~~91.2.64~~ 10/1963

IN THE PRIVY COUNCIL No. 11 of 1961

ON APPEAL FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

AT NAIROBI

B E T W E E N THE UNITED MARKETING COMPANY
(Defendants) Appellants

- and -

HASHAM KARA
(Plaintiff) Respondent

C A S E

FOR THE ABOVE-NAMED APPELLANTS
THE UNITED MARKETING COMPANY

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1. This Appeal is brought by leave of the Court of Appeal for Eastern Africa at Nairobi granted on 2nd March 1961 against an Order of that Court made on 15th September 1960 dismissing with costs an appeal from a Decree of Her Majesty's Supreme Court of Kenya at Nairobi (The Honourable Mr. Justice Templeton) given on 27th April 1959 whereby the learned Judge ordered the Appellants (Defendants) to pay to the Respondent (Plaintiff) the sum of Shs. 51,284/25 with interest thereon at the rate of six per cent per annum from 28th April 1959 until payment in full and further ordering the Appellants to pay to the Respondent his taxed costs of the suit. pp.168-9 pp.167-8 pp.81-2

2. Put in summary form, the Respondent's case against the Appellants was that they were under a binding contractual obligation to him to procure the renewal of an insurance policy on the stock in trade and furniture at his shop on Plot No. 2646 Bazaar Road, Nairobi, to a total value of 50,000/- that the Appellants failed in their duty,

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that at a time when no policy was in force the stock in the said shop was destroyed by fire and that the consequence was that he was unable to make a claim for Shs. 46,270 - 75 cts. under the policy against the Insurance Company in respect of goods destroyed by the fire. This case succeeded before the learned trial Judge and on appeal.

3. The Respondent is a merchant carrying on business in Nairobi and the Defendants are a firm of three partners (H.G. Thanawalla, S.H. Thanawalla and K.H. Thanawalla) carrying on business in Nairobi as Insurance Agents. They are the Chief Agents of the Jubilee Insurance Company Limited which is an Insurance Company incorporated in Kenya and having its head office at Mombasa. The Plaint alleged that the Respondent employed the Appellants as insurance agents to cause to be insured and to keep insured against fire (inter alia) all the movable and immovable properties respectively which were from time to time in his ownership or occupation. The duties of the Appellants under the terms of the alleged employment were stated to be:

pp.1-3

p.2.

"(i) to obtain the said insurance cover for the said properties respectively;

(ii) unless the Plaintiff gave the Defendant firm instructions to the contrary, to renew the said cover without reference to the Plaintiff each time the respective insurance policies become due for renewal;

(iii) to inform the Plaintiff if any of the said policies had not been renewed;

(iv) to render accounts from time to time to the Plaintiff for the amount of the insurance premiums payable to the Defendant firm;

(v) generally to superintend and advise the Plaintiff upon all his insurance business."

4. The Respondent further alleged that "in pursuance of the said employment" the Appellants

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had, since the year 1950, caused to be insured and kept insured against fire "the shop (inter alia) on Plot No. 2646, Bazaar Road, Nairobi, of which the Plaintiff was at all material times the lessee, together with the goods and effects therein which comprised the stock-in-trade of the Plaintiff's said business, in the sum of Shs. 50,000/-." It was alleged that the relevant insurance policy became due for renewal on 17th November 1955 and that the Appellants should then have renewed it for a further year, the Respondent having given no instructions to the contrary, and that in failing to renew the same and in failing to inform the Respondent of the non-renewal the Appellants were guilty of breach of duty and/or negligence whereby he was deprived of any insurance cover in respect of the shop and its contents. A fire took place in the said shop on the night of 9th/10th April 1956 and destroyed the goods therein and, so it was alleged, the Respondent by reason of the Appellants' breach of duty and/or negligence lost a claim under the policy worth Shs. 46,270.-75 cts.

5. The Appellants by their Defence denied the alleged employment and duties and denied that anything they had done had been done under that employment. They agreed that a policy of insurance had been effected with the said Jubilee Insurance Company Limited in respect of the said shop at Plot No. 2646, Bazaar Road, Nairobi. The policy had remained in force until 17th November 1954. The Appellants in effecting the said policy of insurance had acted, as the Respondents well knew, merely as agents for their principals the said Jubilee Insurance Company Limited. If, which the Appellants denied, they owed any duty to the Respondent to renew the said policy then such duty was conditional on punctual payment by the Respondent of the relevant premium and the Respondent had failed to pay the premium in question. All negligence was denied. Damages were put in issue. pp.4-5 p.4. p.5 p.5 p.4 p.5

6. As no particulars were given in the Plaint as to when and how the alleged contract was made, the Appellants, by their Advocates, made a request for particulars. The letter in which this request was made and two letters in answer

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pp.51 ll.16-18

from the Respondent's Advocate were handed in to the learned trial Judge by the Appellant's counsel during the course of the Appellant's case. As these letters are not reproduced elsewhere it will be convenient to set out the substance of these letters here:

From the Appellant's Advocates dated 14th February 1958.

"We should be glad if you would arrange to let us have further and better particulars of the allegation made in Paragraph 4 of the Plaint, namely, in what manner the duties therein mentioned are alleged to have arisen, that is to say, whether by oral agreement, by written agreement or, if it is an implied duty which is relied upon, the circumstances under which such duty is implied.

If the duty was imposed as a result of an oral agreement please let us have the date of such alleged agreement and the names of the parties alleged to have made it, and, if it is a written agreement, please let us have a copy thereof on our undertaking to pay the relevant copying charges."

From the Respondent's Advocate dated 1st March 1958.

"I regret the delay in replying to your letter of the 14th February 1958.

The reply to the further and better particulars requested is as follows:-

Under paragraph 4 of the Plaint

The said duties were orally agreed between the Plaintiff and one H. G. Thanawalla, as agent for and on behalf of the Defendants, in or about the month of August or September 1951 respectively, and/or are to be implied from the course of dealing between the parties from the year 1951 up to the time of the matters complained of."

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From the Respondent's Advocate dated 3rd March 1958.

"I refer you to my letter dated the 1st March 1958, in reply to your letter dated the 14th February, 1958, supplying you the further and better particulars in the above case wherein there is a typical [sic] error.

I shall be obliged if you would kindly read the year 1950, wherever the year 1951 appears in my said letter of the 1st instant.

I regret the mistake."

7. At the trial it was common ground that the Respondent had since 1950 taken out various insurance policies with the said Jubilee Insurance Company Limited. The Appellants, who, as already stated, were the Chief Agents for the said company, had acted in connection with the said policies and had indeed invited the Respondent to insure with the said Company. Both sides agreed that there were discussions in 1950. There were various policies on the Respondent's cars and there were the following policies on properties:

No. MB 4762	on the stock in trade and furniture at No. 2646 Indian Bazaar, Nairobi, Annual premium Shs. 176/-	Ex. 2
No. MB 4775	on No. 209 1530 Fort Hall Road, Nairobi. Annual premium Shs. 263 -50 cts.	Ex.C p.185
No. MB 4789	on No.2256 Blenheim Road, Nairobi. Annual premium Shs. 95-60 cts.	Ex.E.p.187

Each policy ran for one year and was then capable of renewal for a second year by mutual agreement between the insured and the Insurance Company and so on in each subsequent year. The expiry dates of the three policies were respectively 17th November, 16th November and 28th November in each year. The evidence of witnesses from the said Jubilee Insurance Company Limited, showed that it was their practice to Ex.2

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send out to the insured about one month in advance of the expiry date of any particular policy a notice warning him of the forthcoming expiry of the policy. A copy of this notice was sent to the insurance agent concerned. Where a policy in fact lapsed the said Jubilee Insurance Company Limited sent out to the insured immediately a letter advising him of the lapse of the policy. There was documentary evidence to show that this practice had been observed in connection with the Respondent's policies. It was further proved that it was the practice of the said Jubilee Insurance Company Limited to give credit for outstanding premiums, at least in cases where their own agents were concerned. The practice worked in this way, that provided the previous year's premium had been paid, the Company would, if requested so to do, renew the policy for the current year by issuing a renewal slip to this effect, and allow the insured a period of 12 months credit within which to find the premium. Thus, if, for example, policy No. MB. 4762 were due to expire on 17th November 1954, the Company would renew the policy for a further year (if requested to do so) provided that the previous year's premium, i.e. the premium in respect of the insurance year 17th November 1953 to 17th November 1954, had been paid. If it had not been paid by 17th November 1954 the policy lapsed.

p.45 ll. 19-21
p.45 ll. 21-23
p.47 ll. 15-17
e.g. pp.184, 185, 186, 190, 193 and pp. 188 and 192.
p.47 l.42
p.48 l. 2
p.45 ll. 7-10

8. It was also common ground that the Respondent did not himself remit premiums direct to the said Jubilee Insurance Company Limited. The Appellants were the channel through which the Respondent's premiums reached them. But there was acute controversy as to the nature of the Appellants' duties and as to what happened in practice. For the Respondent it was contended that it was the duty of the Appellants:

p.45 ll. 6-7

(a) to renew the policies without reference to the Respondent;

p.12 ll. 25-28

(b) to provide out of their own pocket the monies required for any premiums; and

p.12 ll. 30-34

(c) to recoup themselves thereafter by debiting the Respondent or by striking a balance by

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allowing in account the price of goods supplied by the Respondent to the said H. G. Thanawalla or to his wife. To these points the Appellants replied that (a) they did not have to renew without instructions and that in practice they received such instructions; (b) that apart from one occasion in April 1956 after the fire, they did not pay the said Jubilee Insurance Company Limited until they had themselves received payment from the Respondent; and (c) no set-off in respect of goods supplied was ever allowed and none could be traced in the accounts.

p.17 ll. 30-40
p.52 ll. 2-4
p.52 ll. 34-36
p.59 ll. 33-35

9. In addition to evidence about the course of business a considerable body of evidence was directed to what happened immediately after the fire. There was a meeting at the office of the said Mr. H. G. Thanawalla on the morning of 10th April 1956 (the morning following the fire) at which there were present the Respondent, the Respondent's son, the Mukhi of the Ismailia Community, the Kamadia of that Community, and Mr. H.G. Thanawalla. There was a divergence of testimony as to precisely what was said at this meeting. The material passages in the evidence are collected in the judgment of the learned Judge and it is not necessary to comment further on this episode at this stage.

p.71 l. 26 to p.78 l. 15

10. The facts which were proved in relation to the said policy No. MB 4762 relating to the stock in trade and furniture at the Respondent's shop were that the said Jubilee Insurance Company Limited received the following premiums:

Premium for insurance year 17th November 1951 to 17th November 1952 received on 31st December 1952 — p.46 ll. 39-40

Premium for insurance year 17th November 1952 to 17th November 1953 received on 6th February 1954 — p.46 ll. 36-38

Premium for insurance year 17th November 1953 to 17th November 1954 received in April 1956. — p.48 ll. 40-41

No premium was ever received in respect of any subsequent year. Accordingly the policy lapsed on 17th November 1954 and was not in force at the date of the fire on 9th/10th April 1956.

p.49 ll. 8-10

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11. The learned Judge in a reserved judgment found in favour of the agreement alleged by the Respondent. He also ruled against the Appellants' contention that there was no
p.80 ll. 38-41 consideration for any promise which they may have given to the Respondent. The Appellants
pp. 82-84 appealed on 8th July 1959 and subsequently
pp. 84-87 amended their Memorandum of Appeal. The Court of Appeal for Eastern Africa (The Honourable the President Sir Kenneth O'Connor, The Honourable the Acting Vice President Mr. Justice Gould and The Honourable Mr. Justice Crawshaw a Justice of
pp. 166-7 Appeal) dismissed the appeal in a short judgment. So far as the facts were concerned they contented themselves with saying that all points which could be made in argument had been made. They
pp. 166 ll. 39-44 concluded: "We do not deem it necessary to recapitulate the evidence or the arguments, as, having considered both with care, we are unable to see any reason for differing from the finding of the learned Judge in the Court below in favour of the Respondent's case." As to consideration they found that sufficient
pp. 167 ll. 1-7 consideration was present to satisfy the requirements of both English and Indian law.

12. The case is therefore one in which the Court of Appeal have affirmed the findings of the learned trial Judge. In the absence of reasoning of their own the Court of Appeal, it is submitted, may be taken to have adopted and affirmed the reasoning of the learned trial Judge.

13. The first point which the Appellants desire to raise in this appeal is that the evidence considered as a whole was insufficient to support the findings of the learned Judge, alternatively, that an analysis of his judgment shows that his finding in favour of the oral agreement of 1950 alleged by the Respondent was reached as a matter of inference on the basis of material other than material relating directly to such agreement, but

(a) as to such other material the learned Judge made certain manifest and important errors which can be demonstrated from contemporary documents, and

(b) the material relied upon was incomplete.

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In support of the contention that the learned Judge reached his finding on the oral agreement as a matter of inference, reference may be made to the passage early in the judgment where he refers to the fact that there was a direct conflict between the evidence of the Plaintiff and that of Mr. H.G. Thanawalla as to what was agreed between them regarding insurance business. p.69 ll.25-7

The learned Judge then sets out the two versions of the discussions and says this: "Since only the Plaintiff and Mr. Thanawalla were present at the interview referred to it is necessary to examine the surrounding circumstances in order to decide the terms of the arrangement entered into between them." p.69 l.28 to p.70 l.21

14. It is plain from what follows in the judgment that the event in "the surrounding circumstances" which the learned Judge regarded as of greatest importance in resolving the conflict of testimony was the meeting on the morning of 10th April 1956 mentioned in paragraph 9 above. He sets out, over nearly seven pages of the judgment, the varying accounts of this meeting given by the different witnesses. The judgment then proceeds with this passage: p.71 l.21 pp.71-78

> "after considering all that evidence, and the discrepancies which have been pointed out, I am forced to the conclusion that the Defendant /the learned Judge was referring to Mr. H.G. Thanawalla/ was not telling the truth when he said he told the four people present at that meeting that the policy was not in force and that he would try to get an ex gratia payment. It seems to me that the only interpretation which can be put on the Defendant's attitude is that he was intent upon reassuring everybody that Hasham Kara's property was covered by insurance and that he need not worry about payment of his claim." p.78 ll.16-27

Pausing there, it is apparent that the learned Judge attached vital significance to his finding that Mr. H.G. Thanawalla had assured the Respondent, his son, the Mukhi and the Kamadia that the policy was in force. But in reaching this finding the learned Judge did not advert to an important document, namely, a letter which the Respondent

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had himself written to The Aga Khan, as the head of the Ismailia Community, on 4th July, 1956, that is to say only three months after the fire. This letter eventually reached the Jubilee Insurance Company Limited and was in their file relating to Policy No. MB 4762. The letter was not copied and did not form a separate exhibit but it was referred to by Counsel in their final speeches. The Respondent in giving in this letter an account of the interview of 10th April 1956 includes this sentence: "Mr. Thanawalla then gave one file in the hands of Mukhi and stated that he had written to the Head Office of Jubilee to renew the Insurance Policy of my shop, but he could not understand why this Policy was not renewed." The latter part of this sentence conflicts with the evidence given by the Respondent at the trial, but is directly confirmed by a sentence in the evidence of his son Amirali Hasham Kara. The learned Judge in transcribing the relevant passage from Amirali's evidence only includes part of the sentence. The entire sentence and the two subsequent sentences read as follows: "He said 'I can't understand why one policy in particular has not been renewed', the other policies were renewed. The one that was not was the shop policy. No reason was given at that meeting."

Exhibit O and p.47 11.33-36

p.62 1.10 and p.65 1.34

p.72 11.27-28

p.23 11.33-36

15. It is submitted that the Respondent's letter to the Aga Khan taken with the evidence of his son Amirali, make it abundantly clear that at the meeting on 10th April 1956 Mr. Thanawalla did disclose to them the fact that policy No. MB 4762 had not been renewed. If this is right, there is no foundation for the learned Judge's observation that the only interpretation that could be put on the Defendant's attitude was that he was intent upon reassuring everybody that the Respondent's property was covered by insurance.

16. The learned Judge proceeded in his judgment as follows:

> "Whether he was deliberately misleading them well knowing that the property was not covered, or whether at that time he himself thought it was covered, seems to me to make no difference. In either case the evidence raises a very strong inference that the

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Defendant considered he himself was responsible for renewing the policy, and this is supported by his subsequent conduct."

It is respectfully submitted, for reasons already given, that the first alternative - "he was deliberately misleading them" - must be rejected here. The second alternative predicated is that Mr. Thanawalla genuinely believed that the property was covered by insurance and said so. If this really was the case then it is difficult to see why the evidence should give rise to "a very strong inference" that the Defendant considered he himself was responsible for renewing the policy.

17. The learned Judge next adverts to the fact that Mr. Thanawalla on 10th April 1956 paid to the Jubilee Insurance Company Limited a premium of Shs. 176/- in respect of policy No. MB 4762. It is plain from the documents in evidence that this premium was paid in respect of the insurance year 17th November 1953 to 17th November 1954. The relevant receipt refers expressly to Renewal Slip 13185 which was the Renewal Slip relating to the foregoing period. This payment could not at best have done more than to achieve the retrospective renewal of the policy up to 17th November 1955. In fact the payment did not have this effect because the policy had lapsed so long before. But the Judge appears to have thought that if the payment had had this effect then a claim under the policy could have been entertained. He refers to renewal up to 17th November 1955 as "A pre-requisite before the claim could be considered." But it is respectfully submitted that there was no evidence to this effect. If the premium had not been paid for the year 17th November 1954 to 17th November 1955 the policy would once again have lapsed on 17th November 1955 and the Respondent would not have been covered on 9th/10th April 1956. It is possible that the learned Judge misunderstood a passage in the evidence of Mr. Amarski an official of the Jubilee Insurance Company Limited where he said: "If insured comes with a claim when premium not paid we say although you are covered you had better pay the current premium before we will consider your claim." In the context it is plain

p.78 ll.36-40
Ex.16. p.39 l.1
p.79 ll.16-18 and 20-25
p.79 ll.19-20
p.50 ll.28-31

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that what Mr. Amarski meant was this - If the Company granted cover for a year from 1st January 1959 that cover would remain in force until 31st December 1959 even though the premium was not paid. But if a claim were submitted in, say, November 1959, the Company would as a matter of policy first ask the insured to pay the premium for 1959. He was certainly not saying that if the premium remained unpaid and a claim arose in April 1960 the Company would consider that claim.

18. Accordingly it is submitted that the learned Judge himself fell into error as to the suggested "pre-requisite before the claim could be considered" and this error vitiates his next finding adverse to the Appellants:

p.29 ll.26-32

> "I am quite satisfied that in making the payment of 10th April 1956 the Defendant was under the impression that it would renew the policy up to 17th November 1955 and enable the Plaintiff's claim to be considered, and that at that time there was no thought in his mind of asking for an ex gratia payment."

19. The learned Judge appears further to have rejected Mr. Thanawalla's evidence to the effect that the course of dealing between the Appellants and the Respondent was that the Appellants first collected premiums from the Respondent before remitting them to the Jubilee Insurance Company Limited. But in this instance again there was a contemporary document not referred to by the learned Judge which went to show that such was the course of dealing. Thus Mr. Murji, the official of the Jubilee Insurance Company Limited, referred in cross-examination to a letter on the file from the Appellants dated 25th January 1954 in which they said: "We have today collected the last year's premium on policy 4762 etc. Please renew for a further year." The Appellants desire to refer in further support of this contention to the files Exhibits P and Q.

p.79 ll.37-42

p.48 ll.23-28 Ex.P.

20. As regards the Respondent's evidence (i) that he had no means of knowing whether a policy had been renewed unless the Appellants informed him and (ii) that renewal was automatic and that neither he nor his son gave instructions to renew, the evidence already adverted to in paragraph 7

p.12 ll.28-30

p.12 ll.27-28

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above showed that the Respondent was regularly notified by the Jubilee Insurance Company Limited when a policy was about to lapse and that he was further notified when it had lapsed. Moreover, there were examples in the exhibits of renewal applications signed by or on behalf of the Respondent. Thus one was signed by the Respondent personally (10th December 1952) two were signed by his son Amirali, and one by Mohammed Akber. In passing, and to emphasise the inherent improbability of the obligation allegedly accepted by the Appellants to renew policies automatically and without reference to the Respondent, it is to be noted that each letter from the Jubilee Insurance Company Limited warning that the policy was about to lapse, called on the insured to notify the Company of any change in the nature of the risk and the slip at the foot of such letter (to be signed by the insured) referred to the "amended particulars" given above.

p.193
pp.184 and 185
p.189

21. It is submitted that it is against the background of all the foregoing criticisms of the learned Judge's judgment that one should read his conclusion:

> "I believe the evidence of the Plaintiff and his son that the Defendant agreed to look after his insurance business and to renew the policies from time to time and debit the Plaintiff with the premiums and that that arrangement was in fact carried out until the failure to renew Policy MB 4762 came to light as the result of the fire."

p.80 ll.31-37

On the face of it this purports to be a finding as to the credibility of the Respondent and his son. But if the process of reasoning which led the learned Judge to place credit on their testimony is demonstrably wrong, as is submitted here, and if in arriving at the assessment of credibility the learned Judge left out of account important areas of evidence, in particular contemporary documents, which is also submitted, then in such a case there is no rule of practice which precludes a review of the whole of the evidence on the final appeal.

22. On this part of the case the Appellants may summarise their contention by saying that the

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direct evidence of the alleged oral agreement in 1950 was too conflicting and unsatisfactory to justify a verdict in the Respondent's favour. As to the alternative claim in the Particulars, founded on an implied agreement, the evidence did not disclose a sufficiently uniform pattern of conduct to make it possible to imply an agreement imposing the precise and unusual duties alleged in paragraph 4 of the Plaint.

23. As an alternative argument the Appellants will contend that the terms of the alleged agreement were too imprecise and uncertain to impose any legal liability on the Appellants and they will rely on section 29 of the Indian Contract Act which provides: "Agreements, the meaning of which is not certain or capable of being made certain, are void."

24. Next the Appellants desire to raise the
p.5. point which they pleaded in paragraph 10 of the Defence and in Ground 5 of the Amended Memorandum
p.85 of Appeal that they were not at the material time acting as the agents of the Respondent. Their position was that they were acting as agents for and on behalf of the Jubilee Insurance Company Limited. For evidence in support of this reference may be made to the documents which passed between the Appellants and the Respondent in connection with the insurance policies. When the Appellants sent renewal slips for policies to the Respondent they did so as Chief Agents for Jubilee Insurance Company Limited and the
Exs V/1 to V/5 pp.199-201 relevant letters were signed "p.p. Jubilee Insurance Co. Ltd. (Signature) Chief Agents" or in a similar form. Receipts for premiums were given on Jubilee Insurance Company Limited forms (Exhibit 16). Further support for the view that the Appellants were acting exclusively as the agents of the Company is to be found in the conduct of the Respondent after the fire had taken place. On 24th April 1956 the Respondent
p.182 writes to the Appellants raising small queries on the state of the account between them. The amounts involved totalled less than Shs. 1000/-.
p.172 When writing again on 10th May 1956 he is still adverting to these matters. He does not say - as he might be expected to say if he thought he had a claim against his own agents for a serious breach of contract - that in any event he had a

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claim for Shs. 50,000/- against them. A claim under the policy was presented against the Jubilee Insurance Company Limited by the advocates then acting for the Respondent, Messrs. S.R. Kapila and Kapila, by letter of 21st April 1956. p.183
It was not until 20 months later when the Plaint was issued on 19th December 1957 that it was p.3
claimed that the Appellants were under a personal liability to the Respondent.

25. The foregoing contention of the Appellants was not dealt with in express terms by the learned Judge, but it may be taken that in accepting the evidence of the Respondent he was satisfied that there was a special relationship p.80
between the Respondent and the Appellants. ll.24-27

26. The Appellants contend further that there was no consideration for the agreement which they are alleged to have made. Under the Indian Contract Act, which is in force in Kenya, an agreement made without consideration is void (section 25). There are certain exceptions to this rule but none of them apply here. Consideration is defined in section 2 (d) of the Act as follows:

> "Where at the desire of the promisor the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

It is submitted that there was no consideration moving from the promisee (the Respondent) so as to satisfy this definition. It is true that the Appellants were being paid commission by the Jubilee Insurance Company Limited. In one sense it is true that the making of such payments was an act done by "any other person" and "at the desire of the promisor." But it is submitted that on the true construction of section 2 (d) there must be some nexus or link between the promise of the promisor and the act done by the "other person". Thus, in this case, the Insurance Company would have paid commission to the Appellants whether or not they had made any promise to the Respondent (as he alleges) to renew the policies automatically.

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p.80 ll.38-41

27. The learned Judge dealt with the consideration argument as follows:

> "that there was consideration for this agreement is clear from the Defendant's own evidence that he was entitled to commission on all insurance business transacted by him."

It is respectfully submitted that while the payment of commission would afford consideration as between Jubilee Insurance Company Limited and the Appellants, this could not be consideration as between the Respondent and the Appellants.

p.167 H 1-7

28. In the Court of Appeal the consideration argument was dealt with as follows:

> "The question whether there was consideration for the promise of the Appellants, was argued more fully before this Court than it was in the Court below. We are satisfied upon the facts as found, that there was consideration, both under the English law of contract, and within the provisions of Section 2 (d) of the Indian Contract Act."

29. The Respondent may seek to meet the Appellants' contention that there was no consideration for their promise by reference to section 185 of the Indian Contract Act which provides that: "No consideration is necessary to create an agency." But the law recognises that a merely gratuitous authority does not bind the agent to do anything and if the agent is inactive and does nothing the principal appears to have no remedy. The distinction drawn in the cases is between misfeasance and nonfeasance (Wilkinson v. Coverdale (1793) 1 Esp. 75 and Balfe v. West (1853) 13 C.B. 466). The Appellants submit that the gravamen of the Respondent's case against them here was that they were guilty of nonfeasance.

30. In the further alternative on the agency aspect of the case, the Appellants will contend that such instructions as were given to them by or on behalf of the Respondent were vague and ambiguous and the Appellants were entitled to act on a reasonable interpretation of their mandate. The Appellants did act on a reasonable interpretation

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of the agreement; to renew without any instructions would have been highly unreasonable. It would also be unreasonable to expect the Appellants to have advanced the premiums out of their own pocket and granted indefinite credit to the Respondent.

31. Next, the Appellants desire to advance a contention on damages which was not raised in the Courts below. It is a point of law turning entirely on (1) a document put in evidence as part of the Respondent's case and (2) the undisputed evidence of the Respondent himself.

32. The Appellants submit that, assuming against themselves the existence of the contract and the breach of duty alleged, the Respondent cannot be entitled to recover more by way of damages than what he would have been able to claim if Policy No. MB 4762 had been in force when the fire broke out on 9th/10th April 1956. The position under the policy was that Jubilee Insurance Company Limited contracted to provide cover as follows: Ex. 2

(1) Shs. 40,000/- on non-hazardous stock in trade, the property of the Insured whilst in the building on Plot No. 2646 Indian Bazaar, Nairobi.

(2) Shs. 10,000/- on furniture the property of the Insured whilst in the said building.

The contract was subject to certain warranties on the part of the Insured of which Warranty No. 7 was in the following terms:

"7. Warranted that the Insured keeps and during the currency of the policy shall keep a complete set of Books of Account and Stock Sheets or Stock Books, showing a true and accurate record of all business transaction and Stock in hand, and such Books shall be locked in a fireproof safe, or removed to another building at night, and all times when the premises are not actually open for business."

40. The Respondent in cross-examination stated that he kept stock books, that the stock books relating to the goods destroyed by fire were kept on the p.11 ll.36-8

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shelf in the shop which caught fire. The books were burned. A little further on he said: "It was all misfortune. Usually we take our books to our house at night and put them in a safe. On this night they were left in the shop." It is submitted that on this uncontradicted evidence the Respondent established a breach of the foregoing warranty as a result of which he would not have had any claim under the said policy. In the premises the damages (if any) should be nominal.

p.12 ll.6-8

33. In the alternative, the Appellants desire to draw attention to the fact that, as stated above, the cover in respect of stock in trade was Shs. 40,000/- not Shs. 50,000/- as seems to have been assumed. The Respondent's witnesses Mr. Valji and Mr. Patel were giving evidence to show that the value of the stock in trade destroyed was Shs. 46,881 - 87 cts. This is confirmed by the trading account (Ex. 3). Under the policy the maximum claim in respect of stock in trade would have been Shs. 40,000/- and the Respondent cannot recover more under that head against the Appellants. In fact the policy also contained a pro rata average clause and applying this clause to the figures proved the total sum recoverable would have been Shs. 37,052 - 62 cts.

p.34 p.37 p.171

34. Finally, the Appellants submit that the evidence of Mr. Thanawalla and Mr. Murji should have been held to establish that the Respondent received notice from Jubilee Insurance Company Limited, if not also from Mr. Thanawalla, that his policy No. MB 4762 lapsed on 17th November 1954. Accordingly it is submitted that the Respondent did not establish as a matter of causation that he was deprived of the insurance cover on the said shop and contents as a consequence of the Appellants' failure to tell him that the policy had not been renewed or as a consequence of this failure in conjunction with the failure to renew. The question of damages and the causation thereof were comprehended within the third issue raised before the learned Judge. Damages were put in issue by the Defence and unless expressly admitted are deemed always to be in issue (Civil Procedure (Revised) Rules, 1948, Order 8 r.3).

p.53 ll.6-9 p.60 ll.31-33 p.47 ll.15-17

p.8 ll.37-9 p.5.

RECORD

The Appellants submit that this Appeal should be allowed alternatively that the Decree of the learned Judge should be varied by substituting an award of nominal alternatively reduced damages for the following among other

R E A S O N S

(1) BECAUSE there was insufficient evidence to support the finding that there was an oral agreement entered into in 1950 between the Appellants and the Respondent in the terms alleged by the Respondent.

(2) BECAUSE the Courts below in arriving at the above finding did so as a matter of inference from indirect evidence, as to which they fell into error and which in any event was incomplete.

(3) BECAUSE on the evidence taken as a whole the Respondent did not establish the alleged oral agreement and there was not sufficient material to justify the implication of an agreement in like terms.

(4) BECAUSE the agreement (if any) was void for uncertainty.

(5) BECAUSE at all material times the Appellants were acting as agents for Jubilee Insurance Company Limited and not as agents for the Respondent.

(6) BECAUSE there was no consideration for the alleged or any promise by the Appellants within the meaning of Section 2 (d) of the Indian Contract Act.

(7) BECAUSE the Appellants, if they were the agents of the Respondent, were gratuitous agents and were, at worst, only guilty of nonfeasance.

(8) BECAUSE if the Appellants were the agents of the Respondent their mandate was vague and ambiguous and they acted on a reasonable interpretation of it.

RECORD

(9) BECAUSE even if Policy No. MB 4762 had been in force at the date of the fire the Respondent would have had no claim thereunder and in the premises was only entitled to nominal damages.

(10) BECAUSE even if Policy No. MB 4762 had been in force at the date of the fire and the Respondent had had a claim thereunder he could not have recovered more in respect of stock in trade destroyed then SHS.37,052 - 62 cts.

(11) BECAUSE the damages were not in any event shown to be caused by the breaches of duty or negligence alleged.

F. P. NEILL

No 11 of 1960.

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE COURT OF APPEAL
FOR EASTERN AFRICA AT NAIROBI

THE UNITED MARKETING COMPANY

- and -

HASHAM KARA

C A S E

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