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Judgment 1, 1964

No. 8 of 1963

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N :

THE NATIONAL BANK OF NIGERIA LTD. (Plaintiffs) Appellants

- and -

OBA M. S. AWOLESI (Defendant) Respondent

CASE FOR THE APPELLANTS

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1. This is an appeal from a Judgment of the Federal Supreme Court of Nigeria delivered on the 30th March 1962, allowing an appeal by the Respondent from the Judgment of Mr. Justice Irwin in the High Court of Justice in the Western Region of Nigeria and it ordered that the claim against the Respondent be dismissed with costs of the appeal assessed at 50 guineas and further ordered that the costs in the Court below should be taxed by that Court: pp.31-49 pp.19-22 p.48

2. The matter arises in relation to a claim by the Appellant in the High Court of Justice in the Western Region of Nigeria against the First Defendant therein mentioned, E. O. Adeyemi Taiwo (hereinafter called "Taiwo") and the Respondent (sued as Guarantor) for the sum of £10,023.14.3. as money payable by Taiwo to the Appellants being lent by the Appellants to Taiwo as bankers for Taiwo at his request and for interest upon money due from Taiwo to the Appellants and for bank charges. pp.2-3

3. The principal issues in the case are whether the opening by Taiwo after the date of the Guarantee of a second account and its subsequent operation prejudiced the rights of the Respondent

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as Guarantor under the terms of the Guarantee so as to discharge him from liability thereunder and whether the rule in Clayton's case (1 Mer 572) operated to satisfy the guaranteed debt.

4. The facts of the case may be summarised as follows:-

p.3

The Appellant is a company incorporated in Nigeria and is carrying on banking business in Lagos, the Federal Capital of Nigeria, and other places in Nigeria and also in the City of London. Taiwo was a customer of the Appellants at this Shagamu branch.

On the 30th December 1955 the Respondent executed a guarantee (not to exceed £10,500) to the Appellants on the terms set out therein (see Exhibit "C"), and of which Clauses 1 to 4 and 7

pp.51-52

are as follows:-

> "In consideration of the Bank (which expression shall include their successors and assigns) continuing the existing account with Emanuel Olaseni Adeyemi Taiwo of 140 Akarigbo Street, Shagamu (hereinafter called the Principal), for so long hereafter as the Bank may think fit, or otherwise giving credit or accommodation or granting time to the Principal, I, the undersigned, Moses Sowemimo Awolesi, Afin Akarigbo, Shagamu, hereby guarantee, on demand in writing being made to me, the due payment of all advances, overdrafts, liabilities, bills and promissory notes, whether made, incurred or discounted before or after the date hereof, to or for the Principal, either alone or jointly with any other person or persons together with interest, commission and other banking charges, including legal charges and expenses.
>
> 2. It is mutually agreed that the total amount recoverable thereon shall not exceed Ten thousand and five hundred pounds in addition to such further sum for interest thereon and other banking charges in respect

thereof, and for costs and expenses as shall accrue due to the Bank within six months before or at any time after the date of demand by the Bank upon me for payment. Record

3. And further, that this guarantee shall be applicable to the ultimate balance that may become due to the Bank from the Principal.

4. I agree that this guarantee shall be a continuing security to the Bank, and shall not be determined except at the expiration of six calendar months, written notice given to the Bank of my intention so to do, and in the event of my death the liability of my legal personal representatives and of my estate shall continue until the expiration of six months' notice in writing given to the Bank of the intention of my executors or administrators to determine this guarantee."

.....

7. I also agree that any admission or acknowledgment in writing by the Principal or any person on his behalf of the amount of the indebtedness of the Principal, or otherwise in relation to the subject matter of this guarantee, or any judgment or award obtained by the Bank against the Principal shall be binding and conclusive on me and my legal personal representatives.

5. According to the Judgment of Irwin J. in the Court of First Instance the Respondent was formerly a Sales Agent of the Compagnie Francaise de L'Afrique Occidentale ("C.F.A.O.") at Shagamu, and appeared to be the licensee of a petrol station owned by C.F.A.O. at Shagamu. When the Respondent became Akarigbo of Ijebu Remo the Respondent recommended Taiwo to the Company as his successor. Taiwo was appointed sales agents for C.F.A.O. at Shagamu, and the Respondent executed a Guarantee to C.F.A.O. Taiwo is a nephew of the Respondent and lives in his private house at Shagamu. In his said Judgment Irwin J. also concluded that over the period from 26th September 1955 to 24th December 1955 Taiwo issued 14 cheques, each payable to C.F.A.O., Ijebu Ode, for a total of £9,844, and that each of these cheques was p.20

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endorsed "Refer to Drawer". One cheque dated 26th September for £1120 was honoured on 29th December, the remaining 13 cheques for a total sum of £8,724 were honoured on 30th and 31st December. After payment of those cheques the account was on the 31st December 1955 over-drawn to the extent of

p.6. £10,096.16. 9. (Exhibit "A")

p.20 6. On 12th January 1956 a new account was opened by Taiwo with the Appellant at Shagamu (hereinafter called "No.2 Account"). Thereafter no cheques were drawn on the first account which remained over-drawn. The amounts paid in to the first account after that date did not represent a serious attempt to reduce the over-draft and interest thereon, but were sufficient to pay off the monthly debits on account of interest. The

p.8 resultant total on 24th July 1957 (after debiting interest due on 23rd July) was £10,023.14.3.

p.55 Approximately £29,000 was paid into the Number 2 Account in the year 1956. From 1st January 1957 to 31st March 1957 approximately £4,000 was paid in.

pp.53-54 7. By a letter dated 21st May 1957 (Exhibit "B") addressed to both Taiwo and the Respondent the Appellant demanded than an arrangement be made for the provision of collateral security and for the payment of a substantial amount before the close of business on Monday 10th June 1957. The concluding paragraph of the said letter is in the following terms:

> "Unless this arrangement is made, and a substantial amount is paid in this office before the close of business on Monday 10th June 1957, we shall be compelled to hand over the matter to our Solicitor for legal recovery jointly and severally. Your immediate attention will oblige please."

p.54 8. The Respondent replied to this letter on 6th June 1957 (Exhibit "D") but made no such arrangement for collateral security nor was any substantial amount paid in reduction of the overdraft.

pp.20-21 9. The ledger (Exhibit "F") shows that the Number 2 Account was at times in credit for sums

p.21 exceeding £2,500, but that in May 1957 the

credit balance was £2.19.4. Taiwo, who was called as a witness by the Respondent, stated that on 30th December 1955 he did not know that any of the cheques he had issued had been endorsed "Refer to Drawer"; the Respondent denied all knowledge, at the time of execution of the Guarantee, of Taiwo's liabilities. The learned Judge (Irwin J.) found that both were plainly evasive witnesses and he did not accept their evidence on that issue. Record

10. Taiwo also had an account with the Appellants at Lagos and on 30th December 1955 he issued a cheque for £520 payable to the Appellants and that amount was transferred to the Lagos account. pp.21-22

11. On the 21st August 1957 the Appellants issued a Civil Summons in the Supreme Court of Nigeria joining Taiwo and the Respondent as Defendants claiming £10,023.14.3. and suing the Respondent as Guarantor and on 16th March 1959 Taiwo submitted to judgment for £10,023.14.3. without interest but with costs of 50 guineas. p.1

12. The case came on for further hearing before Irwin J. on 29th April, 22nd May, 27th May, 23rd June and 3rd July 1959. The learned Judge gave judgment on 21st July 1959 and the reasoning of his judgment may be summarised as follows:- pp.11-19 p.19

In the view of the learned Judge the principal contention advanced on behalf of the Respondent was one of substance, namely, that it was not open to the Appellant to make a new account during the currency of the guaranteed one, so as to prevent the application of the principle of Clayton's case, Devaynes v Noble (1816) 1 Mer.572. p.21

He then referred in some detail to In Re Sherry, London & County Banking Company v Terry (1884) 25 Ch.D.692 and in particular to the judgment of Cotton L.J., from which he cited the following passage at Page 706:-

> "The balance which the surety guarantees is the general balance of the customer's account, and to ascertain that, all accounts existing between the customer and the bank at the time when the guarantee comes to an end, must be taken into consideration. So that it would be impossible for the bank to say, to p.21

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the prejudice of the surety, "We carry these sums which have been paid by the customer not to an account of which we ascertain the balance, but to a new account, and we refuse to bring these sums to the credit of his banking account to the relief of the surety". That is quite a different thing, and would be an improper dealing, improper in this sense, that it would prevent the balance of the account from being ascertained in accordance with the terms of the guarantee". 10

p.21 13. The learned Judge also referred to Mutton v Peat (1900) 2 Ch.79 in which it was held that two accounts of a customer must be treated as one in order not to prejudice the rights of the surety.

p.21 Irwin J. held that the letter from the Respondent dated 21st May 1959 (Exhibit "B") was a sufficient demand in writing, although not in express terms, in compliance with the guarantee. 20

p.22 He also held that the Respondent had no claim to have the sum of £520 referred to in paragraph 10 above, deducted from any amount found due by him.

p.22 14. Irwin J. concluded that the ultimate balance owing under Clause 3 of the guarantee was, in the circumstances, to be ascertained by combining the two accounts at Shagamu with the account at Lagos and by taking the balance due on the 24th July 1957, after treating all three as one unbroken account. 30

p.22 He concluded that judgment would be entered for the Appellant for the ultimate balance thus ascertained and referred the matter to a Referee appointed by the Court in default of agreement. The parties in fact agreed to the appointment of the manager of the Bank of West Africa Limited, Abeokuta.

p.22 15. At a hearing before Irwin J. on 31st July 1959, Counsel for the Appellants produced the ledger containing Taiwo's account at Head Office Lagos. These ledgers showed that the account had been dormant since 18th January 1956 and there was a credit balance of 5s.2d. at the relevant date. The Court ordered that the ledger be handed to the manager of the Bank of West Africa Limited, Abeokuta. 40

The evidence on reference to the Manager of the Bank of West Africa Limited Abeokuta (Mr. John Anthony Melhuish), was heard on 21st August 1959 before the Registrar of the High Court. He testified that had the three accounts referred to in the Judgment of Irwin J. been operated as one account from December 30th to July 24th 1957 the total indebtedness to the bank concerned would have been £9,610.14.4. and that he had prepared a statement of credit and debit transactions over the relevant period (Exhibit "K"). The Appellants appeared by Counsel and did not challenge these figures. The Respondent was not represented by Counsel at this hearing of evidence. Record p.23 pp.55-56

16. On 21st August 1959 Irwin J. gave Judgment against the Respondent for £9,610.14.4. and 80 guineas costs. There has been no appeal against this Judgment. p.24

17. The Respondent appealed to the Federal Supreme Court of Nigeria against the judgment of Irwin J., describing it as dated the 31st July 1959 in error for the 21st July 1959. The said Appeal came on for hearing before Unsworth, Taylor and Bairamian F.JJ. on 13th and 14th February 1962. Judgment was given on 30th March 1962. Taylor and Bairamian F.JJ. gave judgments allowing the appeal; Unsworth F.J. gave a dissenting judgment. pp.25-27 pp.27-31

18. Taylor F.J. summarised the major issue (which arose from an additional ground of appeal) as follows:- p.27

> "Is the opening of Account No.2 by the Respondent Bank in favour of the principal debtor a substantial breach of the agreement of guarantee, Exhibit "C", entered into by the Appellant and the Respondent Bank?" pp.51-52

The learned Federal Justice, took into account that the opening and operation of the No.2 Account was done without the knowledge of the Respondent who, he said, was kept completely in the dark as to what was going on between the bank and the principal debtor. In his view the words "continuing and existing account" in Clause 1 of the Guarantee seemed incapable of any other construction than that the parties had agreed p.33

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that the account of the principal debtor existing on 30th December 1955 should be continued as such, i.e. in an unbroken state, and that to his mind negatived the opening of a second account in the

p.33 circumstances disclosed above. Taylor F.J. pointed out that Clause 1 went on to provide that:-

> "Or otherwise giving credit or accommodation or granting time to the principal, I the under-signed, Moses Sowemime Awolesi, Afin Akarigbo, Shagamu, hereby guarantee....."

p.33 He took the view that the Bank could not find shelter under this provision, for the opening of a second account was not a giving of credit or accommodation or granting of time in respect of the existing account. Therefore he construed Clause 3 of the Guarantee so that the words "ultimate balance" in that Clause and the word "account" in Clause 6 could only be read in the light of Clause 1 as relating to the "existing account". Taylor F.J. then continued that, if the parties intended that the principal debtor should be placed in a position where he could open more than one account, the Guarantee should provide for this in unambiguous words, for it has been said that the law favours a surety and protects him with considerable vigilance and jealousy. He then referred to Ward v National Bank of New Zealand (1882) 8 A.C. 755 at p.764 in the following passage quoted from Cotton L.J. in Holme v. Brunskill 3 Q.B.D. 495 at p.505.

> "The true rule in my opinion, is that if there is any agreement between the principal with reference to the contract guaranteed, the surety ought to be consulted, and that, if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, and one which cannot be prejudicial to the surety the surety may not be discharged; yet that, if it is not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not in an action against the surety, go into an enquiry into the effect of the alteration."

p.34 Taylor F.J. then referred to another passage at P.763:-

"A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety has guaranteed". Record

The learned Federal Justice concluded that on the evidence before the Trial Judge it was made clear that the No.2 Account was in credit at times to the tune of £2,500. In his view without an enquiry by way of ordering the taking of a proper account it was not self-evident that the effect of the alteration was unsubstantial or one that could not be prejudicial to the surety, nor was it an alteration which the learned Judge could say was patently unsubstantial and not prejudicial to the Surety. He therefore considered it unnecessary to embark upon an enquiry by way of accounts or otherwise into the effects of the alteration and accordingly he would discharge the surety from liability and would allow the appeal and dismiss the claim with costs assessed at 50 guineas in favour of the Respondent. He further ordered that the costs of the Court below should be taxed by that Court. p.34

19. The reasoning of Bairamian F.J. may be summarised as follows:- p.39

Bairamian F.J. stated that the learned Judge (Irwin J.) had held that it was not open to the Appellant to make a new account during the currency of the guaranteed one so as to prevent the application of the rule in Clayton's case.

After referring in detail to the Judgment of Irwin J. and to the proceedings on reference the learned Federal Justice summarised the contention for the Respondent as follows:- p.42

"(1) that the opening of the No.2 Account materially altered the condition of the guarantee and the surety was thereby discharged; alternatively (2) that as the principal debtor (after the guarantee was given) paid in more than the amount guaranteed, the guarantee debt was satisfied".

The second submission was based on the rule in Clayton's case, the first on the ground that

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a contract of guarantee was "strictissimi juris". Bairamian F.J. summarised the argument for the Appellant as being that the rule in Clayton's case did not apply and that the Appellant was at liberty, under the terms of the Guarantee, to open a second account, and the opening of it did not discharge the guarantor.

pp.51-52

The learned Federal Justice referred to the terms of the Guarantee and stated that Clause 1 was vital in this dispute, and concluded that, when the Guarantee was given, the existing account was a current account, but it was not continued as such, it was insulated as the guaranteed account at the end of the following day. A new account was opened as the customer's current account, but it cannot be said to come within the words of Clause 1.

p.43

"Or otherwise giving credit or accommodation or granting time".

Bairamian F.J. took the view that the credit or accommodation or time was given in and through the insulated account, and he concluded that the new current account was an unauthorised departure from the terms of the Guarantee and quoted a passage from Halsbury's Laws (Third Edition) Volume 18 P.506 Para.929:-

p.43

"Any departure by the creditor from his contract with the surety without the surety's consent, whether it be from the express terms of the guarantee itself or from the embodied terms of the principal contract, which is not obviously and without enquiry quite unsubstantial will discharge the surety from liability, whether it injures him or not, for it constitutes an alteration in the surety's obligations."

p.44

Holme v. Brunskill (1878) 3 Q.B.D.495 at pp.505/506 per Cotton L.J. and other cases were cited as authorities in support.

The learned Federal Justice then once more referred to Halsbury's Laws Volume 2 at p.172 Para. 321 on "Appropriation When Account Guaranteed" and he quoted a passage as follows:-

p.44

"The banker is bound, however, to deal with the accounts in the ordinary way of business"

and a little later on he quoted the passage:- Record

> "On the termination of the guarantee the account may be closed, and a new one opened, to which all payments in may be carried. But the banker is not entitled, where an account is guaranteed to a limited extent, to split that account during the continuance of a guarantee and attribute all payments in to the unsecured balance." p.44

The authorities cited for this proposition were In Re Sherry (Supra) and Deeley v Lloyds Bank Ltd. (1912) A.C.756 H.L. Bairamian F.J. then read a further passage from Halsbury Volume 2 at p.236 para.446: p.44

> "It would be contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one, and carry all payments in to the new account." p.44

The learned Federal Justice stated that the authority for this proposition was In Re Sherry, Cotton L.J. with a reference to compare Mutton v.Peat (Supra) and Bradford Old Bank Limited v. Sutcliffe (1918) 2 K.B. 833 C.A.

In considering In Re Sherry the learned Federal Justice concluded that the opening of the new account in the present case was a device to prejudice the Surety. Where the account was insulated the Guarantor could be kept in the dark. p.45

20. Bairamian F.J. then referred to the effect of the splitting of the account on the amount of interest.

Mr. Melhuish had given evidence on reference that if the accounts had been operated as one, the final debt would have been the amount he gave. The first portion of his evidence (and the accounts he put in) showed that he treated them as separate accounts.

The learned Federal Justice rejected the contention on the part of the Appellant that the opening of the Account No.2 was done merely for the sake of convenience and was immaterial. Such a course was contrary to practice and was frowned on. The remedy was not to order a fresh reference

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because the opening of the second account was an unauthorised departure from the terms of the Guarantee, which operated to the prejudice of the Guarantor. In his view it became unnecessary to consider the
pp.35-38 submission relating to the rule in Clayton's case.

21. The reasoning of Unsworth F.J., (who gave the dissenting Judgment) is as follows:-

Unsworth F.J. referred to the contention that Irwin J. should have held that the very fact of opening a second account discharged the Guarantor from all liability. He then referred to the Judg-
p.37 ments of the Court of Appeal in re Sherry (Supra). The learned Federal Justice did not construe these Judgments as meaning that a surety is necessarily discharged by the opening of a new account, but only that the opening of a new account would not affect the surety whose liability must be calculated in terms of the Guarantee. Unsworth F.J., after considering the terms of the Contract of Guarantee concluded the Guarantee was one for the ultimate balance, and he construed this as meaning the ultimate balance on all accounts. He, therefore, concluded that the Guarantor was not discharged from liability, but that the Appellant was obliged to give the Guarantor the benefit of credits in
p.38 other accounts. As was said in Mutton v. Peat (1900 2 Ch D 79) the method of book-keeping adopted by the Bank must not prejudice the real rights of the Surety under the Guarantee, and Irwin J. rightly held that the amount due by the Guarantor was the ultimate balance as ascertained after treating all accounts as one unbroken account. Unsworth F.J. also concluded that there was no substance in the alternative contention on the rule in Clayton's case, as the Guarantee was a continuing Guarantee for the ultimate balance. He would therefore dismiss the Appeal.

22. The Appellants humbly submit that this Appeal should be allowed with costs and that the Judgment of the Federal Supreme Court of Nigeria on the 30th March 1962 should be reversed and the Judgment of Irwin J. in the High Court of Justice of the Western Region of Nigeria of the 21st July 1959 should be restored for the following amonst other

R E A S O N S :-

(1) BECAUSE the Guarantee was a continuing guarantee for the ultimate balance due to the Appellant from Taiwo (the principal debtor) for due payment of all advances, over-drafts, liabilities, bills and promissory notes whether made incurred or discounted before or after the date of the Guarantee together with interest, commission and other banking charges, including legal charges and expenses;

(2) BECAUSE in the circumstances the rule in Clayton's case (1816) 1 Mer did not apply to the operation of the accounts so as to discharge the liability of the Respondent under the Guarantee;

(3) BECAUSE the amount due by the Respondent on the Guarantee is the ultimate balance as ascertained after treating all accounts as one unbroken account;

(4) BECAUSE the opening and operation of account No.2 and the account with the Appellant at Lagos did not prejudice the rights of the Respondent as guarantor under the terms of the Guarantee and did not discharge the Respondent from any liability under the Guarantee;

(5) BECAUSE the letter dated 21st May 1957 to Taiwo and to the Respondent constituted a sufficient demand to the Respondent as Guarantor for the purposes of the Guarantee;

(6) BECAUSE the amount of £9610.14.4. found by Irwin J. in his Judgment on Reference to be due on the Guarantee by the Respondent to the Appellants was not disputed;

(7) BECAUSE the Respondent is not entitled to any deduction of the £502 paid by Taiwo into the said account with the Appellant at Lagos;

(8) BECAUSE judgment has been obtained by the Appellants against the Principal for £10,023.14.3;

(9) BECAUSE the reasoning of Taylor and Bairamian F.JJ in the Federal Supreme Court of Nigeria is wrong;

(10) BECAUSE the reasoning of the Judgment of Unsworth F.J. in the said Federal Supreme Court is correct;

(11) BECAUSE the reasoning of Irwin J. in the High Court is correct.

NEIL ELLES.

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- and -

OBA M. S. AWOLESI

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