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Judgment 8/1964

IN THE PRIVY COUNCIL No. 26 of 1961

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N

JOHN KHALIL KHAWAM & COMPANY
(trading as JOHN KHALIL KHAWAM)
(Plaintiffs) Appellants

78537

- and -

K. CHELLARAM & SONS (NIG.) LTD.
(Defendants) Respondents

(and Cross Appeal Consolidated).

CASE FOR THE APPELLANTS

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1. This is an Appeal by John Khalil Khawam (hereinafter referred to as "the Plaintiff") who is, and has for many years been, carrying on business as a trader in and importer of textile goods under the style and firm name of John Khalil Khawam & Co., from a Judgment of the Federal Supreme Court of Nigeria (Sir Adetokunbo Ademola F.C.J., Mbanefo C.J., Eastern Region and Brett F.J.) dated the 8th March, 1960, whereby, although allowing his appeal from the Judgment of the Hon. Mr. Justice Coker, in the High Court of Lagos dated 16th February, 1959, respecting the inadequacy of the damages awarded by him to the Plaintiff for the infringement by the Respondents (hereinafter referred to as "the Defendants") of the Design registered by the Plaintiff, and varying the said award, as well as dismissing the cross-appeal of the Defendants in regard thereto, they awarded him an inadequate amount of damages.

pp. 69-79

pp.69 Ll.42-48

p.76 Ll.15-22
p.79 Ll.32-33

p.80 Ll.18-30

2. The question for determination in this appeal is as to the adequacy of the said award of damages made by the Federal Supreme Court to the Plaintiff.

3. The Plaintiff had registered the said Design on the 4th January, 1957, being Design No. 459477, in the Manchester Branch of the Design Registry of the Patent Office of the United Kingdom in respect of the application thereof to cotton piece goods, under and in accordance with the provisions of the Registered

Ex A.-.87

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Designs Act, 1949, of the United Kingdom (hereinafter called "the Act") and accordingly, by the provisions of the United Kingdom Designs Protection Ordinance (Cap 221.) of Nigeria, he became entitled to the enjoyment in Nigeria of the like privileges and rights as though the certificate of registration relating to the said registration had been issued with extension to Nigeria.

4. The privileges and rights to the enjoyment of which the Plaintiff thus became entitled, as provided by sections 7 and 8 of the Act are as follows:-

"7. (1) The registration of a design under this Act shall give to the registered proprietor in the registered design, that is to say, the exclusive right in (Nigeria) to make or import for sale or use for the purposes of any trade or business, or to sell use or offer for sale or hire any article in respect of which the design is registered, being an article to which the registered design or a design not substantially different from the registered design has been applied, and to make anything for enabling any such article to be made as aforesaid, whether in (Nigeria) or elsewhere.

"8. (1) Copyright in a registered design shall, subject to the provisions of this Act, subsist for a period of five years from the date of registration.

(2) The Registrar shall extend the period of copyright for a second period of five years from the expiration of the original period and for a third period of five years from the expiration of the second period if an application for the extension of the period of the copyright for the second or third period is made in the prescribed form before the expiration of the original period and for a third period of five years from the expiration of the second period if an application for extension of the period of the copyright for the second or third period is made in the prescribed form before the expiration of the original period or the second period as the case may be and if the prescribed fee is paid before the expiration of the relevant period or within such period (not exceeding three months) as may be specified in a request made to the registrar and accompanied by the prescribed additional fee."

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5. In having registered the said Design as aforesaid, the Plaintiff by the said provisions of the Act became, therefore, entitled in Nigeria to the exclusive monopoly with respect (inter alia) to the import for sale and the sale or offer for sale of cotton piece goods to which the said Design had been applied for a period of five years and thereafter to two further renewals thereof of five years each, that is a total period of the said monopoly of 15 years

6. One Frederick Wegner, the Representative in Lagos of Messrs. Gilbert McCaul & Co. Ltd., Manufacturers' Representatives and Confirming House, who dealt in African Cotton Crimp Print manufactured in Japan, carried out the said registration of the said Design on behalf of the Plaintiff. He had obtained on behalf of the Plaintiff the production of a counter sketch by a Company in Japan by the name of the Gosho Company Limited of a revised sketch made for the Plaintiff of the said Design to which the Gosho Company had given the identification number of 7140/2. A counter sketch had been similarly made by them of a sketch made for the Plaintiff of which the said counter Sketch 7140/2 was a revision, and to which they had given the identification number 7140. The said Registered Design was from a sample cutting of cotton piece goods called African Crimped Cotton Prints manufactured for the Plaintiff by the said Gosho Company from the said counter sketch 7140/2, to which the said Registered Design had been applied.

p.24 L.18
p.28 L.14
Exh. B1 (original)
Exh. L1 (original)
Exh. B (original)
Exh. L (original)

7. The Defendants are a limited Company with offices in Japan, India and Manchester, and as well as Ibadan and Lagos) shops in most of the important centres in Nigeria all of which sell imported goods. The infringing goods were manufactured on their orders by the said Gosho Company from the said Registered Design, identified by the number 7140/R; and were manufactured on inferior material with inferior dye. The price at which they sold the said infringing goods was 38/- per piece.

p.32 L.35
p.33 L1. 1-4
p.34 L1.44-46

8. Until the wrongful importation and sale by the Defendants of the said infringing goods, the Plaintiff who had from January to December, 1957, imported 9841 pieces, of 10 yards each of the said Registered Design from Japan manufactured by the said Gosho Company, had sold the same by retail obtaining the prices of 55/- and 53/- per piece, the average price per piece being 50/-. The average profit he made when selling at 50/- per piece was 15/- per piece. The result of the infringement by the Defendants was that, because

p.16 L1.22-26
p.16 L1.27-48

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they were selling at a cheaper price the infringing cloth and which was inferior in quality and dye, as aforesaid, the Plaintiff's sales fell so that he was compelled to reduce the price of his cloth first to 43/- and then to 34/- per piece. When he sold at the latter price he was losing on the cloth. The consequence was that all further sales were brought to an end, and he was left with 500 pieces unsold.

9. The findings as regards the facts in both the Judgments of the learned trial Judge and the Federal Supreme Court are concurrent, those of the learned trial Judge being, so far as they are material on the question of damages, as follows:-

p.43 L. 42
p.44 L. 46

"(The Plaintiff) first produced a rough sketch of the design himself. This he handed over to an Artist, by name Aroyewun, to whom he had paid £7.10. - and the artist in turn reproduced the rough sketch and produced other sketches which were produced and admitted as Exhibits B and B1. The sketches Exhibits B and B1 were handed over by him to the Company of Gilbert McGaul & Co. Ltd. of Lagos, through whom he placed an order for cloths bearing the design from Japan. Such cloth bearing the design did arrive in Nigeria, the first imporation being about the end of January, 1957. A piece sample of the cloth with the design was produced and admitted as Exhibit C. He sold Exhibit C in Lagos and Ibadan at the price of approximately 50/- (fifty shillings) a piece of 10 yards.

His sales apparently went on smoothly until sometime in the month of November, 1957 when one Owifadeju called on him at his office and showed him two pieces of cloth of ten yards each with a design that looked like his own. Awofadeju had told him certain things as a result of which be bought the two pieces of cloth from him at 39/- (thirty nine shillings) each. From these he had cut out a small cutting which was attached to the affidavit of Folorunso in support of the application for interlocutory injunction in this case. One of the pieces he had bought from Awofadeju was produced and admitted as Exhibit D. To him both Exhibit C and Exhibit D bear the same design. On the first occasion of his import in January, 1957, the Plaintiff had imported about 1000 pieces, and between January and December, 1957 he had

imported about 9841 pieces of 10 yards each

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His own sales fell and he had to reduce the price first to 43/- a piece and later to 34/- per piece. He further testified that the colours on Exhibit D do fade when washed as Exhibit D is inferior to his own Exhibit C in quality and dye.

At a price of 50/- per piece he was making a profit of fifteen shillings (15/-) on each piece. At the price of 34/- per piece he was selling at a loss. He further testified that he was claiming damages as shown in his pleadings both for loss of profit, and also for his inability to make further orders for the cloth even though he had a monopoly for the use of the design for virtually fifteen (15) years in all ..... "

.....

10. In arriving at the assessment and his award of damages the learned trial Judge said as follows:- p.55 L.25 p.56 L.38

"To start with, I accept the evidence that Exhibit D (i.e. the infringing cloth) is printed with inferior dye on an inferior material. Such is the evidence of the plaintiff as well as the evidence of the witness Noble called by the defendants. The defendants did say that Exhibit D was offered to them in the middle of 1957 by the Gosho Company Ltd. through their office in Japan. The Gosho Company Ltd. were the manufacturers for the plaintiff. The defendant did not make any search or searches at Manchester to know whether or not the design was registered there; in fact it is the evidence that the defendants were not in the habit of making searches for registered designs. There is no doubt that if the defendants had so made a search, the registration by plaintiffs would have been discovered. There is no other evidence to support that of Mr. Ladharam to the effect that it was the Gosho Company Ltd. that 'offered' the cloths to the defendants. The cloth Exhibit D is sold by the defendants in pieces contained on paper wrappers printed inter alia with the following words:- Specially made for K. Chellarams & Sons (Nigeria) Ltd., Lagos Design No. 7140R". p.16 Ll. 34-36 p.37 Ll. 30-33 pp. 28-39

"If as the defendants contended crimped

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cotton African prints are recorded in Japan as open Design OM. No. 36023, why then did this design bear the special No.7140R? The defendants never inquired why was this cloth marked "Specially made for K. Chellaram & Sons" and why was it printed with inferior dye and on inferior material? If the Gosho Company Ltd. were offering some of the stocks of the plaintiffs to the defendants, they would in all probability have offered identically the same stuff in identically the same quality. I reject the evidence that it was the Gosho Company Ltd. that offered Exhibit D to the defendants and indeed such evidence is not consistent with the terms of the confirmation notes Exhibits O and O1. The witness Ladharam carried this position to its logical conclusion when he made the alarming suggestion that the defendants did not even see the design before they ordered for it. I will not, and do not, believe such evidence. I take the view that either the defendants are completely reckless or that their office in Japan having seen the designs of the plaintiffs after the manufacture of Exhibit C, decided to and did order for actual reproduction of the plaintiffs' design on cheaper material with inferior dye and with the avowed purpose of wrecking the market for the plaintiff. This is borne out by the attitude of the defendants to the situation which arose after their receipt of letters Exhibits F, G and Q, indeed the

pp. 88, 89, 97

defendants' representative stated in the witness box that he was seeing Exhibit C for the first time in Court. This is also demonstrated by the way in which the defendants had brought this case throughout. During his address to me I asked Counsel for the defence to let me know his stand whether he was an innocent infringer or he was contesting the validity of the registration. Counsel told me that he was contesting the validity of the registration ....."

.....

p. 57 Ll. 8-41

"It is true that the plaintiff had had to reduce the price of his cloth twice and finally he had to close down. There is however no evidence before me of how much the plaintiff actually lost in the transaction. The claim for special damages therefore fails. I now come to the item of

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general damages. I do not take into consideration the fact that the plaintiff is entitled to two renewals of the period of copyright of five years each, as these renewals are in any case subject to some conditions described by Section 8 (2) of the Act. The defendants ordered out 880 pieces of Exhibit D and had sold about 500 pieces. These goods were cleared by the defendants from the Customs on the 18th November, 1957 and on the 21st December, 1957 when Mr. Ladharam swore to an Affidavit in connection with the motion for interlocutory injunction, the 500 pieces had been sold. The plaintiffs ordered in all about 10,981 pieces from January to the end of 1957 and had only a few pieces left at the time of this action. It is clear that cloth of the design had a phenominal sale and a very good market. The defendants impress me as rather callous and indifferent to the result of their action. I have carefully considered all the circumstances of this case and will fix the general damages in this case at £2000. -. -. (two thousand pounds only) taking still a lenient view of the conduct of the defendants and in particular the fact that I do not know exactly how much the plaintiffs had lost. But I do certainly take into consideration the fact that this is a commercial case the Issues involved in which strike at the very foundation of commercial or trading activities."

.....

"The result is that I give judgment in this case in favour of the plaintiffs as follows:- p.57 Ll. 47-48

.....

"The Defendants shall pay to the plaintiffs the sum of £2000 damages for the infringement by them of the plaintiffs' said registered design. p.58 Ll. 7-9

.....

"The defendants shall also pay the costs of this action to be taxed." p.58 Ll. 15-16

11. The Plaintiff appealed to the Federal Supreme Court against the inadequacy of the said award of damages by the learned trial Judge.

12. The Federal Supreme Court by their Judgment delivered by the Federal Chief Justice in which

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the other members concurred, said as follows:-

p.70 Ll. 13-38

"The plaintiff having made this design, on the 4th January, 1957, registered it in the Manchester Branch of the Design Registry of the Patent Office in Manchester in accordance with the provisions of the Registered Design Act 1949 and obtained a certificate granting him a monopoly of the design for 5 years with a right of renewal for another 10 years.

"During the month of January, 1957, he imported into Nigeria from Japan 1,000 pieces of the material which he sold at 50/- a piece of ten yards making a profit of 15/- per piece. By the end of that year he had imported 9841 pieces in all. About the month of November, 1957, the defendant respondent company had imported into Nigeria cloth of a similar design but inferior in quality which was selling at 38/- per piece. The plaintiff appellant was forced to drop his selling price from 50/- to 43/- per piece and later to 34/- per piece to compete with the intruder into his market. The defendant respondent company asserting, as it did, that the design is an open design in Japan, placed on order with Gosho Company, the same company in Japan which printed the plaintiff appellant's design, the same design on inferior materials. The goods were shipped to Nigeria and sold at a wholesale price of 38/- per piece of ten yards....."

p.71 Ll. 21-22
p.73 Ll. 17-43

They then came to deal with the Defendants' cross-appeal and said:

"There remains grounds 3 and 4. On the cross appeal, Mr. Bickersteth argues that the estimates of damages was not based on the right principle and was not based on evidence. It was submitted that there was no evidence before the Judge to show categorically how much the plaintiff lost; nor was there evidence or basis for calculation of loss per year.

"The arguments on these two grounds of the cross appeal were met by Mr. Bernstein's arguments on the quantum of damages awarded. Hig argument in the main was on the principles of which the amount of damages is to be computed.

"On the quantum of damages, the learned

trial Judge said:-

'It is true the plaintiff had had to reduce the price of his cloth twice and finally he had to close down. There is however no evidence before me of how much the plaintiff actually lost in the transaction. The claim for special damages therefore fails. I now come to the items of general damages. I do not take into the consideration the fact that the plaintiff is entitled to two renewals of the period of copyright of five years each, as these renewals are in any case subject to some conditions described by section 8 (2) of the Act.'

'The plaintiffs ordered in all about 10,981 pieces from January to the end of 1957 and had only a few pieces left at the time of the action. It is clear that cloth of the design had a phenomenal sale and very good market. The defendants impress me as rather callous and indifferent to the result of their action. I have considered all the circumstances of this case and I will fix the general damages in this case at £2,000 taking still a lenient view of the conduct of the defendants and in particular the fact that I do not know exactly how much the plaintiffs lost.'

"Added to those, is the fact that the defendants sold within a month 500 pieces of the 880 pieces which arrived for them from Japan.

"The first question I have asked myself is whether the learned Judge has proceeded on an erroneous principle in his assessment of damages. I am of the opinion he has. What has to be ascertained is the pecuniary loss the plaintiff has sustained by the wrongful acts done to them by the defendants; the plaintiffs are entitled to be compensated for the injuries they have suffered by reason of the wrongful act of the defendants.

"In the case of Pneumatic Tyre Company Ltd. v. The Puncture Proof Pneumatic Tyre Company Ltd., 15 R.P.C. 403 at p.406 Willis, J. said:-

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'As far as the case permits the amount of loss must be proved; but if it can be proved that the necessary consequence of an injurious act is to damage the reputation of the patented article or process, as to interfere with the general and extended use, very substantial damages might be received, though it might be impossible to put a figure on the loss.'

"As the learned trial Judge in the present appeal found, the plaintiffs have suffered considerable loss and damage. By reason of of the defendants infringement, he had to reduce his price and cloth which was sold at 50/- per piece at a profit of 15/- on the piece was reduced first to 43/- and later 34/-, thus selling at a loss. Subsequently, he had to close down and the anticipated profits for 10 years of renewal for which he held a copyright was lost to him. The learned Judge said he did not take this into consideration in awarding damages; it would appear, however, that he took into consideration the fact that the defendants sold 500 pieces of their cloth in one month, which was also a loss of profit to the plaintiffs. At that time from the evidence of the plaintiff's witness J.K. Khawam, a total 1,897 pieces of cloth had arrived for the plaintiffs in addition to what they had left at the time for sale. These were all sold at reduced prices of 43/- and later at 34/- per piece.

"In considering measure of damages, Swinfen Eady, J., in the case Leeds Forge Company Ltd. v. Deighton's Patent Flue Company 25 R.P.C., 209 at p.212 put the matter as follows:-

'In considering the question of the amount of damages, it must be borne in mind that the measure of damage is the loss which the plaintiffs have actually sustained as the natural and direct consequence of the defendant's acts; consequently, the damages will be the estimated loss of profit incurred by the plaintiffs by reason of the sale by the defendants of articles which infringe plaintiffs' patent, whether such loss of profit in respect of any flue is attributable to diminished profit obtained on articles manufactured by the plaintiffs or to the plaintiffs having

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lost all profits by reason of the defendants having made the articles. The burden is upon the plaintiffs to prove the damage they have sustained, and they can only recover upon the facts proved. What the plaintiffs actually claim is the amount of profit they would have made if they had sold, at their original prices, all the flues they did sell, and all the infringing flues sold by the defendants, after giving credit for the profit they actually made on the flues estimating the damages in a case of this kind, fair and just allowances must be made and many matters must be taken into consideration. Mathematical accuracy is absolutely impossible."

"The evidence before the learned trial Judge conclusively established that about 2,000 pieces of the cloth imported by the plaintiffs were, after the defendants' infringement, sold at a reduced profit of 7/- per piece for a time and later at an actual loss of 1/- per piece until the plaintiffs had to close down. This amounts to roughly a loss of an amount between £1,000 to £1,300; added to this was the loss 15/- profit per piece on the 500 pieces sold by the defendants. This resulted in a loss of a total of £375. It would appear that taking all these into consideration the learned Judge has arrived at the figure of £2,000 which, in my view, appears, on the evidence before him, a fair assessment. But the copyright had another four years to run; then the plaintiffs are entitled to two renewals of 5 years each of their copyright. I would estimate the damages for the two 5 year period of renewal (10 years) at £500.

"In conclusion, I reject the submission made by Counsel in the cross appeal that the Plaintiffs are only entitled to nominal damages. I would therefore assess the damages awarded in favour of the plaintiffs as follows:-

"£2,000 general damages as awarded by the learned trial Judge: £500 damages for the two 5 year period of renewal. Total £2,500."

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p.76 L.33 to p. 79

13. Brett F.J. who delivered a separate Judgment said in the course thereof as follows:-

p.79 Ll. 3-18

".....They "(i.e. the Defendants): "have an office in Manchester, and it has not been suggested that they could not have had a search made in the Manchester Registry, or that a search made in revealed the existence of the registration. As to whether they have proved that they had no reasonable ground for supposing that the design had been registered, the evidence of their chief witness to fact, Naraindeas Ladharam, justified the finding of Coker, J., that :

'either the defendants are completely reckless or their office in Japan having seen the designs of the Plaintiffs after the manufacture of Exhibit C decided to and did order for actual reproduction of the Plaintiff's design on cheaper material, with inferior dye and with the avowed purposes of wrecking the market for the Plaintiff'....."

p.79. Ll. 21-23

He then said in regard to the quantum of damages, as follows:-

"As regards the quantum of damages, I agree that Coker J, applied a wrong principle in refusing to allow anything for the right of renewing the copyright for a further ten years. Even on the basis adopted by Coker, J., it may well be that other Judges would have awarded a larger sum, but I cannot say, that on the evidence he made any other manifest error in principle. The Court may take judicial ccgnizance of the fact that fashions change in textile designs as in most other things, and no attempt was made to give any evidence of the life of a successful design in cotton piece goods, I support the variation proposed."

14. The Plaintiff makes the following submissions viz:-

As regards the principal Judgment of the Federal Chief Justice (concurred in by the Chief Justice of the Eastern Region)

(1) It is clear that had the case been remitted back to Coker, J. to re-assess the damages with a direction in accordance with their Judgment that he had proceeded on an

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erroneous principle, he would have awarded a considerably greater sum than £2,000 which he did.

Where the learned trial Judge had erred in law, as held by the said Judgment, was in (1) assessing the damages awardable to the Plaintiff as consisting of two separate claims, namely one for special damages and the other for general damages, and upon such basis he found that there was no evidence before him of how much the Plaintiff actually lost, and for that reason took a lenient view), and therefore, held that the claim for special damage failed and (2) disallowed anything for the Plaintiffs' monopoly in respect of the two renewal periods of five years each. He should instead, as held, by the said Judgment of the Federal Chief Justice, have awarded a sum of damages for the loss suffered by the Plaintiff as found on the facts by him, and concurred in in the said Judgments of the Federal Chief Justice and Brett F.J., with a sum to be included therein in respect of the said renewal periods.

(2) The assessment made in the said Judgment, was in respect of the loss suffered by the Plaintiff in respect of only the first of his first five years' monopoly, for in his said Judgment the Federal Chief Justice having said - p.76 Ll. 6-10

> "..... It would appear that taking all these into consideration the learned Judge has arrived at the figure of £2000, which, in my view, appears, on the evidence before him, a fair assessment"

Then said this - p.76 Ll. 10-11

> "But the copyright had another four years to run, then the Plaintiffs are entitled to two renewals of 5 years each of their copyright. I would estimate the damages for the 5 year period of renewal (10 years) at £500."

(3) It could be expected as a matter of reason on the said concurrent findings of the learned trial Judge, and the Federal Supreme Court, that the profitable sale of the Plaintiff's said Design would only drop gradually over the last four of his first five years' monopoly and go on dropping at a gradually increasing acceleration over the period of the two renewal periods of five years each, and, therefore, in a full year

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the said assessment by the Federal Supreme Court in respect of the first of the first five years' monopoly being based upon only portion of the said quantity of 9841 pieces imported by the Plaintiff in the first year thereof he would have made a total profit on the basis of the said quantity at 15/- per piece of £7380.15.0. On this basis, the Plaintiffs' loss for the last four years of the first five years' monopoly would be in the region of four times that sum which would amount to £29,523. In respect of the two renewal periods putting the average profit the Plaintiff might expect even as low as an average of 2/- per piece the profit that he could expect to make would be, on an importation of the said 9841 pieces per year, £9841. And, accordingly, for the whole period of monopoly to which he was entitled and of which he had been deprived as found, the Plaintiff could reasonably have expected to make a profit in the region of £39,364.

(4) On any view the damages to which the Plaintiff was entitled, upon the said concurrent findings of fact, and the law found by the said Judgment, is a sum very greatly in excess of the said sum of £2000 awarded by the said Judgment which was only in respect of the first of the Plaintiffs' first 5 years' monopoly, and the said sum of £500 awarded in respect of the two renewal periods of five years each of his monopoly.

As regards the said Judgment of Brett F.J. -

(1) It was wrong in holding, contrary to the said Judgment of the Federal Chief Justice, that Coker J., did not make any error - whether manifest or not - in principle in his award of damages, other than in regard to his having disallowed any damages in respect of the two renewal periods of the Plaintiffs' monopoly. It appears to be based first, on the ground that no error by the learned trial Judge in his assessment of the damages as awarded by him was manifest on the evidence, secondly, on the ground that the principle of the Court being permitted to take judicial cognisance of the general change in fashions applies to textile designs as in the instant case, and no attempt was made to give any evidence of the life of a

successful design in cotton piece goods. **Record**

As to the first of the said grounds, it is submitted that whether the learned trial Judge had erred in law (as held by the said Judgment of the Federal Chief Justice that he did) in his assessment of the damages awarded by him did not in any way depend on whether he did so manifestly or not, and whether he had done so or not depended on what the law was and not what the evidence was. And as regards the second ground, it is submitted that the principle of the Court being permitted to take judicial cognizance of such a matter as the change in fashions in a broad general way does not, and could not, apply to the assessment of damages in the case of the said Registered Design of the Plaintiff infringed as it was by the Defendants. And, as regards there being no evidence called of the life of a successful design in cotton piece goods, it is submitted that it is an impossibility; and it is further submitted that in none of the reported cases of infringement has it been so held. The principle of the assessment of damages, it is submitted, is in all such cases, the same, and is, as it applies to all torts; and was rightly held by the said Judgment of the Federal Chief Justice.

Furthermore, it was found by the learned trial Judge and concurred in by the Federal Supreme Court that -

"It is clear that cloth of the design had a phenomenal sale and a very good market." p.57 Ll. 28-30

And as stated by the Federal Chief Justice in the said Judgment (and not dissented from by Brett F.J.) -

"As the learned trial Judge in the present appeal found, the Plaintiffs have suffered considerable loss and damage. By reason of the Defendants infringement, he had to reduce his price .....Subsequently he had to close down and anticipated profits for 10 years of renewal for which he held a copyright was lost to him....."

And furthermore there is the fact that by his said Judgment Brett F.J. supported the award of damages(£500) for the two renewal periods which predicates (it is submitted) that the learned

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Federal Justice must have, at any rate, regarded the profitable sale of the Plaintiff's said Design as continuing during the period of 10 years of the two renewal periods.

15. It is respectfully submitted that the said award of damages of the Federal Supreme Court was wrongly assessed, and is inadequate in amount, and should be varied by an increased award of damages in respect of the first five years and the two renewal periods of five years each of the Plaintiffs' monopoly, or that in the alternative the amount of the damages should be remitted for re-assessment accordingly for the following amongst other

R E A S O N S

1. BECAUSE the amount of damages awarded by the Federal Supreme Court in respect of the first five years of the Plaintiffs' monopoly was in respect only of the portion of the loss suffered by the Plaintiff in the first of the said five years' monopoly and nothing was awarded in respect of the remaining four years thereof; and their award of damages in respect of the two renewal periods was not related, as it should have been, to the amount of damages which should have been awarded therefor.

2. BECAUSE, subject to the correct assessment of damages as set forth in reason 1 above, the said Judgment of the Federal Chief Justice, as concurred in by the Chief Justice of the Eastern Region, in holding the learned trial Judge to have erred in principle in his assessment of the damages awarded by him, was right, and the said Judgment of Brett F.J. in so far as it held otherwise was wrong.

3. BECAUSE, upon the facts as concurrently found by the learned trial Judge and the Federal Supreme Court, and the correct view of the law to be applied to the assessment of damages for the loss suffered by the Plaintiff as held by the said Judgment of the Federal Chief Justice, the award of damages by the Federal Supreme Court was wrongly and insufficiently assessed and was inadequate in amount.

4. BECAUSE the said Judgment of Brett J. was wrong in holding that - whether manifest or not - the learned trial Judge had not

erred in principle in the assessment of damages as awarded by him to the Plaintiff in respect of the first five years of his monoply.

5. BECAUSE, the amount of damages awarded by the Federal Supreme Court is inadequate.

S.N. BERNSTEIN

No. 26 of 1961

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N

JOHN KHALIL KHAWAM & COMPANY
(trading as JOHN KHALIL KHAWAM)
(Plaintiffs)
Appellants

- and -

K. CHELLARAM & SONS (NIG.) LTD.
(Defendants)
Respondents
(and Cross-Appeal Consolidated)

CASE FOR THE APPELLANTS

HALSEY, LIGHTLY & HEMSLEY,
32, St. James's Place,
London, S.W.1.