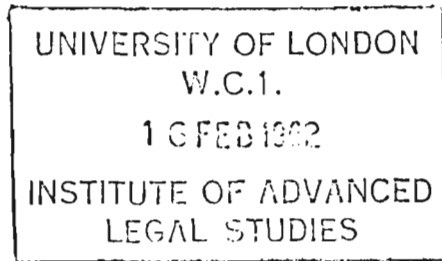


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IN THE PRIVY COUNCIL
ON APPEAL FROM THE FEDERAL SUPREME COURT OF NIGERIA

No. 23 of 1959

BETWEEN

OLATUNJI OLOTAYO Appellant

and

A. Y. OJIKUTU Respondent

CASE FOR THE RESPONDENT

10 1. This is an appeal from a judgment of the Federal Supreme Court of Nigeria (Jibowu, Wagon de Lestang and Hubbard F.J.J.) of the 23rd day of February 1957 allowing an appeal by the Respondent (the plaintiff in the original proceedings) and dismissing a cross-appeal by the Appellant (the defendant in the original proceedings) from a judgment of the Supreme Court of Nigeria (Lagos Judicial Division) of Johnston J. of the 26th day of November 1954.

20 2. By his statement of claim dated 20th day of March 1954 the Plaintiff sued the Defendant for £20,300 special and £14,700 general damages for breach of contract of agency. By his statement of defence dated 20th day of April 1954 the Defendant denied any contract of agency between him and the Plaintiff and pleaded in the alternative that if there were such contract that the Defendant had made due performance of it.

3. At the trial it was common ground that the Defendant made two trips to England in September 1952: that he was an agent for reward and that the Defendant made his first trip to England as an agent for a Syndicate known as the

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Nigerian Produce Enterprises Syndicate in which the Plaintiff and the Defendant were partners together with some three other persons.

4. In his judgment of the 26th day of November 1954 Johnston J. accepted the evidence of the Plaintiff and two witnesses called on his behalf and found that the Defendant made his second trip to England as the Agent of the Plaintiff.

5. It is common ground that during the second trip of the Defendant to England, the Defendant continued negotiations with one Frankel concerning the purchase of a number of Bedford Motor Trucks. With regard to the Defendant's status and conduct during these negotiations, the learned Judge declared as follows :

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"The defendant went to England on his 2nd trip as agent for reward for the Plaintiff thus it must be said that he held himself out as a person possessing the skill and sense of responsibility necessary to and commensurate to the undertaking with which he was entrusted. It is manifest from an abundance of evidence during the trial and notably in the cross examination of the defendant that he failed to discharge his task with sufficient care.....

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"The critical day on defendant's return to England was September 29th. On this occasion the defendant acted with a childlike lack of care. The train of events established by lengthy cross examination has made it clear that at the end of the day the defendant had seen nothing and had investigated not at all. He saw no truck of the sort required by him or promised to him. It should have been clear to him that he was being deceived in every direction. In the face of a clear demonstration on the 29th day of September that there was nothing ready for shipment, and nothing

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likely to be shipped, the defendant, disregarding a double need for caution, paid the £5000 deposit. He had failed to check Frankel's representations. He still pinned his faith on Frankel's words. His gross carelessness is emphasised by his statements of fact in Exhibit "B" and Exhibit "MM", when he had no more than Frankel's assurance that only 12 trucks were ready for shipment. It is convenient in relation to the sequence of issues and events to say at this stage that I find that the defendant by his negligence on the 2nd trip to England committed breach of his contract of agency in regard to the sum of £5000 paid by him to Frankel and is liable to that extent on this first decision of plaintiff's claim to special damages.

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6. It is common ground that a meeting took place in Lagos on 13th day of November 1952. The learned Judge rejected the evidence of the witness Onafeko called by the Defendant to the effect that he was present at this meeting and found that the following were present:- the Plaintiff, the Defendant, Frankel and McVicker (a witness called by the Plaintiff)

p 103

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7. At the meeting of 13th day of November 1952 Frankel demanded £15,000 in addition to the £5000 he had already received in order to obtain and dispatch the trucks. With regard to this aspect of the negotiations the relevant passage of the Judgment reads as follows:- "Notwithstanding plaintiff's repeated and very much repeated assertions in evidence that defendant throughout was the medium of negotiation with Frankel it is my

p 106

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opinion and finding that at this stage the Plaintiff negotiated direct with Frankel and was persuaded or resolved, with the silent acquiescence or approval of McVicker which I shall refer to later, to put up the £15,000."

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The learned Judge went on to find that the sum of £15,000 was advanced to Frankel on 18th day of November 1952 after he had received a letter (Exhibit "L") typed by McVicker in Lagos, dated 15th day of November 1952 and signed by B. Frankel. This letter addressed to the plaintiff was received with a covering letter from the defendant to the plaintiff. The learned Judge also found that McVicker had removed the name of Omotayo Brothers from the Exhibit "L" at the direction of the defendant and not of Frankel and that the Defendant resumed his work as the Agent of the Plaintiff following the delivery of the cheque.

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8. The learned Judge then dealt with the evidence given by the witness McVicker who was the Plaintiff's partner at the time of the trial but was not associated with the Plaintiff at the time of the meeting of 13th day of November 1952. McVicker was found not to be a reliable witness and his evidence that the Defendant had supported Frankel in his request for £15,000 and his evidence that he could not remember the date on which the advance of £15,000 was made to the Plaintiff was rejected. The learned Judge further found that McVicker came to Nigeria in 1952 in order to make contact with the defendant and that his passage money from England was found by Frankel and that the defendant introduced Frankel and McVicker to the Plaintiff in

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November 1952. McVicker was the subject of two further findings of the learned Judge:-

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10 (a) "I find that in September and October 1952 McVicker thought that the truck business was genuine on Frankel's part but I am convinced that McVicker had his doubts when Frankel asked for a further \$15,000. It may be noted at this point that in December 1952 a Company was mooted between McVicker, one Randle, and one Chief Ayobahan. Frankel, it seems, was behind McVicker and bought a car for the company as a bait for business. The Timax Timber Company and Frankel are said by McVicker to have promised investments and if this is true it was because of McVicker's representations to Ayobahan and Randle which
20 induced them to come in. The Company did not materialise as McVicker had no personal means and help from Frankel and Timax did not arrive. This stage of the trial afforded means of judging Frankel's persuasiveness and McVicker's credibility.

pp 108-9

30 Again, since the matter cannot be disregarded, it is my impression that the plaintiff entered into his rubber business with Frankel because he considered that Frankel was behind, if not a member of Timax Timber Company. The telegram Exhibit "W" supports this view. It would seem that McVicker presented Timax Timber Company in a favourable light to the Plaintiff and that Plaintiff somehow gained the impression that Frankel was behind it and financially interested in the venture. I am of opinion that McVicker was as much deceived by Frankel's promises as the Plaintiff and the

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Defendant.

Regarding Exhibit "L". I am of opinion that McVicker took the name of Omotayo Brothers off this letter because Frankel told him to do so. But this does not alter the fact that it was the Plaintiff who advanced the £15,000, relying as I have found, on Exhibit "L" obtained by him before he gave Frankel his cheque."

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(b) "It is my opinion that McVicker was more in Frankel's confidence than he would have the Court believe. At the same time he was trying to advance the interests of Timax Timber Company with the Plaintiff because of his brother's interest in that concern and Frankel's supposed interest also. I am of opinion that when the November meeting took place on the 13th McVicker at that meeting said nothing of his doubts about Frankel to the Plaintiff. I believe that McVicker by that time entertained doubts but it did not suit him because of his various interests to make them known to the Plaintiff, his future partner, at that stage. Nor do I believe that McVicker had any difference of opinion with the Defendant. In fact McVicker stood by and he let the Plaintiff make his deal with Frankel on his own initiative which he did partly because McVicker said nothing against it."

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The effect of these findings upon the Plaintiff concerning McVicker was stated by the learned Judge to be as follows:-

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"In my opinion the Plaintiff would have paused for a while or wholly decided against giving this £15,000 to Frankel

if McVicker, in whom the Plaintiff undoubtedly had confidence, had disclosed his doubts to the Plaintiff..."

Record

9. Consequent upon his findings of fact, with regard to the sum of £15,000 the learned Judge gave his decision in the following words:-

10 "I disallow the Plaintiff's claim to £15,000 of the special damages on the ground that that money was paid to Frankel without the agency of the defendant and that this payment was un-
infl enced by the Defendant's previous conduct in words or writing."

p 110

20 10. The learned Judge then dealt with the balance of £300 claimed as special damage. This sum was paid by the Plaintiff to the Defendant to cover out of pocket expenses incurred by the Defendant during his second trip to England. Johnston J. stated he did not regard this sum as coming within the scope of special damages but did not give any reason for this finding.

30 11. With regard to general damages the learned Judge stated as follows:-
"I am of opinion that the Plaintiff has established good ground for general damages in relation to his loss of the £5,000 paid to Frankel by the defendant. I assess these damages in the sum of £500. If I had arrived at a decision whereby I found the Plaintiff to be entitled to recover £20,000 special damages my assessment of general damages would have been £5,000."

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12. In accordance with the above findings judgment was entered for the Plaintiff for £5,500 with costs.

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13. Both the Plaintiff and the Defendant lodged Notices of Appeal against the judgment of Johnston J.

14. By his Notice of Appeal dated the 19th day of February 1955 the Plaintiff complained of the whole decision of Johnston J with the exception of the findings on the portion of the claim for special damage for £5,000. The following were the Grounds of Appeal of the Plaintiff.

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pp 112-3

GROUND OF APPEAL

(i) The learned trial Judge misdirected himself in finding:

(a) "That the plaintiff negotiated direct with Frankel and was persuaded or resolved with the silent acquiescence of McVicker.. . . . to put up the £15,000.--."

(b) "That McVicker stood by and let the Plaintiff make his deal with Frankel on his own initiative which he did partly because McVicker said nothing against it.The Plaintiff would have paused for awhile or wholly decided against giving this £15,000.--. to Frankel if McVicker in whom the Plaintiff undoubtedly had confidence had disclosed his doubts to the plaintiff."

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(c) "That the plaintiff had ample information to put him on his guard and to employ caution to fullest extent."

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(d) The plaintiff "gave Frankel £15,000.--. and with it his acceptance of Frankel's assurances in Exhibit L. Having done so the plaintiff resumed with the defendant

the interrupted relationship of principal and agent."

Record

and could not have come to the conclusion which he did in finding against the plaintiff for the £15,000 had he not thus misdirected himself.

10 (ii) The learned trial Judge erred in holding that the £15,000.--. was paid by the plaintiff to Frankel without the Agency of the defendant and that this payment was uninfluenced by the defendant's previous conduct in words or writing having found that the £15,000.--. was paid after Exhibit L had been accepted and there being evidence, inter alia, on the face of Exhibit A that the defendant was still acting as Agent of the Plaintiff.

20 AND there being no evidence that the Plaintiff's mind had in any way been disabused of the Defendant's false representations and statements on material issues or that the effect of the defendant's found Negligence and false representations had ceased to be operative on the Plaintiff's mind.

30 (iii) The learned trial Judge was wrong in law to have considered in favour of the defendant, the Plaintiff's failure "to have Frankel's financial position definitely ascertained through his bank" before paying the £15,000 as such failure is not, in law, excuse the Negligence of the Defendant or in any way absolve him from responsibilities and liabilities.

(iv) The learned trial Judge erred in finding against the plaintiff on the loss of the £15,000 as there was abundant

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evidence to establish that the loss naturally flowed from the negligence of the Defendant acting as the Plaintiff's agent for reward.

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15. The Plaintiff sought the following relief from the Court of Appeal:-

"That the Judgment of the Lower Court be varied by a Judgment being entered for the Plaintiff for £20,000 as Special Damages and £5,000.--. General Damages instead of the one for £5,000.--. and £500.--. Special and General Damages respectively and costs to be re-assessed accordingly."

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16. By his Notice of Appeal dated the 24th day of February 1955 the Defendant complained of that part of the Judgment of Johnston J. which awarded £5,000 damages to the Plaintiff in the action together with costs. The further award of £500 damages to the Plaintiff was not appealed against.

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pp 114-5

17. The following were the Grounds of Appeal of the Defendant:-

(a) That the decision is against the weight of evidence.

(b) That the learned trial Judge mis-directed himself on the law and the facts in holding that the defendant was an agent for reward to the plaintiff.

(c) That the learned trial Judge mis-directed himself when he held that the plaintiff did not lend to the Syndicate the £5,000 remitted to the defendant because this finding is contrary to the plaintiff's evidence in Suit No.154/53 (Exhibit "V").

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(d) That the learned trial Judge did not direct his mind to the failure of the plaintiff to adduce conclusive proof of Frankel's bankruptcy.

Record

10 (e) That the learned trial Judge mis-directed himself on the law and the fact when he founded the negligence of the defendant on his failure to ascertain that Frankel had twelve trucks ready for shipment when the plaintiff by his pleadings founded it on the defendant's failure to obtain a Banker's Guarantee or Banker's Reference about Frankel's business credit.

(f) Further grounds of appeal will be filed after the receipt of the Record of Proceedings.

20 18. Grounds (b), (c) and (d) contained in the Notice of Appeal lodged by the Defendant were abandoned at the hearing of the Appeal.

p 120

19. The judgment of the Federal Supreme Court of Nigeria was delivered on 23rd day of February 1957. Jibowu F.J. who delivered the Judgment after setting out the issues raised on the pleadings and the findings of Johnston J. then stated:-

30 "It is proposed to consider the learned Judge's decision in three sections in order to see (1) whether the learned Judge came to a right conclusion when he found that the defendant was plaintiff's agent and not the agent of their Trading Syndicate; (2) whether the learned Judge's finding in favour of the plaintiff in respect of the advance of £5,000 paid by plaintiff to Frankel through the defendant was justified by

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the evidence before him, and (3) whether the learned Judge's conclusion with regard to the further advance of £15,000 made by the plaintiff to Frankel on the motor truck business could be supported."

20. On the first point at the hearing of the Appeal it was no longer disputed that the defendant was the agent of the plaintiff and Jibowu F.J. stated :-

p 125

"All I need say, therefore, on the point is that there was abundant evidence before the learned Judge to justify his conclusion and that it would have been unreasonable for him to hold otherwise."

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21. With regard to the second point it was submitted on behalf of the defendant that the evidence did not support the Judge's finding of negligence on the part of the defendant. On this Jibowu F.J. stated:-

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"I find no substance in the submission of the learned Counsel for the defendant on this point as the evidence clearly supported the learned Judge's findings on the point."

22. Dealing with the third point Jibowu F.J. referred to the meeting of the 13th day of November 1952 and to the findings of Johnston J. regarding the payment of £15,000 demanded by Frankel and continued:-

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"The principle is well settled that a Court of Appeal should not lightly disturb the findings of facts of the Court below which had the opportunity of watching the demeanour of the witnesses with a view to assessing their credibility,

but this is subject to the qualification that such findings may be disturbed if they are based on misdirection. In this case it appears that the learned Judge had clearly misdirected himself on the evidence, failed to direct himself on some aspect of the evidence, and therefore reached a wrong conclusion".

Record

10 23. Jibowu F.J. then dealt with the evidence given by McVicker in the following passage:-

20 "The evidence is abundantly clear that McVicker and Frankel met the plaintiff together for the first time on the 13th November, 1952. McVicker, according to the evidence of the defendant himself, was before then not only a friend but also a business partner of the defendant. The only connecting link between Frankel and the Plaintiff was the defendant, and it will be turning one's back on common sense to reject the evidence of both McVicker and the plaintiff that the defendant introduced McVicker and Frankel to the plaintiff on the 13th November, 1952. The learned Judge had himself found as a fact, which finding is justified by the evidence, that McVicker's passage to Lagos was paid by Frankel. It is, therefore, a reasonable inference to draw that Frankel and McVicker were no strangers to each other and probably had common business interests. As the plaintiff and McVicker met for the first time that day, the learned Judge misdirected himself in holding that the plaintiff undoubtedly had confidence in McVicker. What confidence could a man have in a perfect stranger he was meeting for the first time? The learned Judge himself seemed to have realised that the plaintiff on that occasion looked for some support before

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deciding what his line of action would be, but he wrongly held that he looked for support from the wrong quarter as McVicker's presence at the meeting could only have been due to his interest in Frankel. It appears the most natural thing any one in the plaintiff's position would do was what he said he did, and that was to consult his own agent, the defendant, who had initiated the transaction. In the circumstances, it is only reasonable to expect that McVicker would not take any part in the discussions between the plaintiff and Frankel about the demand for £15,000 further advance in which he was not concerned. If the stranger, McVicker, is eliminated from the picture, we have then the plaintiff, the defendant and Frankel left. Having regard to the fact that Frankel had come out in respect of a business transaction initiated by the defendant on behalf of the plaintiff, one would naturally expect that the discussions which followed would be taken part in by the three of them. The defendant tried to give the impression that he advised the plaintiff against giving any further advance and so walked out of the meeting which fact was denied by both the Plaintiff and McVicker the learned Judge disbelieved the Defendant's evidence that he walked out of the meeting and disbelieved him that his uncle Onafeko was present at the meeting. The plaintiff testified that the defendant advised him to pay the further sum demanded so that the shipment of the trucks might be made. It seems to me unreasonable to hold that the plaintiff, for the mere asking agreed to part with £15,000 to Frankel when £5,000 he had already paid through the defendant had yielded no result. It appears to me an unsound proposition to put forward that, at that stage the plaintiff could and would have forgotten that the defendant, as

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his agent, had cabled and written to tell him that he had seen some of the trucks required already assembled and ready for immediate shipment and that all shipping arrangements had been made for the month of November, 1952. It does not appear that the learned Judge considered that would have been the effect on the plaintiff of an admission by the defendant at that meeting that he had not, in fact, seen any trucks assigned to Frankel assembled and ready for immediate shipment as he had previously stated, and that he knew no more of the matter than what he had been led to believe by Frankel and his associates. If the defence had been that the defendant had tried to disabuse the mind of the Plaintiff of his previous false assurances and that the plaintiff had still insisted on throwing more money down the drain, then the learned Judge's finding would have been right that the plaintiff acted entirely on his own initiative. It is clear from the evidence that the defendant lied and lied as regards what happened at the meeting only to save his own skin, and the plaintiff's evidence which has the ring of truth should have been accepted, as also McVicker's evidence as to the part the defendant played at the meeting. The learned Judge gave no reason for rejecting McVicker's evidence that the defendant supported Frankel in his request for £15,000 and his reason for rejecting his evidence regarding the date the cheque for £15,000 was handed over to Frankel appears inadequate. On this point the learned Judge said: "McVicker purported not to remember the correct date but by his answers referring vaguely to the 14th or 15th as the date I find he was assisting the plaintiff, just too skilfully to be regarded as genuine. On this point I have already said that I believe the cheque to have been given on the 18th November when the plaintiff got possession of Exhibit L."

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The plaintiff gave evidence that he gave the cheque on the 15th November, but that it was dated the 18th to enable him to arrange an overdraft with his Bank. He did not deny receiving letter Exhibit L, which is dated 15th November, and his evidence that he gave the cheque on the 15th November is not inconsistent with his having received Exhibit L on the same date. Furthermore, the Judge's finding that the cheque was given on the 18th November is not supported by the evidence of the defendant who gave the date as the 17th November, and there was no evidence that the plaintiff received Exhibit L on the 18th November. I can, therefore, find no justification for the learned Judge's view that McVicker was trying to assist the Plaintiff either skillfully or otherwise when he put the date at the 14th or 15th November and then stated that he could not remember the exact date. He was sure it was towards the end of the week, and 1952 diary shows that 15th November 1952 was a Saturday and the end of that week. Furthermore, the learned Judge does not appear to have considered that McVicker gave evidence before him in October, 1954, of transactions which took place in November, 1952, almost two years before".

24. Jibowu F.J. then considered the part played by the defendant at and following the meeting of 13th November 1952 and in particular his duty to the plaintiff. His conclusions were as follows:-

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"The defendant was, no doubt, aware of the risk the plaintiff was running by agreeing to advance more money on the business, as the learned Judge found, but it was his clear duty then to let the plaintiff know the whole truth about the business, which he failed to do.

10 With respect to the learned Judge, this aspect of the case does not appear to have been considered by him. The evidence of McVicker is clear as to how the letter, Exhibit L, came to be prepared after the discussions on the 13th November, 1952. The plaintiff was not present, but the defendant was. The learned Judge's finding was: "Regarding Exhibit L, I am of opinion that McVicker took the name of Omotayo Brothers off this letter because the Defendant told him to do so and not because Frankel told him to do so".

20 The question which the learned Judge failed to ask himself was why was the letter confirming the result of the interview of Frankel with the plaintiff on the 13th November, 1952, addressed to the Defendant's firm in the first instance and had to be altered to the plaintiff's name at the request of the defendant, if the defendant's story of the interview was correct and true, and why should McVicker make that alteration not at the request of Frankel the interested party?

30 The defendant again lied about this letter, and would not admit that he had anything to do with it until Exhibit A was produced to show that he received the letter from Frankel and forwarded it to the plaintiff. In the circumstances, it is difficult to see on what evidence the learned Judge based his finding that the defendant ceased to be plaintiff's agent and later resumed his agency, after rejecting the defendant's evidence that he had washed his hands of the business at the meeting of the 13th November, 1952. The evidence shows that the defendant encouraged the plaintiff to pay the £15,000 demanded by Frankel. The evidence goes
40 further to show that the defendant, Frankel and McVicker prepared the letter Exhibit L

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in the circumstances described in McVicker's evidence; the defendant later on wrote out for the plaintiff the cheque on which the £15,000 was paid to Frankel. After Frankel left Lagos and no trucks were shipped, the defendant wrote letters Exhibits 01, 02 and 03 to Frankel about the truck business, and in Exhibit 03 he threatened to cancel the agreement and recover the £20,000 paid in respect of the truck business if no shipment was made by a certain date".

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1.132

25. For the above reasons set out in paragraphs 23 and 24 above Jibowu F.J. held that the learned Judge had misdirected himself in respect of the sum of £15,000. He then found that by failing to have Frankel's financial standing investigated the Plaintiff was guilty of negligence. On the authority of Becker v. Medd 13 T.L.R. 313 Jibowu F.J. held that such negligence did not exonerate the defendant from the consequences of his own negligence. He therefore found that the plaintiff had established his claim to the £15,000.

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26. Jibowu F.J. then dealt with the measure of damages and held that the plaintiff was limited to the "amount of loss actually sustained and he cannot claim the profits he might have made if the venture had not miscarried".

He cited Johnston v. Braham and Campbell 1916, 2 A.B.D. 529. He therefore held that the plaintiff was not entitled to £500 general damages although that point had not been raised by or for the defendant.

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1.133

27. Accordingly the Federal Supreme Court set aside the Judgment of Johnston J. and entered judgment for the plaintiff for £20,000 with costs, and the defendant's appeal was dismissed with costs.

28. From the Federal Supreme Court of Nigeria on 11th March 1957 the defendant obtained an order on motion for stay of execution and on 22nd May 1957 he obtained an order granting final leave to Appeal to Her Majesty in Council.

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pp.135-6

10 29. The Respondent submits that the judgment of the Federal Supreme Court of Nigeria dated the 23rd February 1957 is right and should be affirmed for the following, amongst other reasons

R E A S O N S

(1) BECAUSE in so far as the judgment of the Federal Supreme Court of Nigeria affirms the judgment of the Court below concerning the award of £5,000 special damages to the Respondent, there are concurrent findings of fact in favour of the Respondent.

20 (2) BECAUSE the Respondent is entitled to succeed upon those concurrent findings.

(3) BECAUSE the Federal Supreme Court of Nigeria was right in disturbing the findings of fact of the Court below in so far as such findings related to the plaintiff's claim for £15,000 special damages.

30 (4) BECAUSE there was sufficient evidence to support the findings of fact of the trial judge as varied by the Federal Supreme Court of Nigeria and that such findings should not be disturbed.

(5) BECAUSE the Federal Supreme Court of Nigeria came to a correct conclusion consequent upon its variation of the findings of fact of the Court below.

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(6) BECAUSE of the other reasons contained in the Judgment of the Federal Supreme Court of Nigeria.

JOHN A. BAKER

No. 23 of 1959

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT
OF NIGERIA

BETWEEN:

OLATUNJI OMOTAYO
Defendant-Appellant

- and -

A. Y. OJIKUTU
Plaintiff-Respondent

CASE FOR THE RESPONDENT

HATCHETT JONES & Co.,
90, Fenchurch Street,
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