Privy Council Appeal No. 6 of 1962

Warehousing & Forwarding Company of East Africa Limited – *Appellants*

v.

Jafferali & Sons Limited – – – – – – – *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY 1963

Present at the Hearing:

VISCOUNT RADCLIFFE

LORD MORRIS OF BORTH-Y-GEST

LORD GUEST

LORD PEARCE

SIR KENNETH GRESSON

(*Delivered by* LORD GUEST)

This is an appeal from a decision of the Court of Appeal for Eastern Africa reversing a decision of the Supreme Court of Kenya (Farrell, J.) whereby he dismissed the respondents' claim against the appellants for a sum of Shs.51,350/– damages for breach of an alleged agreement for the grant by the respondents to the appellants of a godown in Clarke Lane, Nairobi. The Court of Appeal entered judgment for Shs.51,350/–.

The appellants are a wholly owned subsidiary of Leslie & Anderson (East Africa) Limited who carry on business as warehousemen and have their main office in Mombasa. On 1st July, 1957, the appellants took a lease for five years of a warehouse in Factory Street, Nairobi, from Jafferali Madatally (the respondents' managing director) and his two brothers. The Factory Street premises proved unsuitable and towards the end of 1957 the appellants were anxious to terminate the lease and to find suitable alternative premises. Negotiations took place between Mr. Elliott (a director of Leslie & Anderson and the manager of the Nairobi branch of the appellants' business) and Jafferali with regard to a lease by the respondents to the appellants of a godown in Clarke Lane, Nairobi. On 3rd December, 1957, Mr. Elliott on behalf of the appellants wrote to the respondents' firm offering to take the Clarke Lane premises on a three years' lease at a rent of £112 10*s.* 0*d.* per month. He made it clear in the letter that his offer was subject to the approval of Mr. Keir, the general manager of the appellants in Mombasa. Following upon receipt of this letter further negotiations took place between Jafferali and Mr. Elliott as a result of which the appellants entered into possession of the Clarke Lane premises on 1st January, 1958. On 9th January, 1958, Jafferali wrote a letter to the appellants in these terms:—

> " In accordance with our mutual arrangement the above godown has been let to you on following terms. . . .
>
> (1) Monthly rental of the godown to be Shs.2250/– nett payable by you to us in advance.
>
> (2) The godown has been let to you upon three years lease commencing from 1st Jan. 1958.
>
> (3) The lease will be prepared by our Solicitors at your expense.
>
> (4) Water, Light and Conservancy charges are payable by you.
>
> .....and usual conditions."

The appellants replied to this letter on 13th January stating that the terms set out in Jafferali's letter of 9th January were agreed except No. 2 and that they wished a lease for one year with option of renewal. Subsequently, a further meeting took place between Jafferali and Mr. Elliott following upon which Jafferali on 25th January wrote a letter to the appellants in the following terms:—

> " We refer to your letter dated the 13th instant, in reply to ours of the 9th instant and to subsequent interview with your Mr. Elliott, it is now agreed that you are renting the godown for a lease of three years from 1.1.58.
>
> We are now proceeding to instruct our Solicitors to prepare a draft of lease and be sent to you for approval ".

To this letter the appellants replied on 3rd February in these terms:—

> " We are in receipt of your letter of the 25th instant " (read " January ") " and are disappointed that you appear unable to accede to our request for one year's lease with our option of extending for a further two years. May we ask you to kindly give this matter further consideration."

On 17th February the respondents' solicitors sent the appellants two copies of the draft lease for their approval. Further correspondence, to which it is unnecessary to refer, took place between the appellants and the respondents. On 29th May, 1958, the appellants gave notice to the respondents of their intention to vacate the premises on 30th June, 1958.

In their plaint claiming damages for the appellant's breach of the agreement the respondents pleaded that an agreement for the lease of the Clarke Lane premises was reached between the parties at Nairobi " in or about January, 1958 " and the issues were agreed in these terms:—

> "1. Was any agreement for a lease of premises on Plot L.R.209/1081, Clarke Lane, Nairobi, concluded between parties? If so, for what term and at what rent and upon what conditions?
> 2. If such agreement concluded, can it be sued upon notwithstanding the same is not registered?
> 3. If agreement concluded and can be sued upon what damages? "

There was no dispute as to the damages for which the appellants were liable if the respondents were entitled to succeed on the merits.

In his opening address counsel for the respondents made it clear that his clients' case was that an oral agreement for a lease of the premises was reached at the end of December 1957, maintaining that this came within the pleadings " in or about January 1958 ". No objection was taken on behalf of the appellants and Jafferali's evidence was that an oral agreement for the lease of the Clarke Lane premises was made by him with Mr. Elliott in December 1957. Mr. Elliott's evidence was that no concluded agreement had been made in December 1957 as to the terms of the lease.

Upon this evidence the trial Judge held that no binding agreement had ever been concluded between the parties. He found that the evidence of the discussions between the parties in December 1957 was inconclusive and that the parties were never *ad idem*. He therefore dismissed the plaintiffs' claim. When the case came before the Court of Appeal the respondents abandoned their case that a verbal agreement had been concluded in December 1957 and maintained upon the evidence that an agreement had been concluded at latest in February 1958. Not unnaturally the appellants' counsel took serious objection to this new case being argued. The Court of Appeal gave careful consideration as to whether the respondents' counsel was entitled to raise this new point, but finally concluded that it was open and held that a concluded agreement had been reached before 17th February 1958.

In order to decide whether the Court of Appeal were right in allowing the new point to be argued it is necessary to consider the evidence upon which the Court of Appeal acted together with the grounds of their decision on the merits. The evidence of Mr. Elliott alone was relied on for this purpose. He stated in evidence that the negotiations were subject to the approval of

Mr. Keir in Mombasa as had been made clear to the respondents in his original letter of 3rd December 1957, and in later conversations. He agreed that discussions might have taken place between 3rd December and 9th January. His evidence proceeded:

> " Before letter No. 6 " (letter of 25th January) " was received I had had a discussion with Jafferali. I told him I would write to Mombasa. It was agreed that we should take a three years lease ". . .
>
> " The next step was for the draft lease to be submitted ".
>
> . . . . . .
>
> " The lease was to be formally engrossed ".
>
> " The draft lease provided for a term of three years. By that time confirmation had come from Mombasa for a three years lease. The Head office of Defendant Co. is in Mombasa ".

The Court of Appeal's view was that the term of three years had been finally agreed between Mr. Elliott and Jafferali before 25th January when Jafferali wrote the letter referred to and that upon Mr. Elliott obtaining the approval of Mr. Keir which must have occurred prior to 17th February, the contract was complete.

The first point to consider is what was Mr. Elliott's position in the negotiations which preceded the obtaining of confirmation from Mr. Keir. Plainly he was only negotiating in December 1957. He had intimated clearly to the respondents the limitation of his authority. It is not at all apparent to their Lordships that at the meeting which Mr. Elliott had with Jafferali in January 1958, Mr. Elliott as an agent had made a concluded contract with Jafferali for a three year lease subject to the ratification of his principal. The sentences " I told him I would write to Mombasa. It was agreed that we should take a three years lease " which have been fastened on by the respondents are in the context in which they occur equally consistent with his offer being subject to the approval of Mr. Keir. The exact purport of these conversations might have been further investigated if these had been material to the point before the trial Judge. " In a case where the agent for one party to a negotiation informs the other party that he cannot enter into a contract binding his principal except subject to his approval, there is in truth no contract or contractual relation until the approval has been obtained. The agent has incurred no responsibility ". (*Watson v. Davies* [1931] 1 Ch. 455, Maugham J. at page 468). Their Lordships desire to make this observation in connection with this case. In his judgment Maugham J. later adds: " In *Bolton Partners v. Lambert* 41 Ch.D. 295 the decision of the Court was, I think, founded on the view that there was a contractual relation of some kind which could be turned into a contract with the company by a ratification, whilst in the absence of ratification there was a right of action against the agent for breach of warranty of authority. It was admitted that there could be no ratification of a legal nullity. An acceptance by an agent subject in express terms to ratification by his principal is legally a nullity until ratification, and is no more binding on the other party than an unaccepted offer which can, of course, be withdrawn before acceptance ". ([1931] 1 Ch. 469). It may be that *per incuriam* his Lordship was using the terms " approval " and " ratification " indiscriminately. It is also to be observed that the authority of *Bolton Partners v. Lambert* [1888] 41 Ch.D. 295 was doubted in *Fleming v. Bank of New Zealand* [1900] A.C. 577, Lord Lindley at page 587. In their Lordships' opinion the evidence does not clearly establish whether Mr. Elliott was negotiating subject to the approval of Mr. Keir or had contracted with Jafferali subject to Mr. Keir's ratification. If Elliott contracted subject to ratification by his principal there would be no concluded contract until ratification had been obtained. The respondents contended upon the authority of *Koenigsblatt v. Sweet* [1923] 2 Ch. 314 that ratification by the principal can operate back to the date when the contract was made by the agent without the necessity of communication to the other party. But in that case the limitation of the agent's authority was not known to the other contracting party. In such a case the agent contracts as principal and his principal is bound upon ratification taking place. When, however, the other party to the contract has intimation of the limitation of the agent's

authority neither party can be bound until ratification has been duly intimated to the other party to the contract. It would be contrary to good sense to hold that a concluded contract had been made in these circumstances.

Their Lordships now return to the evidence. Mr. Elliott says that confirmation was obtained from Mombasa before 17th February, but no date is given. There is therefore no evidence that the ratification by Mr. Keir came before 3rd February. Before ratification was obtained it was open to the appellants to withdraw (see *Watson v. Davies* supra). If ratification was not obtained before 3rd February, their Lordships' view is that withdrawal by the appellants was effectively made and communicated to the respondents by their letter of 3rd February. The respondents contended that this letter did not amount to withdrawal but was an afterthought on the part of the appellants endeavouring to have the contract which had been concluded re-written. Assuming that no concluded oral contract had been made prior to the respondents' letter on 25th January, the appellants' letter of 3rd February did not amount to an acceptance of a three year lease. It was either a counter offer of a one year lease or a withdrawal of the agreement, if made, to a three year lease. On either view there would have been no concluded contract. Crawshaw, Judge of Appeal in the Court of Appeal has assumed that when confirmation was received the contract was complete. He failed to consider the effect of the letter of 3rd February, if ratification came after that date and the result of a failure to intimate ratification.

Their Lordships now address themselves to the preliminary point taken by the appellants that it was not open to the respondents to argue the new point before the Court of Appeal. As their Lordships have already indicated it is impossible to consider this point in isolation without reference to the argument based on the rest of the evidence. It was no doubt within the pleadings, it was no doubt within the issues. Equally no doubt it took appellants' counsel by surprise and misled him as to the case which the respondents were making. Nevertheless, if the facts have been fully investigated or if the facts had been fully investigated and the full investigation would have supported the new case, then there would be no objection. " When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea ". (*Connecticut Fire Insurance Company v. Kavanagh* [1892] A.C. 473 Lord Watson at page 480.)

In the present case the respondents' case proceeded before the trial Judge upon the footing that there was an oral agreement in December 1957. Before the Court of Appeal the respondents abandoned this case and founded on an oral agreement in January 1958 relying on the evidence of Mr. Elliott and correspondence. The position of Mr. Elliott in the negotiations was not clear. The question of ratification was never investigated, neither its terms nor its date. It is not possible to say that the result would have been bound to be the same whatever these investigations had revealed. Applying the principles above referred to their Lordships have no hesitation in saying that the respondents ought not to have been allowed to argue the new point before the Court of Appeal and they find it impossible to say that the appellants were not prejudiced by the course taken by the Court of Appeal. It follows that as the trial Judge held there was no concluded contract, and as his judgment on this point was not challenged, the appellants must succeed.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment of the Court of Appeal set aside with costs to the appellants and the judgment of the trial Judge restored. The respondents must pay the costs of this appeal.

(88212) Wt. 8052/97 90 8/63 Hw.

In the Privy Council

WAREHOUSING & FORWARDING
COMPANY OF EAST AFRICA
LIMITED

v.

JAFFERALI & SONS LIMITED

DELIVERED BY
LORD GUEST

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