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Judged by
22, 1964

IN THE PRIVY COUNCIL

No. 44 of 1962

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA AT DAR ES SALAAM

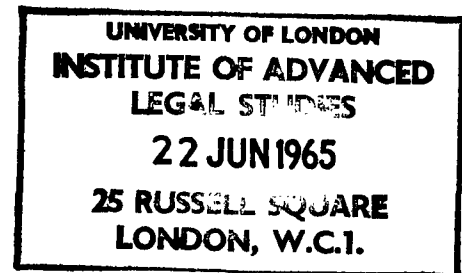
B E T W E E N :

CONSOLIDATED AGENCIES LIMITED (Defendant) Appellant

- and -

BERTRAM LIMITED (Plaintiff) Respondent

RECORD OF PROCEEDINGS



- 78593

ATTENBOROUGH
12, New Court
Lincoln's Inn
London, W.C.2
Solicitors for the Appellant.

SLAUGHTER & MAY
18 Austin Friars
London, E. C. 2.
Solicitors for the Respondent.

i.

IN THE PRIVY COUNCIL

No.44 of 1962

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA AT DAR ES SALAAM

B E T W E E N :

CONSOLIDATED AGENCIES LIMITED (Defendant) Appellant

- and -

BERTRAM LIMITED (Plaintiff) Respondent

RECORD OF PROCEEDINGS

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v.

LIST OF DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT
REPRODUCED

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1.

IN THE PRIVY COUNCIL

No.44 of 1962

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA AT DAR ES SALAAM

B E T W E E N :

CONSOLIDATED AGENCIES LIMITED (Defendant) Appellant

- and -

BERTRAM LIMITED (Plaintiff) Respondent

RECORD OF PROCEEDINGS

No.1

10

P L A I N T

CIVIL CASE NO. 57 OF 1961

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA

AT DAR ES SALAAM

CIVIL CASE NO. 57 OF 1961

BERTRAM LIMITED

Plaintiff

versus

CONSOLIDATED AGENCIES LIMITED

Defendant

In the
High Court
of
Tanganyika
at Dar es
Salaam

—
No.1

Plaint
13th April
1961

P L A I N T

The Plaintiff Company, above-named, states as follows:

20

1. The Plaintiff Company is a private limited liability Company incorporated in Tanganyika having its Registered office at Dar-es-Salaam and its address for service for the purpose of this suit is care of George N.Houry & Company Advocates, Ring Street, Dar-es-Salaam.

In the High
Court of
Tanganyika
at Dar-es-
Salaam

No.1
Plaint
13th April
1961

Continued

2. The Defendant Company is a limited liability Company incorporated in Tanganyika, having its Registered Office at Dar-es-Salaam, and its address for service for the purpose of this suit is care of P.R. Dastur, Esquire, Advocate, Textile House, Market Street, Dar-es-Salaam. 10
3. The Defendant Company is indebted to the Plaintiff Company in the sum of Shs. 349,962/52 made up as follows :-
- | | |
|-------------------------|-----------------------------|
| Shgs. 23,427-52 | on account of LOAN No.1 and |
| <u>Shgs. 326,535-00</u> | on account of LOAN No.2 |
| <u>Shgs. 349,962-52</u> | |
- being moneys lent and advanced by the Plaintiff Company to the Defendant Company on an open and current account between the said two parties which sum being repayable on demand, is due and owing, as per Statements of Accounts annexed hereto and marked 'A' and 'B' respectively, to which the Plaintiff Company craves leave to refer. 20
4. That the Defendant Company is further indebted to the Plaintiff Company in the sum of Shgs.6,040/45 being interest at the rate of SIX per cent (6%) per annum as agreed or customary or by way of damages, on shgs. 349,962/52 from 1st January 1961 to 15th of April, 1961. 30
5. That despite demands and notice to sue the Defendant Company has failed and/or neglected to pay the said sum of Shgs.349,962/52 or any part thereof.
6. That the cause of action arose at Dar-es-Salaam as the said moneys were lent and advanced to the Defendant Company at Dar-es-Salaam and was repayable at Dar-es-Salaam and both the Plaintiff Company and the Defendant Company are registered and carry on business in Dar-es-Salaam within the jurisdiction of this Honourable Court. 40

WHEREFORE the Plaintiff Company claims judgment In the High
for :- Court of
Tanganyika
at Dar-es-
Salaam

- (a) Shs. 349,962/52 as claimed in Paragraph 3
supra;
- (b) Shgs. 6,040/45 as claimed in Paragraph 4
supra;
- (c) Further interest @ 6% p.a. from 16/4/61
till judgment;
- (d) Costs of this suit;
- (e) Interest at Court rate on decretal amount;
- (f) Any further or other relief as this
Honourable Court may deem just in the cir-
cumstances.

—
No.1
Plaint
13th April
1961
Continued

10

? ?

Plaintiff
BERTRAM LIMITED, Director.

What is stated above is true to the best of my
knowledge information and belief.

Dated at Dar-es-Salaam, this 13th day of April 1961

? ?

PLAINTIFF
BERTRAM LIMITED, Director

20

DRAWN AND FILED BY:

GEORGE N. HOURY & COMPANY
ADVOCATES FOR THE PLAINTIFF COMPANY
DAR ES SALAAM.

Filed this 13th day of April, 1961

G. S. Kooner
COURT CLERK

In the High
Court of
Tanganyika
at Dar-es-
Salaam

No.1
Plaint
Annexure 'A'
to Plaintiff -
(undated)

STATEMENT (ANNEXURE 'A')

CONSOLIDATED AGENCIES LIMITED, DAR ES SALAAM

in account with

B E R T R A M L I M I T E D

No.1 ACCOUNT

		<u>DR.</u> Shillings	<u>CR.</u> Shillings	
9.3.51	TO: Cash Loan @ 6% p.a.	85,000.00		
Oct 17	BY: Cash		11,615.00	
Dec 14	BY: Cash		20,000.00	10
Dec 31	TO: Interest	3,924.73		
31.3.52	TO: Interest	1,220.31		
7.6.52	BY: Cash		30,000.00	
31.3.54	TO: Interest - 2 years	3,754.00		
26.4.54	BY: Cash		4,000.00	
31.12.54	TO: Interest	1,312.24		
15.2.55	BY: Cash		10,000.00	
18.3.55	BY: Cash		5,000.00	
31.3.55	TO: Interest	287.50		
31.3.56	TO: Interest	940.00		20
31.3.57	TO: Interest	940.00		
31.3.58	TO: Interest	940.00		
15.5.58	BY: Cash		300.00	
31.3.59	TO: Interest	1,044.18		
6.59	TO: Cash (Part Payment repairs House 301 Regent Estate)	1,430.00		
12.6.59	TO: Cash (ditto)	1,000.00		
31.3.60	TO: Interest	1,223.50		
31.12.60	TO: Interest	1,326.06		30
31.12.60	BY: Balance c/d		23,427.52	
		<u>104,342.52</u>	<u>104,342.52</u>	
1.1.61	TO: Balance b/d	23,427.52		

E.&.O.E.

This is annexure 'A' referred
to in Paragraph 3 of the Plaintiff
Sd. ?

BERTRAM LIMITED, Director.

STATEMENT (ANNEXURE 'B')
CONSOLIDATED AGENCIES LIMITED, DAR ES SALAAM
 in account with
B E R T R A M L I M I T E D
No.2 ACCOUNT

In the High
 Court of
 Tanganyika
 at Dar-es-
 Salaam

 No.1
 Plaint
 Annexure 'B'
 to Plaint- -
 (undated)

		<u>DR.</u> <u>Shillings</u>	<u>CR.</u> <u>Shillings</u>
10	3.8.54 TO: Cash Loan @ 6% p.a.	269,000.00	
	31.2.54 TO: Interest	6,725.00	
	31.3.55 TO: Interest	4,035.00	
	31.3.56 TO: Interest	16,140.00	
	31.3.57 TO: Interest	16,140.00	
	31.3.58 TO: Interest	16,140.00	
	26.8.58 BY: Cash		20,030.00
	3.2.59 BY: Cash		26,000.00
	31.3.59 TO: Interest	16,140.00	
	31.3.60 TO: Interest	16,140.00	
20	31.12.60 TO: Interest	12,105.00	
	31.12.60 BY: Balance c/d		326,535.00
		<u>372,565.00</u>	<u>372,565.00</u>
	1.1.61 TO: BALANCE b/d	326,535.00	

This is annexure 'B' referred
 to in Paragraph 3-of the Plaint

PLAINTIFF
 BERTRAM LIMITED, Director

E.&.O.E.

In the High
Court of
Tanganyika
at Dar-es-
Salaam

NO.2

STATEMENT OF DEFENCE

No.2
Statement
of Defence
19th May 1961

The above-named Defendant states as follows :-

1. The Defendant Company admits the contents of paragraphs 1 and 2 of the Plaint

2. With regard to paragraph 3 of the Plaint, the Defendant Company denies liability to the Plaintiff Company in the sum of Shs. 349,962/52 or in any sum whatsoever on an open and current account, as alleged or otherwise. 10

3. Both the accounts annexed to the Plaint are on the face of them and otherwise time-barred and no exemption (if any) to the ordinary period of limitation is claimed as required by the provisions of Order 7 Rule 6 of the Civil Procedure Code.

4. The Defendant Company will contend that the claims of the Plaintiff Company as contained in the two accounts annexed to the Plaint are barred by the statute of limitation by virtue of the provisions of Articles 57, 58 and 59 of the First Schedule to the Indian Limitation Act, 1908, applicable to this Territory or by one or more of them despite the statement in the Plaint (which is denied) that the amount claimed is in respect of an open and current account. 20

5. The Defendant Company further denies that the loans were repayable on demand as alleged and puts the Plaintiff Company to the strict proof of the said allegation. Alternatively, the Defendant Company will contend that even if the loans were repayable on demand the same are barred by limitation by virtue of the provisions of Article 59 of the Indian Limitation Act, 1908. 30

6. The Defendant Company further states that the accounts annexed to the Plaint are both simple accounts for loans and the principals in both the accounts are clearly time-barred and hence all the items of interest are likewise time-barred.

In the High Court of Tanganyika at Dar-es-Salaam.

No.2
Statement of Defence
19th May 1961

7. The Defendant Company, therefore prays that the Plaintiff Company's claim be rejected with costs to the Defendant Company.

Continued

10

DATED at Dar-es-Salaam this 19th day of May, 1961.

Consolidated Agencies Limited.

Sd. DEFENDANT Director

WHAT is stated above is true to the best of my knowledge information and belief.

Consolidated Agencies Limited

Sd. DEFENDANT Director

Filed this 29th day of May, 1961

20

Sd. Badan Singh
COURT CLERK

DRAWN & FILED BY:

P. R. DASTUR,
Advocate for the Defendant,
DAR ES SALAAM

In the High
Court of
Tanganyika
at Dar-es-
Salaam

No.3

ADDITION OF THE FOLLOWING
PARAGRAPH

No.3
Amended
Plaint
13th June 1961

- 7. That the Plaintiff's claim is not barred by the law of limitation as the debt due to the Plaintiff Company has been acknowledged by the Defendant Company in its books and accounts from year to year.

DRAWN & FILED BY:

GEORGE N. HOURY AND COMPANY
ADVOCATES FOR THE PLAINTIFF
DAR ES SALAAM.

10

Filed this 13th day of June, 1961

COURT CLERK.

No.4

ADDITIONAL WRITTEN STATEMENT OF DEFENCE
ON THE ADDITIONAL PARAGRAPH 7 OF THE PLAINT

No.4
Additional
written state-
ment of
Defence on the
Additional
paragraph 7 of
the Plaint
21st June 1961

- 1. The Defendant Company will contend that the particulars of the alleged acknowledgement as contained in paragraph 7 of the Plaint are vague and not specific and do not constitute a defence to the other- 20
wise time-barred claim of the Plaintiff Company. The Defendant Company will further contend that entries, if any, in its own books and accounts are not acknowledgements in law unless, amongst other requirements the same are communicated to the Plaintiff Company within the period of limitation prescribed by law.
- 2. The Defendant Company states that the alleged statement in paragraph 7 of the Plaint (which is denied) does not serve as an exemption nor an acknow- 30
ledgement to fulfil the requirements of the law relating to acknowledgements.

9.

In the High
Court of
Tanganyika
Dar-es-
Salaam

3. The Defendant Company denies that the alleged debt has been acknowledged in law by the Defendant Company in its books and accounts from year to year as alleged, or otherwise, and puts the Plaintiff Company to the strict proof of the same.

Dated at Dar-es-Salaam this 27th day of
June, 1961.

Consolidated Agencies Ltd.
Director

—————
No.4
Additional
written state-
ment of
Defence on the
Additional
paragraph 7 of
the Plaintiff
21st June 1961
Continued

10

Sd. DEFENDANT

WHAT is stated above is true to the best of my knowledge, information and belief.

Consolidated Agencies Ltd.
Sd. Director

DEFENDANT

Presented for filing this 27th day of June,
1961

Sd.
COURT CLERK.

20 DRAWN & FILED BY:

F.R.DASTUR,
Advocate for the Defendant,
DAR ES SALAAM

Copy served on:

Messrs. George N. Houry & Company
Advocates for the Plaintiff
DAR ES SALAAM.

10.

No.5

In the High
Court of
Tanganyika
Das-es-
Salaam

PROCEEDINGS - OPENING ADDRESS BY
PLAINTIFF'S COUNSEL

4th September 1961

Before WESTON, J.

No.5
Proceedings
Opening
address by
Plaintiff's
Counsel
4th September
1961

HOURY with PATEL for Plaintiff

O'DONOVAN with DASTUR for Defendant

HOURY: My Lord, I presume there is no necessity to read the pleadings?

COURT: No. I have read them.

10

HOURY: My Lord, it is agreed between us that the only issue is the question of limitation, whether the debt is time-barred or not. That facilitates matters. If the debt is not time-barred then there will be judgment for the Plaintiff.

COURT: Let that be the issue then. It will all turn on that issue?

HOURY: It will all turn on whether the claim is time-barred or not.

COURT: Is that the whole claim?

20

HOURY: The whole claim.

O'DONOVAN: The Limitation Act applies either entirely or not at all.

HOURY: Before we start any arguments on the matter sir, I wish to dispose of one or two witnesses. One of my witnesses is the Commissioner for Income Tax and the other one is Mr. Dan Houghton of Messrs. Cooper Bros., Accountants, who were the auditors of the Defendant Company. I have subpoenaed both these gentlemen. As to the Commissioner for Income Tax, he has informed me - I asked him if I could have a look at the accounts and balance sheets submitted to him, and he refused to do so. He said he will hand them to Your Lordship on the date of hearing and then you would make a decision as to whether he should or should not disclose them, on the grounds of the Income Tax (Management) Act. They are in his hands as confidential documents. 30

COURT: Has he told you that he is willing to give them to me?

10 HOURY: He will willingly give them to you, and when you look at them you can decide. It is rather peculiar to my mind. But I won't ask Your Lordship to worry at the moment. -As regards Mr. Dan Houghton, who is the Accountant Auditor, he similarly claims that it would be contrary to professional etiquette to disclose to any person, even on the Court's order, the accounts and balance sheets of his clients, but that he too will produce them to the Court on the Court's summons.

—
No.5
Proceedings -
Opening
address by
Plaintiff's
Counsel
4th September
1961
Continued

COURT: Did all this arise out of the order of my brother Law for discovery?

20 HOURY: No. The order for discovery has been discovered. We have exchanged our affidavits and we are quite happy about it. But my unfortunate position is this today, that I am basing, as I will explain in a moment, our claim on the evidence of the documents exchanged. That is to say, the balance sheets and the accounts exchanged by the two companies. And I am here before you Sir, not having seen or had an opportunity of seeing the accounts which are in the hands of the auditor. I have seen some copies. I want to see, and that is what I base part of my claim on, the accounts that the auditor has got. That is the position.

30 Now I would like to open the case and give the Court, as far as I can, the actual position. Mr. W. Dharsee, Sir, was one of the old legal practitioners in this High Court, and he had, since 1947 or so, carried on certain businesses in financing companies, and he formed, to mention a few of them, Bertram Limited which is the present Plaintiff, the present Defendant Consolidated Agencies Limited, Regent Estates Limited, Mtoni Estates Limited and two or three others.

In the High Court of Tanganyika Dar-es-Salaam

No.5 Proceedings - Opening address by Plaintiff's Counsel - 4th September 1961 Continued

But he - and that is the point I wish to stress - he was the Director who conducted the business of all these companies. He kept all the books and accounts of all the companies in his own office. That is to say, he was the director, he was the manager, he was the person who kept the accounts and the finance, he was the person who drew the cheques, he was the person who paid the companies' monies - all the companies' monies - and he died, My Lord in 1959. Late in 1959

The Administrator-General then took over the estate of W.Darsee and took over all the books of all the companies including the Plaintiff and the Defendant all the books and accounts of Dharsee and MacRoberts, and Advocates' firm, name and the Administrator-General then delivered - as far as the Defendant Company's books and accounts were concerned - were given to Mr.Jaffrabadwalla, who was one of the directors of the company - that is the company Consolidated Agencies. Following that Sir, Mrs.Wali Dharsee became a director of Consolidated Agencies. As far as the Plaintiff Company is concerned, Wali Dharsee was the sole director. There was no other Director. So when he died the Plaintiff Company was left without any director at all, and at the request of the Administrator-General Mr.Carlo Juvenelli was requested to become a director, and I personally, at the Administrator-General's request, and particularly at the request of Mrs.MacRoberts, who is now in Austria, was asked to see what we could do to try and recover some of the monies due to this company, Bertram Limited. Bertram owes something like £20,000 which had been invested by W.Dharsee, on her behalf, in this Company.

Now My Lord, to make it quite clear and quite plain, in case my learned friends have not got my point my submission to Your Lordship, with all due respect, will be this, that Dharsee was a director of Bertrams and he was a director of the Defendant Company, and therefore whatever appears in the accounts of these two companies as owing between one and the other, in my humble submission is an acknowledgement, I hope my point is clear Sir.

I am a director of both companies. I am not to be heard to say that the debt of one company to the other is time-barred when I have included and passed the accounts clearly showing that the one company, in its balance sheets, is owing certain sums to the other. That is my whole case.

In the High
Court of
Tanganyika
Dar-es-
Salaam

COURT: Balance sheets are made public aren't they? Balance Sheets of companies?

No.5
Proceedings -
Opening address
by Plaintiff's
Counsel - 4th
September 1961

10 HOURY: Yes, but both these companies are private companies. So that, Sir, I go one step further, and say, and I will ask you to hold Sir, that the accounts and balance sheets of the Defendant Company were in my possession through Mr. Dharsee, who is my director, of Bertram and Company, and he was also director of Consolidated. He had them all in his hands and he signed the balance sheets for the one and he signed the balance sheets for the other. He signed for Bertram that it is owed by Consoli-
20 dated the sums we claim. He signed for Consolidated that Consolidated owes Bertram. So, Sir, in my humble submission, if that is not an admission then there can be no other admission.

Continued

30 Now My Lord, I would ask you to deal with Mr. Houghton first. I will ask him to come into the box and produce the documents that he has in his possession, and then I will ask for your indulgence Sir, if you will give me ten minutes to have a look at them. I tried hard to look at them and not waste your time right through the week, but I have not been able to do so.

COURT: That is if he produces them.

HOURY: Oh, he will produce them all right. The other side doesn't object to the production.

COURT: the law might object. We will see.

14.

PLAINTIFF'S EVIDENCE

No.6

In the High
Court of
Tanganyika
Dar-es-
Salaam
Plaintiff's
Evidence

EVIDENCE OF D.S.HOUGHTON

P.W.1 DANIEL STEPHEN HOUGHTON, European, Christian,
sworn.

XN-in-C HOURY

No. 6

Daniel
Stephen
Houghton 4th
September 1961
Examination

Mr.Houghton, are you a partner in Cooper Bros?
I am a partner.

Accountants? Chartered Accountants.

I beg your pardon, Chartered Accountants. Since
what year have you audited the books of Consolidated 10
Agencies? - 1954.

Up to what year have they been completed? 1957

You knew Mr.Wali Dharsee? - I knew Mr.Wali
Dharsee.

Was he the director of Consolidated Agencies? -
He was a director of Consolidated Agencies.

How many other directors were there? - I would
need to refer to my files to answer that question.

Please do so - My Lord, I mean no disrespect when
I ask you for directions over a matter which is of 20
some importance to me as a professional man, as to
whether information I have obtained in secrecy from a
client I am compelled to divulge in this Court.

COURT: Certainly there is no disrespect at all.
It is right. We will go into it right away. You are
claiming privilege? I am not claiming anything. I
am asking for directions.

COURT: Well, that is a legal term. It means that
you are not bound to answer the question. You want me
to tell you whether you are privileged not to answer 30
these questions? Yes My Lord.

COURT: I will hear argument on it. I think it would be just as well if you left the box for a moment while the learned gentlemen argue the point. It is for them. (Witness leaves box)

In the High
Court of
Tanganyika
Dar-es-
Salaam
Plaintiffs'
Evidence

No.6

Daniel Stephen
Houghton 4th
September 1961
Examination
continued

10 O'DONOVAN: My Lord, it might assist my learned friend if I say that in my view the witness could, with complete propriety, answer all questions. My clients are certainly not claiming that there is any privilege. If he has any information, as far as we are concerned he can disclose it to the Plaintiff. I think, My Lord, in the Indian Evidence Act the only example of privilege which is recognised relates to disclosures made to an advocate, not to a chartered accountant or a director.

COURT: What is the position in England with regard to chartered accountants?

20 O'DONOVAN: I think exactly the same as here My Lord. That is to say, there is no privilege, and the medical profession, as Your Lordship will doubtless be well aware, constantly endeavour to assert that there is privilege, but no court has ever upheld that.

COURT: Could you refer me to the relevant section of the Indian Evidence Act.

30 HOURY: If my learned friends have no objection I think we are just wasting a lot of time. With respect, Mr.Houghton's clients, whose secrets he is to disclose, have no objection to that disclosure. So where is the dispropriety in it.

O'DONOVAN: I agree.

HOURY: My friends whose books he kept are not objecting. They say answer every question you are asked, quite candidly.

In the High
Court of
Tanganyika
Dar-es-
Salaam
Plaintiff's
Evidence

No.6

Daniel Stephen
Houghton - 4th
September 1961
Examination
continued

COURT: I take your point Mr.Houry. (To witness)
Would you be good enough to come back (Witness returns
to box) I quite appreciate your position as a member
of your profession and you ask me for directions. It
is not necessary for me to give any ruling on the
matter since, as you have heard, the person, the
client whose secrets you are trying to preserve, has
informed me, through counsel, that they have no objec-
tion to your answering any question relating to their
affairs, which frees you from any scruple you may have
in this matter. Does that satisfy you? Yes My Lord. 10

COURT: You have heard it for yourself.

HOURY: And it is on the record.

COURT: You have nothing to reproach yourself for
at all

HOURY: Now Mr.Houghton, was there anybody else?
I don't think so. - Mr.Jaffrabadwalla was a director
in 1954.

COURT: Who was this gentleman - a European?

HOURY: Jaffrabadwalla is an Indian gentleman. 20

COURT: I thought you mentioned Dharsee?

HOURY: There is Dharsee, an Indian too. He died.
And Mr.Jaffrabadwalla, who is in Court, Sir.

COURT: It was an Indian firm. I see

XN-in-Chief CONTD. Mr.Houghton, you didn't audit
the Books of Bertram Limited? - No.

You knew Mr.Dharsee well; did you come into
contact with him during this? - I came into contact
with him during the course of the audits I carried out

And you agree he was an advocate? - I agree he 30
was an advocate.

And his firm was Darsee & MacRoberts? - I had no relationship with the firm professionally, but I understood it to be Darsee & Mac Roberts.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No.6

Daniel Stephen Houghton - 4th September 1961 Examination continued

In connection with the accounts of the Consolidated your relationship was with Darsee? - The appointment of auditor is by the shareholders of the company, not by the directors. My appointment was through the shareholders.

10 Yes, I am perfectly aware of that, Mr. Houghton, What I ask is this - at least what I meant to ask is, whom did you deal with in connection with the accounts? - Mr.Darsee.

Now you have been asked to produce balance sheets. What balance sheets have you got there? From 1954. - I have copies of the balance sheets for 1954, 1955, 1956 and 1957. I haven't got the originals.

20 Who would have the originals? - These would have been sent to the company, the client company Consolidated Agencies.

Are these the ones you have got - may I see them? Do you not keep signed copies of the balance sheets? I keep a copy signed by the directors of the Company.

And can I see the signed copies? I haven't got them in the Court, My Lord.

30 Can they be produced, Mr.Houghton? - My Lord once again I am in difficulty. If I produce what is known in my office as my file of accounts, which is a record of every set of accounts the partners of the firm have signed. I lose part of the essential records of my firm.

They can be taken back, Mr.Houghton.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No. 6

Daniel Stephen
Houghton - 4th
September 1961
Examination
continued

Court: Mr. Houry, I don't wish to interfere in any way. I quite understand the witness's difficulty. You wish to see the accounts audited by the witness's firm. He has produced copies, the originals of which he says were sent to the -

HOURY: the signed copies

COURT: The signed copies were sent to the Defendant. Now surely -

HOURY (to Dastur) Will you agree that these were the accounts that were signed? 10

DASTUR: Yes

HOURY: Now they agree, Sir, that these can be put in. You will have them back, Mr. Houghton. These are signed by Darsee and Mr. Jaffrabadwalla for 1954, 1955, 1956 and 1957. We will put these in as a bundle, Sir as one exhibit.

COURT: What are you putting them in as? As copies kept by this firm of auditors of originals which they have sent to the Defendants?

HOURY: That is right - which the Defendants accept as having been signed by the people shown on these - perhaps we can show you one, Sir. You see they are marked as signed here. (Shown to Court) 20

COURT: Oh I see. These are copies retained, true copies, you testify? - Yes.

HOURY: These are true copies of originals sent to the Defendant Company and signed by the gentlemen named here? - Yes My Lord

COURT: (to Defendant's Counsel) You have no objection, have you? 30

O'DONOVAN: None at all

EX.A. BUNDLE OF BALANCE SHEETS FOR 1954, 1955, 1956 and 1957 PRODUCED, ADMITTED AND PUT IN AS EXHIBIT A.

XN-in-Chief CONTD. Now, Mr. Houghton, will you look at those accounts and tell the Court from 1954 till 1957 whether Bertram Limited is a creditor and to what amount; in other words what amount is shown in the Defendant Company's accounts as owing to Bertram Limited? - My Lord, under the heading "Loans" in the balance sheet of 31st December 1954 and statement of the total of Shs. 412,385/- are the following items:
 10 Bertram Limited Loan Account Shs. 23,385/-
 Accrued interest Shs. 6,211/28." There is another item entitled "Bertram Limited. Loan Account No. 2 Shs. 269,000/- and interest of Shs. 6,725/-. They are included in the total shown on the balance sheet described as loans.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No. 6

Daniel Stephen Houghton - 4th September 1961 Examination continued

That is for 1954? - that was in 1954.

COURT: Could you show me that, please? I would like to see it. Loans, Shs. 412,385/-, that is the figure? - in that total, My Lord, Yes.

20 COURT: Now where do you get this total from?
 - From one of my working papers.

COURT: One of your working papers? - From one of my working papers, which would be extracted from the books of the Company.

COURT: There is nothing on this to show that Bertram owes --? No, nothing at all.

COURT: You are just able to tell me because you happen to be the auditor and saw their books?
 - Yes My Lord.

30 COURT: And this total is made up of two loans?
 - That total is made up of a number of loans My Lord.

COURT: Yes, all of which - - Two of which are those I have quoted.

COURT: I see. Thank you.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No.6

Daniel Stephen Houghton - 4th September 1961 Examination continued

HOURY CONTD: Now Mr.Houghton, before you accept in your audited accounts, before you accept a company is correctly owing certain amounts to other companies what is the practice? - The practice varies, My Lord, but we do our best to get some independent witness of that money being correctly stated, the figure at which it appears in the books, such as a letter or a certificate.

From the Directors? - From the company or the individual to whom the money is owed

10

Now that the account that you were looking at there, have you received a letter from Messrs.Shah & Shah dated the 25th of September - two letters - Yes, my Lord.

Will you produce those to the Court. You will have them all back, Mr.Houghton. You will have them all back, including your file. - (Witness hands letters to Counsel)

HOURY: These are letters addressed to Messrs. Coopers Brothers, Sir. (Reads) "At the request of the above-named company - that is Consolidated Agencies Limited -interest accrued" and the second one, Sir; is in the same terms for the second account, Shs.29,000/-

20

XN-in-Chief Contd. Is this the practice of verifying? - That is the normal practice, my Lord.

COURT: No objection. Mr.O'Donovan.

O'DONOVAN: No, my Lord.

COURT: Let me get this quite clear. Your justification for passing that figure in the balance sheet was these two letters? - Well, first of all, my Lord, the entry was in the books of the Company, and it was verified by receipt of these two letters.

30

COURT: I see. That is the evidence. That is the voucher. - That is so.

EX.B. TWO LETTERS DATED 25th SEPTEMBER from
MESSRS. SHAH & SHAH PRODUCED, ADMITTED
AND PUT IN AS EXHIBIT B.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.6

Daniel Stephen
Houghton - 4th
September 1961
Examination
continued

10 HOURS CONTD: So what you can say, Mr.
Houghton, is that these items were in the books
of the Consolidated accounts to the credit of
Bertram, but the usual practice is not to take
what is in the books for granted but to get some
other verification that the amount is owing? -
That is so, my Lord.

So what is in the balance sheet as finally
signed by you or certified is the correct
amount? - We state that in our opinion the
balance sheet is correct, and we take every step
that we can to see that it is correct, but the
balance sheet report is subject to the remarks
that the auditor makes on it. In this particular
year I see no qualification was made in so far as
monies owing by the firm was concerned.

20 Now can we turn to the next year, Mr.Houghton

COURT: Forgive me, Mr.Houry. It may be I am
obtuse, but I do want to understand this. This is
a letter to the auditors of Bertram Limited?

HOURS: to the Auditors of the Defendant,
Consolidated Limited, Cooper Brothers.

COURT: Yes. By the Plaintiff Company

HOURS: It is a bit confusing

COURT: It certainly is confusing.

30 HOURS: Perhaps Mr.Houghton will explain this.
(Xn-in-Chief Contd.) Here is a copy. Would you
like to explain to the Court how that satisfied
you? - My Lord, this is a letter from the Auditors
of Bertram's Limited in response to a request by
the auditors of Consolidated Agencies for a certi-
ficate or verification of the fact that Bertram's
agree that this sum of money was due to them by
Consolidated Agencies.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

Can we have the next year, for 1955. This again was signed by Mr. Darsee and Mr. Jaffrabadwalla and can you tell the Court where the debt to the Bertram Company is shown? There was a total under Current Liabilities and Provisions headed "Loans" amounting to Shs. 277,385/-

No. 6

Daniel Stephen
Houghton - 4th
September 1961
Examination
continued

Yes. - Included in that total is "Bertram Ltd." Loan Account Shs. 8,385/- together with interest of Shs. 7,151/28; and there is another item headed "Bertram Ltd: No. 2 Loan Shs. 269,000/- interest Shs. 22,865/-"

10

Yes. Is the schedule attached to the balance sheet showing who the creditors are? - No My Lord. Once again this is from my own working files.

Yes, but you have got it somewhere in writing, have you, or typing- No, my Lord.

You mean it is from your own head? - I am giving the figures from my own working papers, my Lord, which I have before me.

COURT: And have you got an acknowledgment that you had ... from the previous year from their accountant? - Yes, my Lord.

20

COURT: That settles it, doesn't it.

HOURY CONTD: Will you produce it, Mr. Houghton.

EX.C. TWO LETTERS FROM MESSRS. SHAH & SHAH PRODUCED, ADMITTED AND PUT IN AS EXHIBIT C.

HOURY CONTD: May we have 1956, please? And that shows - will you just repeat what this year shows? - It shows the total of loans and accrued interest of Shs. 364,208/78, from my own working papers; Bertram Ltd. Loan Account Shs. 8,385/28, interest Shs. 8,091/- Bertram Limited No. 2 Loan Account Shs. 269,000/- and interest of Shs. 39,005/-.

30

And the acknowledgment, or the certificate or whatever it is? - My Lord, in that year in reporting upon the accounts I see that the auditors added under item 4 that "No agreements or statements in respect of debtors, loans and accrued interest receivable amounting to Shs. 535,214/31, in respect of loans and accrued interest payable amounting to Shs. 364,208/78 have been produced to us. Consequently we are unable to state whether the accrued interest has been brought into account or whether repayments have been made directly" so apparently I have had no certificates in support of the figures quoted on 31st December 1956 balance sheet.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No. 6

Daniel Stephen Houghton - 4th September 1961 Examination continued

10

Do you recollect who dealt with this Mr. Houghton? I didn't deal with the year 1956.

You did? - I did not

So your query was as regards the interest accruing to this company? - Yes.

20

Or your firm? - Yes

Not the capital amount owing? - We have, as I say, a working paper in which these figures are stated. They bear similarity to the previous year but we have no actual certificate stating that those figures were in fact owed to Bertram.

But to make it quite clear Mr. Houghton, your working papers are made up from the books of the Company? - They are.

30

You give us the impression that they have just come out of thin air. Those papers you work out are from the books of the company? - They are extracts from the books of the Company.

Did you personally audit the books of the company in any one year? If I show you a book of the company would you know whether you personally had dealt with it? - I might or I might not.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiffs
Evidence

No.6

Daniel Stephen
Houghton - 4th
September 1961
Examination
continued

Never mind for the moment. Can you hand me the 1957 accounts Mr. Houghton? - My Lord, on our balance sheet for 31st December 1957 under loans and accrued interest appears a figure of Shs.365,831/28. Included in that total is Bertram Limited a loan Shs.4,485/- and interest of Shs.12,951/28. There also appears Bertram Limited No.2 account, Shs.269,000/- and interest Shs.55,145/-

That makes a total of Shs.365,000/- or are there any other items? - There are other items also to be included.

10

All from the books of the company? - From the books of the Company.

And I suppose you presumed that the directors knew these accounts? Knew what was in the ledger?
- Yes.

Now this, I see, is signed by Mr. Dharsee alone?
- Yes.

Can you throw any light on that? - I can't remember why it should have been signed by Mr. Dharsee alone.

20

COURT: Was it sufficient for your purpose? - It was sufficient for my purpose

HOURY continues: If I may remind you, say so if you cannot recollect, but was Mr. Jaffrabadwalla refusing to have anything to do with accounts by then? I cannot from memory remember exactly at what stage Mr. Jaffrabadwalla, as it were, stated that he was no longer interested in this company, but I do remember at one stage he did say - or it was reported to me that he said.....

30

COURT: We can't go into that.

HOURY continues: But you knew, in any case from that year, that he was not appearing? - I couldn't say that.

This is for the year 31st December 1957.
Did you cease to be the auditor then? - No.

COURT: Is that in?

HOURY: Yes, My Lord (Ex.A.)

COURT: Are we going to have any vouchers in support of that ?

XN-IN-C - HOURY

10 (Two vouchers handed to HOURY by witness)
Have you any vouchers? Can you produce them?

COURT: From Shah and Shah?

EX.D.HOURY: No, this is from Mr.Dharsee himself, the director of Bertram (Reads) (Vouchers entered as Ex.D.)

COURT: Whose signature is this? - Mr.Dharsee's my Lord.

HOURY continues: Wali Dharsee, Director? - Yes.

You know his signature: - Yes

20 Will you tell us what happened after 1957.
You continued to be the auditors? - Yes.

I understand you were unable to produce a balance sheet? - I was unable to complete the audit for the year 1958 for lack of certain information.

And 1959? - I have not done any audit in connection with 1959.

COURT: You ceased to be auditors? - No My Lord, I haven't had the books presented to me for audit.

HOURY continues: And 1960? - similarly

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No.6

Daniel Stephen Houghton - 4th September 1961 Examination continued

In the High
Court of
Tanganyika
Dar-es-Salaam

Plaintiff's
Evidence

No.6

Daniel Stephen
Houghton - 4th
September 1961
Examination
cont.

So you can't say anything about that except that you have not been given the books to audit? - I have not been given the books for 1959 and 1960.

1958? - 1958, I have the books but I require certain further information to enable me to sign a balance sheet.

So you have prepared a balance sheet? - I have got a draft balance sheet.

Can we have a look at that? Does that draft balance sheet show that Consolidated is owing Bertram a large sum of money? - My working papers for the accounts to 31st December 1958 include a figure of loanes and accrued interest Shs.327,701/28, of which Berrtram Limited are recorded as being owed on loan Account Shs.4,485/- interest Shs.12,651/28. On No.2 account a loan of Shs.269,000/- and interest Shs. 35,115/- 10

And those are from the books of account? - From the books of account.

Have you gone as far as getting a certificate as you did in the others with regard to those loans? - I have a certificate in support of these figures (Handed to HOURY) 20

COURT: any objection Mr.O'Donovan

O'DONOVAN: No my Lord

EX.E. HOURY reads. Certificate entered as Ex.E.

Xn-in-C. Cont. - HOURY.

And that is signed by Mr.Dharsee? - Yes.

Mr.Houghton, as you know I have asked the Court to subpoena you to come and give evidence and assist the Court, but owing to the views you held I have not been able to examine the files in respect of which I wanted you to give evidence. Under the circumstances I don't know what is in your files. Can you tell the Court anything else, other than what you have said now? Can you tell the Court, for instance, why Mr. Jaffrabadwalla has ceased to concern himself with this Company? - I don't know. 30

You don't know, but you know that he has not concerned himself with you in regard to this Company? - I wouldn't say that. Mr. Jaffrabadwalla Has been to see me in connection with the affairs of this Company.

In the High Court of Tanganyika Dar-es-Sallam Plaintiff's Evidence

Since Mr. Dharsee's death? - Since Mr. Dharsee death.

No. 6

But not during his life? - Not during his life.

Daniel Stephen Houghton - 4th September 1961 Examination Cont.

10 Have you got anything in the file that you think the Court may be assisted with? (To Court) I'm sorry Sir, if I had seen it I wouldn't be putting such questions.

COURT: I think you are asking quite a lot of this witness Mr. Houry. You have what you want as far as I can see.

HOURY: Very Well Sir. I will leave it at that I think.

CROSS EXAMINED

Cross-examination

20 XXN - O' DONOVAN

Can you tell My Lord the date on which, in each year, in respect of each year, the balance sheet was signed by the director or directors of the Defendant Company? - I couldn't say on which date the directors signed. I can only say on which date my firm signed.

COURT: You signed after the Directors? - Yes. The date on the balance sheet is the date of signature by my firm.

30 O'DONOVAN continues: Perhaps you could answer it this way. Could you indicate what is the earliest date on which the directors could have signed? I don't want to tie you down to the precise day, but is it obvious for instance, isn't it, that the accounts for 1956 would not be prepared until April 1958 anyway? - I am looking to see if I have a letter on my file forwarding the accounts for signature.

In the High
Court of
Tanganyika
Dar-es-Salaam

Plaintiff's
Evidence

No.6

Daniel Stephen
Houghton - 4th
September 1961
CROSS-EXAMINA-
TION continued

COURT: You say you know the date on which you signed, your firm signed. It is on the balance sheet? - Yes.

COURT: Well, you can just refer to the balance sheet and tell us that can't you? - I signed, or rather my firm signed, the balance sheet for 1954 on 27th October 1956.

O'DONOVAN: We take it then the balance sheet could not have been prepared until shortly before you signed, a month or two at the most? - Well, it would all depend. The time for me sending my balance sheet to a client for signature and its return may be anything from an hour to six months. 10

Can you tell from your file on what date you had prepared these accounts? - On 19th October I sent a letter to Mr.Dharsee enclosing the accounts for signature by the directors. 19th October 1956.

That's for 1954? - the 1954 accounts.

Then you can say he couldn't have signed, or his co-director, before that? - No. 20

Can you help us similarly with the following years? - The 1955 accounts were signed on 19th November 1957. They were signed by my firm. They were sent for signature on 6th November 1957 by the Directors.

We have two more years? - The accounts for 31st December 1956 were signed by my firm as auditors on 11th April 1958. They were sent for signature by the directors, to Mr.Dharsee, on 12th March 1958. The accounts to 31st December 1957 were signed by my firm on 29th April, 1959, having been sent to Mr.Dharsee for his signature on 28th April, 1959. 30

And you have no further signed balance sheets after that? - No.

These balance sheets would not, would they, be sent to the Plaintiff Company or anybody else? - After signature by my firm the balance sheets would be sent to the client company.

In the High Court of Tanganyika Dar-es-Salaam

Plaintiff's Evidence

And you regard it as a confidential document I take it? - I do regard it as confidential.

No. 6

Which you wouldn't communicate to anybody else? - No.

Daniel Stephen Houghton - 4th September 1961
Cross-examination continued

10

Just one last question. In each year in the current liabilities you have got an aggregate figure for loans and interest. Am I correct in understanding that for each year the aggregate is made up of, or it includes, amounts due to other persons than the Plaintiff Company? - Yes.

RE-EXAMINED

No Re-examination HOURY

No RXN.

BY COURT:

Re-examination Court.

20

I just want to be quite clear about this. You are the auditor, or were the auditor at the material time, of the Defendant Company. You examine their books and you find they owe the Plaintiffs X pounds, and Y pounds interest. Then you write off to the Plaintiff Company and say 'Is this true' You get a letter back saying 'Yes it is true' and that satisfied you. Is that correct? Have I understood your evidence correctly? That's all it amounts to? - Yes. There are other processes, but that is what I said.

30

You just see a debt marked in the books you are auditing and you write to the creditor and say 'Is this true' and he writes back and says 'Yes, it is true' ? - Yes.

I have understood you correctly? - Yes.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

Thank you very much

No.7

EVIDENCE OF HUSSEIN DAYA SHAMJI

No.6

Daniel Stephen
Houghton - 4th
September 1961
Re-examination
Continued

P.W.2. HUSSEIN DAYA SHAMJI, Asian, Muslim, Affirmed

XN-in-C. HOURLY:

Mr. Shamji, you are a bookkeeper by trade,
profession? - Yes. From May 1957 to April 1959.

No.7

Hussein Daya
Shamji - 4th
September 1961
Examination

No, just listen please. Are you a bookkeeper by
profession? - No.

What is your profession? - I was at the books 10
before, but I am not a bookkeeper by profession. A
Clerk.

A clerk. All right. Did you know Mr. Wali Dharsee
the advocate? - Yes.

He died in 1959? - Yes

Were you employed by him to keep books? - Yes

What books were you employed to keep? - Bertram
Limited, Consolidated Agencies Limited, Mtoni Estates
Limited, Regent Estate Limited and his books.

His own advocates' books as Dharsee and Mac- 20
Roberts? - Yes.

Were these books all kept in one office? - Yes.

And these companies' registered offices were all
in the same office of Messrs. Dharsee? - Yes.

Who managed these companies? - Mr. Dharsee

Himself? - Yes. He used to sign all the cheques.

He used to sign all the cheques for all these companies? - Except Regent Estqte. That used to be signed by two, Mr.Dharsee and Mr. Mohamed Nasser Rattansey.

Never mind the Regent Estate. Who gave you instructions for the entries? - Mr.Dharsee himself.

In the High Court of Tanganyuka Dar-es-Salaam Plaintiff's Evidence

No.7

Hussein Daya Shamji - 4th September 1961 Examination cont.

10 Would it be correct to say that he was the managing director of all these companies? - Yes

I think you mentioned you kept the books from when? - 1957 to 1959. April 1959

What have you got there? - What do you call that? - Ledger.

That's a ledger of Consolidated Agencies Ltd.? - Yes

20 Will you look up Bertram's account. Tell the Court what is shown there. Is it your hand-writing? - Yes.

How much is owing to - ? - There is a credit of Shs.7,436/28 and a debit of Shs.300/-

O'DONOVAN: I have marked on a separate bit of paper an extract from all these books and the relevant pages, which makes them much easier to refer to. It is not really an exhibit. If I can hand it to your Lordship - .

COURT: Perhaps it can be agreed. Do you wish to put in all the books?

30 O'DONOVAN: I think my learned friend does.

COURT: Do you wish to put them in, Mr.Houry or can you agree what the books show?

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.7

Hussein Daya
Shamji - 4th
September 1961
Examination
Cont.

XN-in-Chief CONTD. Now these two accounts, one on page B1 and one on page B2, are in your handwriting, Mr. Shamji? - Yes.

And on whose instructions would you enter these?
- Mr. Dharsee's

And it would be on Mr. Dharsee's instructions that you would write the cheques? - Yes.

HOURY: My Lord, perhaps your Lordship would be good enough to look at these. This is the account of the Bertram Company, in which there are two cheques, one in each account.

10

COURT: These are your own accounts?

HOURY: No, Sir, these are Consolidated accounts. I am asking for those two cheques, Sir.

COURT: These are your own accounts?

HOURY: They are given to us, to Bertram, by Consolidated. We pay them into our account, and the cheques themselves the bank returns them to the drawer.

COURT: Well these are amounts then that were paid by the Defendants to you?

20

HOURY: To us, and I want the cheques. They are unable to produce those cheques, because they cannot find them. The cheques, I submit, would themselves be acknowledgements of the debt. There is no argument about that. We also produce, Sir, one of the Defendant's books in which they have stuck most of the paid cheques, from which you will see, Sir, that it was Dharsee who signed them.

Xn-in-Chief Contd. Have a look at all those -

30

COURT: What is that book? Did you make it up?

HOURY: Did you stick those in, Mr. Shamji? - Yes.

COURT: Every cheque that was given by your firm, your company, when it came back you stuck it in there? - Yes.

COURT: Well where are the two cheques which Mr.Houry wants?

10 DASTUR: Perhaps it might assist your Lordship as well as my learned friend if I say that I have informed by learned friend that in that book the whole of 1955 is missing. For 1956 there are only three cheques. Exactly what we received from the Official Receiver. We produced everything that we had.

HOURY: We are not concerned with 1955. We are concerned with 1958.

XN-in-Chief CONTD. These are your figures, aren't they? That is your writing? - Yes

20 Well where are those cheques, the paid cheques? - I didn't find them in the office. What I received from the Bank I stuck in this book.

Who would have signed those cheques? - Mr. Dharsee

HOURY: From this you see that 1957 Mr. Dharsee was always signing cheques. I will put that book in, Sir.

EX.F. LEDGER FOR 1958 PRODUCED, ADMITTED AND PUT IN AS EXHIBIT F.

EX.G. BOOK IN WHICH MOST OF THE PAID CHEQUES ARE STUCK PRODUCED, ADMITTED AND PUT IN AS EXHIBIT G.

30 HOURY: The argument here, Sir, is that after he left and after Mr.Dharsee's death this gentleman has kept these books, so I cannot put them through him. We will put them in by consent, Sir.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence
No.7
Hussein Daya
Shamji - 4th
September 1961
Examination
Cont.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.7

Hussien aya
Shamji - 4th
September 1961
Examination
Cont.

Cross-
Examination

COURT: Well we will do that at the end of this witness's evidence.

HOURY: I have finished with him, Sir.

CROSS-EXAMINED

XXN.O'DONOVAN.

Just one question. There is no signature, is there, in the account books? - No, no signature in the account books.

COURT: You mean this isn't signed?

O'DONOVAN: I mean the account books are not signed. 10

COURT: He is looking at this one.

XXN. CONTD. Or any of the account books? - No.

It is not normal practice to sign the account books, and you didn't get them signed? - No.

BY COURT:

Are these the books? You heard the auditor giving evidence, didn't you? - Yes

Are these the books that he looked at? - Yes.

He looked at these books, did he? - Yes 20

Did he look at these? - Yes.

COURT: Is that all?

HOURY: That is all, Sir, for the moment. We will put in these books, Sir, by consent.

EX.H. LEDGER FOR 1950/57 AND 1959 PRODUCED AND PUT IN BY CONSENT AS EXHIBIT H.

COURT: I see. So we have got all the ledgers from 1951 to 1959.

NO. 8

EVIDENCE OF AMBALAL KALIDAS PATEL

P.W.3 AMBALAL KALIDAS PATEL, Asian, Hindu,
affirmed.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No. 8

XN.-in-Chief: HOURY:

Ambalal
Kalidas Patel
4th September
1961 - Examina-
tion.

Are you a chartered accountant? - I was a
chartered accountant. Just now I am only a
B.Com.

10 Did you keep the accounts or audit the
accounts of Consolidated Agencies? - Not Consoli-
dated Agencies.

Whose accounts did you keep? - Bertram Ltd.

On whose instructions? - Mr. Dharsee's

And have you got the balance sheets with you
here? Did you keep these balance sheets - did you
prepare these balance sheets? - Yes.

Just have a look at them, will you. You
prepared them? - Yes.

20 And have a look for 1955 or 1954. What do the
balance sheets show that Consolidated Agencies owed
Bertram Limited? - Shs. 294,643/78

COURT: What year was that? - 1954, March.

HOURY CONTD: That is the total? - Yes

Now go back another year. - Shs. 311,723/78. 1957
Shs. 312,040/- in Account No. 1

Yes. - Shs. 16,763/78 cts., another account.

What year is that? - March 1957

30 And 1958? - 1958 is one account Shs. 312,040/-
Another account is Shs. 16,763/78.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No. 8

Ambalal Kalidas
Patel - 4th
September 1961
Examination
Cont.

36.

Is there another one for the following year? -
March 1959, Shs.278,115/- and another account Shs.
17,136/28.

Now go back to 1954. Who signed in 1954? - One
of the others I missed out. Dharsee has signed as the
accountant.

I mean as a director who signed? - Mr.Dharsee

For 1954? - Yes

1955? - No signature in 1955

Here is the other copy. 1955, signed by Mr. 10
Dharsee? - Yes, Mr.Dharsee

1956? - Mr.Dharsee signed it

1957? - There is no signature on this copy

(Another copy handed to witness) 1957, signed by
Mr.Dharsee? - Signed by Mr.Dharsee

1958? - Signed by Mr.Dharsee

1959 no. - No.

HOURY: In 1959 he died.

COURT: Those are all originals?

HOURY: They are signed copies, Sir. For all 20
intents and purposes they are originals.

XN-in-Chief Contd. These sums are shown as owing by
Consolidated? - Yes

It is not the summary of it. It is in their own
name, is it not? - It is Consolidated Agencies.

HOURY: The.....is different, Sir, to the other one. They don't summarise the total indebtedness but they give a list of -

COURT: And that is all?

HOURY: Yes, they give a list.

COURT: And the names?

HOURY: Yes

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.8

Ambalal Kalidas
Patel - 4th
September 1961
Examination -
Cont.

10 Xn-in-Chief Contd. You said that you audited these accounts? - For the first three years I audited, and the last three years I have prepared from the books.

Now is it not your practice to get a certificate from the debtor company that this amount is correct? - In this case every year in the beginning we were supplying certificates to Cooper Brothers through Dharsee, what was the balance in Bertram Limited

What was the balance shown to the debit of Consolidated in Bertram Limited? - Yes

20 Now what I am asking you is now you are doing Consolidated. - I am not doing Consolidated.

You are doing Bertram's. Sorry. - Bertram's

Did you ask Consolidated to certify to you that these amounts are correct in their books? - Mr.Dharsee was also controlling that company, and he confirmed that Cooper Brothers had certified, and they have not disputed it, and I certified that it is correct (?)

30 So that it was Mr.Dharsee who was managing and directing both companies, who told you that these amounts are correct, and you certified them?-Yes

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence No.8

And he, as you have already told the Court, he signed the balance sheet? - Yes, he signed

EX.J. SIGNED COPIES OF BALANCE SHEETS OF BERTRAM LIMITED PRODUCED, ADMITTED AND PUT IN AS EXHIBIT J.

Ambalal Kalidas Patel - 4th September 1961 Examination - Cont.

CROSS EXAMINED

XXN. O'DONOVAN.

Cross-Examination

I would just like you to clarify your last answer. Messrs. Cooper Brothers as the Auditors of Consolidated Limited required a certificate from you to confirm what was in their client's books. Your firm, however, did not follow the same principle. You did not require a similar certificate from Consolidated. Is that correct? - Yes, because - 10

Well, never mind "because" Is that correct? - Yes

So you never got written certificates to certify what your books showed as due to your client company by Consolidated, is that right? - No.

Re-Examination

RE-EXAMINED

RXN. HOURY

"Because" - I will give you an opportunity to answer it. Why did you not get a written certificate? Because -? - Because Mr. Dharsee stated that "I am controlling both companies and I have forwarded a certificate with these books telling of Consolidated Agencies." 20

Let us have that again. Because Mr. Dharsee told you he controls both companies and you have already given a certificate to Cooper Brothers, and you were satisfied to certify the accounts on that assurance - on Mr. Dharsee's assurance. - Yes 30

BY COURT:

What is your full name? - Ambalal Kalidas Patel

You are a partner in Shah and Shah? - Yes

And you say you were employed by Bertram Limited as their auditor for a certain number of years? - Yes

Which years? - 1954 to 1956 or 1957

Then as auditor of Bertram Limited you wrote these letters to Consolidated Limited about this debt? - To Cooper Bros. yes.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No. 8

Ambalal Kalidas Patel - 4th September 1961 Re-Examination Continued.

10 Would it not have been normal auditing procedure for you as auditor of Bertram Ltd. to have got an acknowledgment from Consolidated Agencies Ltd? In other words, the converse of this. In this case Mr. Dharsee was in control of both the Companies, so that type of acknowledgment we are not receiving.

20 I didn't really ask that. I asked what is the correct auditing procedure. From this it appears that in the opinion of Messrs. Cooper Bros. such a document as this is necessary. They wouldn't sign the accounts as properly audited unless they had this document. What I would like to know is why did you, in your turn, not get a similar document from these people from, the debtors? - My answer is the same. Mr. Dharsee was controlling.

Because Mr. Dharsee was in fact Consolidated Agencies, is that what you are saying? - Yes.

30 Well, what is your cover? Have you anything in writing? You are the auditor. What is your safeguard - just something he tells you in the office? - I understand that he signed those accounts which are prepared on the basis of the books.

Which accounts? - Bertram Limited

Yes I know, but what you want is an acknowledgment from Consolidated Agencies Ltd. that they owe you money, as auditor. What assurance did you have that the books were correct? - Only the verbal assurance of Mr. Dharsee.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.8

Ambalal Kalidas
Patel - 4th
September 1961
Re-examination
Cont.

Verbal assurance. Well I am really asking, is that the normal procedure? Is that normal - verbal assurance? - We have many times accepted such assurance.

Well, Cooper Bros. didn't. Cooper Bros. wanted it in writing, and Cooper Bros. were the debtors or acting for the debtors. You acted for the creditors. Wasn't it more important for you to get an acknowledgment-in writing? - We sent those figures and Cooper Bros. have not objected.....

10

No, Cooper Bros. wouldn't object. They have got what they want. I am asking whether you got what you wanted. All you got was a verbal assurance from Mr. Dharsee; should you not have had it in writing? I am asking; I don't know, I am not an auditor. - We have not taken anything in writing from Mr. Dharsee.

HOURY: I just want to ask, with your permission, Sir, he has told you, and your Lordship may not have heard, that he had the verbal assurance from Mr. Dharsee and the books of account; the books he was keeping and books of account (To witness) Is that what you said? - Bertram's books?

20

Yes. - Yes.

COURT: Yes Mr. Houry, I quite appreciate that, but his duty is to see that those books of account are correct, and just as Cooper Bros. checked that it was a fact that the books he was examining showed that they owed money I would have thought it even more important - I don't know, I am not an auditor. I would have thought it more important that the creditor company should get a voucher which this is, from the debtor company, that the money was in fact owing; because it is a credit in his account, and I would have thought that no auditor would pass a credit without some kind of

30

HOURY: Well, he is not passing a credit. The auditor is not passing a credit.

41.

COURT: What is he passing?

10 HOURY: He wants to know that those accounts are correct. What he is telling you is that because Mr.Dharsee - he was in Mr.Dharsee's office and Mr.Houghton of Cooper Bros. was in his own office - but he, this witness, was doing it for Mr.Dharsee; doing both. The Consolidated Accounts were there and Dharsee was in charge, directing - managing director of both companies - and he says he was satisfied in certifying those accounts for Bertram from the assurance given him by Dharsee. He did not get anything in writing.

COURT: Yes, I understand that. I merely say I would have thought - I may be quite wrong I would have thought that as an auditor he would have required it in writing from Mr.Dharsee even if he was at a desk in the same room. Am I wrong?

20 HOURY: I'm afraid you are Sir, with all due respect. It is for the auditor to be satisfied before he signs the accounts for income tax purposes, satisfied the accounts are correct.

COURT: Yes, I accept that. And as auditor he is, you say, entitled to take a verbal assurance.

30 HOURY: He said so. He said he was satisfied with Mr.Dharsee's assurance as he was managing director of both companies. That's what he has told you. He was mamaging director of both companies so he was satisfied, and on the basis of that assurance he certified the accounts.

COURT: Yes, that's right. I accept that as a fact. Thank you

11.10 a.m. COURT ADJOURNS FOR 10 MINUTES

11.20 a.m. RESUMES - COURT AS BEFORE

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.8

Ambalal Kalidas
Patel - 4th
September 1961
Re-examination
Cont.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence No.8

HOURY: My Lord, with your permission Mr.Patel wants to explain further as regards those two letters. He wants to tell you only on whose instructions they were written.

COURT (to O'DONOVAN) You have no objection?

O'DONOVAN: No, none at all

Ambalal Kalidas Patel - 4th September 1961 Re-examination Agencies. Cont.

WITNESS: Those letters were written at the request of Mr.Dharsee on behalf of Consolidated Agencies.

HOURY: Mr.Dharsee gave you instructions to give that certificate on behalf of Consolidated Agencies as it says here "At the request of the above named company". (Your Lordship will recollect) You wrote those letters on the instructions of Mr.Dharsee? - Yes

The figures are correct? - Yes

COURT: I was merely questioning his action as auditor in accepting a verbal assurance and not getting it in writing, that's all. Thank you.

No.9

EVIDENCE OF SADRUDIN N.D.BANDALI

20

P.W.5 SADRUDIN N.D. BANDALI, Asian, Muslim, affirmed

Xn-in-C - HOURY

No.9 Sadrudin N.D. Bandali 4th September 1961 Examination

What is your occupation? - I am an accountant

Did you know Mr.Wali Dharsee, the advocate? - Yes I did.

Did you, at his request, keep the accounts of any companies, and if so which companies? - The Dharsee group of companies namely, Bertram Ltd. Consolidated Agencies Ltd. Mtoni Estates Ltd. Regent Estates Ltd. and Greenwood Estates Limited.

30

Mr.Bandali, all these companies were private limited liability companies? - Yes, except the advocates' firm.

Dharsee and MacRoberts? - Yes

And where were the registered offices of these companies? - In Suleman Street, Avalon House.

That is Mr.Dharsee's office? - That's right

COURT: Chambers

10 HOURY: Well - his chambers? - That's right

And who was directing those companies? - Mr.Dharsee was solely managing the offices of all these companies

Did he ask you to keep the accounts, and in what year? Just tell the Court how it came about. - Mr.Dharsee was a friend of mine, and in April 1959 he told me to take up the accounts of all these companies. In April 1959

20 What do you mean by 'take up' ? - The accounts section of all these companies.

COURT: In other words, you entered his chambers? - That's right

COURT: As an accountant? - Yes

HOURY continues: And you took over the books of all these companies? - Yes, I did.

All these five companies, you took over all the books? - That's right.

Ledgers, cash books, and so on? - Yes, all sorts of books.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No.9
Sadrudin N.D
Bandali 4th
September
1961 Examination Cont.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.9

Sadrudin N.D
Bandali 4th
September 1961
Examination -
Cont.

COURT: From whom? - I found the books in the chambers of Mr.Dharsee. Left by his previous accountant.

COURT: who was that? - I think it was Mr.George. I think I saw him in the Court this morning.

HOURY continues: George Shamji? - That's right.

You took over from him? - Yes

And is it correct to say that Mr.Dharsee signed all the cheques for all these companies? - Yes he did.

He made the loans from one company to the other? 10
- Yes, except in Regent Estates

Forget Regent Estates. In connection with Consolidated and Bertram? - Yes.

He was the sole managing director. Are you prepared to say that? - As far as I knew he was the only person who signed documents and cheques.

Just have a look - those are the Consolidated accounts. Will you show us where you have written and what is the amount owing to Bertrams by Consolidated?
- This ledger is only for 1958 20

COURT: That's before you came? - That's right.

HOURY continues: 1959 (Passed to witness) The ledger for 1959. - This is not written by me.

How do you account for that? - According to my best recollection there was another ledger. Not this ledger.

COURT: You don't recognise that? - Yes, I don't see my writing in this ledger

HOURY continues: But you kept the accounts in 1959? - Yes, I did. 30

You are absolutely definite? - Yes, quite positive of it.

Have a look at the other book.

COURT: What year is that? - This is from 1951 to 1957.

COURT: That's before your time? - Yes

COURT: You know nothing about that book? - No, I don't

HOURY: continues: We are informed that you only kept the cashbook and not the ledger? - I can't recollect unless I see the books.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence
No.9
Sadrudin N.D
Bandali 4th
September 1961
Examination -
Cont.

10 What books do you want to see? - For the year 1959. If I see the cashbook and ledger for 1959 I can tell.

Here is the cashbook for 1959 - That's correct, I have written up the cash book as far as December 31st 1959.

COURT: That is it: - That's right

COURT: Is that in your handwriting? - That's right

20 HOURY continues: You say that that ledger for 1959 was not kept by you. Would you not have kept it in the ordinary way? - This is a ledger for the year 1958

This is not your handwriting? - No.

HOURY: What we want is 1959. They have produced 1959 and it is not in his handwriting. He didn't keep it. All right, so we will forget about that.

Xn-in-C. Cont. - HOURY

30 You see in the Ledger there are two cheques. in No.1 Account and No.2 Account. Can you throw any light as to where those return paid cheques would be? - 1958?

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No. 9

Sadrudin N.D.
Bendali 4th
September 1961
Examination -

Cont.

Yes. When you took over what did you do with the paid cheques? - I was given to understand there was a practice in the office to file all the paid cheques in this book. Of course I did not follow the same practice when I came to the office, but I understood this was the practice.

Those two cheques are not in the book. Can you tell us what has happened to them? That would be in your time? - This is 1958

Yes. Well you came in 1959? - Yes. I remember 10 handing over all the paid cheques to a clerk of Mr. Jaffarabadwalla. All the paid cheques.

COURT: Your practice was to hand all paid cheques over to another clerk. Is that right? - After the death of Mr. Dharsee I was instructed by the Administrator General to hand over all the documents, books records of Consolidated, to Mr. Jaffarabadwalla.

HOURY continues: And you say that these cheques would have gone to them? - Yes. Must have.

You say that you handed everything - on instructions of the Administrator-General you handed everything to Mr. Jaffarabadwalla's clerk. Right? - Yes. Of course I obtained a receipt from him. 20

Is this a copy of the receipt? - Yes, this is the receipt I obtained from the clerk.

HOURY: My Lord, you will appreciate, I am sure, my difficulty here with these cheques. We get a big book from the Defendants, the relevant cheques are not in it, and they can't produce them. They don't know what has happened to them. For what it is worth 30 Sir, I will put it in.

EX.K. RECEIPT ENTERED AS EXHIBIT K

COURT: Those documents were handed over to the Administrator-General. That's a receipt for them?

HOURY: That's a receipt that he obtained. This witness got instructions from the Administrator-General to hand them over to the remaining director of the Defendant Company.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

COURT: Which he did

HOURY: Which he did

COURT: And got a receipt

No. 9
Sadruddin N.D.
Bandali - 4th
September 1961
Examination -
Cont.

10

HOURY: And got a receipt. It doesn't show so many cheques. So what has happened to them?

COURT: This is the original, is it?

HOURY: It is a photostat copy of the original. We don't want to bring the Administrator-General into it. It is admitted Sir.

COURT: (to O'Donovan): No objection?

O'DONOVAN: No objection My Lord, no.

Xn-in-C. Cont. - HOURY

That Ledger for 1958 - that came into your hands when you were doing the accounts? - Yes

20

You say you started in 1959? - That's right

Now, similar accounts to those were in the same office, as you have said, Bertrams and Consolidated and the other companies, in the same office of Mr. Dharsee? - That's right

And would you say that Mr. Dharsee knew all along, the whole time, what one company of his owed the other company, also his? - Well, he knew it.

30

And he gave you directions what cheques to write from one company to the other, and vice versa? - Yes, I was always acting on his instructions.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.9
Sadrudin N.D
Bandali - 4th
September 1961
Examination -
Cont.

NO XXN.

BY COURT:

You started while Mr.Darsee was still alive? Yes

How long after you were there did he die? About
seven months

And you continued? - Yes

And are still there now? - No

Till when? - I was in Dharsee's office as far as
January 1961

I see. Now from whom did you take orders after 10
Mr.Darsee's death? - I used to take instructions from
Mr.Kennedy, the Administrator-General

Oh, I see. From the Administrator-General only?
- Yes.

Nobody else? - No

Who ran the office after Mr.Dharsee's death? You
said that while Mr.Dharsee was alive he was the
companies. That is what you said? - Yes.

All the companies, including Bertram and Consoli-
dated Agencies? - That is right 20

They were really Mr.Dharsee? - Yes

And he did everything? - Yes

Well now, after he died those two companies
carried on business, didn't they? - Yes, but then
there was no trans.ctions, because Mr.Dharsee used to
operate the account.

Everything came to a stop with Mr.Dharsee's death?
- Yes.

And the Administrator-General took over both companies? - Well, he didn't take up my Lord. He left the books in the office with Mr. Dharsee, and he gave instructions that the books of Consolidated should be handed over to Mr. Jaffrabadwalla.

In the High Court of Tanganyika Dar-es-Salaam Plaintiff's Evidence

No.9

Who is he? - He was the surviving director of Consolidated Agencies.

Sadrudin N.D. Bandali - 4th September 1961 Examination - Cont.

10 HOURY: He is the other director of Consolidated Agencies.

COURT CONTD: Was there any other director of Bertrams Ltd?--Not to my knowledge.

And nothing happened after the death very much - no further transactions? - No.

What were you doing all the time then? - Well I was completing the books of all the companies which were in **arrears**. It took me all this time to complete the books.

20 And when you had completed them in 1961 you left? - I am sorry, I left in January 1960

You took over from George? - That is right

Now do you know that gentleman over there? - Mr. Patel?

Yes. - Yes I know him

Was he in the office at the same time as you? - Well, they were the auditors of Bertram Ltd. That I know

Oh, he was in the office but as an auditor - That is right.

30 You were the accountant, he was the auditor? - That is right

Of Bertram's Only: Just Bertram's

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.9
Sadrudin N.D.
Bendali - 4th
September 1961
Examination -
Cont.

I see. And can you tell me one thing - if you can. Why were Consolidated Agencies audited by Cooper Brothers and Bertram's by Shah & Shah? Do you know of any reason? - Well Mr.Dharsee did not confide in me.

He did not confide. Just a fact. You knew it - I knew it.

HOURY: I would like to put this in, Sir - an Admission of Facts, "the fact that Mr.Wali Dharsee was the sole director of.....Darsee his wife" to facilitate production on the Register of Companies and I think, Sir, that the Registered Office of the various companies including the Plaintiff's and the Defendant's I think that is clear - 10

COURT: Well it is not disputed, is it?

HOURY: No

COURT: Both these companies are in existence and carrying on business, are they?

HOURY: I think I told your Lordship when I opened that, as far as Bertram Ltd. is concerned, at the request of Mrs.MacRoberts, to whom all this money is owed - she paid in cash - Mr.Kennedy, the Administrator-General, Mr.Juvenelli and I agreed to be directors for the purposes of winding up these companies - this company, at least. 20

COURT: Bertram's?

HOURY: Bertram's. And the other company is continued by Jaffrabadwalla - the Defendant Company.

COURT: And the wife of Mr.Dharsee?

HOURY: And Mrs.Dharsee yes - and so are the others, as a matter of fact, Sir, and there is another case pending by Bertram's against Regent Estates which will come on later. 30

COURT: I hope it doesn't come before me?

HOURY: That is all, Sir, That I can assist.

COURT: Thank you

EX.L. ADMISSION OF FACTS PRODUCED, ADMITTED
AND PUT IN AS EXHIBIT L.

Close of case for the Plaintiff. Defence
does not propose to call evidence.

In the High
Court of
Tanganyika
Dar-es-Salaam
Plaintiff's
Evidence

No.9
Sadrudin N.D.
Bandali - 4th
September 1961
Examination -
Cont.

12.00 HEARING ADJOURNED UNTIL 2.15 p.m.

2.15 p.m. COURT AS BEFORE

No.10

10

ADDRESS BY O'DONOVAN
for Defendant Company

No.10
Address by
O'Donovan for
Defendant Co.

O'DONOVAN: May it please your Lordship.
My Lord, there is a reference in the Plaint to
the loans being made on open and current account.
My first submission is that that does not alter
the position in any way because the account could
not be a mutual one so as to make Article 85 of
the Schedule to the Indian Limitation Act appli-
20 cable. Before that section can apply it is
stated in all the commentaries that there must
be transactions on each side creating independent
obligations, and not merely transactions which
create obligations on the one side and those on
the other side being merely complete or partial
discharges. In other words, my lord, an account
which is simply an account of an advance loan and
then of repayment plus the loan is not a mutual
current account. I submit, therefore, my Lord,
30 that Article 59 applies.

COURT: You say what article doesn't apply?

O'DONOVAN: 85.

In the High
Court of
Tanganyika
Dar-es-Salaam

—
No. 10
Address by
O'Donovan
for Defendant
Company Cont.

COURT: 85 reads "For the balance due on a mutual open and current account"

O'DONOVAN: Yes, my Lord, and then the three years run from the close of the year in which the last item admitted or proved is entered.

COURT: and you say that this is not a mutual, open and current account as alleged?

O'DONOVAN: As alleged.

COURT: Well, it is alleged that it is an open and current account.

10

O'DONOVAN: It is alleged only that it is an open and current account.

COURT: Not a mutual one

O'DONOVAN: Not a mutual one; and the other mutuality, that is of independent obligations and not simply situations of a loan on the one hand and a partial discharge of loan on the other, does not exist here, and therefore there is no question here, to put it in another way, of possible shifting balance assisting in favour of the Defendant. I submit, there fore, article 59 applies, and it is pleaded that the money was lent under an agreement that it should be repayable on demand and the period of three years, which is the prescribed period, runs from the date when the loan is made. 20

COURT: For money lent under an agreement that it should be payable on demand.

O'DONOVAN: Yes, my Lord. Three years.

COURT: Three years from the date of the loan

O'DONOVAN: Yes, my Lord.

30

COURT: Not, as the other side presumably will claim three years from the last item acknowledged.

O'DONOVAN: Oh, I think the other side, my Lord, would endeavour to say that there have been subsequent acknowledgments or part-payments which would make a fresh starting point or a number of fresh starting points. This article, my Lord, dealing with money lent is 57, and the special one dealing with a case where money is lent under an agreement that it shall be payable on demand is 59. That is money payable on demand. That is what was pleaded in the Plaint, that it was repayable on demand. My Lord, if one then turns to the two annexures to the Plaint annexures A and B in my submission there is a break of more than three years in each side, which would defeat the Plaintiff unless the Plaintiff pleaded and established facts which take it out of limitation. I may refer your Lordship to annexure A first.

In the High
Court of
Tanganyika
Dar-es-Salaam

—————
No.10
Address by
O'Donovan for
Defendant Co.
Cont.

COURT: Yes

O'DONOVAN: Your Lordship will see that on the righthand side, the righthand column which consists of payments made after the payment of interest on capital, the last two items are Shs.5,000/- on the 18th of March 1955 - Your Lordship has that entry?

COURT: 18th of March.

O'DONOVAN: 1955 By Cash Shs.5,000/-

COURT: Yes.

O'DONOVAN: And then the very last one, my Lord is 15th of May 1958; By cash Shs.300/- Your Lordship will observe that more than three years had elapsed between the date of those two payments. In my submission, therefore, in the absence of anything else taking it out of the Statute of Limitation this debt became time-barred on the 19th of March 1958. If it were time-barred in March 1958, the cash payment in May 1958 does not arise. Two other items My Lord, I should refer to in this connection. Your Lordship will see in the lefthand column two items, 9th June 1959, to cash (part

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payment repairs house 301 Regent Estate) Shs.1,430/-
12th June 1959 to cash (ditto) Shs.1,000/- My Lord I
was in error in stating to your Lordship this morning
that the plea of limitation affected the whole of the
claim or not at all. Those two items had escaped my
notice. They do not appear in the Defendant's ledger
which have been produced, but both these payments, of
course, are well within three years. In view of the
agreement which was reached that the only issue was one
of limitation, I therefore, My Lord, feel in fairness ¹⁰
obliged to concede there should in any event be judg-
ment for the Plaintiff for those two amounts of Shs.
1,430/- and Shs. 1,000/-

COURT: And interest?

O'DONOVAN: Well, the interest calculated there,
my Lord, is interest on the original loan - the
balance of the original loan.

COURT: You concede that the Plaintiff is entitled
in any event to Shs.1,430/- plus Shs.1,000/- on
account No.1, plus interest at 6% from that date? 20

O'DONOVAN: I suppose so, my Lord.

COURT: Very well

O'DONOVAN: Subject to that, my Lord, I would
submit that the prima facie ... on that account
pleaded the break of three years which...before the
15th of May 1958 operates as to prescribe the
Plaintiff's claim for the balance of the original
loan. Similarly, my Lord, look at Exhibit E.

COURT: You draw a line, then, under 31st of
March 1959? 30

O'DONOVAN: Yes, my Lord.

COURT: Right. The two cash payments there are
conceded.

O'DONOVAN: Yes my Lord.

COURT: You say limitation runs for three years from the date on the extreme left of the paper, is that right? Take the first one "To cash Shs.85,000/-"

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HOURY: I think we would all concede, Sir, that the item "cash" means "cheque"

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10 COURT: Yes, we are not arguing that. It is just the money I am talking about. Now take the very first one, 9th of March 1951, Shs.85,000/- was passed to you.

O'DONOVAN: Yes. Now I would submit, my Lord it became time-barred in the absence of any payments in three years.

COURT: Three years in 1954

20 O'DONOVAN: That is in 1954. But my learned friends, I concede also are entitled to claim that a fresh period of limitation starts from each of the **dates** of the payments in the righthand column My Lord, that is under Section 20, which deals with payments operates in more or less the same way as an acknowledgment, that is to say, my Lord it gives rise to a fresh period of limitation computed from the date of payment. Now section 20 which your Lordship will probably see in that edition is an amended section 20, is subject in India to two amendments which do not apply here, the one in 1927 and the other even later, 1942 I think. But the old section, I think is repeated in most of the commentaries, my Lord, and that
30 is the one that is applicable.

COURT: That reads "Where payment.....is made"

O'DONOVAN: Yes, my Lord

COURT: "before the expiration....." I see

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O'DONOVAN: And, my Lord, the words which are I submit of crucial importance are the words "before the expiration of the prescribed period."

COURT: Yes

O'DONOVAN: So that, my Lord, if one looks at the right-hand column of annexure A again, each of the payments up to the penultimate one of Shs.5,000/- up to and including that one, is made within the prescribed period.

COURT: 18th of March 1955

10

O'DONOVAN: Yes, My Lord, so that I would concede the Plaintiff has three years from the 18th of March 1955 in which to file a suit, unless there is a further payment within the prescribed period, and I rely, my Lord, on the fact that the cash payment of Shs.300/- in May 1958 is out of the prescribed period

COURT: You concede, then, that the period of limitation in this case runs from the 18th of March 1955

O'DONOVAN: Yes, my Lord

20

COURT: For three years

O'DONOVAN: Yes, my Lord. The Plaintiffs cannot call in aid the Shs.300/- payment in May 1958 because it was itself made too late.

COURT: Because it was itself made too late.

O'DONOVAN: Yes, My Lord.

COURT: Well - yes, I see. By two months.

O'DONOVAN: About two months, My Lord.

COURT: Exactly two months, isn't it?

O'DONOVAN: I thought less three days

30

COURT: Well I haven't added it up yet but limitation runs, you say, for three years, and the first year is from 18th March 1955 to 17th March 1956. Oh, I see

O'DONOVAN: Yes

COURT: Am I right?

O'DONOVAN: I think so, my Lord. The next runs from the 18th.

10 COURT: Well nothing turns on that because it is a two-month period anyway

O'DONOVAN: Yes, my Lord.

COURT: So, whether it is the 15th of March 1958 or the 18th of March 1958, you say that the Plaintiff's claim is out of time by two months.

O'DONOVAN: Yes. Then, my Lord, may I ask your Lordship to look at Annexure B to the Plaintiff.

COURT: That is all you want to say on -

20 O'DONOVAN: That is on annexure A, yes, My Lord. Annexure B to the Plaintiff my Lord, the date of the loan is dated - first item - the 3rd of August 1954

COURT: Yes

O'DONOVAN: And I submit it was time-barred on the 4th day of August 1957 and the two cash payments referred to are out of time themselves by a year or more

COURT: And what about those two cash payments, themselves.

30 O'DONOVAN: Well, I submit they don't revive the original - those are part-payments my Lord by the debtor company to the Creditor.

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COURT: Oh I see. I'm sorry

O'DONOVAN: Yes. In other words, my Lord, the break occurs between the date of the loan and the date of the first part-repayment

COURT: Yes, I see

O'DONOVAN: My Lord, if I might dispose of one point, my Lord, an acknowledgment by itself would be quite insufficient to revive a time-barred debt unless it amounted to an express promise to pay. If it were an express promise to pay, then my Lord, it could be sued on under Section 25 of the Indian Contract Act. Section 25, my Lord, deals with the exceptional cases where an agreement is not void when it is without consideration, and one of them, sub-section (3) is the case of a promise made in writing and signed by the person to be charged therewith or by his agent to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of limitation of suits. But I would submit that is not sued on here -

COURT: No

O'DONOVAN: - and consequently, my Lord, it would be quite insufficient merely saying that there was an acknowledgment. The Plaintiff would have to go much further and show that there was an express promise in writing, and, my Lord, the Plaintiff in his amended plaint endeavours to avoid application of the Limitation Act by relying upon acknowledgments by the Defendant Company in its books of accounts from year to year. Of course it is quite true that during each of the periods where I say there was a break in the accounts in annexure A and annexure B entries have of course been made in the Defendant Company's books and balance sheets have been signed and so on. Presumably those are the facts which are relied on as taking this matter out of limitation. My learned friend's problem in fact, I submit, is this; it is to show that at the time of the last two cash payments in each case the matter was not time-barred. If he could get as far as maintaining his claim up to the date of these last two cash payments, well then, of course, the suit is

10 filed within the period of three years from this latter date. My Lord, so far as the books of account are concerned themselves, they, I submit, can be virtually ignored because they are not signed. It would be most unusual if they were signed, because, My Lord, acknowledgements, however liberally one wished to construe the provisions of this Act, have to come within the provisions of section 19 of the Limitation Act to avail the Plaintiff at all. Nothing can operate as an acknowledgment unless it comes within the terms of section 19, and that reads My Lord: "Where before the expiration of the period prescribed.....from the time when the acknowledgment was so signed." It is clear, my Lord, from all the commentaries that a signature is absolutely essential, and in fact, my Lord, the question whether the Company's books of accounts could possibly amount to an acknowledgment was referred to the Indian Courts in a Bombay case. My Lord, if I may I would simply quote the volume and page rather than attempt to pronounce the names.

COURT: Yes, don't attempt to pronounce the names.

30 O'DONOVAN: Indian Law Reports, my Lord, 1886 Vol.10 Bombay series, page 71 and I refer now to the judgment of the Chief Justice on page 73. The questions asked him were these; "Is an entry.....that it be written by, him or his agent" and there are two answers there. I don't rely on the first part, which appears to have been overruled, because an entry in the debtor's books would not amount to an acknowledgment unless communicated to his creditor -

COURT: Exactly

O'DONOVAN: - or to someone on his behalf.

COURT: Exactly. That is what I thought.

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O'DONOVAN: But I think I should in fairness to the Plaintiff say that the scope of Section 19 appears to have been a little bit enlarged after that. I refer your Lordship to the second point, my Lord, which is completely in controversy. It is this: "Every acknowledgment in order to create a new period of limitation must be signed by the debtor himself or someone deputed by him." Then it does not matter on what document the signature is placed.

COURT: But there is no difficulty about that in 10 this case, is there?

O'DONOVAN: No, my Lord.

COURT: Because there is evidence that an acknowledgment has been signed.

O'DONOVAN: Yes. The books of account have not been signed.

COURT: But the balance sheet.

O'DONOVAN: The balance sheets, yes. I am coming to the balance sheets in a moment, my Lord. I submit therefore, one can eliminate the books of account, by 20 which I refer to the ledger or the cash book. One of the witnesses was asked the question "there are no signatures in them". So, my Lord, the only other thing one is left with, I submit, is the balance sheets.

COURT: Before we go to them - I'm sorry, I want to follow this. Your point is that an acknowledgment must be an acknowledgment of the other side, not just an entry in one's own books?

O'DONOVAN: Or it must be communicated to somebody 3

COURT: Exactly. You tell the other side "I acknowledge the debt" somewhere or other.

O'DONOVAN: Yes, my Lord.

COURT: The mere entry in the diary or books of accounts is not an acknowledgment, that is your point?

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O'DONOVAN: Yes, my Lord.

10 My Lord, if I might clear the other matter out of way, no reliance can be placed on the certificate signed by the creditor company, the Plaintiff by their auditors. It doesn't matter that Mr. Dharsee himself was a director of the creditor company. Those are not acknowledgments signed on behalf of the debtor - they are certificates signed on behalf of the creditor. They don't come within section 19.

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20 To turn to the balance sheets, on which my learned friend has the only possible argument. First of all, I submit that they were not communicated, or not proved to be communicated, to anybody except the debtor company's own auditors. That is to say, My Lord, the debtors signed balance sheets, returned them to the auditors who signed them and sent them back again. They kept a copy. They treated them as confidential. In my submission there is there no communication to anyone which would make it an admission or acknowledgment of anything.

COURT: Let me get this point. You say in fact, on the point I put to you in the case of the ledgers, you say acknowledgment means acknowledgment to the other side.

30 O'DONOVAN: Yes, or to some third party. I would concede that my Lord, on the authorities.

COURT: Yes, or to some third party

O'DONOVAN: But not one's own auditor in my submission

COURT: I see. One's own agent.

O'DONOVAN: Yes, my Lord.

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COURT: It is not communication if you tell your own clerk.

O'DONOVAN: No, my Lord.

COURT: I see. Have you any authority for that?

O'DONOVAN: Yes, my Lord. This is not unusual my Lord, but the authorities are far from unanimous on this point.

COURT: They never are

O'DONOVAN: May I come to that point in one moment. I think I gave Your Lordship the volume. (Passed to O'Donovan) My Lord, the passage to which I wish to refer is at pp.225 and 226 in this commentary, which is Rastomji's 6th edn., under the heading "Acknowledgment to stranger". It says, "the acknowledgment must be.....seeking to recover possession. The acknowledgment need not necessarily be addressed to the creditor or to anyone representing him.....if it is addressed to a third party." In my submission it is clear that it is no more addressed to a third party by being disclosed to the company's agents than it would be addressed if it were kept in the office of the company itself. 10 20

My Lord, I have two other criticisms of the balance sheet which I submit are less open to argument. The first is that in every case the balance sheet was signed at a much later date than the end of the financial year with which it was dealing. Sometimes over a year later. It is clear from the documentary evidence that the financial year of the company ended on 31st December each year. It is also quite obvious that in every case all that the balance sheet was intended to establish was the company's position at the last date of the financial year, and it mattered not - it would be quite irrelevant in the preparation of a particular balance sheet that the whole amount of an alleged debt had been repaid on 1st January of the following year. Therefore, my Lord, the signature of a director on a balance sheet prepared long afterwards is not an acknowledgment that the amount shown as due 30

in the balance sheet is still due at the date when he signs. It is not an acknowledgment of a subsisting debt.

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COURT: Except the last one. It would have been carried forward.

O'DONOVAN: It is only an acknowledgment. My Lord, that there was a debt some year or two before.

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10 COURT: Yes. Well suppose, to take year one, in year two it is repeated and in year three it is repeated again, in year four it is repeated again.

O'DONOVAN: Yes

COURT: Well, year four would show that it had existed for the previous three years, but not in the interval between the last day of the fourth year and the date of signature.

20 O'DONOVAN: Yes, but my Lord, to come within S.19 I submit it is quite insufficient that there is a written acknowledgment that debt previously existed. There is no acknowledgment within S.19 unless there is an acknowledgment of a subsisting liability; subsisting, that is to say, at the date of signature.

COURT: It is evidence that it subsisted at 31st December last.

O'DONOVAN: Yes, but that's not good enough my Lord, because one can't infer from that that it existed at the date when the balance sheet was signed.

30 COURT: Yes

O'DONOVAN: My Lord, my authority for saying that is, I think first of all all the commentaries make it clear that there must be an acknowledgment of a debt subsisting at the date of the acknowledgment that is to say at the date of the signature.

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In Rustomji, 6th edn., to which I referred a moment ago, it is dealt with on pp.191, 192 and 193. "Acknowledgment must be of present subsisting liability". In other words, it is an "unequivocal admissionat the time of acknowledgment. A mere statement that a debt had been due at some previous time is insufficient". It carries on at pp.193 under the heading "Admission of debt or liability as once existing" And that is not sufficient. One must, my Lord, be able to read into the acknowledgment, in itself, the meaning that the person making the acknowledgment is then at the date of the acknowledgment, under an existing liability. Such liability cannot be read into it by proof aliunde. That proposition appears at p.192. 10

There was some doubt in India, if I can take up a few minutes of Your Lordship's time, as to the effect of the decision in India of a Privy Council case. That was an appeal from Calcutta in 1908, Vol.33 Calcutta Series, at p.1047. The facts are miles away from the present case, but shortly they were these. Letters of administration were applied for in respect of a deceased's estate. It was objected that the person applying for Letters of Administration was a debtor of the estate and therefore couldn't get Letters. He put in an affidavit in reply saying "for the last five years....doesn't effect his right to apply for probate". Then the question arose whether that statement that for the last five years he had had an open and current account was a sufficient acknowledgment within s.19. Their Lordships of the Privy Council held that it was, and the reason why is stated at p.1057. Their Lordships say, "An acknowledgment according to the Indian Act must be signed by the party.....the respondent acknowledged his liability to pay his debt to the deceased or his representative if the balance should be ascertained to be against him" The case, I submit, has been made over-much of in the discussions because it appeared in some courts in India to be relied upon as authority for saying this, that if there is an acknowledgment that a debt was once due and there is no denial of the fact that it is now due, the admission that it was once due is good enough, 20 30 40

coupled with the non-denial, or non-denial of payment. That I submit, is not so, because in this case their Lordships held, in the peculiar circumstances of the case, that it was reasonable to presume that the accounts which the respondent said were unsettled at the date of the death of the deceased remained unsettled when he made the statement; otherwise it was hardly a relevant statement to make.

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10 I submit that the effect of that judgment
has been put completely accurately in the comment-
ary by Chitsley and Rao, Indian Limitation Act,
2nd edn., at p.683. The paragraph dealing with
the matter starts at p.681 under the heading
"Acknowledgment of past liability.....past
liability is insufficient". Then the commentators
go on to discuss parts of the Privy Council case
which I have just read to Your Lordship and they
say at p.683. "The above judgment of the Privy
20 Council has been taken by the undermentioned
decision to lay down that an admission of a past
liability....subsisting liability" That is
exactly the way the case is treated.

The Privy Council case was considered, by
Mr. Justice Nair, who was himself later a Privy
Councillor, in a Madras case. All India Reporter
1925 Madras, at p.675 Mr. Justice Nair dealt with
the Privy Council case in this way. Here, my Lord,
there was reference to a decree. It says that
30 doesn't indicate any admission of present liability
Referring to the Privy Council case he says, "the
respondent who was named.....in this case there
was a clear admission that there were open and
current accounts.....to make that a valid acknow-
ledgment. That decision does not give us much
help in deciding whether a mere statement of fact
that decrees were passed against a party amount to
any acknowledgments of any subsisting liability...
40 executed."

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I submit that those decisions can be summarised in this way. There may be cases where it is sufficient simply to admit that there was a past liability unaccompanied by any denial of its continuation, if in those circumstances one would infer that a subsisting liability is admitted. But that is about as far as one can go in stretching the point in the Plaintiff's favour, and I submit it can't apply in the present case. Here, my Lord, it is not relevant with regard to the balance sheet for any particular year to deny that the indebtedness which is shown in the balance sheet has since been repaid. It doesn't matter. So that, my Lord, although one might be able to say of certain debtors, 'Well you admitted the amount had been due, you allege that thereafter you paid it, we rather expected you to say that that was your case' - it doesn't apply. One doesn't expect Mr.Dharsee, in signing the balance sheet, to add the words 'I have, since the date at which this account was prepared, or my company has discharged this liability' 20 Therefore my Lord, the particular class of cases where it might be sufficient simply to refer to past liability doesn't include the present case, and therefore there is no acknowledgment of a subsisting liability which comes within s.19

My last point, my Lord, is this. Betram Limited are not referred to by name in the balance sheets.

COURT: Who?

O'DONOVAN: The Plaintiff company. All that is stated in the balance sheets is that an aggregate amount is due on loan accounts, and interest, and that aggregate includes not only the amount due to the Plaintiff company but amounts due to third parties. I submit that it is insufficient on that ground, and I rely on a passage at p.213 of Rushtomji, at the bottom of the page "An acknowledgment of indebtedness from the aggregate of several.....is not sufficient to take the claims out of the statute" In other words, the acknowledgment must relate to the particular indebtedness or liability sued for, and it doesn't do so if it is imply an aggregate sum including amounts due to other person as well. If one can't read into the acknowledgment itself the necessary admission (?) then it doesn't avail the Plaintiff to refer to any subsequent admissions of the acknowledger. He must be 30 40

able to show, with regard to any so-called written acknowledgment, that in itself it imports an acknowledgment of a then existing liability; a particular, then existing liability

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Unless there is any other point with which Your Lordship wishes me to deal.....?

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COURT: No, I would just like to make quite clear your contentions with regard to these documents which passed between auditors. Take this last one, 14th July 1959, 'To whom it may concern: This is to certify that the Defendants (that's you) were indebted to us in the sum of so much as at 31st December 1958' Now that is a certificate given at your behest?

O'DONOVAN: Yes

COURT: You are asking them to certify that they owe you the sum?

O'DONOVAN: Yes, my Lord. that might be splendid proof that the amount is really due, or the debt once existed. It nevertheless doesn't make it an acknowledgment in writing by the Defendant. I would submit there are two things wrong with that my Lord, if one considers whether it can be called an acknowledgment. First it is signed by the wrong person. It is signed by the creditor, or on behalf of the creditor, apparently at the verbal request of the director of the debtor company. Therefore it doesn't come within the scope of the section, where a fresh period of limitation runs against the person signing an acknowledgment. Secondly, it relates to the past and not to the present.

COURT: I see. Thank you

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NO.11

ADDRESS BY HOURY FOR
PLAINTIFF COMPANY

No.11
Address by Houry
for Plaintiff
Company

HOURY: My Lord, I did try to follow my learned friend's ingenious defence in argument, but first of all I would submit that the accounts between the parties should be considered as open and current and therefore coming under article 85. The difference between that and the sections on which my learned friends have submitted is this, that the three years would run from the close of the year, in which the last item was acknowledged or paid, while under sections 57 and 59 the three years run from the date of payment. So if you hold there is not an open and current account it means the first account will be out of time by two months. If you hold that it is an open and current account then you have got to the end of the year 1958, when the Shs.300/- was paid. 10

Now my Lord, what I would ask Your Lordship to bear in mind right through the course of this case and the arguments put before you, is what has been abundantly made clear by all the witnesses, that Dharsee the deceased, was a director who directed all these five or six companies, a managing director; and although we may not concern ourselves with the other companies we must, in my submission, concern ourselves with the Plaintiff Company and the Defendant Company. So my Lord, I would ask you to hold, as in my submission no doubt you really must hold, that where Dharsee signed as director for the one company, Bertram and where that signature is required to be acknowledged as an acknowledgment by the other company, Consolidated, then Sir, I submit it is within your power, and fair and equitable, and it must be taken that he so signed as agent, if not the director as director agent of the other company 30

COURT: Let me get your point Mr.Houry. You are saying then that these documents signed by Mr.Dharsee are signed not only for Bertram but also..... 40

HOURY: But also for Consolidated. There is no doubt about it. How can it be otherwise?

COURT: Well, he has signed as director - "indebted to us in the sum of" The other one signed by the debtor: "This is to certify that the amount standing to the debit in our books"

HOURY: Yes

COURT: Well, I appreciate your point Mr.Houry

10 HOURY: Sir, I will deal next, with the submission made by my learned friend that the acknowledgment must be capable of being construed as an express promise to pay

COURT: Before we get there, Mr.Houry, would it inconvenience you if we go back to the first point? Mr.O'Donovan's first point was that the period of limitation runs as for a loan, not as for a mutual, open and current account.

20 HOURY: Yes. My submission is that it is a mutual, open and current account, and therefore article 85 applies.

COURT: Where does the mutuality come in?

HOURY: Open and current account, Sir.

COURT: It says "due on a mutual, open and current account" and you have pleaded open and current

HOURY: Open and current

COURT: But not mutual

30 HOURY: No, I have not pleaded it was mutual. In fact, Sir, in my submission it would make no difference, except that I have set off the two amounts at the end of the year, because, if you look at the accounts Exhibit A, as my learned friend has

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said, if you take it that they are simply accounts for loans, then I agree with him that we are two months out. But the mutuality, Sir, in the account in this. As you will see, we advanced them first Shs.85,000/-

COURT: Yes

HOURY: Then they advanced us Shs.11,000/- and they advanced us Shs.20,000/- and they advanced us Shs.30,000/- and they advanced us Shs.4,000/- and Shs.10,000/- and Shs.5,000/-

10

COURT: Did they?

HOURY: You have it from the evidence that -

COURT: But wasn't this all repayment of the loan?

HOURY: Why should it, Sir?

COURT: It starts off -

HOURY: How are we to construe that, Sir? You have got it from all the accountants who came in. They said Mr.Dharsee was directing finances, and he was paying from one company to the other - transferring from one to the other. I concede that it can be construed as payments on account

20

COURT: I would have thought so

HOURY: It may be so, Sir, but my submission is that it is a mutual account. They have started off with Shs.85,000/- Why then should it be, Sir, Shs. 11,615/- the next item on the credit side, or why should it be Shs. 20,000/- and then Shs.30,000/-? No doubt, Sir, this one director who was managing finances of the companies was - I don't want to use the word "juggling" but as it suited one or the other he passed a cheque from the one company to the other. There is no doubt about it.

30

COURT: Well, Mr. Houry, I really wish to put to you my difficulty so that you will have an opportunity of answering it. If you look at No.1 Account, the first entry is "To cash, loan at 6% p.a."

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HOURY: Yes

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COURT: We start off by it being a loan, and in terms a loan.

Address by Houry for Plaintiff Co. Cont.

HOURY: Yes

10 COURT: Right. And all the way down there is money coming from one side, money coming back, cash. Now surely, prima facie looking at this account - and I am sure the No.2 account is precisely the same.

HOURY: I see your point, My Lord.

20 COURT: It starts off, it is a sort of heading to the thing "To cash, loan at 6% p.a. Shs.269,000 " Then the other side is the repayment. I may be wrong but prima facie that is what it looks like to me.

30 HOURY: It may appear on this in fact that they are always indebted to the Plaintiffs, but in my submission, Sir, it can be considered a mutual account because the one company was paying to the other, although all the time under this account the Defendant company was indebted to the Plaintiff But that, Sir, in my submission does not stop it from being a mutual, open and current account. We agree that it is open and current, and it is also mutual because at any time the Defendant company could have paid into this account something more which could have turned the balance, therefore it is a mutual account. It is not as though I am a grocer or a buyer of motor cars and I supply motor cars for £200,000 and then they continue paying on account. This is just cash. Two companies who are nothing more than a financing company. They are all financing companies. They are not either selling
40 sisal or selling goods, they are both financing

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Address by
Houry for
Plaintiff Co.
Cont.

companies. It is just so happens here, that this Company, the Defendant Company, in the course of these years was indebted, but that does not in my submission stop it from being a mutual, open and current account Sir. I think you have got Rustomji, 5th edition, at page 825: "Open and current account.....does not change the account into an account stated"

COURT: Would you answer this, please? I am a bit puzzled about this. Suppose there is a genuine loan.

HOURY: Yes Sir.

10

COURT: I Borrowed £100 from somebody. He opens an account, £100, debtor me. I pay him back from time to time, and he marks down what I pay him. Would you call that an open and current account?

HOURY: No, What I am saying, Sir, in my submission is that they are both financing companies, and at any time there was this possibility - probably contemplated - we haven't got the people here, Sir; The Defendants did not go into the box and give any assistance in this case, and my man is dead.

20

COURT: Yes

HOURY: So we can only do our best with what there is before us.

COURT: Yes

HOURY: My argument Sir, applies to both accounts A and B.

COURT: Yes

HOURY: Account B Sir, Account No.2 if you will see the accounts, if it is a simple account then it would be a third of 858. The first payment is 854. 30
Three years from there, therefore the cash paid on the 15th May 1958 by the Defendants would, I think, be out of time if it is a simple account, but not out of time if it is an open and current account under section 85.

COURT: Yes

HOURY: That, I concede, Sir, so as I stated to your Lordship in my opening speech what I replied on very definitely is the balance sheets and the acknowledgements.

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COURT: Well your first point is that it is a mutual open and current account. That is the first point to be settled.

Address by Houry for Plaintiff Co. Cont.

10 HOURY: Yes. Now my learned friend, Sir, has put before you that any acknowledgment must be of such a nature that it must amount to a promise to pay. I say that is not so under Indian Law, and that is quite clear. It is so under English Law, but not under Indian Law.

DASTUR: I did not say that

20 HOURY: Yes you did. Please don't interrupt. You did say, and that is what you submitted, that there must be a promise to pay, otherwise it is not an acknowledgment. Right? If you look at page 296, Sir, and 297 in Rustomji's 5th edition, it says: "Section does not require promise to pay - English law distinguished." Quite clear. "In English Law an.....from them a promise" so my Lord, it is clear that under the Indian Law that we here are governed by now an acknowledgment need not infer a promise to pay, although in my submission, since it is a very fine point an acknowledgment does infer a promise to pay. No doubt. But not to the length, Sir, in the submission 30 that my learned friend Mr.O'Donovan has asked you to interpret, that the statement in a balance sheet are just no good and that they do not infer a promise to pay. Now, my Lord, I want to refer you to the law in Fustomji again as regards balance sheets - acknowledgements in balance sheets. Page346, Sir, "Balance Sheet: Acknowledgment. In A statement in a balance sheet acknowledging a debt due.....to the creditor or to any one representing him." Now, Sir, that is our very 40 very vital and categorical words, and that is the

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law. Sir, I cannot concede how a signature by Mr. Dharsee under these circumstances of these two companies, in which he is a managing director of both, in which he has signed both balance sheets, how it can be paid by his successors now, Jaffrabadwalla his successor who is now in the Company, that this account is time-barred, when we have not only both directors, Sir Dharsee but the principal shareholder who acknowledges in both accounts, in both balance sheets, that the Defendant company is indebted to the Plaintiff Company 10 in the sums shown. Now my friend takes as his last point which deals with this that although the Bertram accounts in the liabilities, or rather in the assets, show the consolidated company as owing the money by giving their name Mr.Houghton in doing the consolidated accounts does not show Bertram, that is the Plaintiff, by name as being owed by that company. But, my Lord, if you will only have a look at them Mr.Houghton has told you that he does not give a list of them but they are computed in his working 20 accounts and he has given you the figures and some evidence of what the Defendant company was owing in those items shown, and in addition to those he has computed them. Then again, Sir, I think you will find in one of them attached to the Balance Sheet, Sir you can find the letters in addition to the certificates with the report of the auditors to the members to the members, Sir. These balance sheets and the report are made to the members of the Company, that is to say the shareholders: not, as my learned friend has 30 attempted influence the Court, that they were just left in the books in the offices of the Company, the office of Mr. Dharsee. Why should the Court presume, or assume, that, and that they did not go to the shareholders, as it must do, and to all the directors? You see, take this last one, Sir the 14th of July 1959. "This is to certify that Messrs.Consolidated Agencies Ltd. were indebted to us in the sum of Shs.321,000/- made up as follows". Then they give the account. "For Bertram Darsee Director." "For Bertram Darsee, 40 Director" Now he is also the director of the Consolidated company, and he keeps all the accounts with one accountant in his own office, one registered office for all the companies. Is it not to be assumed, Sir,

that he is certifying for both? But what Cooper Brothers at the moment were concerned with was to get it from Dharsee, that is from Bertram Ltd. that Consolidated was at that date, which is the 14th of July 1959, indebted in that amount. That is so with all these certificates. Now the other point taken by my learned friend is that the acknowledgment must be an acknowledgment of the present debt, and that the signature, Sir, by -
 10 looking at Exhibit No.1, the balance sheet at 31st December 1954, it is signed by the Auditors on the 27th of October 1956, and the auditor has told you that it could be a day, two days, five hours or six months. Why hasn't Jaffrabadwalla Sir, had the courage to come before you and say "I signed this in 1956, not in 1954"?

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 Houry for
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COURT: But it is there, isn't it? One can deduce when he signed it.

HOURY: How, Sir?

20 COURT: Well, one has the date of signature of the auditor.

HOURY: Of the auditor, He told you -

COURT: And he told us that he would not sign it until the other party had signed it, so we know that he signed it some time before.

HOURY: But it could be five months, six months, or two hours.

COURT: Oh it could be.

HOURY: Six months at the outside.

30 COURT: I am only trying to understand this. It doesn't really matter as to actual periods. Mr.O'Donovan's point was that a balance sheet represents the position as at the 31st of December of a certain year, and that is signed some time afterwards. He didn't say when. And, whenever it is signed afterwards, it can only mean that that was the position at 31st December.

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Address by
Houry to
Plaintiff
Company - Cont.

HOURY: Accepted. Accepted, Sir. That is accepted
It is conceded. So we go, Sir, we go to the 1957
accounts. We go to 1954 which was signed on the 27th
of October and we go to the 1955 accounts which were
signed on the 19th of November 1957, and we cannot
come to any other conclusion than that is an admission
that at least before the 27th of October 1956 that
amount was due

COURT: Well that is what Mr.O'Donovan says isn't
so.

10

HOURY: Well my submission is that it certainly
is so. There can be no other construction on it,
otherwise it is on them. The authority he has given
your Lordship to refer to , 1906 properly construed is
in our favour, not in his.

COURT: A Privy Council case.

HOURY: Calcutta 1906 Vol.33: and it is for them,
Sir, having acknowledged it, it is for them to prove
that it has been paid since. They have made no such
attempt. They have made no such attempt to prove it,
and therefore, Sir, continuing my argument, in subse-
quent years they are out right up to 1956 and 1957
whichever date they signed it, and my submission is
that on the 31st December 1957, which is the last one
we have here, as your Lordship will recollect nothing
was done after that, because the auditors could not
get anything out of them.

20

On 31st December the amount was still owing in the
books, as explained by Mr.Houghton the auditor. So
that Sir, if that is, as I submit it is, and must be
so taken that that is an admission of the debt as on
31st December 1957, then whatever other construction
you put on the accounts the claim is not time-barred,
as in my submission there was no admission that it was
due on 31st December 1957 an admission by Dharsee, and
an admission that it was owing on 31st December 1956,
31st December 1955 and 31st December 1954: an admission
from year to year that this amount is due and owing.

30

COURT: A different amount, a growing amount.

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HOURY: A growing amount, as explained by Mr. Houghton. So that whether it is an open and current mutual account, or whether it is a simple loan account, I submit your decision Sir, on this question of the balance sheets, whether there were acknowledgments or not, would decide the matter of limitation.

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Address by Houry for Plaintiff Co. Cont.

10 I would also refer Your Lordship to Sir Alastair Forbes' judgment in the court of Appeal for Eastern Africa 1960 Part 4 East African Law Reports: I won't give you that name Sir, p.848. "An account is open when a balance is not struck.....against the charity" That is what I was submitting Sir.

COURT: There is certainly no shifting balance here.

20 HOURY: No, but that does not mean it is not a mutual account. Now I would take your Lordship through the whole of this s.19. You have before you Sir, Rustomji's Law of Limitation, 5th ed., Article 85 in Vol.2. p.824. Now that is quite clear that if it is a mutual open and current account the three years run from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account. If you will turn to p.834 under "Mutual accounts, any time within 30 is....the statute operates. Action for the whole amount due.....after the date" so in account No.1 the Shs.300/-

COURT: You say the three years count from 15th May 1958?

HOURY: Yes.

COURT: So you are just one month before the end of your limitation period, even if everything you say is correct. You are just within a month?

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HOURY: Yes

COURT: The proceedings on 13th April. Is that right?

No.11

Address by HOURY for Plaintiff Co. Cont.

HOURY: Yes. Now my Lord, I have already dealt with the submission that the section does not require a promise to pay. That is on pp.296 and 297. On pp.303 and 304 you will find it quite clearly stated (p.303 Vol.1). "Acknowledgment need not expressly specify the liability. It may be inferred..... liability was subsisting at the time of the acknowledgment" My Lord, I ask you to invoke this in the interpretation of the balance sheets, as I do not see what other interpretation, what other inference you can make following that the witnesses, and particularly Mr.Houghton have explained to you - as they have explained the balance sheets. Those items of liability in the balance sheets on which my friend has made so much play, it does not mention Bertram - it is a system of accounts, the auditor has told you; and I go one further and I say it is signed by Dharsee, the director of both companies. You see Sir, the acknowledgment need not be expressed, but it must be made under circumstances from which the Court can infer that the liability was subsisting at the time of the acknowledgment. 10 20

Now, my learned friend has also said the acknowledgment was at the end of the previous year. Very well Sir. But when it is a continual acknowledgment from year to year in respect of each of the five years, surely there can be only one inference made - that that amount is still subsisting. The crux of it is this, if it was not subsisting the defence or the Defendants, today would not have invoked the Statute of Limitation. They would have pleaded payment. They would have said "we have paid this" 30

COURT: Is that thing I can take into account? Is it proper for me to consider that?

10 HOURY: I am asking you to infer from the balance sheets that that money is subsisting. If it is not subsisting, I say by way of argument that they would have taken the defence that they had paid it, not that it is time-barred. So that fortifies, in my humble submission, the finding that I hope you will make that that is an admission and an acknowledgment, and that you can infer from that balance sheet, with the support of Mr.Houghton's evidence, that those amounts in those several balance sheets shown as a liability of the Company - those amounts include the liability of Consolidated Agencies to Bertram.

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Address by HOURY for Plaintiff Co.
Cont.

20 On p.330, "Sufficiency of acknowledgment is a question of law. Whether a particular writing amounts to sufficient acknowledgment is a question of law...even though the words may be identically the same" I say this, it is for Your Lordship to say whether these balance sheets are acknowledgments or are not acknowledgments. If you say no, then we lose our case, If you find that they are acknowledgments, then we win. But it is for you Sir, from all the surrounding circumstances - and those circumstances are these (I will repeat them Sir, with your permission) I repeat them in this way. The same director for Plaintiff and Defendant managing director, not just director, the managing director of both companies. He signed all the cheques you will see from the books. He signed all the cheques millions of shillings, for both companies. He signed both balance sheets. He gave the certificates for the liability. Now those are the circumstances Sir, from which I ask you to infer that that acknowledgment is an acknowledgment of a subsisting liability, and the fact that it comes from year to year.

40 COURT: What you are asking me to do, Mr.Houry is in fact to take a signature over the name Bertram and hold that it also binds Consolidated Agencies, because it happens to be the same person

HOURY: In a way.

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Plaintiff Co.
Cont.

COURT: That is what you are asking.

HOURY: In a way, certainly, and it is: but on the other hand Sir, not exactly that, because you have got the balance sheets of Bertram and you have got the balance sheets of Consolidated. They are acknowledging....

COURT: That's another point

HOURY: No Sir, the Defendants, by Dharsee's signature on their own balance sheets in 1957 are acknowledging the debt, and if you were to take that 10 as the last acknowledgment then we are not time-barred

COURT: Before you leave No.1 account Mr.Houry, you say that the three years dates from 15th May 1958?

HOURY: Yes

COURT: If that be so you are in time anyway. You don't need any acknowledgments do you?

HOURY: No, that is quite true. That's my second shot Sir. That's my second broadside.

COURT: I see. Now with regard to account No.2...

HOURY: Same thing, Sir.

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COURT: Where does time begin to run in your submission?

HOURY: In my submission Sir, if it is an open and current mutual account then it runs from the end of the year 1959

COURT: You say it runs from the end of the year 1959 because of the payment of Shs.26,000/-?

HOURY: Because of the payment of Shs.26,000/- on 3rd February 1959. Under article 85 it is from the end of the year in which the last payment is made. 30

COURT: And the intervening period doesn't count you any, doesn't matter, because it is open and current? Still open?

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HOURY: Yes

COURT: And back to No.1 it would run from 31st December 1959?

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HOURY: Yes

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HOURY for
Plaintiff Co.
Cont.

COURT: The same principle, not the 15th May it would be 31st December, the end of the year?

10 HOURY: Yes

COURT: I see

HOURY: On p.343, under the heading "Successive acknowledgments: If a subsequent acknowledgment is made within the new period..... by section 25". Here Sir, you have consecutive years 1954 to 1957. It could even have been under this Sir, a lapse of three years. On p.344, under the title "Acknowledgment may be in writing made for any purpose...of the liability in dispute" The authority on that is Bombay Law Reports, 385, and various others. From that Sir, you see there is no ambiguity in those words. From that you will see that...

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COURT: Have you looked at the paragraph immediately below that?

HOURY: Confidential documents?

COURT: Yes (reads)

HOURY: Naturally Sir. The Commissioner. Yes. There it is Sir. In my submission there is no ambiguity in those words. The main thing you can gather from all these commentaries is that what the Court has to say is, has there been an acknowledgment, and construe it in any way, always in favour of the person to whom the other side is indebted.

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Cont.

That sir, in my humble submission, is the text of of all these commentaries, that if the court finds there is an admission there is an acknowledgement; and what better acknowledgement can there be, in my humble submission Sir, than a balance sheet, an annual balance sheet; that money is owing.

As regards the other point that my friend had referred to, as to whether an acknowledgement must be addressed or communicated to somebody, p. 348: "Acknowledgment must be addressed or communicated to somebody or to anyone representing him". I think my learned friend has conceded that. "An acknowledgment implies that it is made to somebody, hence a mere writing it is ineffective if made to a stranger". That is under English law. Try and interpret this, Sir, to our case. Even if those balance sheets and those certificates did not come to us or anybody else there is still, in my humble submission, an acknowledgement of the debt to us. To us Sir, to the plaintiffs. No other possible construction, in my submission, can be put on them. It is an admission of a debt, to us and nobody else.

On p. 350 you will find a note on the acknowledgement in debtor's own books. "An entry in the debtor's own books cannot operate as an acknowledgement.....signed by the debtor or his agent". Now Sir, here, if you will look at the ledger book, you will find that it is paid by cheque, and the cheque number is given. If that cheque was available - and it should have been made available - then, Sir, the signature on the cheque, which would have been the signature of the defendant company, would be sufficient, that is to say it would have been a sufficient acknowledgement without any doubt as the signature appearing on the cheque made payable to us against this account. But that is not available, and as it is not available, Sir, I submit that you may look at the account of the defendant company, which gives the sum of Shs. 324.000/- as owing to us as in 1958, and

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as on August the 26th they gave us a cheque No. 838780 "to you", that is to Bertram, for Shs. 20,030/-.

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COURT: That is on the account?

10 HOURS: It is on the account. I am not for this purpose concerned with the account, my lord. I am talking about the acknowledgement in the books. As alleged, Sir, as they have been given notice to produce this cheque, and they say "We cannot, we haven't got it, we have lost it", your lordship is entitled to deduce from this that this cheque No. 838, which in their books, in their own ledger, they have got as "Paid to you", Bertram Ltd., is a cheque signed by them and is an acknowledgement, a signed acknowledgement, that on that date in 1958 they owed us Shs. 324,145/-, against which on the 8th of August they paid us Shs. 20,030/-. Similarly, sir, 20 with No.1 account, on the same dates, May 1958, in their own books they acknowledge Shs.17,436/- and on the 15th of May 1958 they paid us Shs. 300/-, again by their cheque to us. Sir, you cannot give a cheque without signing it, and signing a cheque is an acknowledgement, and the cheque together with this account is an acknowledgement, of that account as on 15th May 1958. So, Sir, my third line of argument is that in their own books, as I have said in 30 my pleadings, they have admitted this amount, and it is signed by them by the cheque which they have put in. That is for both accounts, sir, No.1 and No.2. It is perfectly clear, sir, when taking this into account, that again the same argument applies, that Dharsee was a director of both, that one accountant has kept both accounts, and that it was within the knowledge of all the parties, Dharsee and his directors, that this amount is acknowledged.

40 COURT: Your argument then is that it was communicated; if you had had the cheque it would have been an acknowledgement communicated, and that, because they cannot produce it, I must assume that it was, because their account book

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Houry for
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says so.

HOURY: It is in their account books, which were as much ... with the defendant company through Dharsee, the mutual director. I think that is all I can possibly submit to your lordship.

No.11

Address by
Houry for
Plaintiff Co.
Cont.

COURT: Thank you. Is there anything more?

HOURY: That is all, my lord.

JUDGEMENT RESERVED:

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4.20 p.m. Court adjourns.

No.12

No. 12

Judgment of
Weston J.
19th September
1961.

JUDGMENT OF WESTON J.

WESTON, J.

The parties to this action are private limited liability companies incorporated in this Territory and carrying on business in it, apparently as finance companies exclusively. The companies are two of a number formed by a Mr. Wali Dharsee, who died on 16th November 1959. This gentleman, who was a legal practitioner in these Courts, was sole director of the plaintiff company (hereinafter referred to shortly as the plaintiff) from 1952 to the date of his death. He was also a director of the defendant company (hereinafter referred to shortly as the defendant) from 1951 until he died, the other director being one Mr. K.F. Jaffrabadwalla. Mr. Houry, who appeared for the plaintiff, was exercised to impress upon me and adduced evidence which does satisfy me, that in fact Mr. Wali Dharsee was in effective control of all these legal persons of his own creation, including both plaintiff and defendant, and that they were mere incorporeal puppets brought into being solely to serve the purposes of Mr. Wali Dharsee. The point is of major

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importance from the plaintiff's point of view because; as Mr. Houry informed me in his opening, his "whole case" is based on this factual situation.

In the High Court of Tanganyika Dar-es-Salaam

The Plaintiff's main claim is set out in paragraph 3 of his plaint (which was filed on 13th April 1961) and this reads as follows:-

No.12

10 "The Defendant Company is indebted to the Plaintiff Company in the sum of Shs. 349,962/52 made up as follows:-

Judgment of Weston J. 19th September 1961 - Cont.

Shs. 23,427-52 on account of LOAN No.1
and Shs. 326,535-00 on account of LOAN No.2

Shs. 349,962-52

20 being moneys lent and advanced by the Plaintiff Company to the Defendant Company on an open and current account between the said two parties, which sum being repayable on demand, is due and owing, as per Statements of Accounts, annexed hereto and marked "A" and "B" respectively, to which the Plaintiff Company craves leave to refer".

It will make for easier understanding of the arguments of both counsel if the accounts referred to in this paragraph (they are not long or complicated) are also set out:-

CONSOLIDATED AGENCIES LIMITED, Dar-es-Salaam

in account with

B E R T R A M L I M I T E D

No. 1 ACCOUNT

		Dr:	Cr.
30 9.3.51	TO CASH, loan @ 6% p.a.	Sh. 85,000.00	
Oct.17	BY CASH		Sh 11,615,00
Dec.14	BY CASH		Sh 20,000.00
Dec.31	To interest	Sh. 3,924.73	
31.3.52	To Interest	Sh 1,220.31	
7.6.52	BY CASH		Sh 30,000.00

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No.12

Judgment of
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		<u>Dr</u>	<u>Cr</u>	
31.3.54	To Interest (2 years)	Sh 3,754.00		
26.4.54	BY CASH		sh 4,000.00	
31.12.54	TO Interest	Sh 1,312.24		
15.2.55	BY CASH		Sh 10,000.00	
18.3.55	BY CASH		Sh 5,000.00	
31.3.55	TO Interest	Sh 287.50		
31.3.56	TO Interest	Sh 940.00		
31.3.57	TO Interest	Sh 940.00		
31.3.58	TO Interest	Sh 940.00		10
15.5.58	BY CASH		Sh 300.00	
31.3.59	TO Interest	Sh 1,044.18		
9.6.59	TO CASH (part pay- ment repairs House 301 Regent Estate)	Sh 1,430.00		
12.6.59	TO CASH (ditto)	Sh 1,000.00		20
31.3.60	TO Interest	Sh 1,223.50		
31.12.60	TO Interest	Sh 1,326.06		
31.12.60	BY BALANCE c/d		Sh 23,427.52	
		-----	-----	
		Sh 104,342.52	Sh 104,342.52	
		-----	-----	
1.1.61.	TO BALANCE b/d	Sh 23,427.52		

E. & O.E.

CONSOLIDATED AGENCIES LIMITED, Dar-es-Salaam

in account with

B E R T R A M L I M I T E DIn the High
Court of
Tanganyika
Dar-es-SalaamNo. 2 ACCOUNT

No.12

		<u>Dr.</u>	<u>Cr.</u>
	3.8.54. TO CASH, loan @ 6% p.a.	Sh 269,000.00	
10	31.2.54 TO Interest	Sh 6,725.00	
	31.3.55 TO Interest	Sh 4,035.00	
	31.3.56 TO Interest	Sh 16,140.00	
	31.3.57 TO Interest	Sh 16,140.00	
	31.3.58 TO Interest	Sh 16,140.00	
	26.8.58 BY CASH		Sh 20,030.00
	3.2.59 BY CASH		Sh 26,000.00
	31.3.59 TO Interest	Sh 16,140.00	
	31.3.60 TO Interest	Sh 16,140.00	
	31.12.60 TO Interest	Sh 12,105.00	
20	31.12.60. BY BALANCE c/d		Sh 326,535,00
		<u>Sh 372,565.00</u>	<u>Sh 372,565,00</u>
	1.1.61 TO BALANCE b/d	Sh 326,535.00	

Judgment of
Weston J.
19th September
1961 - Cont.E. & O.E.

30 The defendant in reply denied liability to the plaintiff, and by paragraph 2 of the defence pleaded that the accounts set out above were "on the face of them and otherwise time-barred and no exemption (if any) to the ordinary period of limitation is claimed as required by the provisions of O.7 r.6 of the Civil Procedure Code".

Paragraphs 4, 5 and 6 of this defence are in the following terms:-

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"4. The Defendant company will contend that the claims of the plaintiff company as contained in the two accounts annexed to the plaint are barred by the statute of limitation by virtue of the provisions of Articles 57, 58 and 59 of the First Schedule to the Indian Limitation Act, 1908 applicable to this Territory or by one or more of them despite the statement in the plaint (which is denied) that the amount claimed is in respect of an open and current account.

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5. The Defendant company further denies that the loans were repayable on demand as alleged and puts the plaintiff company to the strict proof of the said allegation. Alternatively, the defendant company will contend that even if the loans were repayable on demand the same are barred by limitation by virtue of the provisions of article 59 of the Indian Limitation Act, 1908.

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6. The Defendant Company further states that the accounts annexed to the plaint are both simple accounts for loans and the principals in both the accounts are clearly time-barred and hence all the items of interest are likewise time-barred".

On 13th June 1961 the plaint was amended pursuant to a consent order of this Court by the addition of a new paragraph 7 thus worded:-

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"That the Plaintiff's claim is not barred by the law of limitation as the debt due to the Plaintiff Company has been acknowledged by the Defendant Company in its books and accounts from year to year".

and issue was joined upon reply of the defendant to the above new paragraph.

At the hearing it was agreed by the parties that the sole issue was that of limitation, and that if it were found that the debt claimed was

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not time-barred, judgement would be for the plaintiff; and conversely there should be judgement for the defendant if it were established that the plea of limitation was good.

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10 It would, I think, be convenient if the defendant's position as stated by Mr. O'Donovan were first set out. Learned counsel argued that the accounts were debtor and creditor accounts simpliciter. Each account was the record of a loan made by the plaintiff to the defendant and the repayments made by the defendant on account of principal and accrued interest. The accounts were not mutual, open and current accounts within the meaning of article 85 of the First Schedule to the Indian Limitation Act (hereinafter referred to as the Act). There was at no time a shifting balance. Accordingly, the period of limitation applicable was that provided for by article 59 of the First Schedule to the Act, that is to say three years from the dates on which the loans, respectively, were made.

20

30 It follows then, as to No.1 Account, which related to a loan of Shs. 85,000/- at 6% per annum made by the plaintiff to the defendant on 9th March 1951, various payments made by the defendant to the plaintiff between that date and 18th March 1955 prevented time from running out against the plaintiff. But from 18th March 1955, when a sum of Shs. 5,000/- was so paid, the account lay quiescent (except for the entry by the plaintiff of sundry sums representing interest) until 15th May 1958, when a payment of Shs. 300/- was made by the defendant to the plaintiff. Learned counsels submission was that since the debt became time-barred three years after 18th March 1955, that is to say on 18th March 1958, the Shs. 300/- paid on 15th May 1958 was ineffective to set time running again, having been made some two months after the expiry of the three-year period of limitation. Mr. O'Donovan conceded, however, that the plaintiff was entitled to Shs. 1,430/- cash advanced to

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the defendant on 9th June 1959, and to a further sum of Shs. 1,000/- advanced three days later.

As to Account No.2, which related to a loan of Shs. 269,000/- at 6% per annum made by the plaintiff to the defendant on 3rd August 1954, this became time-barred three years later on 3rd August 1957. The cash payment of Shs. 20,030/- made on 26th August 1958 was made just over a year too late to avail the plaintiff in any way.

10

In connection with all payments made by the defendant to the plaintiff Mr. O'Donovan contended that they were payments on account and nothing more. They were not accompanied by any promise to pay so as to revive the time-barred debts under section 25(3) of the Indian Contract Act. I can only regard this last submission as having been made by Mr. O'Donovan ex abundanti cautela since there is no question on the pleadings of any claim in contract, founded on that provision.

20

Turning now to the case for the plaintiff, Mr. Houry argued first that the accounts were mutual, open and current accounts where there had been reciprocal demands between the parties, and that as a consequence the appropriate period limitation was that laid down in article 85 of the First Schedule to the Act, that is three years from the close of the year in which the last item admitted or proved was entered in each of the accounts. Thus, as regards, No.1 Account, the three years would run from 31st December 1958, in view of the payment of Shs. 300/- by the defendant to the plaintiff on 15th May 1958; and as regards No.2 Account, three years from 31st December 1959, being the close of the accounting year in the course of which Shs. 26,000/- was so paid. If, however, Mr. O'Donovan's submission as to the period of limitation applicable were accepted, then the plaintiff was relying on successive acknowledgements of the debts by the

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defendant "in its books and accounts from year to year".

10 These, then, being the opposing submissions it seems to me I ought to say at once that in my judgement it is not open to the plaintiff, on his pleadings, to contend that article 85 of the First Schedule to the Limitation Act should or could apply. His claim is an unequivocal one for monies lent and advanced to the defendant and repayable on demand. There is no hint of a claim for any balance struck. In any event, and quite apart from the technicalities of pleading, it seems to me that on the face of them the accounts are clearly what Mr. O'Donovan says they are. I cannot read into them any mutuality of dealing so that each party could have a demand or right of action against each other. The first item in each

20 account states the date of the loan, the amount lent and the rate of interest, and I cannot accept for one moment Mr. Houry's contention that the amounts on the credit side of the accounts are "advances" made by the defendant to the plaintiff. Learned counsel for the plaintiff, as I have already said, argued that both companies were in Mr. Dharsee's hands as clay in the hands of a potter, and I have already said I accept this. I accept too, Mr. Houry's contention that as it suited

30 Mr. Dharsee he could pass a cheque from one company to the other. In this connection the ugly word "juggling" fell from learned counsel's lips. But I am not concerned here with what Mr. Dharsee might have done had he chosen. I can only look to what the plaintiff had done as appears from the documents before me, and these documents - the two accounts - spell out their nature in unmistakable terms. Accordingly I hold that

40 the proper period of limitation in this case is that contained in article 59 of the First Schedule to the Act.

I must now consider the Plaintiff's contention that there have been such acknowledgements of the debt as will have

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kept sufficient time running to enable him to maintain this suit. In this connection, a great number of documents was produced, and I think these may be listed as under:-

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1. Books of account of the defendant.
2. Books of account of the plaintiff.
3. Letters and certificates signed by or on behalf of the plaintiff.
4. Balance sheets of the plaintiff.
5. Balance sheets of the defendant for the years ending 31st December 1954, 1955, 1956 and 1957, prepared by the defendant's auditors. 10

These documents, other than the balance sheets of the defendant, can be disposed of shortly. Not one is "a writing signed by the party against whom such property or right is claimed", i.e. a writing signed by the defendant. None satisfies this first and fundamental requirement of section 19 of the Act. They would no doubt have been of immense value to the plaintiff had the question been one of proving an acknowledgment of the debt, and the only proof of this which can be entertained is a writing signed by the debtor. 20

Among the documents listed under item 3 above there were three certificates signed by Mr. Dharsee as director of the plaintiff company. These signatures appear under the words "For Bertram Ltd." Learned counsel for the plaintiff argued that having regard to what I have referred to as the factual situation, these signatures should be considered to be the signatures of the defendant. This is a proposition which I must reject. I was referred to no authority giving me reason to think that principles settled nearly a century ago by Salamon -v- Salamon & Co.(1897) A.C.22 H.L., were no longer valid. We are concerned here with the acts and deeds of the plaintiff and the defendant. Those of Mr. Wali Dharsee are of no interest or relevance. 30 40

But the defendant's balance sheets remain and to these I now turn. They are, as I have

10 said, in respect of the defendant's financial years ending 31st December 1954, 1955, 1956 and 1957. It is not in dispute that all were signed by the defendant. Mr. Houghton, the auditor employed by the defendant, gave evidence (which I accept without question) that among the defendant's liabilities, included in the amount appearing as "Loans" in each of these balance sheets, were the debts owing to the plaintiff; that indeed he did not sign the balance sheets until he had satisfied himself that the defendant was in fact liable to the plaintiff in the amounts shown in his (defendant's) books of account. This he did by obtaining certificates from the plaintiff's auditors (see Exhibits B and C) or the plaintiff himself (see Exhibits E and D) that the plaintiff's books of account confirmed the accuracy of the entries in the defendant's books.

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30 In Jones -v- Belgrove Properties Ltd. (1949) 2 K.B. 700, the Court of Appeal in England found no fault with the action of Birkett J. (as he then was) who at first instance had evidence before him of precisely the same kind as I have before me here, and found that a figure of £7,638,8.10d "to sundry creditors" appearing in the defendant's balance sheets included the debt of £1,807.0.0d "due and owing to the plaintiff" (at p.701). This case has been followed by the Indian courts (see the All India Reporter 1952 February, Part II, para 33, at p.145). Accordingly I hold that in this case each of the balance sheets is a writing signed by the defendant referring with sufficient particularity to his liability to the plaintiff. And I reject Mr. O'Donovan's argument, based on the statement in Rustomji on Limitation, 6th edn., (at p.213), that "an acknowledgment of an indebtedness upon the aggregate of several distinct classes of claims, but which neither refers to any particular claim nor to one debt only, has been held not sufficient to take any one of the claims out of the statute".

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But learned counsel for the defendant had other objections to the efficacy of the balance sheets as valid acknowledgements. He argued in the first place that the balance sheets had not been addressed or communicated to any person other than the defendant's own agents. Secondly - and this I think was his main objection - that they were insufficient as being acknowledgements of past, not subsisting liability.

10

In order to appreciate Mr. O'Donovan's main contention it is necessary to return to the evidence of Mr. Houghton. This gentleman was unable to say when the balance sheets were signed by the defendant, but he testified that he signed them only after the defendant had done so. Since Mr Houghton was able to give the dates on which he himself signed and the dates on which the balance sheets were sent to the defendant for signature in each case, the period within which, if not the precise date on which, the balance sheets were signed by the defendant can be fixed with certainty. It emerges that:-

20

(a) The balance sheet showing the defendant's financial position as at 31st December 1954 was sent to him for signature on 19th October 1956 and must have been signed by the defendant between that date and 27th October 1956, when Mr. Houghton testified he signed.

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(b) The balance sheet showing the defendant's financial position as at 31st December 1955 was sent to him for signature on 6th November 1957 and must have been signed by the defendant between that date and 19th November 1957, when Mr. Houghton testified he signed.

(c) The balance sheet showing the defendant's financial position as at 31st December 1956 was sent to him for signature on 12th March 1958 and must have been signed by the defendant between that date and 11th April 1958, when Mr. Houghton testified he signed.

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(d) The balance sheet showing the defendant's financial position as at 31st December 1957 was sent to him for signature on 28th April 1959 and must have been signed by the defendant either on that date or on 29th April 1959, when Mr. Houghton testified he signed.

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10 Thus, in each case the balance sheet was signed a considerable time after the end of the financial year to which it related. Mr. O'Donovan argued strongly that this was a fatal defect. The authorities and learned commentators he contended are agreed that section 19 of the Act requires an acknowledgement of a subsisting liability. An acknowledgment of a past liability has never been held sufficient. Learned counsel maintained that nothing could be clearer than that each of the balance sheets
20 produced was no more than an acknowledgement of such a past liability.

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The advice of their Lordships in Maniram Seth -v- Seth Rupchand (1906) 33 Calcutta, 1047 did not impugn this principle. The judgement has been misunderstood by certain courts in India where more had been read into it than was warranted by anything their Lordships had said. As it is put in Chitale and Rao's Commentary on the Act (Vol. 1 at
30 p.662);

"The above judgement of the Privy Council has been taken by some decisions to lay down that an admission of a past liability unaccompanied by any statement that it has been discharged necessarily implies that the liability is subsisting at the time the admission was made."

The learned commentators continue, however;--

40 "But, this view has not been generally accepted. The general view is that the Privy Council decision merely means that even a statement that a liability

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existed may, in the particular context in which it appears and in the circumstances in the light of which it has to be interpreted, imply an admission of a subsisting liability".

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Mr. O'Donovan adopted this as being a correct statement of the effect of the judgement, and argued that there was nothing in the context in which the acknowledgements in this case appear, namely the balance sheets, or in the circumstances in the light of which they fall to be construed implying an admission of subsisting liability. Each balance sheet would have been signed in precisely the same form in which it was signed if the defendant's debt had been discharged on the day following the close of the financial year in respect of which such balance sheet was prepared. It is not usual for a balance sheet to show that any liability has been discharged between its preparation and signature.

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20

Mr. Houry submitted shortly that the Privy Council decision, "properly construed", was in his favour.

The facts of the case are given accurately and briefly in Chitale and Rao, op cit, as follows:

"R and M had money dealing between each other. M died, leaving a will under which R was one of the executors. R applied for probate of the will. To this, objection was taken on the ground that he was indebted to the estate and hence, was not entitled to apply for probate. R replied by a statement which ran as follows: 'The applicant R is a big mahajan of Burhanpur paying Rs.106 as income-tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate'."

30

This statement was held sufficient acknowledgement within section 19 of the Act. As I read their Lordships' advice, the point which claimed their

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Lordships' special attention was quite unconnected with the question of past or subsisting liability. This was whether a conditional acknowledgement of liability was good in Indian law. Their Lordships state the problem thus (at p.1058):-

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10 "We have therefore the bare question of whether an acknowledgment of liability if the balance on investigation should turn out to be against the person making the acknowledgment is sufficient".

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And their answer was yes. It seems to me that at no time were their Lordships exercised by the question of the validity of an admission of past liability. They found the natural meaning of the last two sentences of the respondent's statement to be:-

20 "I am presently liable to M if the balance of the account I had with him for the five years before his death should turn out to be in his favour".

It was the dealings between the parties that were past. Their Lordships did not find that the respondent had made an admission of past liability and then infer from the circumstances that that liability had continued till the time of the making of the admission. They inferred from the circumstances that he had made an admission of an existing liability. This is clear from the following passage from their Lordships' judgment (at p.1057):-

30 "An acknowledgment according to the Indian Act must be signed by the party affected by it, and the only document, which can be relied upon as an acknowledgment signed by the respondent, is the statement filed by the respondent in the proceedings touching the application for probate, 40 the material part of which has been already set out, but which it is convenient here to repeat. 'For the last five years he' (the respondent) 'had open and current accounts with the deceased'. There can be no doubt that the five years spoken

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of are the five years before the death of Motiram, i.e., before 6th October 1898. On that date the whole of the indebtedness other than interest had been incurred, there having been no dealings since 12th May 1898. There is therefore a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that, whoever on the account should be shown to be the debtor to the other, was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative, if the balance should be ascertained to be against him".

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20

It would appear however, that at first instance the Civil Judge had ruled against the validity of the acknowledgment on the ground that it related to a past liability. Their Lordships' comment is as follows (at p.1059):-

"The acknowledgment, to which attention has been directed, is followed in the same paragraph by the following sentence: 'The alleged indebtedness does not affect his' (the respondent's) 'right to apply for probate.' Stress was laid by the Civil Judge upon the word 'alleged'. He was of opinion that the word 'had' in the sentence 'for the last five years he had open and current accounts with the deceased' and the word 'alleged' was fatal to the validity of the acknowledgment. Their Lordships cannot share this opinion. The first sentence shows that there were open accounts at the death of Motiram. If nothing further is alleged the natural presumption is that they continued unsettled at the time the statement was made. The sentence which follows is perfectly consistent with this

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admission. The meaning is 'even if there is a balance against the respondent, that does not disqualify him from fulfilling the duties of an executor', and it has been pointed out that what is relied upon here is an acknowledgment subject to the condition that an adverse balance really exists, and the condition is fulfilled in fact".

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10 I find myself, therefore, unable to agree that the decision is in favour of the plaintiff in this case. I feel bound to decide that the balance sheets are no more than acknowledgments of past liability, and as such not sufficient under section 19 of the Act.

In view of this finding I do not think it necessary to consider Mr. O'Donovan's other objection to the balance sheets.

20 I confess I come to this conclusion with some reluctance, the more so because it would appear that under English law the conclusion might well have been different. In Jones -v- Belgrove Properties Ltd. op cit, the position was apparently substantially what it is here, yet the plaintiff had no difficulty there. The balance sheets showed the company's position as at 21st May 1939, 1940, 1941, 1942, 1943 and 1945 and good acknowledgment was held to have been made on 31st December 1946.

30 In the final result, I must find that the plaintiff's claim is time-barred. Accordingly judgment will be entered for the plaintiff in the sum of Shs. 2,430/- only, conceded by the defendant, together with interest on that amount at Court rates from today's date until the date of payment. The plaintiff will pay 95% only of the costs of this suit.

Delivered in Court at Dar es Salaam this
19th day of September 1961.

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Dar-es-Salaam

No. 13

DECREE

(Issued under Rules 21 and 56 of the E.A.
Court of Appeal Rules, 1954.)

No. 13

Decree
19th September
1961

The Plaintiff Company claims :-

1. Shs. 349,962/52 from the Defendant Company
made up as follows:-

Shs. 23,427.52 on account of LOAN No. 1 and
Shs. 326,535.00 on account of LOAN No. 2

being moneys lent and advanced by the Plaintiff
Company to the Defendant Company on an open and
current account between the parties, which sum
being repayable on demand is due and owing as per
statements of Accounts annexed to the Plaint. 10

2. Shs. 6,040/45 being interest at the rate of
six per cent per annum as agreed or customary or by
way of damages on Shs. 349,962/52 from 1st January
1961 to the 15th April, 1961.

3. Further interest @ 6% p.a. from 16/4/61 till
judgment.

4. Costs of this suit.

5. Interest at Court rate on decretal amount. 20

6. Any further or other relief as this Honourable
Court may deem just in the circumstances.

This suit coming on this day for hearing and
final disposal before the Honourable Mr. Justice
Weston in the presence of G.N. Houry, Esq., Q.C.,
and G.S. Patel, Esq., Dar es Salaam, Advocates
for the Plaintiff Company and B.O'Donovan Esq.,
Q.C., Nairobi and P.R. Dastur, Esq., Dar es
Salaam, Advocates for the Defendant Company.

IT IS HEREBY ORDERED AND DECREED that:- 30

1. The Plaintiff Company's claim is time barred

but that the Defendant Company do pay to the Plaintiff Company the sum of Shs. 2,430/- only, as conceded by the Defendant Company with interest thereon at 6% p.a. from today's date until date of payment.

2. The Plaintiff Company do pay to the Defendant Company the 95% only of the costs of this suit.

10 Given under my hand and the seal of the Court, this 19th day of September, 1961.

Seal of Her Majesty's High Court of Tanganyika Sd: R. MacKay REGISTRAR

Issued & Signed: 19/10/61.

In the High Court of Tanganyika Dar-es-Salaam

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Decree 19th September 1961 - Cont.

No. 14

MEMORANDUM OF APPEAL

CIVIL APPEAL No.82 of 1961

BERTRAM LIMITED APPELLANT

VERSUS

CONSOLIDATED AGENCIES LIMITED RESPONDENT

20 (Appeal from a Judgment of Her Majesty's High Court of Tanganyika at Dar-es-Salaam (Honourable Mr. Justice J Weston) dated the 19th day of September, 1961 in Civil Case No. 57 of 1961.

BETWEEN

BERTRAM LIMITED PLAINTIFF

VERSUS

CONSOLIDATED AGENCIES LIMITED DEFENDANT)

30 BERTRAM LIMITED, the Appellant, above-named, APPEALS to Her Majesty's Court of Appeal for Eastern Africa against that part of the decision above-named on the following

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Memorandum of Appeal 10th November 1961

In Her Majesty's
Court of Appeal
for East Africa
at Dar-es-Salaam

No. 14

Memorandum of
Appeal 10th
November 1961
Cont.

grounds, namely :-

1. That the Learned Judge erred in holding :-

(a) That the Balance-Sheets of the Defendant Company for the years 1954, 1955, 1956 and 1957 are no more than acknowledgments of past liability and as such not sufficient under Section 19 of the Indian Limitation Act.

(b) That the Appellants claim is time-barred. 10

2. (a) That the Learned Judge should have held that the Balance-Sheets of the Defendant Company adduced in evidence for the years 1954, 1955, 1956 and 1957 were acknowledgments of the subsisting liability of the Defendant Company to the Plaintiff Company within section 19 of the Indian Limitation Act 1908.

(b) That the Plaintiff Company's claim was therefore not time-barred and should have entered judgment for the Plaintiff Company as prayed. 20

The Appellant therefore, prays that this Honourable Court may be pleased to set aside that part of the Judgment and Decree that Plaintiff Company's claim is time-barred and to enter judgment for the Appellant as prayed in the Plaint with costs.

Dated at Dar-es-Salaam, this 10th day
of November, 1961. 30

R.G. HOURY

GEORGE N. HOURY & COMPANY
ADVOCATES FOR THE APPELLANT.

Filed on 19th day of November, 1961.

Sgd. R.G. Patel
S.O. (Civ).

No. 15

NOTES OF ARGUMENTS ON
APPEAL, FORBES, A.G.P.

In her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

9.2.62

Coram: Forbes Ag.P.
Crawshaw Ag. V-P
Newbold J.A.

Houry Q.C., G.S. Patel and R.G.
Houry with him, for appellant.

10

O'Donovan Q.C., Dastur with him,
for respondent.

Houry opens:

Ask adjournment as late.

Thursday agreed as suitable date.

ORDER

Adjourned to 13.2.62 at 9.30.

A.G. Forbes
Ag.P
9.2.62.

13.2.62 Bench and Bar as before

20 Houry opens:

We have agreed certain points which will
shorten appeal as not necessary to refer
to record.

Hand in typed copy of agreed concessions.

(O'Donovan: Agree facts as stated.)

Refer to P. 100 line 45 - 51: Finding
of judge.

No. 15

Notes of
Arguments of
Appeal, Forbes
A.G.P. 13th
February 1962.

In her Majesty's
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No. 15

Notes of
Arguments of
Appeal, Forbes
Ag.P 13th
February 1962
Cont.

Submit the trial judge, even if he was right on that point, should have gone further and said that even if there were acknowledgments of past debts, he should have referred to the accounts - p.92 and p. 93 - from which it appears that on 15.5.58 there is a payment of 300/- - (p.92) and, on p. 93, payments on 26.8.58 and 3.2.59 of Shs. 20,030/- and 26,000/-, which are all admitted to have been by cheque. They appear in books as "cheque to you No. ...".

10

Have asked for production of cheques.

But though cheques normally stuck in books, this particular book was missing.

If judge right, his own finding brings case out of Limitation Act because of these payments which were acknowledged while subsisting - section 19 of Limitation Act.

If court with me on that point, I am home i.e. if acknowledgements made while debt still subsisting is not time barred.

20

No. 2 a/c would be time barred in April '63, and No. 1 a/c would be time barred in May '61. P. 97 of Record, line 30.

Submit that it is an acknowledgement of a past liability, but one still subsisting.

Any balance sheet made up to 31st December, signed on 1st January would be acknowledgment of past liability.

Here, starting from '54 it is continual acknowledgement that debt is subsisting. No authority to show not acknowledgment of subsisting liability. If paid during three years, will it not have said so.

30

No balance sheets or a/cs after 1958.

No.1 a/c - 300/- paid on 15.5.58.

Limitation for that is May '61.

Action filed in April '61.

Section 19 of Limitation Act.

I submit that last words "computed from time acknowledgment signed" - the acknowledgment was signed as shown in judgment, i.e. date of signing of balance sheets, and it is from that date that Limitation accrues.

In Her Majesty's
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No. 15

Notes of
Arguments of
Appeal, Forbes
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Cont.

10 Rustomji (5th Ed.) P. 355. acknowledgment by a director. Dharsee was only director of plaintiff company at the time and managing director of respondent company.

P. 346 of Rustomji: balance sheets.

Am asking court to find that acknowledgments in these balance sheets signed by the director imply a promise to pay, if not paid at the time.

Section 20 of Limitation Act.

20 What I am saying is that although payments in No.1 a/c (300/-) and in No.2 a/c, on the face of them appear to be time barred in a/cs, i.e. after limitation period had expired, the balance sheets are acknowledgments which revive the debts, and they were within the limitation period.

30 Submit that even if dates of acknowledgments in balance sheet, but refer back to last day of year to which they relate, decision is still wrong by reason of payments.

If wrong in saying period runs from date of signing yet the payments were made within period running from date to which a/cs relate.

Loan made on 3.8.54. (No. 2 a/c)

In her Majesty's
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Notes on
Arguments of
Appeal, Forbes
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Limitation on 3.8.57.

Between October '56 and debt acknowledgment
as subsisting at 31st December, 1954.

So debt good up to December 30th 1957.

That judge's finding.

Then acknowledgment of 1955 balance sheet -
signed between 6.11.57 and 19.11.57 at
which date debt was subsisting i.e. before
30.12.57 - of subsistence of debt at
31.12.57 - which brings limitation up to
31.12.58.

10

Then balance sheet for '56 signed between
March/April '58 on which date debt still
subsisting, i.e. before 31.12.58, brings
period to 31.12.59.

Then payment of cheques is made within
that period.

Acknowledgment of balance sheets for '57
in April 1959 - brings it to 30.12.60.

Houghton's evidence that no further
balance sheets.

20

Cheque of 300/- was payment made before
debt time barred - 15.5.58 - and extends
debt to 15.5.61. payment of Shs.20,030/-
and Shs. 26,000/- brings limitation period
on No. 2 a/c up to 3.2.62.

Privy Council case referred to by judge -
p. 98 of record - Maniram Seth v. Seth
Rupchand (1906) 33 Cal. 1047.

P.100 of Record lines 30 - 40.

30

Submit passage in my favour. When
acknowledgments in balance sheets made the
presumption was that the indebtedness was
continued.

Concede this argument not very strong.
But go back to my first argument, that
acknowledgments were good as at 31st
December of year to which they relate.

In Her Majesty's
Court of Appeal
For Eastern Africa
Dar-es-Salaam

Short adjournment.

A.G. Forbes

No. 15

On resumption: Bench and bar as before.

O'Donovan:

Notes of
Arguments of
Appeal, Forbes
Ag.P, 13th
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Cont.

10

Important feature of section 19 is that
fresh period created is computed from time
the acknowledgment is signed. No question
of acknowledgment of earlier debt and
computing time from that date.

Time is computed from time of
signature.

It must be acknowledgment of present
subsisting liability. 18.3.55 and
15.5.58 - more than 3 years between
payments.

20

Acknowledgment must be signed before
expiration of prescribed period.

Must be acknowledgment of debt due and
owing at date acknowledgment is made.

Rustomji - Curious commenting.

Consists of succession of stints which
are contradictory.

30

Is more a reference to Indian decided cases
than a commentary e.g. p. 193 of 6th Ed.
(P. 300 in 5th Ed). 6th Ed. P.233 (5th
Ed P.346). This is probably what a
judge said. Refers to 19 M.W.N. which
is not available. Reference to 1897, 20
Mad. 239. Have found that. That balance
sheet must have been signed in circumstances
in which debt was still subsisting.
Periaswamy v. Subramaniam I.L.R. (1897) 20
Mad. 239.

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No. 15

Notes of
Arguments of
Appeal, Forbes
Ag.P, 13th
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Cont.

Does not deal with balance sheets at all.
Must amount to acknowledgment that debt is
due at date acknowledgment is made.

(1925) Mad. 675 - Alayil v. Abdu and Ors.

Effect of decisions submit is that there
may be cases where acknowledgment of debt
as once subsisting is sufficient as it
constitutes an existing liability, i.e.
in circumstances where if debt discharged
one would expect a stint that debt had
been discharged.

10

No such expectation in case of a balance
sheet.

Rustomji 6th Ed. P. 192: Not sufficient
if acknowledgment merely shows debt due
at prior time.

5th Ed. P. 299 - top.

No. 1 a/c.

1st Balance sheet in respect of year 1954.
It would not show what had been paid since
that date. In fact there were payments
since that date.

20

Can one say looking at any of balance
sheets that on date it is signed the debt
is still due.

Normal balance sheet would never be an
acknowledgment.

Balance sheet cannot refer back to date to
which it refers in view of plain words of
section 19.

30

Crucial matter is date when the balance sheet
or any other document is signed - Evidence of
this can be given.

At date it is signed it must unequivocally admit that there is a debt then due.

Submit judge had correctly stated effect of Privy Council case - P.99 of Record.

Circumstances must be circumstances in which one construes acknowledgment.

Under Limitation Act a balance sheet can never operate as an acknowledgment.

10

Might be case - e.g. if balance sheet signed on 1st January of following year.

Stint at P. 346 of Rustomji (5th Ed) is bad law.

Point taken below: That balance sheet not published to 3rd party. No dealt with by Judge. Ask leave to take point.

(Houry: Do not take objection)

(ORDER: As no objection, leave granted)

20

P. 33: Balance sheets were drawn up by auditors, submitted for signature and then retained as confidential document.

Submit if no communication to anyone other than company's servants or agents, then he had not communicated it.

No authority. Rustomji P. 348. Publication can be to stranger.

(Publication to annual general meeting ?)

Concede that would be good enough. But at p. 33.

Houry: (In reply)

30

Rustomji accepted as good authority.

Additional point taken.

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Notes of
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Cont.

Dharsee was director and shareholder in each company.

Communication to him is surely acknowledgment of debt.

It is communication to the creditor.

(1939) Bom. 237 Bhalchandra etc. v. Chanbasappa etc. at p. 238.
Acknowledgment in document not addressed to any person.

Swamynath v. Subrama 50 Mad. (1927) 549. 10

If respondents argument correct, no balance sheet can be an acknowledgment of a debt for purposes of section 19.

Submit that is absurd.

Submit that in circumstances of present sequence of events when balance sheets year after year shown acknowledgment is of existing debt.

Balance sheets prepared from working records.

Case referred to by Judge - 20

Jones V. Belgrave Properties (1949)
2 K.B. 100.

Rustomji P. 300 - 1 (5th Ed.).

Section 19 of set.

Submit there was such an acknowledgment of debt in the balance sheets.

Ask for decision to be recovered and that judgment be entered for sum as prayed.

Ask certificate for two counsel.

O'Donovan:

111.

Also ask for certificate for 2 counsel.

C.A.V.
A.G. Forbes
Ag.P
13.2.62.

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No. 15
Notes of
Arguments of
Appeal, Forbes,
Ag.P, 13th
February 1962
Cont.

No. 16

NOTES OF ARGUMENTS ON
APPEAL - CRAWSHAW AG.VP.

9.2.62.

No. 16
Notes of
Arguments on
Appeal, Crawshaw
Ag. V-P, 13th
February 1962

10 Coram: Forbes Ag.P
Crawshaw Ag. V-P
Newbold J.A.

Houry Q.C, G.S. Patel and R.G. Houry
with him, for appellant.

O'Donovan, Q.C., Dastur with him, for
respondent.

Houry opens:

Asks that appeal be adjourned as it is now
late and O'Donovan returns to-day and I have
to go to Morogoro.

20 Court:

By consent adjourned to Thursday 13th
at 9.30.

E.D.W. Crawshaw
J.A.

9.2.62.

In Her Majesty's
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13.2.62. Bench and bar as before.

Houry opens:

Hands in typed facts agreed by Counsel.

No. 16

O'Donovan:

I agree them.

Notes of
Arguments on
Appeal,
Crawshaw Ag.
V-P, 13th
February 1962
Cont.

Houry:

100/45 Even if Judge right in this para.
as to past acknowledgments, he should have
gone further and referred to the accounts
appearing in his judgment at pages 92, 3.

10

At 92 payment of 300/- on 15.5.58.

At 93 payment of 20,030/- on 26.8.58.

At 93 payment of 26,000/- on 3.2.59.

These were all by cheques and appear in
respondent's books of A/c as "cheque to you".

Judge's own finding brings case out of
Limitation Act, because of these payments
which were acknowledged whilst they were
subsisting - section 19 Limitation Act.

If acknowledgments in balance sheets were
made whilst debt still subsisting, I am home.

20

No. 2 a/c time barred in April 1962.

No. 1 a/c time barred in May 1961.

I take dates from last date balance sheet
could have been signed.

97/27 Balance sheets signed nearly 2 years
after relevant year. Recognition of past
liability I admit, but a subsisting one,
unless shown it has been paid, which is not
alleged.

30

Starting with 1954 it is a continuing acknowledgment.

After 1958 a/cs not sufficiently maintained to enable balance sheets to be prepared.

As to No. 1 a/c I have taken time to run from date of payment of the 300/- on 15.5.58.

Section 19 Limitation Act.

10 Acknowledgment was signed by signing balance sheet and from that date time began to run afresh.

P. 355 (5th Ed) Rustomji on Limitation. Dharsee was the only director of the appellant company and Managing Director of respondent.

P. 346 - statement in balance sheet. Signature on balance sheet show implied promise to pay, even though a promise is not necessary under section 19.

20

Section 20 Limitation Act. The payments in No. 1 and No. 2 a/cs appear on the face of it to be time barred in a/c, the balance sheets are acknowledgment which revive them, and the acknowledgments were within the time period. Debt accrues from date of acknowledgment in balance sheet and not from date of loan.

Even if dates of acknowledgment are not taken as those on signing of balance sheets, they relate back to date to which balance relates. Payments were within time period, and signature on balance sheet revive them.

30

No. 2 a/c loan made on 3.8.54 Limitation Act section 20 - 2nd August, '57. Between 19th October '56 and 27th October '56 acknowledgment on balance sheet revives it.

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for Eastern Africa
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No. 16

Notes of
Arguments on
Appeal,
Crawshaw Ag. V-P
13th February
1962 - Cont.

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Notes of
Arguments on
Appeal,
Crawshaw Ag.V-P
13th February
1962 - Cont.

Between 6th and 19th November '57
acknowledgment in balance sheet, at which
date debt still subsisting and not time
barred until December '58.

Acknowledgment in '56 balance sheet signed
between 12th March and 11th April '58 on
which date still subsisting until end of
December '59.

Balance sheet '57 similarly brings us to
end '60. Therefore last payments shown
in a/cs are the date from which time last
began to run.

10

98 - Maniram case,

100/30 - 38.

On resumption: Bench and bar as before.

O'Donovan:

Section 19 - Fresh period computed from time
acknowledgment is signed. No question of
computing time from an earlier date up to
which it is admitted debt was still due.

20

Rustomji merely makes statements without
argument or logic.

He does little more than refer to Indian
cases.

P. 193 (6th Ed) Rustomji under section 19.
Admission of debt past existing.

P. 223 - balance sheets.

(1918) Mad. Weekly Notes. 48 Note (t).

(1897) 20 Mad. I. L. R. 239. Periaswamy v.
Subramniar. Acknowledgment must recognise
debt is due at time acknowledgment is made.

30

(1925) 91 I.C. 833 (Mad).

Acknowledgment of decree having been passed.

If a person writes "I admit having borrowed £5 from you yesterday" that might be sufficient, as one would expect him to add that he had repaid it if he had. Not the same presumption in signing balance sheet.

(5th Ed) Rustomji 299 (top.)

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No. 16

Notes of
Arguments on
Appeal,
Crawshaw Ag.V-P
13th February
1962 - Cont.

- 10 Date of signing balance sheet cannot show that debt is then still due as may have been interim payments, as in fact there were as shown at pages 92, 93. Therefore impossible time should begin to run from a date when acknowledgment is not an acknowledgment of the amount then due.

Support Judge's views of the Privy Council case.

- 20 99/29 - "Presently liable".

I would like to take point I took in lower court, but judge did not deal with it. Section requires that the acknowledgment must be communicated to someone. Balance sheets drawn up by auditors, signed by directors, and kept as confidential documents. Submit that communication to company's servants is not communication. No authority for this.

- 30 248 (5th Ed) Rustomji.

- 33 - Evidence that balance sheets not communicated to anyone.

Houry:

This court has always taken Rustomji as good authority.

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Communication was direct to creditor, for
Dharsee, represented both dr. and cr.
companies.

(1939) Bom. 237, Bhalchandra v. Chanbasappa.

No. 16

Swamynath v. Subrama 50 Mad. (1927) 549.

Notes of
Arguments on
Appeal,
Crawshaw Ag.V-P
13th February
1962 - Cont.

259 (5th Ed) Rustomji.

No balance sheet could ever be an
acknowledgment unless the signature can be
regarded as dating back to the end of the
period covered by balance sheet.

10

Balance sheet does not itself name cr. but
compiled from working records which do.

Jones v. Belgrave (1949) 2 All E.R. 198, 9.

300, 301 - Rustomji (5th Ed).

Both counsel ask for certificate for two
counsel.

Houry objects to costs from Nairobi.

Judgment reserved.

E.D.W. Crawshaw
Ag. V-P

20

13.2.62.

No. 17

No. 17

Notes of
Arguments on
Appeal Newbold
J.A. 13th
February 1962

NOTES OF ARGUMENTS ON
APPEAL, NEWBOLD, J.A.

9.2.62

Coram: Forbes Ag.P
Crawshaw Ag. V-P
Newbold J.A.

Houry Q.C., G.A. Patel and R.G. Houry with
him, for appellant.
O'Donovan Q.C., Dastur with him, for
respondent.

In Her Majesty's
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Houry opens:

Submit late in day to start - will not
finish today. Ask that it be put down
for Thursday.

Court:

10 What about Thursday.

Houry:

Agree.

O'Donovan:

Adjourned to 9.30 on 13.2.62.

C.D. Newbold J.A.
9.2.62.

13.2.62 - Bench and bar as before.

Houry opens:

20 We have agreed certain matters - put in
agreed facts and conceded point.

O'Donovan:

I agreed.

Houry:

P. 100 L 47 - Judge unable to agree that
case in favour of appellant and stated
that acknowledgments were of past debts.

30 Even if correct Judge should have referred
to accounts to which he refers at P. 92
and P. 93 from which on 15.5.58 payment of
300/- in No. 1 and on 26.8.58 and 3.2.59

No. 17

Notes of
Arguments on
Appeal, Newbold
J.A. 13th February
1962 - Cont.

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No. 17

Notes of
Arguments on
Appeal, Newbold
J.A. 13th February
1962 - Cont.

payments of 20,030/- and 26,000/- on
No. 2 account. These payments admitted
to be by cheque.

Submit that even if acknowledgments in
B/S are of past date his own finding brings
case out of Limitation Act as payments
acknowledged debt.

Submit No. 2 time barred April '62.

Submit No. 1 time barred May '61.

These dates last date of signature and date
of payment in No. 1 account. 10

Submit signature of B/S is of a subsisting
liability - it is a subsisting liability
unless shown as paid.

Starting from 1954 there is a continual
acknowledgment that debt subsisting.

If debt had been paid during years would they
not have said so.

After 1958 no accounts.

Section 19 of I.L. Act. 20

Submit words "acknowledgment so signed"
means material date is that on which b/S
signed.

P. 355 Rustomji Vol. I (5th Ed) -
acknowledgment by director.

P. 346 - acknowledgment in B/S.

Submit acknowledgments in B/S imply a
proviso to pay if not earlier paid.

Section 20 of I.L. Act - period runs afresh
from time of first payment. 30

Although payments in No. 1 and No. 2 accounts
made after limitation period expired, yet B/S

acknowledgments which revive debt and
acknowledgments within limitation period.

Say B/S an acknowledgment at date of
signature.

Submit even if dates of acknowledgment
not taken as dates of signature but refer
back to date of B/S finding wrong in view
of payments made by cheque.

No. 2 account

10

Loan made 3.8.54.
Period ends 2.8.57.
Between 19.10.56 - 27.10.56 debt acknowledged.

Due as at 31.12.54.

Between 6.11.57 - 19.11.57 debt acknowledged.

Due as at 31.12.55.

Between 17.3.58 - 11.4.58 debt acknowledged.

Due as at 31.12.56.

Between 28.4.59 - 29.4.59 debt acknowledged.

Due as at 31.12.57.

20

Acknowledgements in each case made within
statutory period and period now runs to
31.12.60.

Similarly with No.1 account.

Payments by cheque in each case made
within statutory period and they in turn
extend period.

Maniram Seth V. Seth Rupchand (1906) 33 Cal.
1047 - assumption that when acknowledgments
made the debts subsisted.

30

Adj. for few minutes.
C.D. Newbold.

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No. 17

Notes of
Arguments on
Appeal, Newbold
J.A. 13th February
1962 - Cont.

In Her Majesty's Court of Appeal for Eastern Africa Dar-es-Salaam

On resumption: Bench and bar as before.

O'Donovan:

No. 17

Notes of Arguments on Appeal, Newbold J.A. 13th February 1962 - Cont.

Section 19 - appellant submits fresh period computed from date of signature - this basis of appellant's case.

No. 1 account - break of more than 3 years between 18.3.55 and 15.5.58. There must be some acknowledgment within that period.

Section 19 requires two things -

- (1) acknowledgment must be signed before expiration of time period. 10
- (2) acknowledgment must be of debt due and owing at date when acknowledgment made.

Rustomji P. 193 (6th Ed) p. 300 (5th Ed)
P. 223 (6th Ed) p. 346 (5th Ed),
and stated in B/S supplement - case not available.

Periaswamy V. Subramaniam I.L.R. (1897) 20 Mad. 239 - acknowledgment must be one of debt due when acknowledgment made 20
Alayil v. Abdu (1925) Mad. 675, 1925 I.C. 833 (Mad).

Submit there may be cases where circumstances such that admission of past debt sufficient if can infer subsisting debt.

Rustomji P. 192 (6th Ed) - not sufficient if debt due at prior time.

P. 299 (5th Ed) - any admission short of debt due at time of admission not sufficient. 30

No.2 account could only be saved by B/S for 1954.

Submit that under section 19(1) B/S could not be taken to be the date to which B/S made up. Date of signature is of crucial importance.

The circumstances of a subsisting debt must be inferred from acknowledgment itself - not from surrounding circumstances.

Rustomji P. 346 (5th Ed) is bad law and not founded on case to which it refers.

Communication to other party.

Ask for leave to refer to them.

Houry:

Do not object.

10 Court:

As no objection leave granted.

O'Donovan:

Must be communicated to creditor or this party - Exp. 1.

Submit no communication if no communication to any person other than servant.

Houry:

20 There must have been communication to Dharsee who represented Bertram and then there must be communication to creditor.

Bhalchandra v. Chanbasappa (1939) Bomb.237 document not addressed to any person is a good act.

Swamynath v. Subrama (1927) 50 Mad. 549 - acknowledgment can be implied from circumstances.

Submit date of B/S is good.

Acknowledgment as at that date - otherwise B/S could never be acknowledgment.

30 In circumstances of sequence of events - years B/S etc. - submit there is a clear acknowledgment of subsisting debt.

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Notes of
Arguments on
Appeal, Newbold
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1962 - Cont.

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Jones v. Belgrave (1942) 2 K.B. 700.

Rustomji (5th Ed) p. 301 - circumstances in
which debt made.

No. 17

Section 19 - clear 0 where acknowledgment
made within period a fresh period starts.

Notes of
Arguments on
Appeal, Newbold
J.A. 13th February
1962 - Cont.

Ask that appeal be allowed with costs and
that judgment be entered for sum as prayed
in plaint. Ask for certificate for two
counsel.

C.A.V.

10

C.D. Newbold
J.A.
13.2.62.

No. 18

No. 18

Judgment
Forbes V-P
29th March
1962

JUDGMENT FORBES, V-P

BERTRAM LTD.APPELLANT

AND

CONSOLIDATED AGENCIES LTD.RESPONDENT

(Appeal from judgment of H.M. High Court of
Tanganyika at Dar-es-Salaam (Weston J.)
dated 19th September, 1961.)

20

in

Civil Case No. 57 of 1961

Between

Bertram Ltd.

Plaintiff

and

Consolidated Agencies
Ltd.

Defendant).

FORBES V-P

This is an appeal from a judgment and decree of the High Court of Tanganyika dated 19th September, 1961, whereby it was held that the bulk of the appellant company's claim against the respondent company was time-barred.

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Dar-es-Salaam

No. 18

The background to the action from which the appeal arises is stated by the learned judge of the High Court as follows:

Judgment
Forbes V-P
29th March
1962 - Cont.

10 "The parties to this action are private
limited liability Companies incorporated
in this Territory and carrying on
business in it, apparently as finance
companies exclusively. The companies
are two of a number formed by a Mr. Wali
Dharsee, who died on 16th November, 1959.
This gentleman, who was a legal
practitioner in these courts, was sole
director of the plaintiff company
20 (hereinafter referred to shortly as the
Plaintiff) from 1952 to the date of his
death. He was also a director of the
defendant company (hereinafter referred
to shortly as the defendant) from 1951
until he died, the other director being
one Mr. K.F. Jafrabadwalla. Mr. Houry
who appeared for the Plaintiff, was
exercised to impress upon me, and
adduced evidence which does satisfy me,
30 that in fact Mr. Wali Dharsee was in
effective control of all these legal
persons of his own creation, including
both plaintiff and defendant, and that
they were mere incorporeal puppets
brought into being solely to serve the
purposes of Mr. Wali Dharsee".

The appellant company's claim concerns
two loan accounts (hereinafter referred to
as "Loan No.1" and "Loan No.2" respectively)
40 and is stated in paragraph 3 of the plaint
(which was filed on 13th April, 1961) as
follows:

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No. 18

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1962 - Cont.

"3. The Defendant Company is indebted to the Plaintiff Company in the sum of Shs. 349,962/52 made up as follows:-

Shs.	23,427.52	on account of LOAN No.1 and
Shs.	326,535.00	on account of LOAN No. 2.
<hr/>		
Shs.	349,962.52	
<hr/>		

being moneys lent and advanced by the Plaintiff Company to the Defendant Company on an open and current account between the said two parties, which sum being repayable on demand, is due and owing, as per statements of Accounts annexed hereto and marked "A" and "B" respectively, to which the Plaintiff Company craves leave to refer". 10

There was also a claim for interest on the sum of Shs. 349,962.52 in respect of the period 1st January to 15th April, 1961.

The statement of account referred to in relation to Loan No. 1 is as follows:- 20

CONSOLIDATED AGENCIES LIMITED, DAR-ES-SALAAM
in account with

BERTRAM LIMITED

NO. 1 ACCOUNTS

	Dr.	Cr.	
9.3.51	TO: Cash Loan @ 6% p.a.	Shs. 85,000.00	
Oct.17	BY: Cash	11,615.00	30
Dec.14	BY: Cash	20,000.00	
Dec.31	TO: Interest	3,924.73	
11.3.52.	TO: Interest	1,220.31	
7.6.52.	BY: Cash	30,000.00	
31.3.54.	TO: Interest-2years	3,754.00	
16.4.54.	BY: Cash	4,000.00	
31.12.54.	TO: Interest	1,312.24	
15.2.55	BY: Cash	10,000.00	

	Dr	Cr.
18.3.55	BY:Cash	5,000.00
31.3.55	TO:Interest	287.50
31.3.56.	TO:Interest	940.00
31.3.57	TO:Interest	940.00
31.3.58	TO:Interest	940.00
15.5.58	BY:Cash	300.00
31.3.59	TO:Interest	1,044.18
9.6.59	TO:Cash (part payment repairs House 301 Regent Estate)	1,430.00
12.6.59	TO:Cash (ditto)	1,000.00
31.3.60	TO:Interest	1,223.50
31.12.60	BY:Balance c/d	23,427.52
	<u>Shs. 104,342.52</u>	<u>104,342.52</u>

In Her Majesty's
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No. 18

Judgment
Forbes V-P
29th March
1962 - Cont.

1.1.61 To Balance b/d Shs. 23,427.52

E. & O.E.

20 The Statement of Account in relation to Loan
No.2 is:-

"CONSOLIDATED AGENCIES LIMITED,
DAR-ES-SALAAM
In account with
BERTRAM LIMITED

No. 2 ACCOUNT

	Dr.	Cr.
3.8.54.	TO:Cash loan @ 6% p.a.	269,000.00
31.2.54	TO:Interest	6,725.00
30 31.3.55	TO:Interest	4,035.00
31.3.56	TO:Interest	16,140.00
31.3.57	TO Interest	16,140.00
31.3.58	TO: Interest	16,140.00
26.8.58	BY:Cash	20,030.00
3.2.59	BY:Cash	26,000.00
31.3.59	TO:Interest	16,140.00
31.3.60	TO:Interest	16,140.00
31.12.60	TO:Interest	12,105.00

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	Dr.	Cr.
31.12.60 BY: BALANCE c/d		326,535.00
	Shs. 372,565.00	<u>372,565.00</u>

No. 18

1.1.61 TO: BALANCE b/d 326,535.00

Judgment
Forbes V-P
29th March
1962 - Cont.

E. & O.E."

By an amendment to the plaint the
appellant company pleaded:

"7. That the Plaintiff's claim is not
barred by the law of limitation as
the debt due to the Plaintiff
Company has been acknowledged by the
Defendant Company in its books and
accounts from year to year."

10

The respondent company pleaded inter alia that
the accounts were time-barred under the
provisions of the Indian Limitation Act, which
applied in Tanganyika; the relevant period,
which is not in dispute, being three years.

The appellant company relied on certain
balance sheets of the respondent company as
acknowledgements of the existence of the loans
to keep them alive under section 19 of the
Limitation Act. That section (hereinafter
referred to as "section 19") reads as follows:

20

"19. (1) Where, before the expiration of
the period prescribed for a suit or
application in respect of any property or
right an acknowledgement of liability in
respect of such property or right has been
made in writing signed by the party against
whom each property or right is claimed, or
by some person through whom he derives title
or liability, a fresh period of limitation
shall be computed from the time when the
acknowledgement was so signed.

30

(2) Where the writing containing the
acknowledgement is undated, oral evidence
may be given of the time when it was signed;

but, subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

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Judgment
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1962 - Cont.

10

Explanation I. - For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

20

Explanation II. - For the purposes of this section, 'signed' means signed either personally or by an agent duly authorized in this behalf.

Explanation III. - For the purposes of this section an application for the execution of a decree or order is an application in respect of a right."

30

Although the particular loans made by the appellant company are not specified as such in the balance sheets, these loans are included in the general item "Loans" in each balance sheet, and the learned judge held, following Jones v. Bellgrove Properties Ltd. (1949) 2 K.B. 700, that this would be a sufficient acknowledgment of the debt - subject of course, to the point whether it could be said to be an acknowledgment of a subsisting liability. This part of the learned judge's decision which is favourable to the appellant company, has not been challenged by the respondent company. The learned judge, however, continued:

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"In order to appreciate Mr. O'Donovan's main contention it is necessary to return to the evidence of Mr. Houghton. This gentleman was unable to say when the balance sheets were signed by the defendant, but he testified that he signed them only after the defendant had done so.

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 18

Judgment
Forbes V-P
29th March
1962 - Cont.

Since Mr. Houghton was able to give the dates on which he himself signed and the dates on which the balance sheets were sent to the defendant for signature in each case the period within which, if not the precise date on which, the balance sheets were signed by the defendant can be fixed with certainty. It emerges that:-

- (a) the balance sheet showing the defendant's financial position as at 31st December 1954 was sent to him for signature on 19th October 1956 and must have been signed by the defendant between that date and 27th October 1956, when Mr. Houghton testified he signed. 10
- (b) The balance sheet showing the defendant's financial position as at 31st December 1955 was sent to him for signature on 6th November 1957 and must have been signed by the defendant between that date and 19th November 1957, when Mr. Houghton testified he signed. 20
- (c) The balance sheet showing the defendant's financial position as at 31st December 1956 was sent to him for signature on 12th March 1958 and must have been signed by the defendant between that date and 11th April 1958, when Mr. Houghton testified he signed. 30
- (d) The balance sheet showing the defendant's financial position as at 31st December 1957 was sent to him for signature on 28th April 1959 and must have been signed by the defendant either on that date or on 29th April 1959 when Mr. Houghton testified he signed. 40

Thus in each case the balance sheet was signed a considerable time after the end of the financial year to which it related. Mr. O'Donovan argued strongly that this was a fatal defect. The authorities and learned commentators he contended are agreed that section 19 of the Act requires an acknowledgment of a subsisting liability. An acknowledgment of a past liability has never been held sufficient. Learned counsel maintained that nothing could be clearer than that each of the balance sheets produced was no more than an acknowledgment of such a past liability.

In Her Majesty's
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No. 18

Judgment
Forbes V-P
29th March
1962 - Cont.

The learned judge, after considering the case of Maniram Seth v. Seth Rupchand (1906) 33 Cal. 1047 (P.C.), on which Mr. Houry relied, agreed with Mr. O'Donovan's arguments and held that the accounts were time-barred, saying:

"I find myself, therefore, unable to agree that the decision is in favour of the plaintiff in this case. I feel bound to decide that the balance sheets are no more than acknowledgments of past liability, and as such not sufficient under section 19 of the Act.

In view of this finding, I do not think it necessary to consider Mr. O'Donovan's other objection to the balance sheets.

I confess I come to this conclusion with some reluctance, the more so because it would appear that under English law the conclusion might well have been different. In Jones v. Bellgrove Properties Ltd. op. cit., the position was apparently substantively what it is here, yet the plaintiff had no difficulty there. The balance sheets showed the company's position as at 21st May, 1939, 1940, 1941, 1942, 1943 and 1945 and good acknowledgment was held to have been made on 31st December 1946.

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 18

Judgment
Forbes V-P
20th March
1962 - Cont.

In the final result, I must find that the Plaintiff's claim is time-barred. Accordingly, judgment will be entered for the plaintiff in the sum of Shs. 2,430/- only, conceded by the defendant, together with interest on that amount at Court rates from today's date until date of payment. The plaintiff will pay 95% only of the costs of this suit".

At the commencement of the hearing of the appeal Mr. Houry and Mr. O'Donovan, who appeared respectively for the appellant company and the respondent company both at the trial and on the appeal, put in an agreed statement, on the basis of which the appeal was argued. The statement is as follows:

10

"CONCEDED BY APPELLANT AND RESPONDENT

THAT

1. Walli Dharsee (Advocate) was the Managing Director of both Plaintiff and Defendant Companies i.e. Bertram Limited and Consolidated Agencies Limited. 20
2. The books of account of both companies were kept in his office under his control and direction.
3. The payment in No.1 account of Shs. 300/- on the 15.5.58 and in No.2 account Shs. 20,030/- on the 26.8.58 and Shs. 26,000/- on the 3.2.59 were paid by cheque by the Defendant (Respondent) Company to Plaintiff (Appellant) Company as appearing in the books of account of the said Companies. 30
4. No express promise to pay is required under the Limitation Act in acknowledgments under sec. 19 of the said act.
5. The only issue is whether the suit is time-barred. 40

6. If the suit is not time barred there will be judgment for Plaintiff (Appellant) as prayed in the plaint.

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 18

Judgment
Forbes V-P
29th March
1962 - Cont.

10 In this court Mr. Houry argued, as he had done in the court below, that the signature of the balance sheets by the directors operated as acknowledgments of the existence of the debts as at the date of signature. Alternatively, he argued that the balance sheets must at least be effective admissions of the existence of the loans on the dates to which they referred, and that, taking into account the payments of Shs. 300/- in respect of Loan No. 1 on 15th May, 1958 and Shs. 20,030/- and Shs. 26,000/- in respect of Loan No. 2 on 26th August, 1958 and 3rd February, 1959, respectively, which payments had been made by cheque, the suit would still be within the period of limitation. He relied on a passage in THE LAW OF LIMITATION by RUSTOMJI (5th Ed) where, at page 346, the learned author says:

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"A statement in a balance sheet acknowledging a debt due by the company is sufficient within section 19".

Mr. O'Donovan's reply to both arguments was that any statement of a debt in a company balance sheet, unless actually signed by the directors on the day to which it relates, is never more than an acknowledgment of the existence of a past debt, and that an acknowledgment of a debt, to be effective for the purposes of section 19, must be an acknowledgment of an existing debt. He contended that the passage in RUSTOMJI relied on by Mr. Houry was bad law.

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I accept that an acknowledgment of a debt, to be effective for the purposes of section 19 must be an acknowledgment of an existing debt. There is ample authority in India to this effect, and I agree with the learned trial judge that nothing in Maniram Seth v. Seth Rupchand (supra) is in conflict with this view. It follows, I think, that if the

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Court of Appeal
for Eastern Africa
Dar-es-Salaam

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Judgment
Forbes V-P
29th March
1962 - Cont.

signature of the balance sheets by the directors merely operates as an admission of the existence of the debt as at the date to which the balance sheet refers, that is no more than an admission of a past debt and would not be effective as an acknowledgment for the purposes of section 19. That I think, disposes of Mr. Houry's second argument. It remains, however, to consider whether the signature of the balance sheets can operate as admissions of the existence of the debt at the dates of signature.

10

At first sight Mr. O'Donovan's argument that the signature of a balance sheet can only operate as an admission of a debt shown thereon as at the date to which the balance sheet refers, appears sound. Nevertheless this does not appear to be the interpretation which courts have put on balance sheets. So far as the passage in RUSTOMJI set out above is concerned, the earlier of the Indian cases referred to by the learned author in the relevant footnote does not, with respect, appear to concern balance sheets; and the report of the later case, which appears to be the principal authority for his statement, is unfortunately not available. However, in the English case to which he refers, Re Atlantic and Pacific Fibre Co. (1928) Ch. 836, it was held in respect of debentures and debenture interest, that:

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"the issue of the balance sheets constituted, in the circumstances, a sufficient acknowledgment of the company's indebtedness to the plaintiff and the other debenture holders under the debentures." 30

It appears implicit in this that the balance sheets were an admission of liability as at the date of issue of the balance sheets. The Bellgrove Properties case (supra) followed the Atlantic and Pacific Fibre Co. decision. In the Bellgrove Properties case the balance sheets considered were the balance sheets of the company as at 21st May, 1939, 1940, 1941, 1942, 1943 and 1945, which were presented to the shareholders of the company on 31st December, 1946, having been

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previously signed by a firm of chartered accountants as agents of the company and by two directors of the company. On these balance sheets it was held by Birkett J. (as he then was) at first instance that "the company had made an acknowledgment in writing signed by their agents to the plaintiff that the debt remained unpaid and due to him on 31st December, 1946"; i.e. the date of presentation of the balance sheets to the shareholders, which was some 19 months after the date to which the last balance sheet related. This finding was apparently not challenged on the appeal, and was accepted by the Court of Appeal. The Bellgrove Properties case was considered and distinguished in Re Transplanters (Holding Co.) Ltd. (1958) 2 All E.R. 711, but no comment was directed to this aspect of the case. The decision in the Bellgrove Properties case was considered and applied in India by the High Court of Madras in Rajah of Vizianagaram v. Official Liquidator (1952) A.I.R. (Mad.) 136. At page 145 the court, after referring to the decision in the Bellgrove Properties case, and, inter alia, to the finding that the balance sheet contained an acknowledgment that the debt "at the date of the annual general meeting" remained unpaid and due, said:

In Her Majesty's
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for Eastern Africa
Dar-es-Salaam

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Judgment
Forbes V-P
29th March
1962 - Cont.

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"Mr. Tiruvenkatachari contends that this decision should not be applied and is erroneous. On the other hand, Mr. Rajah Ayyar contends that the observations of the Privy Council in "Maniram Seth v. Seth Rupchand" 33 Cal.1047 at p.1060 are to the effect that the provisions of the Limitation Act in England regarding acknowledgment are more stringent than what they are in India. We have not been shown any reason why the judgment of the Court of Appeal should not be followed by us".

I think we ought to follow and apply those decisions in the instant case. The Bellgrove Properties case relates to the date

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 18

Judgment
Forbes V-P
29th March
1962 - Cont.

of presentation of the balance sheets to the share-holders at the annual general meeting, and not to the date of signature by the directors. However, the significance of the date of presentation to the shareholders is that under the English law the acknowledgment must be made to the person whose claim is being acknowledged. This is not necessary under section 19. Under section 19 signature by the directors as agents of the company is a sufficient acknowledgment. On the basis of the decision in the Bellgrove Properties case, and bearing in mind that the period of time in the instant case between the days to which the balance sheets relate and the dates of signature of the balance sheets is comparable to the relevant period in the Bellgrove Properties case, I would hold that the signature of the balance sheets by the directors was an ineffective acknowledgment of the existence of the debt as at the date of the signature. This is the opposite conclusion to that reached by the learned trial judge, but the learned judge did not have his attention drawn to the Rajah of Vizianagaram case, which shows that the Bellgrove Properties case has been followed in India in relation to section 19.

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If I am right, it follows that successive acknowledgments were made in the respective balance sheets which kept alive the right to recover the debt. The last balance sheet was signed on 28th or 29th April, 1959, and accordingly the suit, which was filed on 13th April, 1961, was within the limitation period.

30

I would accordingly allow the appeal with costs and order that judgment be entered for the appellant company with costs as prayed in the plaint.

Dated at Dar-es-Salaam this 29th day of
March 1962.

40

A.G. Forbes
VICE-PRESIDENT

No. 19

JUDGMENT - CRAWSHAW, J.A.

BERTRAM LIMITED APPELLANT

AND

CONSOLIDATED AGENCIES LIMITED RESPONDENT

(Appeal from judgment of H.M. High Court
of Tanganyika at Dar-es-Salaam (Weston J.)
dated 19th September, 1961

in

Civil Case No. 57 of 1961

10

Between

Bertram Limited Plaintiff

And

Consolidated Agencies
Limited Defendant).

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 19

Judgment
Crawshaw J.A.
29th March, 1962.

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I have had the advantage of seeing the
judgments of my brother judges, and agree
that the appeal should be allowed with costs.
The English cases to which they have referred
are I think relevant in spite of the
difference in the wording of section 19 of
the Indian Limitation Act, which is applicable
in Tanganyika, and the English law at the time
applicable to the decision of those cases.

Dated at Dar-es-Salaam this 29th day of
March, 1962.

(E.D.W. CRAWSHAW)
JUSTICE OF APPEAL

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 20

JUDGMENT, NEWBOLD, J.A.

BERTRAM LIMITEDAPPELLANT

No. 20

AND

CONSOLIDATED AGENCIES LIMITEDRESPONDENT

Judgment
Newbold J.A.
29th March
1962.

(Appeal from judgment of H.M. High Court
of Tanganyika at Dar-es-Salaam (Weston J.)
dated 19th September, 1961.

in

Civil Case No. 57 of 1961

Between

10

Bertram Limited Plaintiff

and

Consolidated Agencies
Limited Defendant).

I agree that the appeal should be allowed with costs. In Jones v. Bellgrove Properties Ltd. (1949) 2 K.B. 700, which was followed in Rajah of Vizianagaram v. Official Liquidator (1952) A.I.R. (mad.) 163, it was held that a statement in a Balance Sheet of an amount owing to creditors constituted an acknowledgment in writing that the debt remained unpaid and due at the date of the annual general meeting. This being so it must equally be an acknowledgment of a subsisting debt at the date the Balance Sheet is signed by the Director, as that date must be earlier than the date of the annual general meeting. I am fortified in this view by the fact that the books of the respondent company, the evidence of the auditor and, in relation to the earlier Balance Sheets, the subsequent Balance Sheets show that the debts in question were subsisting at the date

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of the signature of each of the Balance Sheets. If the Balance Sheets are acknowledgements of subsisting debts at the dates of their signature, then, as each such acknowledgement was made within the limitation period, the right to recover the debts was kept alive and the suit was filed within the limitation period.

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 20

Judgment
Newbold K.A.
29th March
1962 - Cont.

10 Dated at Dar-es-Salaam this 29th day of
March, 1962.

Sgd. C.D. Newbold

JUSTICE OF APPEAL

No. 21

ORDER

No. 21

Order

BERTRAM LIMITEDAPPELLANT
and

29th March 1962

CONSOLIDATED AGENCIES LIMITEDRESPONDENT

20 (Appeal from the Judgment & Decree of Her
Majesty's High Court of Tanganyika at Dar-es-
Salaam (Mr. Justice Weston) dated the 19th day
of September, 1961).

In

CIVIL CASE NO. 57 of 1961

Between

BERTRAM LIMITEDPlaintiff

And

CONSOLIDATED AGENCIES LIMITED. Defendant

30 Before: The Honourable Mr. Justice A.G. Forbes,
Vice-President

The Honourable Mr. Justice E.D.W.
Crawshaw, Justice of Appeal, and

The Honourable Mr. Justice C.D.
Newbold, Justice of Appeal .

THIS APPEAL coming for hearing on the 13th
day of February, 1962, and UPON hearing G.N.

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 21

Order

29th March 1962

Continued

Hourly, Esquire of Her Majesty's Counsel, with
G.S. Patel, Esquire, Counsel for the Appellant
and B.O'Donovan, Esquire, of Her Majesty's
Counsel, with P.R. Dastur, Esquire, Counsel for
the Respondent, IT WAS ORDERED that the appeal
do stand for judgment and upon the same coming
for judgment this day IT IS ORDERED that the appeal
be allowed with costs for two Counsel and that
judgment be entered for the Appellant Company
with costs as prayed in the plaint.

10

Given under my hand and the seal of the
Court at Nairobi, this 29th day of March, 1962.

Issued & Signed on: 24/4/62. Sgd. R. MacKay
DEPUTY REGISTRAR

No. 22

Order granting
Final Leave to
Appeal to Her
Majesty in
Council
21st March
1962

No. 22

ORDER GRANTING FINAL LEAVE
TO APPEAL TO HER MAJESTY IN
COUNCIL

Civil Application No. 4 of 1962 (P.C.)

In the matter of an intended Appeal to H.M.
in Council

20

(From Original Decree in Civil Appeal No. 82
of 1961 of H.M. Court of Appeal for Eastern
Africa at Dar-es-Salaam).

CONSOLIDATED AGENCIES LIMITEDAPPLICANT
(Original Respondent)

versus

BERTRAM LIMITEDRESPONDENT
(Original Appellant)

In Chambers this 21st day of November, 1962.

Before the Honourable Mr. Justice Lawrence Weston. 30

ORDER

In Her Majesty's
Court of Appeal
for Eastern Africa
Dar-es-Salaam

No. 22

Order granting
Final Leave to
Appeal to Her
Majesty in
Council
21st March
1962 - Cont.

UPON application made to this Court by
Counsel for the above-named Applicant on the
21st day of November, 1962 for final leave to
appeal to Her Majesty in Council as a matter
of right under sub-section (a) of the section
11 of the Appellate Jurisdiction Ordinance,
1961 (No. 55 of 1961), and UPON READING the
affidavit of Pirojshaw Rustomji Dastur sworn
10 on the 31st day of October 1962 and UPON
HEARING Counsel for the Applicant and for the
Respondent THIS COURT DOETH ORDER that the
Applicant do have final leave to appeal as a
matter of right to Her Majesty in Council
from the judgment and order above-mentioned
and that the costs of this application be
costs in the intended appeal AND IT IS
FURTHER ORDERED that the record of the
intended appeal be dispatched to the
20 Registrar of the Privy Council within 15
days from today.

Dated at Dar es Salaam this 21st day
of November 1962.

(Sgd.) R. MacKay

DEPUTY REGISTRAR
HER MAJESTY'S COURT OF APPEAL FOR
EASTERN AFRICA

Signed and Issued: 24/11/62.

EXHIBIT "A" BALANCE SHEET 1954

CONSOLIDATED AGENCIES LIMITED
BALANCE SHEET, 31ST DECEMBER 1954

H.M. High Court of Tanganyika
Civil Case No. 57 of 1961
Exhibit No. A. Balance Sheets 1954 to 1957
(4 Balance Sheets)

Put in by Plaintiff
Sgd. L. Weston
Judge

EXHIBITS
"A"
Balance Sheet
1954

1953 Shs.	Authorised Shs.	Issued and fully paid Shs.	1953 Shs.		Shs.	Shs.
	CAPITAL			FIXED ASSETS		
200,000	Shares of Shs.1,000/- each	<u>200,000.00</u>	200,000.00	13,296	Freehold land, at cost	13,296.00
<u>163,081</u>	UNAPPROPRIATED PROFIT	<u>16,149.15</u>	<u>200</u>		Furniture, at director's valuation.	<u>200.00</u> 13,496.00
<u>363,081</u>	Total Capital and Reserves	216,149.15	13,496		INVESTMENTS, at cost:-	
	CURRENT LIABILITIES AND PROVISIONS				75,000 shares of Shs.1,000/- each fully paid in Tanganyika Sisal Estates Limited.	75,000.00
62,013	Trade creditors and accrued liabilities.	92,542.56			44 shares of Shs.100/- each fully paid in Farida Estates Limited.	14,124.80
9,106	Director's current account	9,106.00			5 shares of Shs.1,000/- each fully paid in Pugu Estates Limited.	5,000.00
<u>257,385</u>	Loans	<u>412,385.00</u>	514,033.56		201 shares of Shs.100/- each fully paid in Mtoni Estates limited	20,100.00
<u>328,504</u>					75 shares of Shs.100/- each fully paid in Magogoni Estates Limited.	7,500.00
	W. Dharsee Director				20% share in Mboa Maji Syndicate:- Estate account	11,566.70
	K.F. Jafrabadwalla Director				Hotel account	4,416.72
					Part payment against one-third share of 20% interest in Diamondabad Estates Syndicate.	5,580.00
					One-third share in plots 6 and 14 Ursino Estate	4,668.00
					One-third share in plots 51 and 52 Ursino Estate	<u>4,000.00</u> 151,956.22
			<u>137,708</u>		CURRENT ASSETS	
			76,668		Secured loans and interest thereon	354,853.35
			-		Less Provision for doubtful debts	<u>150,000.00</u> 204,853.35
			326,700		Unsecured loans and interest thereon	255,209.68
			78,175		Director's current account	63,926.82
			42,500		Income tax overpaid	35,400.00
			<u>16,338</u>		Balance at bankers	<u>5,340.64</u> 564,730.49
			<u>540,381</u>			
<u>691,585</u>						
	Shs.	<u>730,182.71</u>	<u>691,585</u>			Shs. <u>730,182.71</u>

REPORT OF THE AUDITORS TO THE MEMBERS

We have audited the above balance sheet.

- We have been unable to ascertain the market value of investments which cost Shs. 56,856.22
- Subject to the foregoing remark, we have obtained all the information and explanations we have required and in our opinion, the above balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of our information and the explanations given to us and as shown by the books of the company

DAR ES SALAAM, 27th October 1956

COOPER BROTHERS & CO.
Chartered Accountants.

EXHIBIT "A"

CONSOLIDATED AGENCIES LIMITED
 PROFIT AND LOSS FOR THE YEAR ENDED 31ST DECEMBER 1955

EXHIBITS
"A"
 Profit & Loss
 Account 1955

1954		Shs.	Shs.	1954		Shs.
Shs.		Shs.	Shs.	Shs.		Shs.
187	Registration fees	-		27,295	Interest receivable	33,688.00
<u>686</u>	Rates	371.22		-	Rent receivable	675.00
<u>873</u>			371.22	-	Profit on sale of land	1,881.01
	Administration expenses :-					
14,586	Interest payable	17,080.00				
41	Bank charges	22.50				
1,000	Audit and accountancy	2,000.00				
<u>628</u>	General expenses	<u>655.00</u>	19,757.50			
<u>16,255</u>						
10,167	Profit for the year before Income tax		16,115.29			<u>36,244.01</u>
<u>27,295</u>			<u>36,244.01</u>	<u>27,295</u>		<u>36,244.01</u>
150,000	Provision for doubtful debts		-	10,167	Profit for the year before income tax	16,115.29
7,100	Provision for income tax		4,100.00	163,082	Profit unappropriated at 31st December 1954	16,149.15
16,149	Profit unappropriated at 31st December 1955.		28,164.44			
<u>173,249</u>			<u>32,264.44</u>	<u>173,249</u>		<u>32,264.44</u>

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EXHIBIT "A"

AUDITORS REPORT

COOPER BROTHERS & CO.

Exhibits "A"
Auditors
Report
11th April
1958.

P.O. BOX 45,
DEWHURST BUILDING
DAR ES SALAAM,
TANGANYIKA.

CONSOLIDATED AGENCIES LIMITED

REPORT OF THE AUDITORS TO THE MEMBERS

10 We have audited the annexed balance sheet of Consolidated Agencies Limited at 31st December 1956.

No certificates in respect of investments of a book value of Shs. 121,744/80 have been exhibited to us nor have we been able to ascertain the market value thereof.

20 No accounts or agreements in respect of syndicates in which this company has shares amounting to Shs.47,604/29 have been produced to us.

No agreements or statements in respect of debtors, Loans and accrued interest receivable amounting to Shs. 535,214/31 or in respect of loans and accrued interest payable amounting to Shs.364,208/78 have been produced to us. Consequently we are unable to state whether the correct interest is being brought into account or whether repayments are being made correctly.

30 Interest charged in the year amounting to Shs. 33,966/- has not been received.

The securities held in respect of loans and accrued interest amounting to Shs.396,827/35 have not been produced to us.

No evidence in support of creditors amounting to Shs. 52,756/97 has been produced to us.

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Exhibits "A"
Auditors
Report
11th April
1958.
(continued)

No certificates in support of directors' current accounts amounting to Shs.143,343/32 have been produced to us.

No statutory books could be produced to us.

Consequently, we are neither able to state that we have received all the information and explanations that we have required nor that the annexed balance sheet shows a true and correct view of the state of the company's affairs.

10

COOPER BROTHERS & CO.

Chartered Accountants

DAR ES SALAAM, 11th April 1958.

EXHIBIT "A"

CONSOLIDATED AGENCIES LIMITED
BALANCE SHEET, 31ST DECEMBER 1956

EXHIBITS
"A"
Balance Sheet
1956

1955		Authorised	Issued and	1955		
Shs.		Shs.	fully paid	Shs.		Shs.
			Shs.			Shs.
	CAPITAL				FIXED ASSETS	
200,000	Shares of Shs. 1,000/- each	200,000.00	200,000.00	-	House on Plot 301 Regent Estate	53,622.92
				13,438	Freehold land at cost	13,438.00
				200	Furniture, at directors valuation	200.00
				<u>13,638</u>		
28,164	Profit unappropriated		154,807.47			67,260.92
<u>228,164</u>			<u>354,807.47</u>			
	CURRENT LIABILITIES AND PROVISIONS				INVESTMENTS	
					At cost :-	
186,837	Creditors and accrued liabilities	59,057.97		75,000	Tanganyika Sisal Estates Limited	75,000.00
9,106	Director's current account	9,106.00		14,125	75 shares of Shs.1,000/- each fully paid	
307,401	Loans and accrued interest	<u>364,208.78</u>	432,372.75	5,000	Farida Estates Limited	14,124.80
				20,100	44 shares of Shs.100/- each fully paid	
				7,500	Pugu Estates Limited	5,000.00
				-	5 shares of Shs.1,000/- each fully paid	
					Mtoni Estates Limited	20,100.00
					201 shares of Shs.100/- each fully paid	
					Magogoni Estates Limited	7,500.00
					75 shares of Shs.100/- each fully paid	
					First Permanent Building Society:-	20.00
					1 subscription savings share	<u>121,744.80</u>
	W. Dharsee Director			11,567	20% shares of Mboa Maji Syndicate:-	11,566.70
	K.F. Jafrabadwalla Director			4,416	Estate account	4,416.72
				4,668	Hotel account	4,668.00
				4,000	One third share in Plots 6 and 14 Ursino	4,000.00
					One third share in Plots 51 & 52 Ursino	
					One third share of 20% interest	
					Diamondabad Estate Syndicate	<u>21,952.87</u>
				<u>21,953</u>		168,349.09
				<u>168,329</u>	CURRENT ASSETS	
				375,701	Secured loans and accrued interest	396,827.35
				<u>150,000</u>	Less Provision for doubtful debts	<u>150,000.00</u>
				225,701		246,827.35
				228,050	Debtors, unsecured loans and accrued interest	138,386.96
				63,927	Director's current account	134,237.32
				31,300	Income tax overpaid	26,500.00
				471	Balance at bankers	5,618.58
				92	Cash in hand	-
				<u>549,541</u>		551,570.21
<u>731,508</u>		Shs.	<u>787,180.22</u>			Shs.
						<u>787,180.22</u>

This is the balance sheet referred to in our report dated 11th April 1958 which is annexed.

COOPER BROTHERS & CO.
Chartered Accountants.

EXHIBIT "A"

CONSOLIDATED AGENCIES LIMITED
 PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDED 31st DECEMBER 1956

EXHIBITS
"A"
 Profit & Loss
 Account
 1956

1955 Shs.		Shs.	Shs.	1955		Shs.
<u>371</u>	Rates		638.35	33,688	Interest receivable	33,966.00
	Administration expenses :-			675	Rent receivable	6,100.00
17,080	Interest payable	17,556.62		1,881	Profit on sale of land	-
23	Bank charges	20.00			Dividends received from Tanganyika Sisal Estates Limited (Gross)	150,000.00
2,000	Audit and accountancy	2,000.00				
655	General expenses	85.00				
-	Legal expenses	<u>823.00</u>				
<u>19,758</u>			20,484.62			
<u>16,115</u>	Profit for the year before income tax		168,943.03			
<u>36,244</u>		Shs.	<u>190,066.00</u>	<u>36,244</u>		Shs. <u>190,066.00</u>
4,100	Provision for income tax		42,300.00	16,115	Profit for the year before income tax	168,943.03
28,164	Profit unappropriated at 31st December 1956		154,807.47	16,149	Profit unappropriated at 31st December 1955	28,164.44
<u>32,264</u>		Shs.	<u>197,107.47</u>	<u>32,264</u>		Shs. <u>197,107.47</u>

EXHIBIT "A"

COOPER BROTHERS & CO.
CHARTERED ACCOUNTANTS

Exhibits "A"
Auditors
Report
29th April
1959.

DAR ES SALAAM

CONSOLIDATED AGENCIES LIMITED

AUDIT REPORT

We have audited the annexed balance sheet of Consolidated Agencies Limited at 31st December, 1957.

- 10 2. No evidence has been produced to us to verify that the value of the shares in Pugu Estates Limited and Magogoni Estates Limited are of the value stated.
3. In our opinion the value of the shares in Farida Estates Limited are over valued by approximately Shs. 13,000/0.
4. We have seen no evidence in support of the participation in the Diamondabad Estate Syndicate.

20 Subject to these remarks we have received all the information and explanations we have required and in our opinion such balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of our information and the explanations given to us and as shown by the books of the company.

Dar es Salaam, 29th April, 1959

COOPER BROTHERS & CO.
Chartered Accountants

EXHIBIT "A"

CONSOLIDATED AGENCIES LIMITED
BALANCE SHEET, 31ST DECEMBER 1957

EXHIBITS
"A"
Balance Sheet
1957

			1956				
Shs.		Shs.	Shs.	Shs.		Shs.	Shs.
CAPITAL				FIXED ASSETS			
200,000	Shares of Shs.1000/- each	200,000.00	53,623	House on plot 301, Regent Estate Pledged to First Permanent Building Society, per contra.		53,622.92	
<u>154,807</u>	Accumulated loss	<u>14,675.90</u>	13,438	freehold land at cost		13,438.00	
354,807		185,324.10	<u>200</u>	Furniture, at directors valuation.		<u>200.00</u>	
			<u>67,261</u>				67,260.92
LONG TERM LOANS				INVESTMENTS			
	Mortgages with First Permanent Building Society			At costs:-			
	Secured by charge over house on plot 301, Regent Estate and 50% share of Phoenix Court	84,912.18	75,000	Tanganyika Sisal Estates Limited 75 shares of Shs.1000/- each fully paid		75,000.00	
			14,125	Farida Estates Limited 44 shares of Shs.100/- each fully paid		14,124.80	
			5,000	Pugu Estates Limited 5 shares of Shs.1000/- each fully paid		5,000.00	
59,058	Creditors and accrued liabilities	63,300.67	20,100	Mtoni Estates Limited 201 shares of Shs.100/- each fully paid		20,100.00	
9,106	Director	9,106.00	7,500	Magogoni Estates Limited 75 shares of Shs.100/- each fully paid		7,500.00	
<u>364,209</u>	Loans and accrued interest	<u>365,831.28</u>	20	First Permanent Building Society 1 subscription savings share		<u>20.00</u>	
<u>432,373</u>		438,237.95		20% share of Mboa Maji Syndicate:-		121,744.80	
			11,567	Estate account		11,566.70	
			4,417	Hotel account		4,416.72	
	W. Dharsee Director		4,668	One third share in Plots 6 and 14 Ursino		4,668.00	
			4,000	One third share in Plots 51 and 52 Ursino		4,000.00	
			21,953	One third share of 20% interest in Diamondabad Estate Syndicate		21,952.87	
			<u>168,350</u>	One half share in Phoenix Court pledged to First Permanent Building Society, per contra		<u>113,314.56</u>	281,663.65
			396,827	CURRENT ASSETS			
			<u>150,000</u>	Partly secured loans		339,000.00	
			246,827	Less Reserve for bad debts.		<u>254,000.00</u>	85,000.00
			138,387	Unsecured loans and accrued interest		79,085.40	
			134,237	Debtors		<u>54,350.00</u>	133,435.40
			26,500	Director		218,435.40	
			5,618	Income tax overpaid		140,354.92	
			<u>551,569</u>	Cash at bankers		<u>759.34</u>	359,549.66
<u>787,180</u>		<u>708,474.23</u>	<u>787,180</u>			<u>708,474.23</u>	

This is the balance sheet referred to in our report dated 29th April 1959 which is annexed.

COOPER BROTHERS & CO.
Chartered Accountants.

150.
EXHIBIT "A"

CONSOLIDATED AGENCIES LIMITED

PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDED 31ST DECEMBER 1957

EXHIBITS
"A"
Profit & Loss
Account 1957

1956		Shs.	1956	Shs.	Shs.
638	Rates	1,129.23	33,966	Interest received	4,611.00
17,557	Interest	25,985.05	6,100	Rents receivable	19,694.87
-	Insurance	753.00	-	Letter of credit cancelled	387.00
2,000	Audit and accountancy	3,500.00	150,000	Dividends received	-
20	Bank charges	58.25	-	Loss for the year	169,483.37
85	General expenses	59.41			
-	Bad debts written off	58,691.30			
-	Provision for bad debts	104,000.00			
823	Legal expenses	-			
168,943	Gross profit	-			
<u>190,066</u>		<u>Shs. 194,176.24</u>	<u>190,066</u>		<u>Shs. 194,176.24</u>
-	Loss for the year	169,483	28,164	Profit unappropriated 31st December, 1956	154,807.47
42,300	Provision for income tax	-	168,943	Profit for the year	-
154,807	Profit unappropriated 31st December 1956	-	-	Loss carried forward	14,675.90
<u>197,107</u>		<u>Shs. 169,483.37</u>	<u>197,107</u>		<u>169,483.37</u>

EXHIBIT "B"

H.M. HIGH COURT OF TANGANYIKA
 CIVIL CASE No. 57 OF 1961
 EXHIBIT NO. B - 2 sheets-two
 papers
 Put in by Plaintiff.

Sd. L. WESTON
 JUDGE

Exhibits "B"
 Two letters
 from Messrs.
 Shah & Shah
 to Cooper
 Bros. & Co.
 25th Septem-
 ber 1956.

Date: 4.9.61.

10 SHAH & SHAH P.O. Box 948,
 ACCOUNTANTS & AUDITORS. Tel.Add:TAXATION
 2, INGLES STREET,
 PARTNERS:- Telephone 2575
 V.D. SHAH Dar es Salaam,
 A.K. PATEL Tanganyika Territory.
 K.D. SHAH
 25th September, 1956.
 AND AT
 IRINGA IBEYA & Z'BAR.

20 Messrs. Cooper Bros & Co.,
 Standard Bank Chambers,
Dar es Salaam.

Dear Sirs,

Consolidated Agencies Ltd.,
No. 1 Account

30 At the request of the abovenamed Company,
 we hereby certify that according to the Books of
 Messrs. Bertram Ltd., as at 31st December, 1954,
 the said Consolidated Agencies Ltd., No.1
 Account, was indebted to the said Messrs. Bertram
 Ltd., in the sum of Shs. 29,596/28.

Yours faithfully,

SHAH & SHAH

SD: ?

PARTNER

Exhibits "B"
Two letters
from Messrs.
Shah & Shah
to Cooper
Bros. & Co.
25th Sep-
tember 1956
(continued)

EXHIBIT "B"

SHAH & SHAH P.O.Box 948 Tel.Add:
ACCOUNTANTS & 2, INGLES STREET, TAXATION
AUDITORS Dar es Salaam, Telephone 2575
Tanganyika Territory

25th September, 1956.

Partners:-
V.D. SHAH
A.K. PATEL
K.D. SHAH

10

AND AT
IRINGA MBEYA & Z'BAR.

Messrs. Cooper Bros & Co.,
Standard Bank Chambers,
Dar es Salaam.

Dear Sirs,

Consolidated Agencies Ltd.,
No. 2 Account

At the request of the abovenamed
Company, we hereby certify that according
to the Books of Messrs. Bertram Ltd., as
at 31st December, 1954, the said Consoli-
dated Agencies Ltd., No.2 Account, was
indebted to the said Bertram Ltd., in the sum
of Shs. 275,725/- being as to Shs. 269,000/- loan
given and Shs. 6,725/- interest accrued thereon
up to 31st December, 1954.

20

Yours faithfully,

SHAH & SHAH

SD. ?

30

PARTNER

153.

EXHIBIT "C"

H.M. HIGH COURT OF TANGANYIKA
CIVIL CASE NO. 57 OF 1961
EXHIBIT NO. C - two letters,
2 sheets-

Put in by Plaintiff

Sd: L. WESTON
JUDGE

Date: 4/9/61

Exhibits "C"
Two letters
from Messrs.
Shah & Shah
to Messrs.
Cooper Bros.
& Co.
25th Septem-
ber 1956.

10 SHAH & SHAH P.O.Box 948, Tel.Add:TAXATION
ACCOUNTANTS 2, INGLES STREET, Telephone 2575
& AUDITORS Dar es Salaam,
Tanganyika Territory

PARTNERS:- 25th September, 1956
V.D. SHAH
A.K. PATEL
K.D. SHAH

AND AT
IRINGA MBEYA & Z'BAR.

20 Messrs. Cooper Bros & Co.,
Standard Bank Chambers,
Dar es Salaam.

Dear Sirs,

Consolidated Agencies Ltd.
No. 1 Account

30 At the request of the abovenamed Company,
we hereby certify that according to the Books of
Messrs. Bertram Ltd., as at 31st December, 1955,
the said Consolidated Agencies Ltd., No.1 Account
was indebted to the said Messrs. Bertram Ltd.,
in the sum of Shs. 15,536/28.

Yours faithfully,

SHAH & SHAH

SD: ?

PARTNER

154.

Exhibits "C"
Two letters
from Messrs.
Shah & Shah
to Cooper
Bros. & Co.
25th Sep-
tember 1956
(continued)

SHAH & SHAH
ACCOUNTANTS
& AUDITORS

P.O.Box 948,
2, INGLES STREET
DAR ES SALAAM,
TANGANYIKA TERRITORY

Tel.Add.
TAXATION
TELEPHONE 2575

PARTNERS:-
V.D. SHAH
A.K. PATEL
K.D. SHAH

25th September, 1956.

AND AT
IRINGA MBEYA & Z'BAR.

10

Messrs. Cooper Bros. & Co.,
Standard Bank Chambers,
Dar es Salaam.

Dear Sirs,

Consolidated Agencies Ltd.
No.2 Account

At the request of the abovenamed Company,
we hereby certify that according to the Books
of Bertram Ltd., as at 31st December, 1955,
the said Consolidated Agencies Ltd., No.2
Account was indebted to the said Messrs.
Bertram Ltd., in the sum of Shgs. 291,865/-
being as to Shs. 275,725/- loan given and
Shs. 16,140/- interest accrued thereon up to
31st December, 1955.

20

Yours faithfully,

SHAH & SHAH

SD. ?

PARTNER

155.

EXHIBIT "D"

H.M. HIGH COURT OF TANGANYIKA
CIVIL CASE NO. 57 OF 1962
EXHIBIT NO. D - two letters-
2 sheets -

Put in by Plaintiff

Sd. L. WESTON
JUDGE

DATE: 4/9/61.

Exhibits "D"
Two Certifi-
cates by
Bertram Ltd.
21st April
1959 and 15th
April 1959

10 TELEPHONE NO.2376 DIRECTORS
W. DHARSEE TELEGRAMS
O.T. HAMLYN "CONFERENCE"

BERTRAM LIMITED

—————
P.O. Box 413, 9, SULEIMAN
STREET,
DAR ES SALAAM
TANGANYIKA TERRITORY

21st April, 1959.

TO WHOM IT MAY CONCERN

20 This is to certify that the amount standing to
the debit of Messrs. Consolidated Agencies
Limited in our Books as at 31.12.1957 is
Shs. 312,040.00. We should have debited this
Company with Shs. 12,105/00 representing interest
for the year 1957 but this was inadvertently
omitted. We therefore, propose to debit the said
sum of Shs. 12,105.00 to Consolidated Agencies
Limited in the following year.

For BERTRAM LIMITED:

30

Sd. ?

DIRECTOR.

156.

Exhibits "D"
Two
Certificates
by Bertram Ltd.
21st April
1959 and 15th
April 1959
(continued)

15th April, 1959.

TO WHOM IT MAY CONCERN

This is to certify that Messrs. Consolidated Agencies Limited, Dar es Salaam, was indebted to us in the sum of Shs. 17,436.28 as at 31st December, 1957.

BERTRAM LIMITED

Sd: ?

DIRECTOR

Exhibits "E"
Certificate
by Bertram
Ltd. 14th
July 1959.

EXHIBIT "E"

10

H.M. HIGH COURT OF TANGANYIKA
CIVIL CASE NO. 57 OF 1961
EXHIBIT NO. E
Put in by Plaintiff

Sd. L. WESTON
JUDGE

DATE: 4.9.61.

14th July, 1959.

TO WHOM IT MAY CONCERN

This is to certify that Messrs. Consolidated Agencies Limited were indebted to us in the sum of Shs. 321,251.28 as at 31st December, 1958, made up as under :-

20

No.1 A/C	17,136.28
" 2 "	<u>304,115.00</u>
Shs:	<u>321,251.28</u>

FOR BERTRAM LIMITED

SD. ?

DIRECTOR

EXHIBIT "L"

H.M. HIGH COURT OF TANGANYIKA
CIVIL CASE NO. 57 OF 1961
EXHIBIT NO. L
Put in by Plaintiff.
4.9.61 Judge

Exhibits "L"
Admission of
facts by
Defendant
Company
pursuant to
Notice 24th
August 1961

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA
AT DAR ES SALAAM
CIVIL CASE NO. 57 OF 1961

10 BERTRAM LIMITED PLAINTIFF
V E R S U S
CONSOLIDATED AGENCIES LIMITED ... DEFENDANT

ADMISSION OF FACTS PURSUANT TO NOTICE
(0.12 r 5).

20 The Defendant company in this suit, for the
purposes of this suit only, hereby admits the
several facts respectively hereunder specified,
subject to the qualifications or limitations, if
any, hereunder specified, saving all just except-
ions to the admissibility of any such facts, or
any of them as evidence in this suit:

Provided that this admission is made for the
purposes of this suit only and is not an admission
to be used against the defendant company on any
other occasion or by any one other than the Plaintiff.

Dated at Dar es Salaam, this 24th day of
August, 1961.

Sd. ?
for P.R. DASTUR
ADVOCATE FOR THE DEFENDANT
COMPANY, DAR ES SALAAM.

30 To: Messrs. George N. Houry & Company,
Advocates for the Plaintiff,
DAR ES SALAAM.

FACTS ADMITTED:

Exhibits "L"
Admission of
facts by
Defendant
Company
pursuant to
Notice 24th
August 1961
(continued)

- (1) That WALLI DHARSEE, was the Sole Director of BERTRAM LIMITED, a Company incorporated and registered in Tanganyika under the Companies Ordinance, Cap.212, from the Year 1952 to the date of his death, 16th November, 1959.
- (2) That the said BERTRAM LIMITED carried on business in Tanganyika.
- (3) That the Directors of the Defendant Company, CONSOLIDATED AGENCIES LIMITED, for the years 1951 to 1959 were K.F. JAFFRABADWALLA and WALLI DHARSEE and that after the death of the said WALLI DHARSEE, the Directors of the said Company were K.F. JAFFREBADWALLA and MRS. PUTLI WALLI DHARSEE, the wife of WALLI DHARSEE, Deceased.

IN THE PRIVY COUNCIL

No. 44 of 1962

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA AT DAR ES SALAAM

B E T W E E N :

CONSOLIDATED AGENCIES LIMITED (Defendant) Appellant

- and -

BERTRAM LIMITED (Plaintiff) Respondent

RECORD OF PROCEEDINGS

ATTENBOROUGH
12, New Court
Lincoln's Inn
London, W.C.2
Solicitors for the Appellant.

SLAUGHTER & MAY
18 Austin Friars
London, E. C. 2.
Solicitors for the Respondent.