IN THE PRIVY COUNCIL No. 11 of 1961

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

THE UNITED MARKETING COMPANY Appellants

- and -

HASHAM KARA Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from an order, dated the 15th September, 1960, of the Court of Appeal for Eastern Africa (O'Connor, P., Gould, Ag. V.-P. and Crawshaw, J.A.) dismissing an appeal from a decree, dated the 27th April, 1959, of the Supreme Court of Kenya (Templeton, J.) awarding the Respondent damages of shs.51,284.25 for breach of contract. pp.167/8 pp.81/2

2. In the Plaint, dated the 19th December, 1957, the Respondent pleaded that he was a merchant carrying on business in Nairobi, and the Appellants were a firm of insurance agents in Nairobi. At all material times the Respondent employed the Appellants as insurance agents to keep insured against fire all movable and immovable properties from time to time in his ownership or occupation. Under that employment it was the duty of the Appellants to obtain insurance cover for the said properties, to renew the policies without reference to the Respondent, unless he gave instructions to the contrary, each time they became due for renewal, to tell him if any of them had not been renewed, and to render accounts to him from time to time of the premiums. In pursuance of the said employment, the Appellants had, since 1950, kept insured against fire a shop pp.1-3

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in Bazaar Road, Nairobi, of which the Respondent was lessee, together with his stock in trade therein, in the sum of shs.50,000. The policy on this shop had become due for renewal on the 17th November, 1955, and it had been the Appellants' duty to renew it, the Respondent having given no instructions to the contrary. The Appellants, in breach of their duty and negligently, had failed to renew the policy and failed to tell the Respondent that it had not been renewed. On the night of the 9th/10th April, 1956, the shop and all the goods in it had been destroyed by fire, whereby the Respondent had suffered damage amounting to shs.46,270.75, which, by reason of the Appellants' breach of duty and negligence, he had been unable to recover from the Jubilee Insurance Co., Ltd., with which the shop and contents had previously been insured.

pp. 4-5

3. By their Defence, dated the 14th February, 1958, the Appellants denied that the Respondent had employed them as he alleged in the Plaint. They said that at the Respondent's request they had insured his shop in Bazaar Road with the Jubilee Insurance Company until the 17th November, 1954, but denied that they had been under any duty to renew the policy. The Respondent, they alleged, had been well aware that they had effected this policy merely as agents of the Jubilee Insurance Company. If they had been under any duty to renew the policy, thich they denied, they alleged that this duty had been conditional upon punctual payment by the Respondent of the premium, which he had failed to pay.

4. The action came on for trial before Templeton, J. on the 26th, 27th and 28th January and the 2nd and 3rd February, 1959. The following issues were framed and agreed by the

p.8, ll.33-39 parties:

(1) Did the Respondent employ the Appellants as his agents to effect his insurances on his properties?

(2) If so, upon what terms?

(3) Did the Appellants commit any breach of that contract, or were they negligent in their performance of it? If so, what damage resulted?

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Evidence relative to these issues, both oral and documentary, was given on both sides. pp. 9-61

5. The learned Judge reserved his judgment, which he delivered on the 27th April, 1959. He said that it was common ground between the parties that, in 1950, the Respondent and one H.G. Thanawalla, a partner of the Appellant firm, had a conversation, in which the Respondent agreed to give all his insurance business to the Appellants; but there was a direct conflict between the Respondent and Thanawalla about the terms of the arrangement. The Respondent had said that it had been arranged that the Appellants would renew the policies year by year, without instructions from him, and debit his account with the premiums. This arrangement had continued until the fire, and at that time he had been under the impression that the policy on the shop in Bazaar Road (Policy No. M.B.4762) had been renewed for 1956. During the period in question Thanawalla had been a customer at the Respondent's shop, and, from time to time, accounts were squared between them and any balance due from the Respondent for premiums was paid. Thanawalla, on the other hand, had said it was not true that he had agreed to renew policies without instructions, nor that the practice was for the amount due for goods to be set off against the premiums. He alleged that, in accordance with the practice of the Jubilee Insurance Company, a policy due for renewal was renewed upon payment of the previous year's premium. The learned Judge considered at length the evidence on both sides, and, as a result, accepted that given by the Respondent and his son. He held that the Appellants had agreed to look after the Respondent's insurance business, and to renew the policies from time to time and debit the Plaintiff with the premiums, which arrangement had in fact been carried out until the failure to renew the policy, No. M.B.4762, came to light as a result of the fire. There was consideration for this agreement, because the Appellants were entitled to commission on all insurance business transacted by them. By failing to renew policy No. M.B.4762 the Appellants had committed a breach of the agreement. The learned Judge accepted evidence given that the value of the stock in hand immediately before the fire had been shs.50,611.12, and that of the salvaged goods had been shs.3,729.25. He therefore gave judgment for the Respondent for shs.46,270.75 with interest and costs.

pp.68-81
p.69, ll.20-27
p.69, l.28 - p.70, l.2
p.70, ll.3-21
pp.70-80
p.80, ll.31-37
p.80, ll.38-41
p.80, ll.42-45
p.80, l.46 - p.81, l.6

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pp.85/6

6. The Appellants appealed to the Court of Appeal for Eastern Africa. Their Amended Memorandum of Appeal, dated the 8th July, 1959, set out various grounds of appeal. Apart from questions of fact, the points raised were, in substance, that the agreement (if any) between the parties had been gratuitous, and not supported by consideration.

pp.166/7

7. The appeal was heard on the 12th, 13th and 14th September, 1960, and judgment was given on the 15th September. The learned Judges said that in the Supreme Court, while the question of consideration had been touched upon briefly, the case had been argued almost entirely on the question of fact, whether the agreement between the parties had been

p.166, ll.32-44

made as alleged. Templeton, J. had resolved this question in favour of the Respondent, and the learned Judges, after hearing exhaustive argument upon it, saw no reason for differing from his

p.167, ll.1-7

finding. They were satisfied that there was consideration to support the agreement, both according to English law and within the provisions of the Indian Contract Act. The appeal was accordingly dismissed with costs.

8. The findings made by Templeton, J. upon the evidence having been confirmed in every particular by the learned Judges of the Court of Appeal, the Appellants, in the respectful submission of the Respondent, should not now be allowed to challenge those findings or to reopen any matters of fact.

9. The Respondent respectfully submits that, upon the facts thus concurrently found by the Courts below, there was a contract of agency between him and the Appellants. The Respondent agreed to insure his property through the agency of the Appellants, and the Appellants agreed to take out and maintain the necessary policies, upon which they received commission from the Jubilee Insurance Co., Ltd. The Appellants broke this contract by failing to maintain the policy covering the shop in Bazaar Road and its contents, and in consequence the Respondent suffered damage amounting to the sum awarded to him by the Supreme Court.

10. The Respondent respectfully submits that the judgment of the Court of Appeal for Eastern Africa was right and ought to be affirmed, and this appeal ought to be dismissed, with costs, for the

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following (amongst other)

R E A S O N S

1. BECAUSE the Supreme Court of Kenya and the Court of Appeal for Eastern Africa made concurrent findings of fact in the Respondent's favour:

2. BECAUSE there was a valid and enforceable contract between the parties:

3. BECAUSE it was the duty of the Appellants under the said contract to renew the policy of insurance No. M.B.4762 for the year 1955/56:

4. BECAUSE the Appellants broke the said contract by failing to renew the said policy and the Respondent suffered damage in consequence:

5. BECAUSE of the other reasons set out in the judgments of the Supreme Court and the Court of Appeal.

J.G. LE QUESNE.

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