Privy Council Appeal No. 71 of 1934

James Eggay Taylor - - - - - - *Appellant*

v.

The United Africa Company, Limited - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

PRELIMINARY JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH OCTOBER, 1936

Present at the Hearing:

LORD MAUGHAM.

LORD SALVESEN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD MAUGHAM.]

This appeal has taken a somewhat unfortunate course. It is an appeal from a judgment of the West African Court of Appeal setting aside a judgment of the Divisional Court sitting at Cape Coast Castle. The action was one by the United African Company, Limited, the respondents in the appeal, against a person who had been employed as agent for them for some years, based upon his negligence in carrying out his duties under a written contract, dated 30th July, 1933, that is, his breach of his contractual liabilities under that contract, and it also was based to some extent upon the fact that under clause 3 of the written contract he was responsible for any deficiency as regards goods and moneys received at the factory of which he was in charge, due directly or indirectly to his act, neglect, or default. There is absolutely nothing in the statement of claim, which was amended in due course on an application by the defendant, which suggested any sort of fraud on the part of the agent, the defendant; *a fortiori* there was no suggestion that the moneys which the plaintiffs alleged had been lost, amounting to the sum of £7,816, had been lost owing to the circumstance that the defendant had feloniously taken it or any part of it, or that he had embezzled the money in any way. When the case came on for trial before the learned judge of first instance, two persons were called who had been servants of the branch of which the defendant was in charge, one of them being Henry Reginald Horner Acquah and the other Thomas Akyiremansa Carr; the first was the cashier, and the second was the book-keeper employed at the branch in question. Both these men were

brought up in custody. They were serving terms of imprisonment, having been convicted ultimately on their own confession of falsifying the books of the branch and of other wrongful acts in connection with their duties. When they were in the box, they having been called on behalf of the plaintiffs in order to establish the case of negligence against the defendant, it appeared that each of them was desirous of testifying that the moneys, or the greater part of the moneys in question, had been taken by the defendant himself or had been given to him by the witness Acquah. Part of their evidence was proper and relevant evidence led to justify the charge of negligence, but that part of their evidence which suggested that the defendant had himself taken the money was in support of a charge which it was not open to the plaintiffs to establish on the pleadings, and indeed it amounted to a complete change of the nature of the cause of action which was open to the plaintiffs. In the opinion of their Lordships there is no rule which is less subject to exception than the rule that charges of fraud, and *a fortiori* charges of criminal malversation or felony, against a defendant ought not to be made at the hearing of an action unless, in a case where there are pleadings, those charges have been definitely and clearly alleged, so that the defendant comes into Court prepared to meet them. Their Lordships must express the opinion that the learned judge was wrong in allowing Acquah and Carr to state in evidence that Taylor had received these moneys or was responsible for the disappearance of the moneys by way of fraud. So far as their Lordships can gather from the materials before them, the counsel for the plaintiffs was not responsible for the case diverging in the way it did from the case set out in the pleadings, and it is very noticeable that when the defendant himself was called into the box, although he naturally was asked whether the statements made by the two persons who had given evidence against him, Acquah and Carr, were true, and although he flatly denied their charges, there was no endeavour on behalf of the plaintiffs in any way to cross-examine him with a view to showing that he was guilty of either fraud or felony or any other criminal conduct whatsoever. As far as their Lordships can understand, the Court was addressed on both sides on the footing that a case of negligence in the wide sense was being made and that there was no other case before the Court. It is true that the manager for the plaintiffs, Mr. Bray, was recalled at the end of the evidence by the judge himself, and was asked by the judge whether he believed the evidence that Acquah and Carr had given, and he said he did and went on to say that the plaintiffs asked the Court to believe that evidence. In the opinion of their Lordships it was an error of judgment to have asked Mr. Bray these questions and to have attached any weight to the answers to them. The belief of Mr. Bray was irrelevant from any

point of view; but apart from that no case of fraud or felony was, properly speaking, before the Court. All that had happened was that two witnesses, both serving terms of imprisonment for crime, had for some reason which it is not necessary to go into thought fit to say that their crimes had been instigated by the defendant in the action. The learned judge, having come to the conclusion that the two witnesses, Acquah and Carr, were telling the truth, thought it was right to take the view that the action was an abuse of the process of the Court and that the alleged negligence was nothing more than camouflage, to use his phrase, and, accordingly, he held that the defendant was guilty of a felony. He went on to say that the charge had been concealed under a cloak of negligence and that, according to a well known rule which was laid down in the Court of Appeal in the case of *Smith* v. *Selwyn*, [1914] 3 K.B. 98, it was not open to the plaintiffs to make the felony of the defendant the foundation of the civil action until the defendant had been prosecuted or a reasonable excuse shown for his non-prosecution. The learned judge continued that as it was impossible to stay the civil action, as had been done in certain cases of that character, and inasmuch as no reasonable excuse had been shown for the non-prosecution of the defendant, he had no alternative but to non-suit the plaintiffs as regards that portion of the claim which dealt with £7,816 and he non-suited the plaintiffs with costs. Another small sum which was in issue at the trial need not be dealt with, because that has not been brought before their Lordships.

In fact, however, the plaintiffs in the action had a very good ground for not prosecuting the defendant, though the learned judge was not aware of it for the reason that he had made no enquiry upon the matter whatever. The plaintiffs, having brought an action based on the civil liability of the defendant apparently thought, and in their Lordships' view rightly, that there was no question as regards felony open to either side, certainly not open to the plaintiffs. The position with regard to it was this : the plaintiffs had placed the matter in the hands of the police and pressed for a prosecution to be instituted, but the police, after having made investigations and after consulting the law officers, had decided that the evidence was not sufficient to justify a prosecution. The plaintiffs' agent made a special journey to Accra to press for a prosecution, but was unsuccessful, as was stated by the Chief Justice when delivering the judgment of the Court of Appeal. He also says :—

> "In this country the public very properly look to the police to institute and carry on prosecutions when a public wrong has been committed. The advice of the law officers is the last word as to the propriety of a prosecution. It would, in my view, be wholly unreasonable to hold that a member of the public had failed in his public duty because he failed to institute a private prosecution after the police, on the advice of the law officers, had refused to prosecute."

Accordingly, if the position before the trial judge had been that a claim on the basis of a criminal taking of the money by the defendant was open to the plaintiffs, there would have been a sufficient ground for holding that a non-suit of the plaintiffs on the ground of the decision in *Smith* v. *Selwyn* (*supra*) was not the proper course to take, since there was sufficient reason for not prosecuting the defendant. What seems to have escaped the attention of the learned trial judge was that the point was never one which properly speaking arose for his consideration. Had the plaintiffs endeavoured to enforce the charge of felony or endeavoured to support the charge of negligence, if that had been possible, by making the charge of felony a part of their case the learned judge's duty was to have stopped such a course on their part. It is true that there are cases in which a civil claim may obviously be based upon a felonious act, and if the court sees that, although the pleadings attempt to disguise the fact or may not point it out very clearly, it may be right on the grounds of public policy for the judge to say that the defendant, if he is the man who is alleged to have committed the felony, ought to be prosecuted or a reasonable excuse shown for his non-prosecution; but there was nothing of the kind in this case. The action was one which was quite open to the plaintiffs if the defendant was innocent of fraud under the terms of the written agreement between the plaintiffs and the defendant, and in their Lordships' view the question as to the principle of *Smith* v. *Selwyn* (*supra*) or how far it goes, and what precisely had to be shown in this case, really did not arise for consideration at all.

Then there was an appeal and on the appeal the evidence as to the reasons for non-prosecution was admitted. In their Lordships' view, assuming that the rule of public policy was one that was open for consideration, the evidence was properly admitted, because it cannot be right for a judge to come to a conclusion such as that which the trial judge came to in this case without making enquiry of counsel for the plaintiffs. When the learned Chief Justice, Sir Donald Kingdon, delivered judgment he said that the evidence had satisfied him that the plaintiffs had in fact reasonable excuse for non-prosecution. He proceeded as follows:—

> "As to whether they (the plaintiffs) have proved their case or not I think it is unnecessary to look further than the following passage in the trial judge's ruling upon the application to review: 'I agree that this finding'—[namely that the loss of £7,816 was sustained by the plaintiffs as the direct result of the 'act' of the defendant]—would have been sufficient to 'entitle the plaintiffs to judgment, had public justice been vindicated'. I also agree and I consider the evidence so overwhelming that no Court could possibly come to any other conclusion. It is abundantly clear that the plaintiffs proved their case and that, but for the point as to non-prosecution being taken by the Court, they would have been given

judgment in the Court below. Now that reasonable excuse for non-prosecution has been shown, the plaintiffs are, in my opinion, entitled to judgment."

That statement of the Chief Justice's is consistent with and tends to support the view that he also was considering whether there was not strong evidence to establish a charge of felony against the defendant. That point, as above pointed out, was never open either for the Court of Appeal or for the court of first instance. Their Lordships are unable to find in the judgment of the Chief Justice any finding as to the amount, if any, for which the defendant is liable on the footing of negligence or breach of contract.

Their Lordships desire to make it quite clear that according to ordinary principles of justice the defendant must be taken in this action to be an innocent man. His position is in effect just the same as if it had been established that he was not guilty of any fraud whatever.

There remains for consideration the somewhat difficult question as to the course which their Lordships should advise His Majesty to take. There was a plain charge of what may be called for shortness negligence against the defendant, and, as far as the materials before their Lordships go, it is plain that some damages had been caused, by the admission of the defendant himself, owing to his negligence. Their Lordships cannot very well in the circumstances say that the matter should be sent back to West Africa for decision. The case was heard to the end before the trial judge and the whole of the evidence seems to be before their Lordships. With some reluctance they have come to the conclusion that they must themselves decide whether the existing evidence in the case is sufficient to justify the finding that a loss of £7,816 has been sustained by the plaintiffs as the direct or indirect result of the act, neglect or default of the defendant, or whether some less, and if so what, loss has been proved to have been so occasioned. Owing to some correspondence which took place between the solicitors for the two parties before the matter was heard, their Lordships are driven to the conclusion that it would not be fair and just to attempt to decide this matter to-day, because there was language in the correspondence which passed between them which led to the conclusion that the amount due on the footing of negligence alone was not to be gone into. Their Lordships, therefore, think it right in order that they may be in a position to decide the issue as to quantum of damages for negligence, to grant an adjournment to enable any necessary documents to be printed or copied, and to enable counsel to inform themselves as to the relevant points which alone remain for discussion when the matter comes before this Board again. Their Lordships purposely say " printed or copied ", because in the circumstances they are desirous that no large amount of cost should be involved in the matter. They think, so far as they can form an opinion, that with

regard to a number of documents all that will be necessary will be a sample or example of the document in question. They are quite content that copies should be made and duplicated by one of the duplicating processes, and they think that on that footing the cost involved should not be large. It is their Lordships' suggestion, without making it a part of the order, that the respondents should deliver particulars of the items in respect of which as they allege the evidence adduced at the trial proves that the loss was occasioned by the act, neglect or default of the defendant. If that can be done, it seems to their Lordships that it will very greatly shorten the labours of both sides, and the time that will be occupied in discussing the matter before the Board. Their Lordships have anxiously considered the question as to whether they can in any way interfere with what has been described as the sequestration order made on the application of the appellant for leave to appeal. In strictness, it is not a sequestration order, but it has the effect, no doubt, of making it very difficult for the appellant to deal with his properties. Their Lordships are unable to interfere with that order; it is not clear that they would have any right to do so, but at any rate, in the circumstances of the case they do not think it possible to interfere. On the other hand, their Lordships think, having regard to the fact that both sides are to some extent responsible for the unfortunate position which has arisen, it would be fair to direct that the costs of copying or printing and duplicating any documents which have to be brought to the attention of the Board ought to be equally shared in the first instance by the respondents and the appellant, subject to any order which may be made at a later date.

There is only one other observation which their Lordships desire to make and that is that expedition is very desirable on both sides, as they are desirous of disposing of this matter before the present tribunal while the matter is clear in their minds.

Their Lordships understand that the respondents can give their particulars within seven days, and there will be fourteen days allowed for the next stage. When the documents have been agreed they will be brought in to the Registrar for the purpose of duplication, and special efforts are to be made to expedite the process of copying.

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In the Privy Council

JAMES EGGAY TAYLOR

v.

THE UNITED AFRICA COMPANY, LIMITED

DELIVERED BY LORD MAUGHAM

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