

*Privy Council Appeal No. 26 of 1961*

**John Khalil Khawam & Company (trading as John Khalil Khawam) Appellant**

v.

**K. Chellaram & Sons (Nig.) Limited - - - - Respondents**  
**(Consolidated Appeals)**

FROM

**THE FEDERAL SUPREME COURT OF NIGERIA**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 2ND MARCH 1964**

*Present at the Hearing:*

LORD EVERSLED

LORD GUEST

LORD DONOVAN

*[Delivered by LORD GUEST]*

This is an appeal from a decision of the Federal Supreme Court of Nigeria allowing an appeal from a decision of the High Court of Lagos. The appellant was the registered proprietor of a design for textile piece goods under the Registered Designs Act, 1949 as applied to Nigeria by the provisions of the United Kingdom Designs Protection Ordinance (Cap.221) of Nigeria. The registration of a design under the Act gives to the proprietor the copyright in the design for a period of five years from the date of registration. The copyright can be extended by the Registrar upon application for a second and third period of five years each. According to the findings of Coker J., the trial Judge, there was an infringement by the respondents of the appellant's design. Coker J. granted an injunction against the respondents from selling or importing any textile piece goods bearing the appellant's design. He also awarded to the appellant £2,000 damages for infringement of the appellant's registered design and ordered the respondents to deliver up to the appellant all cloths of the design in their custody. The Federal Supreme Court of Nigeria dismissed a cross appeal by the respondents and allowed the appeal by the appellant to the extent of increasing the damages to £2,500.

The only question which comes before the Board is the amount of damages to which the appellant is entitled.

The design in question is described in detail by the trial Judge and consists of lines, rosettes, stars, circles and zigzag lines which are reproduced horizontally as many times as the width of the material permits. The design was registered by the appellant on 4th January 1957 in the Manchester Branch of the Design Registry of the Patent Office in Manchester. The cloths bearing the design were manufactured for the appellant in Japan by Gosho Company Ltd. and the first consignment of 1,000 pieces arrived in January 1957. Between January and December 1957 the appellant imported about 10,000 pieces of 10 yards each and sold them at 50s. a piece. The respondents commenced to sell pieces of inferior cloth bearing the appellant's design in November 1957. A customer of the appellant complained to him in November 1957 about the sale of spurious goods by the respondents at £1 18s. a piece and called the appellant a cheat. The respondents' goods were of inferior dye and quality. Between 18th and 27th November they sold 500 pieces in all. Thereafter there was a spectacular fall in the appellant's sales of these pieces of cloth, and he had to reduce the price of a piece which originally had been 50s. to 43s. and later to 34s. At this price he was selling at a loss and ultimately as a result he was unable to repeat his orders for the material and he had at the

date of the trial in December 1958 about 500 pieces of the material left. At 50s. per piece the appellant says he made an average profit of 15s., having paid 35s. for the goods from the manufacturer.

The appellant's particulars of claim were for £50,000 damages based upon his loss of profit for the life of the design at 15s. per piece. The appellant's counsel did not before the Board contend for this figure, but contented himself with a claim for about £20,000 calculated at the same rate of profit but upon a more modest basis. Their Lordships have no hesitation in rejecting this extravagant claim. The appellant produced no books to justify such a claim nor any supporting evidence.

His purported rate of profit rested upon his *ipse dixit*. He had not even checked his stock at any stage in the proceedings and consequently no accurate figures were given as to the stock at any given time. It is true that the trial Judge found as a fact that cloth of the design had a phenomenal sale and a very good market and that the appellant finally had to close down on these particular goods with 500 pieces left over. While mathematical accuracy is not possible, the burden was on the appellant to prove the damage which he had sustained and there is no evidence in their Lordships' opinion to support a claim of any figure in the region of £20,000. In particular the appellant produced no evidence to show what might in Nigeria have been the expected life of a design of such a character nor of the relative popularity of this line.

The respondents in their cross appeal submitted that there was no evidence to justify even the figure of £2,000 damages awarded by the trial Judge. The principle upon which an appellate court will act in reviewing an award of damages were stated by Viscount Simon in *Nance v. British Columbia Electric Railway Company Ltd.* [1951] A.C. 601 at p.613:

“(1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v. Lovell* [1935] 1 K.B. 354, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C.601). The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly ‘out of all proportion’.”

Their Lordships are unable to affirm that the Courts below either applied a wrong principle of law or that the amount awarded is so inordinately low that it must be a wholly erroneous estimate of the damage. The approach made by Coker J. to the question of damages, subject to one exception, was correct. He took the number of pieces sold by the respondents—500 in all—which but for the respondents' infringement would have been sold by the appellant and he accepted the appellant's evidence of his supply in 1957 being about 10,000 pieces. Upon these figures he awarded a round sum of £2,000 damages in respect of the first five year period. It is true that he fell into error in failing to consider the two renewals of the period of the copyright of five years each. But this error was corrected by the Federal Supreme Court when they added £500 to the damages in respect of the last two periods of renewal. The Federal Supreme Court made a more detailed calculation of the figure for the first five year period upon which they found that the trial Judge was justified in his award of £2,000. Here again their Lordships cannot say that the Federal Supreme Court arrived at this figure upon any wrong

principle of law or that the award of £500 is inordinately high for the last two five year periods. Owing to the respondents' infringement of his design the appellant lost the monopoly value which could have persisted for this latter period of ten years. In their Lordships' opinion the cross appeal on damages must therefore fail.

An alternative argument was submitted for the respondents that they were in any event innocent infringers and were entitled to the protection of section 9 of the Registered Designs Act, 1949 or Section 3 of the United Kingdom Designs (Protection) Ordinance of Nigeria. Section 9(1) of the Act of 1949 provides as follows:

“ 9 (1) In proceedings for the infringement of copyright in a registered design damages shall not be allowed against a defendant who proves that at the date of the infringement he was not aware and had no reasonable ground for supposing that the design was registered.”

Section 3 of the Ordinance provides as follows:

“ 3. The registered proprietor of a design shall not be entitled to receive any damages in respect of an infringement of copyright in a design from any defendant who proves that at the date of the infringement he was not aware nor had any reasonable means of making himself aware of the existence of the registration of the design.”

Without entering into the history of section 9 of the 1949 Act their Lordships are satisfied that section 3 of the Ordinance is the relevant section for consideration for the reason that section 2 which applies the 1949 Act to Nigeria commences with the words “ Subject to the provisions of this Ordinance ”: this clearly preserves the Ordinance as the ruling provision if there is any inconsistency between the two.

Turning now to the provisions of section 3 of the Ordinance the respondents have a finding in their favour that they were unaware of the existence of the registration of the design. They however have concurrent findings in fact in the Courts below that they failed to prove that they had no reasonable means of making themselves aware of the existence of the registration of the design. The practice of this Board is not to disturb concurrent findings of fact unless there is a miscarriage of justice or a violation of some principle of law or procedure. The question whether there is evidence on which the Courts could arrive at their finding is a question of law (*Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508 at p.521). In their Lordships' opinion there was evidence upon which the trial Judge was entitled to hold that the respondents upon whom was the *onus* had failed to prove the defence available to them under section 3. The respondents had an office in Manchester where the branch of the Designs Registry of the Patent Office is situated and if they had made a search there, they could have discovered the existence of the registration. It may well be that an ordinary individual may be excused from making such a search. But the respondents were traders in Lagos and elsewhere in Nigeria engaged in the selling of textile goods. The only witness from the respondents' firm was Naraindas Ladharam who said he had never seen the appellant's design before the Court proceedings and that the design was offered to his firm by Gosho Company in Japan the firm who manufactured the appellant's cloth. This witness was disbelieved by Coker J. The only reasonable inference is that the respondents must have known between January and November 1957 of the phenomenal sale of goods bearing the appellant's design and that no other firm in Lagos was marketing goods of this design. When the respondents put their inferior goods on the market they sold 500 pieces within a matter of ten days. They were thus put upon their enquiry as to whether the design was registered. As Coker J. put it, the respondents “ failed to make the necessary investigation which a prudent man of business in the same circumstances would have made ”. Their Lordships conclude that the Courts below were right in rejecting the respondents' defence of innocent infringement. The cross appeal on this aspect must also fail.

Their Lordships will therefore humbly advise Her Majesty that the appeal and the cross appeal be dismissed. The appellant must pay two-thirds of the costs of the appeal.

In the Privy Council

---

**JOHN KHALIL KHAWAM & COMPANY**

trading as

**JOHN KHALIL KHAWAM**

v.

**K. CHELLARAM & SONS (NG.) LIMITED**  
**(CONSOLIDATED APPEALS)**

---

DELIVERED BY  
**LORD GUEST**

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,  
HARROW  
1964