Privy Council Appeal No. 44 *of* 196/-

The Honourable Sir George William Kelly Roberts Trading as The City Lumber Yard – – – – – *Appellants*

v.

Albert Soltys – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH MAY 1963

Present at the Hearing:
LORD EVERSHED
LORD DEVLIN
LORD PEARCE
(*Delivered by* LORD EVERSHED)

This is an appeal from the judgment dated 23rd March 1961, of the Chief Justice of the Bahamas dismissing the action brought by the plaintiffs (hereafter referred to as "the appellants") in which they claimed from the defendant (hereafter called "the respondent") the sum of £323 6*s.* 10*d.* as due to them for goods sold and delivered in or about the month of June 1959 at the request and by the authority of the respondent to a Mr. Pratt a contractor then engaged by the respondent (or by a company which the respondent wholly controlled) in the erection at Nassau for the respondent of a building which their Lordships were informed was a veterinary hospital. There was no or no substantial dispute, as their Lordships understand, as regards the amount claimed in the action or that building material to the value of that amount was in fact delivered by the appellant to Mr. Pratt and used in the erection of the veterinary hospital. The only real question in issue in the action was whether the material so delivered had in fact been supplied by the appellant to Mr. Pratt with the authority of the respondent so as to make the respondent directly liable therefor to the appellants.

From what has been said it is clear that the issue in the action was of a strictly limited nature and was one purely of fact. For this reason and since the amount involved was relatively small the case was one which, according to both the learned counsel before their Lordships, could be fairly compared with an action in a county court in this country. But it is also clear that in putting forward their claim the appellants asserted two distinct matters of fact upon both of which there was a direct conflict of evidence. In the first place it was claimed by the appellants that at some date probably in the early part of June 1959 an interview took place between the contractor Mr. Pratt and the respondent in regard to the supply by the appellants of the goods which were later the subject of the claim in the action. Mr. Pratt was called as a witness by the plaintiffs and gave evidence to the effect that at the interview referred to and alleged as having taken place between himself and the respondent authority was expressly given by the respondent to Mr. Pratt to order the goods in question from the appellants for use in the construction of the respondent's veterinary hospital. For reasons later appearing Their Lordships are deliberately putting the substance of the alleged conversation in an imprecise form. Second, it was alleged by the appellants that the supply of such goods to Mr. Pratt for the account of the respondent was expressly authorised by the respondent in a telephone conversation which took place

between the appellants' representative, a Mr. Thompson (who also gave evidence on the appellants' side) and the respondent on or about the 10th June 1959. The respondent, who was the only witness called on his side, denied both the above-mentioned allegations—that is, he denied that he had ever given to Mr. Pratt authority of the kind which Mr. Pratt had stated in evidence and also denied that he had ever spoken to Mr. Thompson on the telephone or had given through Mr. Thompson or anyone else to the appellants the authority which Mr. Thompson had stated he had received.

The learned Chief Justice at the beginning of his judgment stated that " Mr. Pratt says that as he had little capital he got the defendant Dr. Soltys to agree that building materials could be ordered in his name and the price be deducted from the next periodic payment under the contract. " Having so stated the learned Chief Justice made no further reference at all to the alleged meeting and conversation between Mr. Pratt and the respondent. He confined himself for the rest of his short judgment to the second issue of fact above-mentioned, namely, the alleged telephone conversation between Mr. Thompson and the respondent. Of the two witnesses, Mr. Thompson and the respondent, the learned Chief Justice stated that both impressed him equally as truthful witnesses by their demeanour. Then, after referring to certain matters affecting in his view the probabilities of the two conflicting accounts given by Mr. Thompson and the respondent respectively, the learned Chief Justice concluded his judgment as follows: " The plaintiffs must therefore rely upon the telephone conversation and the onus of proof that it occurred is on them. I find that they have failed to discharge that onus and the suit must be dismissed with costs. I will only add that I can have only the faintest expectation that this decision is more likely than not to be in accordance with the truth of the matter ". Mr. Goodenday for the appellants suggested that in the passage quoted from the judgment the learned Chief Justice had been at fault in his application of the principle of the onus of proof; and further suggested that in failing to express any conclusion of fact in regard to the interview between Mr. Pratt and the respondent the Chief Justice had failed to notice that if the evidence of Mr. Pratt were accepted the appellants had established a distinct and separate cause of action based on Mr. Pratt's authority in fact as the respondent's agent to order the goods from the appellants apart altogether from the alleged confirmation given by the respondent to Mr. Thompson in the telephone conversation. On the other side, Mr. Kemp contended that the question, " Aye " or " No ", whether the conversation as alleged by Mr. Thompson on the appellants' behalf took place was a pure question of fact which the Chief Justice had decided and that such decision could or should not now be impugned. Mr. Kemp contended also that the Chief Justice's conclusion as regards the telephone conversation involved or should be regarded as having involved necessarily and inevitably a rejection of Mr. Pratt's evidence of his earlier conversation with the respondent. He submitted too that a close examination of the evidence given given by Mr. Pratt disclosed in any case serious doubt as to the real nature of the arrangement between himself and the respondent which Mr. Pratt alleged had been made—particularly whether according to Mr. Pratt the respondent had authorised him to order the goods in question in the respondent's name or had promised to open or procure the opening of an account with the appellants in the name of Mr. Pratt. Mr. Kemp drew attention to certain matters appearing in the evidence which (as he contended) had the effect of making the respondent's denial of the telephone conversation more probable than Mr. Thompson's assertion of it. Finally, Mr. Kemp stressed the point that treating this case as being truly comparable to a county court action the short judgment of the learned Chief Justice should not be subjected to critical examination or analysis—that in substance it clearly showed a decision eventually arrived at in the respondent's favour on a matter of fact.

Having regard to the conclusion which their Lordships have reached it is in their opinion undesirable that they should deal more fully with the issues of fact and the inferences to which Mr. Kemp alluded. On the other hand, their Lordships are not satisfied that Mr. Goodenday's submission as regards the

Chief Justice's application of the principle of the onus of proof is well founded; nor having regard to the pleadings and the way in which, according to the note of counsel's opening before the Chief Justice, the case was submitted for decision do their Lordships now think it right to attach substantial weight to the contention that the alleged conversation between Mr. Pratt and the respondent should have been treated as giving rise to a separate and alternative cause of action on the appellants' part.

Their Lordships none-the-less have felt seriously disturbed by the absence in the judgment of the Chief Justice of any finding as regards the alleged conversation between Mr. Pratt and the respondent or any reference whatever thereto save in the statement of the effect of Mr. Pratt's evidence at the beginning of the judgment which their Lordships have already quoted. It is clear that in the view of the Chief Justice the determination of the appellants' claim depended and depended solely on the view proper to be taken as regards the alleged telephone conversation. As already noted in the opinion of the Chief Justice both Mr. Thompson and the respondent appeared to be truthful witnesses so that the determination of the question relating to the telephone conversation had to be reached by considering the respective probabilities of the conflicting stories—and also of course of any other relevant material throwing light upon the matter. It is further clear that in the view of the Chief Justice the question in regard to the telephone conversation was so nicely balanced that it might be said to have rested upon a razor's edge—a view much emphasised by the final sentence of the judgment. If the Chief Justice's analysis of the case is so far correct then, as it seems to their Lordships, for the final determination of the vital matter of the telephone conversation the truth or falsehood of Mr. Pratt's evidence of his conversation with the respondent was to say the least extremely relevant if not perhaps decisive. Indeed the two matters of fact on which there was a direct conflict of evidence are in their Lordships' opinion necessarily and inevitably linked together. In particular it was of the essence of Mr. Thompson's evidence that he had communicated by telephone with the respondent as a consequence and by reason of the information he had had from Mr. Pratt of the respondent's authority given to Mr. Pratt which Mr. Thompson on the appellants' part was not willing to act upon without the confirmation of the respondent. In other words, their Lordships have felt it impossible to avoid the conclusion that the learned Chief Justice in failing as he did to express any finding as regards Mr. Pratt's evidence (particularly as he had at the beginning of his judgment stated what in his view was the effect of it) failed to appreciate the vital significance of this evidence in relation to the telephone conversation.

Their Lordships have already observed that in the view of the Chief Justice the issue between the appellants and the respondent rested upon what their Lordships have called a razor's edge. Their Lordships, therefore, cannot escape the conclusion that the failure of the Chief Justice to appreciate the significance of the evidence of Mr. Pratt may have resulted in a real miscarriage of justice. If therefore the amount in dispute had been substantial their Lordships can feel no doubt that the right course in the interests of justice would have been to order a new trial. In this case, however, the sum involved is no more than £323 and the question therefore arises whether in a case such as the present involving so relatively small an amount it would be right to order a new trial the costs of which when added to the costs incurred might be said to be disproportionate to the sum involved. In the end of all however their Lordships have come to the conclusion that in the interests of justice their proper course is to order a new trial. In reaching this conclusion their Lordships do not forget that there is no appellate court in the Bahamas and that the matter comes direct from the trial Judge. If therefore it is true to say, as the learned counsel suggested, that the action should be treated as truly analogous to a county court action in this country, their Lordships think that in all the circumstances of the case their Lordships ought to deal with it on lines comparable to those on which the Court of Appeal in England would deal with such a case coming before it from a county court. Applying that test their Lordships' view is that they should—as would the Court of Appeal in England—order a new trial and further direct that the new trial should be

conducted before a judge other than the Chief Justice. In so saying their Lordships wish to make it quite clear that they are not to be taken to be casting any reflection whatever upon the skill and competence of the Chief Justice but following what would be the practice of the Court of Appeal in a similar case from the county court their Lordships feel it right to direct that the matter should be retried before another judge so that both the learned Judge and indeed the parties to the suit should be free from any possible embarrassment that might attach should the case be retried by the learned Chief Justice himself.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed, that the judgment of the Chief Justice should be set aside and that there should be a retrial of the action before some other judge than the Chief Justice. Their Lordships also direct that the respondent should pay the costs of the appellants before the Board but that the costs of the trial before the Chief Justice should, like the costs of the retrial, be at the discretion of the learned Judge before whom the matter comes.

(87738) Wt. 8052/97 80 6/63 Hw.

In the Privy Council

THE HONOURABLE SIR GEORGE WILLIAM KELLY ROBERTS TRADING as THE CITY LUMBER YARD

v.

ALBERT SOLTYS

DELIVERED BY
LORD EVERSHED

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