27, 1959

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IN THE PRIVY COUNCIL

No. 32 of 1958

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL

FOR EASTERN AFRICA

BETWEEN

KIRIRI COTTON COMPANY LIMITED

Appellants

and

RANCHODDAS KESHAVJI DEWANI

Respondent

CASE FOR THE APPELLANTS

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1. This is an appeal from a Judgment and Order of Her Majesty's Court of Appeal for Eastern Africa dated the 18th day of April 1958 dismissing with costs an appeal against a Judgment and Decree of Her Majesty's High Court of Uganda dated the 24th day of September 1957, whereby it was ordered and decreed that Judgment be entered for the Respondent (plaintiff) for Shs 10.000/- with costs to be taxed.

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2. The action was brought by the Respondent as plaintiff by a plaint dated the 21st day of September 1956 in the High Court of Uganda at Kampala (Civil Case No.883 of 1956) to recover as money received by the Appellants (defendants) for the use of the Respondent (plaintiff) the said sum of Shs 10.000/- paid by way of premium

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on or about 15th day of June 1953 for a sub-lease of a dwelling-house at Kampala for a term of 7 years and one day from the 1st day of June 1953 at a monthly rent of Shs 300/- payable in advance. The said sub-lease was by verbal agreement which was later reduced into writing, executed by the Appellants and the Respondent, and dated
pp 4-8 the 17th day of September 1953. The Respondent has been and remains in occupation of the said dwelling-house since the 15th day of June 1953.

3. The Laws of the Uganda Protectorate chapter 115 Rent Restriction (being Ordinance Number 10 of 1949) at all material times provided by section 3 as follows:-

3. (1) No owner or lessee of a dwelling-house or premises shall let or sub-let such dwelling-house or premises at a rent which exceeds the standard rent.

(2) Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made before or after the grant of a tenancy shall be guilty of an offence and liable to a fine not exceeding Shs 10.000 or imprisonment for a period not exceeding six months or to both such fine and imprisonment.

Provided that a person acting bona fide as an agent for either party to an intended tenancy agreement shall be entitled to a reasonable commission for his services:

And provided further that nothing

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in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more.

(3) Where any person is charged with an offence under subsection (2) of this section the court may consider any other transaction of the person charged and if the court is satisfied that such other transaction was not bona fide but that it was in fact part of the transaction in relation to the granting of the tenancy it may take such other transaction into account when considering the evidence in respect of the charge under subsection (2) of this section.

The expressions "dwelling-house" and "premises" are defined by section 2 of the said chapter and Ordinance as follows:-

"dwelling-house" means any building or part of a building let for human habitation as a separate dwelling where such letting does not include any land other than the site of the dwelling-house or the garden or other land within the curtilage of the dwelling-house.

"premises" means any building or part of a buildinglet for business, trade, or professional purposes or for the public service, but shall not include any land other than the site of the premises or land within the curtilage of the premises.

4. The principal question raised by this appeal is whether the Respondent is entitled to recover by civil action the aforesaid sum of Shs.10.000/- which was received from him by the Appellants in contravention of section 3(2) of

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the aforesaid chapter and Ordinance which prescribes a penalty for contravention and does not provide for the recovery of money so paid.

5. The facts of the case are contained in the evidence of the Respondent which was the only
pp 10-11 evidence given in the trial of the action and was as follows:-

> "Plaintiff in this case. I came to Kampala, Uganda, in 1953 - March. I lived with a brother for 1½ months. I took a flat, but I had to pay Key money. I was searching for some time. I got a flat at Kololo but after 2 - 3 days I had to leave as I had trouble with a co-tenant. Then I got in touch with C.B.Patel, after having difficulty. I borrowed 10.000/- from the Company as my brother was a director
> (Cross examined) I paid the money by borrowing the money".

pp 10-16 6. The action was heard in the High Court of Uganda (Lyon J) on 18th September 1957. The learned judge reserved judgment which he gave on 24th September 1957 in favour of the
pp 16-27 Respondent (plaintiff).

The learned judge noted the terms of the written sub-lease and recorded as the agreed issues: (1) Has the plaintiff any cause of action as disclosed in the plaint? (2) Is the plaintiff entitled to recover Shs 10.000/- paid by him to defendants as premium? He found as
p 17 facts that the sub-lease was obviously drafted by a lawyer or lawyers, that the respondent was at a disadvantage during the negotiations for the flat and that he may have thought the transaction did not constitute an offence. He considered the provisions of the Ordinance and held

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that the receipt of Shs 10000/- by the Appellants was illegal. pp 18-19

The learned judge then considered Rex v. Norman Godinho, Cr. App.62/50; 1950 E.A.C.A. (vol.xvii) 134. in which case the Court of Appeal for Eastern Africa had held in a criminal appeal that as there was no right to recover a premium paid in contravention of Section 3 (2) of the Ordinance a magistrate had no power under the Uganda Criminal Procedure Code, section 175 (1), to award compensation to the tenant to be paid out of a fine imposed upon the landlord for contravention of the said section 3(2). He held that Godinho's case was decided per incuriam and upon special facts; if and insofar as it decided that the tenant and the landlord were in pari delicto this point had not been fully argued and the opinion expressed was obiter and did not make sense. pp 19-20 pp 21-22

The learned judge proceeded to consider the judgment of Edwards C.J. in the High Court of Uganda in Jamnadas Salabbai v. Haribbai Mangalbbai Patel, civil appeal No.20 of 1949, where Godinho's case was distinguished, and other English authorities in which the question whether one who is party or accessory to the contravention of a statute is prevented from basing a claim on that contravention or crime; Browning v. Morris (1778) 2 Cowp 790; Langton v. Hughes (1813) 1 M. & S. 593; Smith v. Cuff (1817) 6 M. & S. 160 Kearley v. Thompson (1890) 2 Q.B.D. 742; Gray v. Southouse 1949 2 All E.R. 1019 Falmouth Boat Construction Co.Ltd. V.Howell 1950 2 K.B. 35 and Green v. Portsmouth Stadium Ltd (1953) 2 All E.R. 102. p 23 pp 24-26

The learned judge concluded his review of the authorities by holding that he was not bound

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to follow Godinho's case and/or distinguishing it on the fact that there was no evidence that
p 26 l.36 the Respondent knew he was doing wrong and that
p 24 l.10 the Respondent could not be considered to be particeps criminis created by section 3 (2) of the Ordinance. In his opinion the Ordinance was enacted almost entirely to protect tenants
p 22 l.20 and to prevent landlords taking advantage of the housing shortage and he therefore held that the
pp 26-27 Respondent was one of a class protected by the Ordinance, was not in pari delicto with the
p 22 l.21 Appellants, had not been guilty of laches in
pp 26-27 prosecuting his claim and was therefore entitled to recover the premium which he had paid. Answering in the affirmative both questions embodying the agreed issues the learned judge gave judgment for the Respondent.

7. The Appellants appealed to the Court of Appeal for Eastern Africa against the judgment of the High Court of Uganda. The Appeal came on for hearing on the 17th day of March 1958 (O'Connor P., Forbes J.A. and Keatinge J.) and on 11th day of April 1958 the Court delivered judgment dismissing the appeal with costs.

pp 31-54 The judgment of the learned President was the judgment of the Court with which the other members of the Court agreed without reservation or addition. The learned President recorded that the findings of the learned trial judge that the payment of the premium was illegal and that there was no estoppel delay acquiescence or
p 34 laches by the respondent were not appealed against. He proceeded to consider the previous
p 35 - decision of the Court in Rex v. Norman Godinho and was of opinion that the true ratio decidendi in that case was that a sum paid in contravention
p 40 of section 3(2) of the Ordinance could not be

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recovered in a civil suit. He rejected the different interpretation of Godinho's case given by Edwards C.J. in the case of Jamnadas Salabhai v. Haribhai Mangalbhai Patel in the High Court of Uganda although the said learned Chief Justice had been party to the decision of the Court in Godinho's case he doubted whether it was correct that the Court was not bound to follow in a civil appeal a previous decision of its own upon a relevant point of law arising in the course of a criminal appeal, but did not decide that point because he took the view that Godinho's case was decided in ignorance or forgetfulness of authorities binding on the court and per incuriam as defined in Morelle v. Wakeling 1955 1 All E.R. 708 (C.A.), 718 per Sir Raymond Evershed M.R. He adopted the exceptions to the principle of stare decisis recognised in Young v. Bristol Aeroplane Co. 1944 2 All E.R.293, 300 C.A. per Lord Greene M.R.; 1946 A.C. 163,169 per Lord Simon, with amplifications including any decisions of the Court which cannot in its opinion stand with established decisions on the common law or doctrines of equity of the superior courts in England given before the date of reception of the common law and doctrines of equity which date was for Uganda the 11th day of August 1902.

p 38 l.40

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p 40 l.33

p 42 l.40

The learned President considered that decisions of the superior courts in England had established that contravention of an Act of Parliament could be made the subject matter of an action where the parties to an illegal contract were not in pari delicto and where the contract was made illegal with the object of protecting a class to which the plaintiff belongs liable to be oppressed or imposed upon; Browning v. Morris (1778) 2 Cowp 790 Kearley v. Thompson 1890 24 Q.B.D.742 C.A. He held

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p 44 1.11 that Godinho's case was decided in ignorance or forgetfulness of these decisions and was therefore not binding on the Court.

p 45 The learned President then turned to consider, untrammelled by Godinho's case, whether or not the Respondent was entitled to recover his premium. He thought that neither party intended an illegal transaction and considered that the absence from the Ordinance of any specific provision concerning recovery was not conclusive that the legislature did not intend that there should be a right of recovery at common law or in equity. In his opinion section 3(2) of the Ordinance was passed for the protection of prospective tenants liable owing to their condition and the scarcity of housing to be imposed upon by

p 46 1.20 landlords and agreed with the finding of the learned trial judge that the respondent was one of that protected class. In his opinion it followed that the respondent and the appellants were not in pari delicto and it was consistent with and in furtherance of the policy of the Rent Restriction Ordinance that illegal premiums should be recoverable (semble) because it would

p 46 1.39 restore the parties to the status quo ante.

The learned President considered that the decision of Devlin J. in Gray v. Southouse (1959) 2 All E.R.1019 was authority for the proposition that it is not contrary to public policy for a tenant to recover a premium made illegal by the English Rent Acts even when he knows the transaction is illegal and that principle applies a fortiori where the giver of the premium is innocent. He did notice that in Gray v. Southouse the money was paid for a consideration which wholly failed, and was recovered on that ground, whereas the Respondent got his sub-lease

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and occupied the premises, but nevertheless thought the Respondent was entitled to recover the premium which was taken in contravention of the Ordinance "after the transaction is finished and completed" citing Browning v. Morris supra and Barclay v. Pearson (1893) 2 Ch 154 167 and distinguishing Kearly v. Thompson supra. p 47 l.30

The learned President then proceeded to consider the question whether without express provision a person who is damnified by breach of a statutory obligation enforceable by a penalty has a right of action. He considered Cutler v. Wandsworth Stadium Ltd 1949 A.C.398 and Green v. Portsmouth Stadium Ltd 1953 2 All E.R. 102 C.A. which cases decided that no civil action lay. He distinguished these cases on the ground that the relevant statute (the Betting and Lotteries Act 1934) was passed for the benefit of the public and not for the benefit of the class (book makers) to which the plaintiffs belonged. He adopted and applied the principle stated by Lord Mansfield in Browning v. Morris supra that, in furtherance of statutes which prohibit contracts for the sake of protecting one set of men from another set of men, the person injured after the transaction is finished and completed may bring an action and defeat the contract. He held after reviewing some English authorities, that it was not necessary that the statute should expressly or impliedly contemplate such a civil action but that it was necessary to consider the scope, purpose and language of the statute as a whole, for whose benefit it was intended, public policy and convenience. He concluded that on the facts of this case the respondent was entitled to recover his premium and dismissed the appeal.

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8. It is respectfully submitted that the judgment of O'Connor P. contains errors which vitiate the reasoning which led to the conclusion reached, in that he gave no or insufficient weight to the factors in the case that

a) the contract (namely the agreement for a sub-lease) was an illegal contract whether or not the parties thereto knew it was illegal;

b) the Respondent paid the illegal premium voluntarily even if mistaken as to its legality;

c) the illegal purpose for requiring and/or paying the premium was wholly effected upon the grant of the said sub-lease;

d) the claim for the return of the premium was by action for money received for the use of the Respondent, that is to say ex aequo et bono, after the Respondent had received and when he still retained the benefit of the said illegal contract namely the said sub-lease;

e) the parties can not be restored to the status quo ante.

O'Connor P. failed in the premises to apply the correct principle, which has been established by a long line of decisions binding upon him, that money paid voluntarily under or in pursuance of an illegal contract cannot be recovered back after the carrying out in any substantial manner of the illegal purpose; Simpson v. Bloss 1816 7 Taunt.246; Kearley v. Thompson 1890 24 Q.B.D. 742 C.A.; William Whiteley Ltd v. R. (1909) 101 L.T. 741; 26 T.L.R. 19: Evanson v. Crooks (1911) 106 L.T.; 264 Alexander v. Rayson 1 K.B. 169; Berg v. Sadler & Moore 1937 2 K.B. 158 C.A.

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9. A formal Order in accordance with the Judgment of the Court of Appeal was made on the 18th day of April 1958 and against the said Judgment and Order this appeal is now preferred to Her Majesty in Council the Appellants having been granted final leave to appeal by an Order of the Court of Appeal for Eastern Africa at Kampala dated the 16th day of September 1958. p 55 pp 56-57

The Appellants humbly submit that the decision of the Court of Appeal for Eastern Africa is wrong and should be reversed and that this Appeal should be allowed with costs both here and below for the following among other

REASONS.

(1) BECAUSE the Uganda Rent Restriction Ordinance does not give a right of recovery to a person who pays a premium rendered illegal by section 3(2) thereof;

(2) BECAUSE on the proper construction of the said Ordinance the penalty for asking or receiving an illegal premium which is provided by the said section 3(2) is the sole remedy and no civil action can be founded thereon;

(3) BECAUSE the respondent paid the illegal premium voluntarily and was particeps criminis;

(4) BECAUSE there was no evidence to support the finding that the respondent paid the said illegal premium under oppression or duress or that he was at a disadvantage or imposed upon;

(5) BECAUSE there was no evidence to support the finding that the respondent was not in pari delicto;

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(6) BECAUSE the Court of Appeal of Eastern Africa erred in considering that, the respondent having entered into and enjoyed occupation of the dwelling house under the tenancy in respect of which he paid the said illegal premium, the recovery of the said premium would restore the parties to the status quo ante and was consistent with and in furtherance of the said Ordinance, Common Law and Equity;

(7) BECAUSE the Court of Appeal of Eastern Africa erred in holding that it was not bound to follow the previous decision of the said court in Rex v. Norman Godinhoand that the said previous decision was given per incuriam; 10

(8) BECAUSE Rex v. Norman Godinho was correctly decided;

(9) BECAUSE the Judgments of the Court of Appeal for Eastern Africa were wrong.

F.ELWYN.JONES.

E.P.WALLIS-JONES

IN THE PRIVY COUNCIL

No. 32 of 1958

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

Between

KIRIRI COTTON COMPANY LIMITED
Appellants

and

RANCHODDAS KESHAVJI DEWANI

CASE FOR THE APPELLANTS

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W.C.2.

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