

making 2,500 shares out of 10,000, and one of them, referred to in the evidence as Mr. "Khaled" or "Khalid", was a director and Mr. Ba Saleh was his alternate director.

The evidence of Mr. Khaled, corroborated by some letters that were produced, shows that from at least 1959 onwards there were disputes between Mr. Khaled and the other directors of the Bottling Company. He was claiming for himself and Mr. Ba Saleh the right to inspect the books of the Bottling Company, and the other directors were showing some unwillingness to accord them that right. Then, according to Mr. Khaled's evidence, at some time in 1961 when he was in Aden the other directors who were present offered to buy the shares of Mr. Khaled and his brothers for £60,000. Mr. Khaled was willing to sell the shares at that price, but he said there were certain accounts to be settled. The other directors said they would consult with their Uncle Michael (also a director of the Bottling Company) who was in Athens. Subsequently they reduced their offer to £50,000, and Mr. Khaled was willing to sell for that price. They said he could proceed to Kuwait, but that on their return to Aden they would prepare the necessary papers and pay out the money to Mr. Ba Saleh. Mr. Khaled waited two or three months but they did not write to him. There is a letter of 24th May 1962 which shows that at that date the dispute about inspection of the Bottling Company's books was continuing. According to Mr. Khaled's evidence he met Mr. Wadia, who was acting as agent for the defendants, in Kuwait. Mr. Wadia said he had come to Kuwait in connection with the proposed share transaction. Mr. Khaled said that the figure of £50,000 had been mentioned. Mr. Wadia said that the other directors were now willing to offer only £40,000. Mr. Khaled agreed to the figure of £40,000. The defendants' advocates prepared a draft agreement dated 18th July 1962, whereby the defendants would buy the plaintiffs' shares in the Bottling Company for £40,000, of which £20,000 was to be paid on the signing of the agreement and the remainder by four three monthly instalments of £5,000.

Shortly afterwards a revised version of the draft agreement was drawn up by the defendants' advocates and approved by the plaintiffs' advocate, Mr. Bhatt. This draft agreement was dated 8th August 1962. It provided for the plaintiffs to sell and the defendants to buy the plaintiffs' 2,500 shares in the Bottling Company for £40,000. It contained the following provisions:

"2. . . . On the signing of this Agreement and of the forms of share transfer £28,000 to be paid into the account of Khaled Abdul Latif Al Hamad at the Midland Bank, London. Thereafter by twelve monthly instalments of £1,000. . . . The Buyers to provide a Banker's guarantee that the monthly instalments shall be paid.

3. The monthly payments . . . shall be made to Khaled . . . either in Aden or elsewhere if he so desires subject to Exchange Control permission being obtainable . . .

4. As soon as this Agreement is signed the Sellers shall cease to exercise their rights as directors of or shareholders in Aden Bottling Co. Ltd.

5. The Sellers shall forthwith sign forms of transfer of their shares and deliver up existing share certificates to Aden Bottling Co. Ltd. The persons to be named in the forms of transfer to be signed by the Sellers shall be such persons whom the Buyers choose to nominate as Transferees.

6. In consideration of this Agreement the Sellers release Aden Bottling Co. Ltd. from all claims of whatsoever nature they may have or have had against Aden Bottling Co. Ltd. or its directors or shareholders."

It is to be observed that signature and delivery of the share transfers would be part of the performance of the agreement, not part of the

acceptance of the offer. The sequence would be (1) the acceptance of the offer by execution of the agreement notified to the defendants, and then (2) the signature and delivery of the share transfers by the plaintiffs in pursuance of Clause 5, and then (3) the payment of the £28,000 by the defendants in pursuance of Clause 2. It is therefore not necessary to consider some questions that were raised as to details of the share transfers. If there was any defect, it would only be a defect in performance of the contract and could easily be put right. Their Lordships agree with the view taken on this point in the judgment of the Court of Appeal for Eastern Africa.

The defendants' lawyers sent the draft agreement and draft share transfers and copies of them to Mr. Bhatt. Then on 13th August the defendants wrote to Mr. Bhatt, saying "Kindly hand over to Mr. Wadia Hassanali the documents relevant to our purchase of Mr. Khaled Abdul Latif and Bros. shares in the Aden Bottling Company. These are the documents that were sent to you by our Advocates Messrs. Nunn and Kazi. Mr. W. Hassanali will personally take these documents to Kuwait for signature by Mr. Khaled Abdul Latif and his brothers". On 14th August 1962 the defendants wrote to Mr. Wadia (Hassanali) in Cairo sending share transfer forms and saying that they were sending copies to his address in Kuwait, and the writer said "Trust your mission will be completely successful and I look forward to news from you."

It is clear from these two letters and later letters, which will be mentioned, and from the oral evidence and from the defendants' pleading (called the Written Statement) that Mr. Wadia was the agent of the defendants in this transaction, *i.e.*, the proposed agreement for the purchase by the defendants of the plaintiffs' shares in the Bottling Company for £40,000.

In Cairo in the latter part of August 1962 there was at least one meeting between Mr. Wadia as agent for the defendants and Mr. Khaled and Mr. Ba Saleh acting for the plaintiffs. All three of them gave evidence, Mr. Khaled on commission as a witness for the plaintiffs, Mr. Wadia on commission as a witness for the defendants, and Mr. Ba Saleh at the trial as a witness for the plaintiffs. After the meeting there was some correspondence, to which reference will be made.

It is plain that Mr. Khaled did not accept the offer in Cairo, but the crucial question is whether the offer was rejected or whether it was kept open for later acceptance. The learned judge decided that it was not rejected, and his decision on this point appears to their Lordships to be supported both by the oral evidence and by the correspondence. The evidence of the three witnesses already mentioned showed that at the meeting or meetings in Cairo Mr. Khaled expressed approval of the proposed agreement; but he wished to take the proposed agreement and other documents to Kuwait to show to his brothers and consult with them: Mr. Wadia said he could not let Mr. Khaled take the original documents which had been entrusted to Mr. Wadia for obtaining signatures on behalf of the plaintiffs, and these documents were handed back to Mr. Wadia: but Mr. Khaled said that would not matter because he had received another set of the documents from Mr. Bhatt and these could be signed in Kuwait and sent to Mr. Ba Saleh to be given to Mr. Bhatt. There is a probable inference from Mr. Wadia's evidence that he agreed with this suggestion, and Mr. Ba Saleh's evidence was that Mr. Wadia said to Mr. Khaled "As long as you have got two copies of the same document sign it and send it to the advocate in Aden". On that evidence it appears that the offer was not rejected but was being kept open for possible acceptance after Mr. Khaled had shown the documents to his brothers in Kuwait and consulted with them.

There is however also some evidence of Mr. Khaled and Mr. Ba Saleh having tried to obtain some addition to or modification of the terms of

payment set out in the offer. The most important evidence of that is contained in a letter of 31st August 1962 written to Mr. Wadia by Mr. Khaled who was then leaving Cairo. This is the translation :

“ Dear Son,

I am sorry to inform you that I had intended to leave to India with His Highness the Prince, Sheikh Mohd. Ba Saleh will leave to Aden at the end of the ninth month, and he has all the power to represent us, no need to refer to us or to Kuwait. I have already informed Mr. Ba Saleh with all we need. Please inform your friends that if they have agreed upon our conditions, they should write the papers and hand them over to Ba Saleh and he will send them to my brothers for signature and to send them back in time. The conditions are well known to you, they should pay the agreed amount in cash, after we receive payment we will hand over the papers to them. No reference should be made to us, we have delegated powers to Mr. Ba Saleh that, if he sees any delay, he should take an immediate steps, because your friends intends the delay and waste of time.

Khaled A. Latif.”

There are two different versions of the conditions referred to in that letter. Mr. Khaled said in his evidence that, in connection with the Bank guarantee of the payment of the twelve instalments of £1,000 each, it was desired to have twelve separate documents which would be signed by the Bank and would be similar to bills of exchange so that they could be used for raising money. A different version would be derived from two letters from Mr. Wadia to Mr. “Dino” dated 27th August and 2nd September 1962. These letters had been put in subject to objection when the evidence was taken on commission and were ruled inadmissible by the learned judge, evidently under sections 105 (2) and 87 of the Civil Courts Ordinance on the ground that the defendants had failed duly to enter these letters in the list of documents annexed to their “Written Statement”. Their Lordships find it unnecessary, as did the Court of Appeal, to decide whether or not the letters were admissible, or, if discretion was involved, should have been admitted. Whatever the “conditions” were, it seems clear that Mr. Khaled and Mr. Ba Saleh were trying to obtain some addition to or modification of the terms of payment set out in the proposed agreement. This attempt could have been treated by the defendants as a counter-offer impliedly rejecting and putting an end to the offer. *Hyde v. Wrench* (1840) 3 Beavan 334. *Tinn v. Hoffman & Co.* (1873) 29 L.T. 271. The Court of Appeal held that the letter did have that effect. But in their Lordships’ opinion the Court of Appeal did not sufficiently take into account the answering letter, which is an equally or even more important letter, because it shows the defendants’ attitude expressed by their agent Mr. Wadia. The offer was their offer, a unilateral act, and it was for them to indicate by their attitude whether they were keeping it open or not. The answering letter was dated 25th September 1962 and was written by Mr. Wadia to Mr. Khaled. It was (after translation from the Arabic) as follows :

“ Dear uncle Khalid Abdul Latif Al Hamad. God save you. After Salams I hope that you are in a good health. We received your letter dated 31st August 1962 through brother Mohamed Ba Saleh in Cairo. We hope you will meet your brothers soon after your return to Kuwait. And we request to send to brother Mohamed Ba Saleh or to advocate Bhatt the agreement together with transfer shares forms after signing them on behalf of yourself and on behalf of your brothers, and I shall ask Athanas to get ready the papers and also bank guarantee for 12000 twelve thousand pounds as demanded by you. Family and mother are well. Please give my salams to mother of Abdul Latif thousand salams.

Your son,

Wadi Hasonali.”

That answering letter is evidently referring to the original offer, which provided for a bank guarantee covering the £12,000 to be paid by instalments. The letter affords evidence, corroborating the oral evidence, of the arrangement made in Cairo, that the offer would be kept open for later acceptance after Mr. Khaled should have shown the documents in his possession (the counterparts) to his brothers in Kuwait, and that the mode of acceptance would be by the plaintiffs signing the documents and sending them to Mr. Ba Saleh or Mr. Bhatt for communication to the defendants. The letter also shows the defendants adhering to that arrangement. They might have adopted a different attitude but in fact they adhered to the arrangement made in Cairo at the end of August.

The delay of more than three weeks between the letter of 31st August and the answering letter of 25th September was not explained.

According to his own evidence Mr. Khaled, having gone to Kuwait on 31st August, left for India with the Sheikh of Kuwait on the next day 1st September; he returned to Kuwait from India on 1st October. He signed the agreement for himself and as attorney for his brothers on 2nd October, and he and his brothers signed their respective share transfers. He then forwarded these documents to Mr. Bhatt through Mr. Ba Saleh. Mr. Ba Saleh seems to have stayed in Cairo. At any rate, according to his own evidence, he returned to Aden on 21st October 1962 and three or four days afterwards he collected his post and found a letter from Mr. Ahmed, the brother of Mr. Khaled, and the counterpart agreement signed by Mr. Khaled and the signed share transfers, and a letter addressed through Mr. Ba Saleh to Mr. Bhatt. He enquired for Mr. Bhatt and ascertained that he was away from Aden and would be returning in December. Then Mr. Ba Saleh after two or three days at the end of October went to the office of Mr. Dino and saw Mr. Dino personally and told him that the documents had been signed by Mr. Khaled and his brothers. He requested Mr. Dino to arrange for the first payment of £28,000 to be paid in London in accordance with the agreement. Mr. Dino said: "Wait for a few days, and I will send telegrams to my brothers". After a few more days Mr. Ba Saleh went to Mr. Dino again, and Mr. Dino said to him "Wait. We sold our building near by our factory for 25,000 to 30,000 in order to settle the account of Khalid and his brothers but wait until I receive a reply from my brothers. I will write to them."

That was Mr. Ba Saleh's account of these interviews. It was strongly denied by Mr. Dino but accepted by the judge. There were undoubtedly grounds on which the learned judge could prefer the evidence of Mr. Ba Saleh to that of Mr. Dino. A simple ground is that Mr. Dino said in his evidence that there were no disputes between the defendants and Mr. Khalid prior to the agreement, whereas the early letters produced showed that there were such disputes. There were also other matters which could be regarded as raising doubts as to the reliability of Mr. Dino's evidence. At any rate the learned trial judge heard and saw these two witnesses and his preference for Mr. Ba Saleh's evidence must be respected.

When Mr. Ba Saleh's evidence as to these interviews is taken to be correct, it shows that the plaintiffs accepted the defendants' offer at the end of October. The acceptance was by Mr. Ba Saleh informing the defendants that the plaintiffs had signed the documents.

By a letter of 5th November 1962 (which by an obvious mistake was signed "the Aden Bottling Co. Ltd.") Mr. Dino wrote to the plaintiffs:

"As has already been conveyed through our mutual friend Mr. Wadia Hassanali, we are not any longer interested in purchasing your shares and we hope Mr. Wadia has reported this matter to you. We are however prepared to offer you our shares for £120,000. If you are not interested in the purchase, we shall upon hearing from you and in consultation with Mr. Ba Saleh try and find a buyer for the whole lot of shares (ours and yours inclusive). We are endeavouring our best to sell the whole lot of shares at best obtainable price.

However in this connection Mr. Basaleh called on us recently to convey the contents of your letter to him. . . .”

This letter could not operate as an effective revocation of the offer after it had been accepted at the end of October. It affords evidence of the continuing agency of Mr. Wadia for the defendants in respect of the proposed purchase by the defendants of the plaintiffs' shares in the Bottling Company. He was therefore the defendants' agent in respect of this proposed transaction when he wrote the letter of 25th September.

On 31st December 1962 Mr. Bhatt, having returned from abroad, wrote to the defendants' advocates, saying:

“I refer you to my letter No. 400/8/62 of 13th August 1962 and since then my clients have returned to me the Original Agreement and Transfer Forms of shares held by them duly signed by all the partners of Messrs. Khalid Abdul Latif and Bros. and the documents are ready for delivery to you against payment at London a sum of £28,000 . . . as being the first instalment mentioned in the Agreement dated 8th August 1962 signed by you and by all the partners of the said firm of Khalid Abdul Latif and Brothers. You will please let me know whether the amount has been paid and if so when the same was paid at London. In case the amount is still not paid, will you be good enough to inform me as to when you will arrange such payment at London.”

On 9th January 1963 the defendants' advocates wrote to Mr. Bhatt:

“We are instructed to reply to your letter dated 31st December.

In view of the fact that the documents were sent to you for signature on the 8th August and there has been a delay of nearly five months, our clients take the view that this delay in completing the transaction entitles them to regard it as having been repudiated by your clients. . . .”

On 19th March 1963 Mr. Bhatt wrote to the defendants' advocates:

“I refer you to your letter of January 8, 1963 and I am now instructed to inform you that there was no delay on the part of my clients. My clients long before informed your clients for their having signed the agreement which was sent to them for their signature and which was already signed by your clients.

So far as the delay is on the part of your clients, who have to act upon the agreement by making payments agreed therein. . . .”

The omission from Mr. Bhatt's letter of 31st December 1962 of any mention of Mr. Ba Saleh having at the end of October informed Mr. Dino of the plaintiffs' acceptance of the defendants' offer is surprising. However Mr. Ba Saleh dealt with this point in his cross-examination and the learned judge accepted his evidence, saying “I am also satisfied that although there is no mention in Mr. Bhatt's letter of the 31-12-62 of Ba Saleh's interviews with Dino and of Dino's promises to pay, Ba Saleh did inform Mr. Bhatt of these incidents. I accept the testimony of Ba Saleh that although he did so inform Mr. Bhatt, Mr. Bhatt chose to draft the letters in that form.” This again is a point on which the learned judge's view as to the credibility of the witness Ba Saleh—who gave evidence before him, not on commission—ought to be respected. The evidence is not incredible. Mr. Khaled said that he left Kuwait for Egypt on 4th October 1962 and did not return to Kuwait until 1st January 1963. Mr. Ba Saleh said he did not see the letter of 5th November 1962 or a copy of it until Mr. Khaled gave him a copy in 1963. If Mr. Bhatt did not know of the defendants' desire to withdraw from the transaction and thought the agreement was settled and concluded and only performance of it was required, he might well consider it unnecessary to state the date and method of communication of the acceptance.

The letter of 9th January 1963 from the defendants' advocates to Mr. Bhatt raises a serious difficulty for the defendants' contentions. This is referred to in the judgment of the President of the Court of Appeal. He

said, mentioning the writer of the letter, that he "referred to the defendant company's offer as repudiated by delay, a position inconsistent with rejection of the offer at Cairo or, indeed, withdrawal of the offer before communication of acceptance. I find it difficult to give a rational explanation of this letter and I do not find Mr. O'Donovan's explanation, which was that the letter was badly drafted, as very convincing. I accept that this letter is not consistent with what I believe to be the true position. If however, I assume that the offer at Cairo was not rejected but was accepted there are, in my opinion, so many facts inconsistent with such an assumption that I am forced to reject it. In the result, in spite of the inconsistency created by this letter, I have come firmly to the conclusion that the offer was rejected at Cairo, and that the trial judge erred in not dismissing the suit".

With regard to this passage in the judgment of the President it must be pointed out with respect that he was assuming only two possibilities, namely acceptance or rejection of the offer at Cairo, whereas in their Lordships' opinion, which accords with the findings of the learned judge, the effect of the evidence, both oral and documentary, is that at Cairo the offer was neither accepted nor rejected but was kept open for future acceptance by the plaintiffs after consultation by Mr. Khaled with his brothers in Kuwait.

A further question is whether the purported acceptance at the end of October 1962 came too late, after a reasonable time for acceptance had expired. This is a substantial question, as the period of about two months which elapsed between the communication of the offer towards the end of August and the communication of the acceptance towards the end of October seems very long. Especially it can be urged that in view of unsettled conditions in South Arabia, where a revolution had started in the Yemen (on 27th September, as counsel stated, there being no evidence of the date), a prompt or at any rate an earlier acceptance or rejection should have been given. But the course of the negotiations is important on the issue of what was a reasonable time for acceptance. The negotiations had started in 1961 and continued in 1962 and can be fairly described as protracted with considerable intervals between the moves and countermoves. It was arranged in Cairo that the offer should be kept open for Mr. Khaled to consult his brothers in Kuwait. Mr. Wadia, the defendants' agent, knew from the letter of 31st August that Mr. Khaled had to go to India. Mr. Wadia did not reply to the letter until more than three weeks later, and he was adhering to the arrangement. The documents were signed on 2nd October, and only the communication of the acceptance was delayed. According to Mr. Ba Saleh's evidence, accepted by the learned judge, when the acceptance was communicated by Mr. Ba Saleh to Mr. Dino at the end of October Mr. Dino received and acquiesced in the acceptance without making any suggestion that it was out of time. On the whole it cannot be said that a reasonable time for acceptance of the offer had elapsed.

The remaining question is whether specific performance is the appropriate remedy in this case. On this question the Court of Appeal agreed with the learned judge's decision that an order for specific performance would be appropriate. The President said "The fact that disputes had arisen between the owners of the shares of the Bottling Company and the fact that there must have been a limited market for those shares provided, in my view, ample justification for the trial judge in his discretion making the order for specific performance". Their Lordships are in agreement with this view.

Their Lordships have humbly advised Her Majesty that this appeal be allowed, the judgment and order of the Court of Appeal for Eastern Africa dated 24th February 1966 set aside and the judgment and decree of the Supreme Court of Aden dated 9th June 1965 restored. The respondents must pay the appellants' costs of this appeal and in the Court of Appeal for Eastern Africa.

In the Privy Council

**KHALED ABDUL LATIF AL HAMAD
AND OTHERS**

v.

ATHANAS BROS. (ADEN) LIMITED

DELIVERED BY
LORD PEARSON