~~GF.2.C.1.4~~

25/1963

IN THE PRIVY COUNCIL No. 6 of 1962

ON APPEAL FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA, LIMITED Appellants

- and -

JAFFERALI AND SONS, LIMITED Respondents

74089

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from an Order, dated the 9th August, 1961, of the Court of Appeal for Eastern Africa (Forbes, V.-P., Crawshaw and Newbold, JJ.A.) allowing an appeal by the Respondents against a Decree, dated the 3rd June, 1960, of the Supreme Court of Kenya (Farrell, J.). The Supreme Court dismissed the action, in which the Respondents were the Plaintiffs and the Appellants were the Defendants. The Court of Appeal set aside the decree of the Supreme Court and ordered that judgment be entered for the Respondents for Shs. 51,350. p.100. p.39.

2. The Respondents issued a Plaint in the Supreme Court of Kenya in September, 1949. They pleaded that the Appellants had held certain premises in Factory Street, Nairobi for a term of five years from the 1st July, 1957 as tenants of three individuals named Madatally. One of these three was the Managing Director of the Respondents. Towards the end of 1957, the Appellants had wished to leave the premises in Factory Street and to be released from their tenancy of those premises. It had accordingly been agreed that, in consideration of the Respondents' obtaining such a release, the Respondents would grant and the Appellants would take a lease of premises belonging to the Respondents in Clarke Lane, Nairobi. The Appellants and the p.1.

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Respondents had agreed in or about January, 1958 that the Respondents should grant and the Appellants should take a lease of these premises in Clarke Lane for three years from the 1st January, 1958 at the rent of Shs.2,250 per month. The Appellants were accordingly released from their obligations under the tenancy of the premises in Factory Street and entered into possession of the premises in Clarke Lane and remained in possession of them and paid rent for them until the 30th of June, 1958, when they quitted the premises in Clarke Lane. The Appellants had wrongfully refused to execute or enter into any lease for the term of three years and had wrongfully repudiated their obligation to take a lease of the Clarke Lane premises in accordance with the agreement with the Respondents. In consequence the Respondents had suffered damage, particulars of which were set out, amounting to Shs.51,350.

p.4. 3. By their Defence, dated the 14th October, 1959, the Appellants admitted that they had at one time been tenants of the premises in Factory Street and had released that tenancy to the landlords, but they did not admit the agreement described in the Plaint for that release. They admitted that they had entered into negotiations with the Respondents with reference to the premises in Clarke Lane, but denied that any concluded agreement of lease had ever been concluded. They alleged that the only terms upon which they had been willing to conclude a lease had been set out in correspondence between them and the advocates for the Respondents, and those terms had not been acceptable to the Respondents. Accordingly, according to the Defence, the Appellants had given one month's notice of their intention to vacate the premises in Clarke Lane and had vacated them on the 30th of June, 1959. They denied the damage, and alleged that the agreement for a lease was not enforceable because it had not been registered; but those two points no longer arise.

4. The following correspondence was produced in evidence:

p.106. Exhibit 3: Letter of the 3rd December, 1957 from Leslie and Anderson (East Africa), Limited (the parent Company of the Appellants) to the Respondents' Agents.

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In this letter Leslie and Anderson (East Africa), Limited described negotiations which they had had about the premises in Factory Street and Clarke Lane, and said that they were prepared to take a three year lease of the Clarke Lane premises at £112.10.0. per month, provided they were allowed "free vacation" of the premises in Factory Street; this was subject to the approval of the General Manager of the Appellants.

Exhibit 4: Letter of the 9th January, 1958 from the Respondents to the Appellants. p.108.

The Respondents wrote that "in accordance with our mutual arrangement" the premises in Clarke Lane had been let to the Appellants for three years from the 1st January, 1958 at a monthly rental of Shs.2,250, the lease to be prepared by the Respondents' Solicitors at the Appellants' expense, water, light and conservancy charges to be payable by the Appellants, "and usual conditions".

Exhibit 5: Letter of the 13th January, 1958 from the Appellants to the Respondents. p.109.

The Appellants wrote that they agreed to the terms set out in Exhibit 4, with the exception of that defining the term of the lease; they wanted a lease for one year with an option of renewal. They asked the Respondents to send them a draft lease.

Exhibit 6: Letter of the 25th January, 1958 from the Respondents to the Appellants. p.109.

The Respondents referred to Exhibit 5 and to a subsequent meeting with a representative of the Appellants, and wrote that "it is now agreed that you are renting the go-down for a lease of three years from 1.1.58".

Exhibit 8: Letter of the 3rd February, 1958 from the Appellants to the Respondents. p.111.

The Appellants asked the Respondents to reconsider their request for a lease for one year with option of renewal.

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p.112. Exhibit 9: Letter of the 17th February, 1958 from the Respondents' advocates to the Appellants.

p.113. This was a covering letter accompanying the draft lease (Exhibit 9A).

p.118. Exhibit 12: Letter of the 14th March, 1958 from the Appellants to the Respondents' advocates.

The Appellants raised various points upon the draft Lease, relating principally to the repairing covenants. They raised no point upon the provision of the draft lease that the term should be for three years from the 1st January, 1958.

pp.120-123. Exhibits 13 and 14:

These letters contained argument between the parties about the repairing covenants in the draft lease.

p.124. Exhibit 15: Letter of the 24th April, 1958 from the Respondents' Advocates to the Appellants.

The Advocates put forward a revised repairing covenant, and added that, if the Appellants insisted upon a clause which made the Respondents responsible for all repairs save only those directly attributable to abuse by the Appellants, the Respondents felt "that no useful purpose can be served by a further continuance of the present relationship".

p.126. Exhibit 17: Letter of the 29th May, 1958 from the Appellants to the Respondents' Advocates.

In answer to Exhibit 15, the Appellants gave notice of their intention to vacate the premises in Clarke Lane on the 30th June, 1958.

5. At the trial before Farrell, J., evidence on behalf of the Respondents was given by Jafferali Madatally, their Managing Director. He said the

p.5, ll.10-20. Appellants had formerly been tenants of the Factory Street premises, of which he and his two brothers were the owners. In November or December, 1957 conversations had taken place between his

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brother Nazaralli and the Defendants, as a result of which Exhibit 3 had been written. The witness had written to Mr. Elliot, of the Appellant Company, between the 20th and 30th December, 1957, and they had reached an agreement that, provided the Respondents gave free vacation of the Factory Street premises, the Appellants would take a lease of the Clarke Lane premises for three years from the 1st January, 1958 at Shs.2,250. He had handed over the keys of the Clarke Lane premises on the 30th or the 31st of December, 1957, and had written Exhibit 4 on the 9th January 1958. The period of three years and the other terms mentioned in Exhibit 4 had been definitely agreed. Before writing Exhibit 6, the witness had had a conversation with Mr. Elliot, who had finally agreed to the term of three years. The witness had been surprised to receive Exhibit 8, and had not been prepared to alter the terms. He had executed the document of surrender of the Factory Street premises on the 17th of May, 1958.

p.9, ll.21-28.

p.9, ll.29-36.

p.9, l.37 - p.10, l.5.

p.10, ll.9-10.

6. Mr. N.W.C. Elliot, a Director of Leslie and Anderson (East Africa), Limited, gave evidence for the Appellants. He said it had been agreed that the lease of the Factory Street premises should be surrendered, and there had been conversations about alternative accommodation. The Appellants had in due course been offered the go-down in Clarke Lane. When the witness had written Exhibit 3, it had been agreed that the Appellants should leave Factory Street and go to Clarke Lane, but the only terms agreed had been the date of occupation and the rent. Negotiations had been subject to the approval of the General Manager, Mr. Keir. By the 9th January, 1958, the Appellants, the witness said, had not agreed to a three year least. Before receiving Exhibit 6, the Appellants had had a discussion with Mr. Jafferali, and it had been agreed that the Appellants should take a three years' lease. The next step had been for the draft lease to be submitted, and on receiving it the witness had disagreed with the provision for repairs. Cross-examined, he said that the surrender of the Factory Street premises had been part of the negotiations for new premises. The Appellant Company had had legal authority to enter into a lease. The draft lease had provided for a term of three years, and by that time confirmation had come to the Appellants from their head office in Mombasa for a three years' lease.

p.14, ll.25-36.

p.14, l.37- p.15, l.6.

p.15, ll.13-16.

p.15, ll.17-19.

p.16, ll.1-5.

p.16, ll.18-19.

p.16, ll.29-31.

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pp.24-38.

7. Farrell, J. delivered Judgment on the 3rd of June, 1960. After summarising the facts, he said

p.28, ll.35-44. Counsel for the Appellants had objected that the facts opened for the Respondents suggested that the agreement (if any) had not been concluded in January, 1958 (as pleaded in the Plaint), but in the latter part of December, 1957. Counsel for the Respondents had declined to ask for any amendment, arguing that the words "in or about January, 1958" were wide enough to cover the last days of December, 1957. The learned Judge said the only

pp.29-34. issue in the case was whether there had been a concluded agreement between the parties. He referred to certain authorities, and held that in Kenya, as in England, the phrase "usual conditions" had a definite and ascertainable meaning. The

p.35, ll.31-37. learned Judge said that, in view of the conflict in the direct evidence of Mr. Jafferali and Mr.Elliot, the decision of the question whether there had been a concluded agreement had to be sought primarily from a consideration of the correspondence. The

p.36, ll.15-46. language of Exhibit 5 suggested to him that the writer had not then considered that any concluded agreement had been reached, at any rate on the question of the term. After the writing of this

p.37, ll.1-17. letter there had been another meeting between Mr. Jafferali and Mr. Eliot; Mr. Jafferali said it had then been agreed that the Appellants should take a three year lease, Mr. Elliot said he had told Mr. Jafferali that he would write to Mombasa and it had been agreed that they should take a three year lease. In cross-examination, Mr. Elliot had said that the confirmation had been received from Mombasa by the time the draft lease was submitted

p.37, ll.18-32. on the 17th February, 1958. Exhibits 6 and 8 reflected, the learned Judge said, the same conflict

p.37, l.33 - p.38, l.18. of evidence. The further correspondence was not of any great significance, though the Appellants' letters were consistent with their attitude that they had continued merely in negotiations right up to the 29th of May, 1958, when they had served

p.38, ll.19-26. Notice to Quit. The onus was on the Respondents to satisfy the Court on a balance of probabilities that a concluded agreement had been reached. On the evidence of the witnesses, Farrell, J. said, he would have found the case not proved, as he had no reason to prefer the word of one to the word of the

p.38, ll.26-36. other. As to the correspondence, there were letters written by the Respondents which supported their case, but there were no letters on the other

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side amounting to any admission against the Appellants, and the Appellants' correspondence was completely consistent with their case as presented in evidence. The learned Judge's conclusion was that the parties had never been ad idem. He accordingly held that the Respondents had failed to discharge the onus upon them, and dismissed the action, with costs. p.38, ll.35-46.

8. The Respondents appealed to the Court of Appeal for Eastern Africa, by a Memorandum of Appeal dated the 15th of August, 1960. The appeal was argued before Forbes V.-P., Crawshaw and Newbold, JJ.A. on the 12th July, 1961. Judgment was reserved, and was delivered on the 9th August, 1961. pp.42-44. pp.45-77. pp.78-100.

9. The leading judgment was delivered by Crawshaw, J.A. Having summarized the facts and the pleadings, he said the case turned entirely upon the issue whether there had been a concluded agreement for the lease of the premises in Clarke Lane. Farrell, J. had held that the conclusion of the agreement had not been dependent on the preparation of a formal instrument, and also that the expression "usual conditions" had a meaning capable of ascertainment. These findings had not been challenged before the Court of Appeal. Farrell, J. had held that the Respondents had not discharged the onus of proving that a binding agreement "was ever concluded", and these last words indicated that he had been considering, not simply the period up to the end of 1957, but the whole period up to the 29th of May, 1958. Counsel for the Appellants had objected to the Respondents arguing before the Court of Appeal that an agreement had been concluded later than December, 1957, because, he alleged, their case in the Supreme Court had been that an oral agreement had been made in December. Counsel for the Respondents before the Court of Appeal had argued that the term of three years had been finally agreed before the 25th January, 1958 (i.e. the date of Exhibit 6). Crawshaw, J.A. pointed out that the Plaint had alleged an agreement "in or about January 1958", and the Appellants had not asked for any particulars of this. The learned Judge at the trial had not confined his attention to the period ending with December, 1957, and Counsel for the Appellants had himself referred in his address at the trial to the Respondents' allegation of an agreement concluded in or about January, 1958. The learned Judge pp.78-94. p.84, ll.11-22. p.85, ll.25-48. p.87, ll.11-40. p.87, l.43 - p.91, l.37.

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therefore concluded that Counsel for the Respondents had not been relying on any new matter before the Court of Appeal, and was entitled to approach the evidence in a way different to that adopted at the

p.91, l.38 - p.92, l.26. trial. Farrell, J. had gone wrong in not considering the effect, following Exhibits 4 and 5, of the confirmation obtained by Mr. Elliot from the Respondents for a term of three years. At the time of that confirmation no other conditions of the

p.92, l.27 - p.93, l.4. lease had been in dispute. By the time of the submission of the draft lease to the Respondents, all the conditions which had been under negotiation, including that of the term, had been agreed, and no condition not previously raised was then in dispute. The question of liability for repairs had not been raised until later, by which time there was already a concluded agreement on the point under the term

p.93, l.42 - p.94, l.8. "usual conditions". Crawshaw, J.A. therefore concluded that the appeal should be allowed, the judgment and decree of the Supreme Court set aside, and judgment entered for the Respondents for Shs.51,350, together with costs of the trial and interest as claimed. In view of the different basis on which the Respondents' case had been put in the Court of Appeal, he thought there should be no order for the costs of the Appeal.

pp.97-100. 10. Newbold, J.A. said he agreed with the order

p.98, l.34 - p.99, l.21. proposed. Mr. Elliot's evidence showed that the Appellants had agreed to the term of three years by the 17th February, 1958. that had been the last condition of the agreement to be settled, so a concluded agreement had then been reached, since there was no evidence that any new term for negotiation had been introduced before the settlement of the outstanding question of the period of the lease. It was true that new arguments had subsequently been introduced, but the introduction of new negotiations did not affect an agreement already concluded. A concluded agreement had therefore been reached between the 13th January and the 17th February, 1958, and the subsequent negotiations had not affected the position. The

p.99, l.22 - p.100, l.3. learned Judge said it was clear that the pleadings and the issues had been wide enough to cover an agreement concluded in February, 1958, and the case for the Appellants had always been that no concluded agreement had ever been reached and the negotiations had continued until April, 1958. There had therefore been no prejudice to the Appellants in the fact that the Respondents' case had been put somewhat

differently in the Court of Appeal from the way in which it had been put before the Supreme Court. Forbes, V.-P. said he agreed that the proper inference from the evidence was that a concluded agreement had been reached by the 17th February, 1958, and that it had only been subsequently to this that negotiations about new terms affecting repairing liability had been opened by the Appellants. That liability was covered by the phrase "usual conditions", and the Respondents had been entitled to insist on the terms so agreed. The learned Vice-President said he thought the Respondents should be allowed to rely upon an agreement concluded by February, 1958, because it appeared that all matters relevant to that had been fully investigated, and all evidence relevant to it had been given, in the Supreme Court.

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pp.94-96.
p.95, ll.1-15.
p.95, l.16 - p.96, l.25.

11. The Respondents respectfully submit that Farrell, J. did not give due effect to the evidence of Mr. Elliot. It was clear, not only from the Respondents' evidence but also from the evidence for the Appellants, that a concluded agreement for a lease of the premises in Clarke Lane had been reached, at the latest, by the 17th February, 1958. This view of the evidence was covered by the Plaint and the issues settled in the Supreme Court, and there was no ground upon which the Respondents could have been prevented from submitting it to the Court of Appeal.

12. The Respondents respectfully submit that the order of the Court of Appeal for Eastern Africa was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the evidence on both sides shewed that the parties reached a concluded agreement for a lease of the premises in Clarke Lane.

2. BECAUSE Farrell, J. failed to give proper consideration to all the relevant evidence.

3. BECAUSE of the other reasons given by the learned Judges of the Court of Appeal for Eastern Africa.

J.G. LE QUESNE.

No. 6 of 1962

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

WAREHOUSING AND FORWARDING COMPANY OF EAST AFRICA, LIMITED
Appellants

- and -

JAFFERALI AND SONS, LIMITED
Respondents

CASE FOR THE RESPONDENTS

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