servants. If the respondent were a common carrier then he would be liable for the non-delivery unless he could establish one of the very few excuses available to a common carrier such as Act of God. If he were not a common carrier he could, of course, escape liability by showing that the goods were lost without any fault on his part. The distinction between the case as against a common carrier and as against an ordinary carrier lay not so much in the facts to be established by the plaintiffs but the defences open to the respondent. In any case, paragraph 4 of the statement of claim did set out separately the alleged theft of the goods which was not necessary to be established in the case relating to a common carrier but was a material factor in a case of conversion or detinue.

Upon these pleading points their Lordships find themselves in agreement with the view of the judge at the trial.

There was no question of surprise since the appellants' counsel stated his contention in opening the case on 27th February, 1950, and it was not until the 14th March, 1950, that the respondent's counsel made any objection. In such circumstances, if the judge thought that the pleadings were not sufficiently clear or did not adequately raise the case which the plaintiff desired to make he should have ordered them to be amended. But the judge was in their Lordships' view entitled to hold as he did hold after full consideration of the respondent's submission that the appellants' contention was open upon the pleadings as they stood, and in this in their Lordships' judgment the learned judge was right. The facts stated in paragraphs 2, 3 and 4 of the statement of claim are sufficient to raise the question of the respondent's liability apart from any liability as a common carrier.

On the 28th October, 1954, the respondent amended his printed case and has argued before their Lordships' Board that a principal or master cannot be liable for his agent's or servant's fraud unless the principal or master has been himself negligent. This argument was based principally upon the case of *Cheshire v. Bailey* [1905] 1 K.B. 237.

In their Lordships' opinion *Lloyd v. Grace Smith & Co.* [1912] A.C. 716 establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment. In that case it was clearly in the course of the servant's employment since it was the fraud of a solicitor's clerk in the solicitor's office on the business of the solicitor's client. In *Cheshire v. Bailey* (*ubi supra*) it was held that the criminal act of the servant had not occurred in the course of his employment. The contract was not a contract of carriage of goods but the hire of a brougham for the personal use of a jeweller's traveller in the course of his business. The servant drove the brougham away when the traveller was absent and by arrangement with two thieves participated in the theft of jewellery left by the traveller in the brougham. Their Lordships do not find it necessary to decide whether that case is distinguishable on its facts from the case of *Lloyd v. Grace Smith & Co.* or has been overruled by the decision in *Lloyd v. Grace Smith & Co.*

In the present case the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on the journey which the respondent had undertaken to carry out and the conversion therefore was in their Lordships' view in the course of the employment of the respondent's servants. There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment. It is a question of fact in

each case whether the wrong was committed in the course of the servant's employment and in the present case their Lordships are of opinion that upon the uncontradicted evidence the conversion of the appellants' goods took place in the course of the employment of the respondent's servants.

As Her Majesty in Council has granted special leave in this case the question as to the adequacy of security only directly affects the question of costs but it may have some general importance.

In their Lordships' view it is too narrow a construction of the words of the Order to treat the actual deposit of the sum in which the appellants were ordered to find security as insufficient on the ground that the appellants did not "enter into good and sufficient security."

The sum of money was as good as if not better than a bond and on the strict wording of the Order only the appellant Company itself could enter into security and in cases where the appellant was not a person of substance the bond would be of much less value than the actual sum.

For these reasons their Lordships will humbly advise Her Majesty that the appeals should be allowed and judgment entered for the appellant company for £4,777 9s. 4d. The respondent must pay the costs before their Lordships' Board and in the Courts below.



**In the Privy Council**

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**THE UNITED AFRICA COMPANY LIMITED**

v.

**SAKA OWOADE**

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DELIVERED BY LORD OAKSEY

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