Privy Council Appeal No. 23 *of* 1959.

Olatunji Omotayo – – – – – – – – *Appellant*

v.

A. Y. Ojikutu – – – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JULY 1961

Present at the Hearing:

LORD TUCKER.

LORD DENNING.

LORD MORRIS OF BORTH-Y-GEST.

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal from a judgment of the Federal Supreme Court of Nigeria (Jibowu, Nageon de Lestang and Hubbard F.J.J.) of the 23rd February, 1957 allowing an appeal by the respondent (who was the plaintiff in the original proceedings) and dismissing a cross-appeal by the appellant (who was the defendant in the original proceedings) from a judgment of the Supreme Court of Nigeria (Lagos Judicial Division) (Johnston J.) of the 26th November, 1954. By the judgment last referred to the respondent was awarded £5,000 special damages and £500 general damages. Both parties appealed. The respondent claimed that the award in his favour should have been for the respective sums of £20,000 and £5,000. The appellant complained of that part of the judgment of Johnston J. which awarded the sum of £5,000: the further award of £500 was not the subject of an appeal. The Federal Supreme Court allowed the respondent's appeal in part and entered judgment in his favour for £20,000 and dismissed the appellant's appeal. The Court held that the learned Judge had been wrong in awarding the respondent £500 general damages but noted that this matter had not been raised by or on behalf of the appellant. Judgment was entered for the respondent for £20,000 with £500 costs in the Court below and £128 costs of the appeal and the appellant's appeal was dismissed with 25 guineas costs to the respondent. Appeal is now brought from this judgment and the effective issues are whether the respondent was entitled to be awarded £20,000 or alternatively to be awarded £5,000 or whether he should not have been awarded either of these sums.

It will be convenient to refer to the appellant as the defendant and to the respondent as the plaintiff. The plaintiff and the defendant were both general traders and they were members (with three others) of a syndicate in Lagos. The business of the syndicate was concerned with general trading and the events which resulted in this litigation followed upon a visit to London which was paid by the defendant as far back as 1952. The litigation began by writ of summons dated the 7th January, 1954. After the judgment in the Federal Supreme Court final leave to appeal was granted. That was on the 22nd May, 1957. The record was agreed by the parties on both sides on the 27th December, 1957 but was not received in the Privy Council office until the 2nd July, 1959. The record was bespoken on the 1st October, 1959: duplicating was concluded in May, 1960 and the respective cases were lodged in October, 1960.

The defendant who was a general trader and produce merchant paid his visit to London on behalf of the syndicate in September, 1952. He came

in the hope of finding buyers for Nigerian produce which the syndicate might sell. He was furnished with certain samples of produce which included Nigerian cedar. He became acquainted by introduction with a man named Frankel. In the course of an interview with Frankel, in which the interest of Frankel as a possible purchaser of produce was sought, the defendant was asked by Frankel whether he (the defendant) would be interested in a purchase of Bedford motor trucks. Frankel claimed to be friendly with the manufacturers of them. By a letter dated the 4th September, 1952 Frankel made an offer to sell fifty Bedford 5-ton trucks at the price of £707 each f.o.b. The defendant by letter accepted the offer and being agreeable to paying Frankel a 5 per cent. buying commission at sight in Lagos looked forward to receiving his confirmation. Shortly thereafter Frankel asked the defendant for a deposit of £5,000 saying that the manufacturers (Vauxhall Motors) wanted him to deposit money and saying also that it was their first transaction together. After making certain enquiries through his bank the defendant returned to Nigeria and reported to the plaintiff and to the members of the syndicate. It seems clear that a delivery of the lorries in Lagos might result in profitable dealings in regard to them. The plaintiff was undoubtedly interested. A question arose at the trial as to whether the events that followed were any concern of the syndicate or whether they alone involved the plaintiff and the defendant. It was held by the learned Judge that the later events did not concern the syndicate and this finding has remained unchallenged. The plaintiff agreed to proceed further with the project of buying Bedford lorries and the defendant returned by air to England as the agent of and with instructions from the plaintiff. The plaintiff agreed to pay to the defendant a sum of £300 for his expenses and further agreed to give him 35 per cent. of the net profit that resulted from the anticipated dealings with the lorries. Summarising the main events that followed, the defendant after his return to England reported to the plaintiff in such a way that the plaintiff remitted the sum of £5,000 which was paid to Frankel. Frankel then wished to have a further advance before the lorries were sent: he asked the defendant first for £18,000 but altered that sum to £15,000. Later Frankel paid a visit to Lagos and saw the plaintiff and the plaintiff gave Frankel a cheque (dated the 18th November, 1952) for £15,000. Frankel therefore received a total of £20,000. At a later date he asked for a further advance which was not made. Time went on but no lorries were ever delivered. Recourse against Frankel has been impossible. Eventually by writ of summons dated the 7th January, 1954 the plaintiff brought an action against the defendant claiming damages for breach of the contract of agency. The issue raised in the litigation is whether the defendant was negligent in his conduct when acting on behalf of the plaintiff and whether the plaintiff suffered loss in consequence. The learned Judge at the trial held that the defendant had acted with a lack of care and that the plaintiff had in consequence suffered the loss of the sum of £5,000. He held that the loss of the £15,000 did not result. He held that in the circumstances such sum was paid to Frankel without the agency of the defendant and that the payment of it was uninfluenced by the defendant's previous conduct in words or writing. The Federal Supreme Court took a different view in regard to this latter point and held that the plaintiff was entitled to recover both the £5,000 and the £15,000.

The hearing of the action involved the taking of evidence on some fourteen days in October and November, 1954 and the consideration of a large number of documents. On the hearing of the appeal their Lordships have been fully referred to the notes of the evidence and to the documents. It is submitted on behalf of the defendant that a consideration of the findings and of the documents should lead to the view that the defendant was not shown to have been negligent.

In approaching the issue as to whether the defendant failed to exercise the measure of care which in all the circumstances was demanded of him it is relevant to bear in mind that he was not one who possessed or claimed to possess the expert skill or the experience or the special training of a broker or business agent. The plaintiff knew the defendant as a general trader in Lagos and as a fellow member of the syndicate which has been mentioned.

The plaintiff was not entitled to expect or to require a higher measure of skill or knowledge than one in the position of the defendant could reasonably be expected to possess. The plaintiff knew that the defendant was a produce dealer and had no special qualification as a motor dealer. The defendant said in his evidence that in his own business (dealing in timber and produce) he shipped through agents and that he had no personal experience of shipping procedure. It is further important to note the circumstances under which the defendant was introduced to Frankel and under which they met and the steps which the defendant took to enquire as to Frankel's financial standing.

When the defendant first travelled to London he was given by a Mr. McVicker in Lagos a letter of introduction to Mr. McVicker's brother in London. Mr. McVicker in Lagos had been sent out there in 1952 as an agent for one Gourewitz with a view to rubber purchases: he had a letter of introduction to the defendant: he had met Frankel and the learned Judge held that it was Frankel who had paid his passage money. Mr. McVicker in Lagos did not then know the plaintiff but came to know him later and at the time of the trial was his partner.

When the defendant reached London he first met Mr. McVicker's London brother (who was a director of a timber company who were potential importers of rubber) and then, in his company, met Frankel. Mr. McVicker in Lagos had in fact spoken to the defendant about Frankel and had said that he was a wealthy man. The defendant's meetings with Frankel were such as confirmed that Frankel was in a substantial way. The defendant learned that Frankel was a furrier and was in the rubber business. The defendant went to Frankel's office, travelling in an expensive car, and all the indications in regard to Frankel seemed satisfactory. It was in this setting that the plan for the sale of the motor lorries arose. Had all gone according to expectations there seems little doubt that the transaction was one from which the plaintiff would have been able to make an agreeable profit.

During his first visit to London and after making the arrangements about the lorries with Frankel the defendant made enquiries as to Frankel's financial position. The learned Judge held that the result of the enquiries was such as to satisfy him. In his judgment the learned Judge said:—

> " It is clear that the defendant on his first trip was much impressed by Frankel's ostentatious mode of living and his show of apparent business prosperity. It is a safe assumption that defendant's Bank Manager in London made an inquiry into Frankel's business and financial position which if not as thorough an investigation as it might have been satisfied the defendant already so favourably impressed by what he had seen of Frankel. The defendant, in other words, had developed that degree of confidence in Frankel which Frankel had worked to instill in the defendant."

The defendant's account of these enquiries was that having had Frankel's offer to sell the lorries of the 4th September and having sent his acceptance of the 5th September he wrote to Lagos to inform the plaintiff and told Frankel that he would like to meet him at the Farmers and Commercial Bank of London. The meeting took place and Mr. McVicker also attended. The defendant said in his evidence:—

> " Frankel and McVicker showed me a letter from Vauxhall Motors and showed it to the Manager, Mr. Coker: Mr. Coker went through the letter. I had taken them to my bank so that my bank could investigate Mr. Frankel's financial position.
>
> " The Manager promised to investigate Frankel's financial position. He asked Frankel who were his bankers. Later what he told me satisfied me as to Frankel's financial position. Then I met again with Frankel and Frankel confirmed his offer."

The bank manager, Mr. Coker, who is now a legal practitioner in Lagos, gave evidence at the trial. He confirmed that the defendant had sought his

assistance by making enquiries about Frankel's credit. His evidence is of considerable importance when considering whether the defendant was guilty, as the plaintiff contended, of a lack of reasonable care. He said:—

> " I invited Frankel to my office. He came with his secretary a Mr. McVicker—defendant and Mr. Abudu were also present. I asked Frankel if it was true that he was going to supply trucks. He showed me an offer from Vauxhall Ltd. for supply of 50 Bedford trucks. More than £35,000 in cost.
>
> " I asked Mr. Frankel how soon he could ship. He said within 30 to 60 days. He said that Mr. Omotayo would have to pay cash. I told him it would be impossible for any African to pay such a lump sum. Then he said that we should have to make a deposit against the order. And payment on a Sight Draft basis.
>
> " He agreed to a deposit of £5,000, to ship the lorries and to payment of the balance on arrival of each lorry in Nigeria.
>
> " Frankel asked for the deposit. The defendant accepted this suggestion. I asked Frankel the name of his Bankers. He told me it was Barclays Bank of Bishop Gate. I asked him how long he had been in business. He said over 25 years. I obtained his consent to make inquiry of his bank and he agreed. I told him I would report to defendant and then go further into the matter. I telephoned the Manager of the Bank. Frankel's Bank, whether Frankel was a customer, and that one of our customers wanted to do business with Frankel. I discussed the value of the business. That it involved a lot of money.
>
> " I was satisfied with the result of my investigation. I invited Frankel and his secretary to call and I reached final arrangements with them. That if defendant paid £5,000 deposit Frankel must ship 12 lorries within 60 days. Frankel agreed to do this. After this interview I went to Frankel's office. He introduced me to his staff and showed me round when I was leaving I told Frankel that I would see Mr. Omotayo.
>
> " I wanted to know what his business office was like. That he had one and had a good one.
>
> " I was favourably impressed by all I saw. A dealer in furs, a city office and staff. Rental value of premises not less than £1,500."

As to the letter from Vauxhall Motors spoken of by Mr. Coker the defendant said that he had previously seen it in Frankel's office. The lorries were apparently to have left hand drives. Mr. Coker further said that he found that Frankel was in a position to open a letter of credit for £35,000 and that Frankel's bank manager had informed him that Frankel had been a good customer and had a good turnover and was in a position to do the business.

This evidence amply warrants the conclusion of the learned Judge that the defendant was satisfied as to Frankel's business and financial position and indeed there does not seem to be ground for the criticism that the bank manager's investigation was not as thorough as it might have been.

When the defendant returned to Lagos the position was that there was a prospect of being able to have lorries shipped to Lagos by Frankel, that if £5,000 were paid as a deposit a number would be shipped, that Frankel appeared to be a man doing substantial business and that there was a very favourable and adequate report from his bankers as to his financial standing. The plaintiff had to decide whether he would take up the venture. The syndicate did not. In considering the matter it must have been apparent to the plaintiff that the course of business that was proposed involved trusting Frankel. Instead of having an arrangement pursuant to which the plaintiff opened a letter of credit upon which Frankel could draw upon presentation of documents there was to be a payment of £5,000 to Frankel many days before any lorries were to be shipped. The plaintiff's private secretary Mr. D. O. S. Ajayi made the suggestion to the plaintiff that instead of his making a payment of £5,000 he should open a letter of credit. The plaintiff

decided otherwise and having agreed to give the defendant 35 per cent. of the eventual net profit from the anticipated deal he agreed that the defendant should return to England. The defendant was asked to carry out certain instructions. The plaintiff agreed to pay the defendant £300 for his expenses.

It is necessary to consider what were the instructions which the defendant received from the plaintiff. Because of their importance in connection with the issue as to whether the defendant failed in his duty their precise terms as recorded may be noted:—

> " I told him to see that the chassis are assembled and not to be in cases. Also that he should find out to his satisfaction the financial position of Frankel before he parted with the money which I was going to send to him. Also I gave him this instruction and explained to him that I agreed to send him the money direct as, against the advice of my secretary, because I was satisfied that he was a business man and owned property free from encumbrances over the value of this money.
>
> " Defendant even suggested that he would obtain Bank references of Frankel or a guarantee before he parted with any money to him. I agreed to that suggestion."

The defendant returned to England. It was during this visit that as a result of a communication from him to the plaintiff the plaintiff remitted the sum of £5,000 so that it should be paid over to Frankel. The first vital issue in the appeal is whether the conclusion was warranted that the defendant failed to carry out his instructions and whether he failed to exercise due and reasonable care.

Upon his arrival in England, which was towards the end of September, the defendant saw Frankel. Frankel asked for the £5,000 deposit and the defendant said that the sum would be available but that he would like to see the trucks. Frankel then took the defendant in his car to Luton and to a factory where Vauxhall cars were manufactured. The defendant's evidence was:—

> " Frankel came out with a European who was introduced to us as Sales Manager. He said that the 25 trucks arranged by Frankel were ready for shipment. I saw trucks being driven out of the factory, from where we stood.
>
> " They appeared to be undergoing a test. It seemed to be a very busy factory. More of the factory was elsewhere.
>
> " Next this man who was introduced by Frankel as a Sales Manager went back into the factory, having given me Exhibit " K ".
>
> " Then we drove back to London. I had been told by the Sales Manager that 25 trucks were ready for Mr. Frankel:
>
> *To Court:*—The Sales Manager did not point out the trucks to me in the factory."

The defendant learned that the price of the lorries would be £667 instead of £707. Exhibit K was a pamphlet which depicted and described the type of lorry. It was clear that the chassis were assembled. (The leaflet (Exhibit K) was at a later date sent by the defendant to the plaintiff. It was sent with a letter of the 9th October. In a letter of a later date (27th October) the plaintiff wrote to the defendant:—" The photograph of the Bedford lorry in your first letter meet my expectation and satisfaction, you could not have done better ".)

After the visit to Luton the defendant went with Frankel to the office of a shipping agent and he gathered that Frankel had arranged shipping space for 25 trucks for Nigeria in two separate and different consignments one being for 12 trucks and the later one being for 13 trucks. Then the defendant saw Mr. Coker the bank manager and reported to him all that he had seen. He

then sent a cablegram to the plaintiff. That was on the 29th September. It was in the following terms:—

> " TWELVE VEHICLES ASSEMBLED ALREADY FOR IMMEDIATE SHIPMENT PRICE SIX HUNDRED AND SIXTY-SEVEN POUNDS FREIGHT INCLUDING ALL CHARGES ONE HUNDRED AND FIFTY POUNDS REMIT IMMEDIATELY FIVE THOUSAND AND THREE HUNDRED POUNDS DEPOSIT DELAY DANGEROUS SELLER UNSATISFIED MY INABILITY TO DEPOSIT NOW—OMOTAYO."

It should here be mentioned that the defendant had made what the learned Judge described as a " collateral arrangement " to negotiate for the trucks in England as agent for Messrs. Brandler & Rylke Ltd. There was a letter of agreement dated the 26th September. The conclusion of the learned Judge was that the defendant became the plaintiff's agent " and then enlisted Brandler & Rylke as an interested party as a safety measure against default by the plaintiff on his commitments ." The learned Judge added:—" I do not think that the defendant and the plaintiff trusted each other very far ". On the same date as the defendant sent his cablegram to the plaintiff in the terms above set out he sent one to Mr. McVicker in Lagos for the benefit of Brandler & Rylke Ltd. in which he stated that 13 lorries were available for immediate shipment. It can readily be assumed that the 12 and the 13 referred together to the 25 which the defendant said he was told at Luton were ready for shipment.

After the plaintiff received the cablegram set out above dated the 29th September he remitted the sum of £5,300 to London. The amount of £5,000 was to be paid to Frankel as the deposit which he required: the amount of £300 was for the defendant's expenses as had been agreed. Frankel received the sum of £5,000.

The plaintiff has lost the £5,000 which he paid and the question arises whether this loss was the result of and should be attributed to some negligence on the part of the defendant. The learned judge so held. His reasons were contained in the following passage:—

> " 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 September that there was nothing ready for shipment, and nothing likely to be shipped the defendant, disregarding a double need for caution, paid the £5,000 deposit. He had failed to check Frankel's representations. He still pinned his faith on Frankel's words."

This view was upheld on appeal by the Federal Supreme Court. They pointed out that on his second trip the defendant made no further enquiries as to Frankel's financial position and further that he had not seen any vehicles assembled and ready for shipment by Frankel and had seen no signed agreements between Frankel and Vauxhall Motors. They concluded that he had " been fooled by Frankel and his associates " and that he " failed to show care, diligence and skill which his position as an agent demanded before involving his principal in a financial loss which due care and diligence could have averted".

Their Lordships are unable to share these conclusions. The conclusions cannot be regarded as being concurrent findings of fact. The determination of the case involves considering the measure of the duty owed by the defendant and in the light of the ascertained facts considering whether there was a failure to perform such duty. In the light of the facts and circumstances which existed at the time their Lordships do not consider that the defendant is shown to have failed to have displayed the measure of skill and care that

could reasonably be demanded of him. It is clear now that different procedures might have been adopted. Business might have been transacted in such a way that money would only pass in exchange for documents which would give entitlement to receive goods. The defendant was not however guaranteeing the successful outcome of the transactions and provided that he acted honestly no more could be demanded of him than that he should show that measure of skill and diligence which could be expected of one in his position. Nor must the events of the time be judged in the light of knowledge and experience gained at later dates. It can hardly be correct that the defendant had seen nothing and had not made any investigations before he sent the cablegram of the 29th September to the plaintiff. On his first visit to England the defendant had seen much of Frankel. Frankel appeared to be a man of affluence and there were all the indications that he was well placed in business. The bank manager saw Frankel and went to his office. The bank manager was satisfied. A report from Frankel's bank was obtained and the report was eminently re-assuring. There is evidence that even at later times Frankel was trusted by those who had dealings with him. On the defendant's second visit to England there was no reason at all to suppose that the favourable reports of Frankel's financial standing were not still operative. The defendant went to Luton and saw the kind of truck that Frankel was promising to send. The chassis were assembled and they were of a type that would be suitable for Nigeria. It is said that the defendant did not see particular trucks in the sense that he did not see the actual trucks which Frankel was to despatch. The defendant was asked in cross-examination whether he saw " any vehicles intended from Frankel to the plaintiff " before he sent the cablegram of the 29th September: the defendant said that he had not but that he was told of them by the sales manager and that the cablegram represented the information given to him by the sales manager. If the sales manager at Luton told the defendant that 25 trucks were ready for Frankel and were ready for shipment then it was not negligent for the defendant to have asked the plaintiff to remit the sum of £5,000 on the basis that 12 vehicles were assembled and were ready for immediate shipment. While it may be that any such documents passing between Vauxhall Motors and Frankel as were seen by the defendant or by Mr. Coker may not have bound Vauxhall Motors to deliver the position was that Frankel had promised to ship the trucks if he had a deposit of £5,000 and the sales manager had told the defendant that there were 25 trucks which were available for Frankel.

Viewing the position in the light of the circumstances as at the end of September and without grafting upon the situation the wisdom which later events inspired their Lordships conclude that the defendant was not shown to have been negligent or to have failed to show that measure of care or skill which the plaintiff was entitled to expect.

The correspondence shows that there was a company who were the sole distributors of Bedford trucks for the area which included Nigeria. Normally therefore there could not be straight supplies and any purchases of such trucks could only take place through the sole distributors. The opportunity which gave rise to the present litigation owed its origin to the circumstance that there was an export allocation of trucks for Israel. The position was stated by the defendant in a letter of the 9th October to the plaintiff which contained the following passage:—

> " The position of the Trucks order is that Messrs. Frankel got authority to buy the quantity allocated for Israel which country is unable to pay in sterling. This order has been confirmed by Messrs. Vauxhall Motors the makers of Bedford Trucks to Messrs. Frankel who is buying on my behalf on a commission of 5 per cent. They (Frankel) have bargained with the shipping company who promised shipping space for November. We are still pressing other shipping companies as I urge that shipment should be made immediately as I have promised many of my buyers that shipment will be made in October. At the moment I can only confirm that shipping space is available for November. If we succeed earlier than that, I shall let you know.

" There is another one important point which I ought to make you aware of, as you are aware, we cannot at any time get straight supply for West Africa as the U.A.C. have the monopoly to import Bedford that way. The buying of Israel allocation makes it imperative that we must take the exact goods reserved for that country. Hence the trucks are all left hand drive and with cabs. We are at the moment trying to persuade Vauxhall to supply those without cabs, although the price is the same as I quoted you. I hope they will agree to this suggestion because they will have the cabs to their advantage."

Enclosed with that letter was the leaflet referred to above. In a later letter (dated the 27th October) the plaintiff expressed satisfaction with the type of truck and with the fact that they were " built up to be lefties " and hoped for speedy shipments.

What next happened was that Frankel asked the defendant for a further payment. Frankel apparently said that the manufacturers would not deliver the trucks unless he paid them a large sum. Frankel asked the defendant for a further advance of £18,000, which he later reduced to £15,000. The defendant declined to pay saying that this was contrary to the original arrangement and saying that he had neither the authority to pay nor the money with which to pay. The defendant then returned by air to Lagos.

The next development in the situation was that Frankel himself went to Lagos. A meeting took place on the 13th November at which the plaintiff, the defendant, Frankel and Mr. McVicker (of Lagos) were present. Much evidence was given in regard to that meeting and in regard to the events which followed it. In the result the plaintiff gave Frankel a cheque (dated the 18th November) for £15,000. The issue is raised as to whether the plaintiff lost that sum of £15,000 (for its loss is now assumed and is the basis of the claim) as a result of the defendant's negligence and breach of duty. The learned Judge held that Frankel told the plaintiff at the meeting on the 13th November of his inability to get " returns " from some other business in which he was engaged and said that he required a further £15,000. He held also that the plaintiff gave Frankel the £15,000 on the 18th November after he had obtained a letter written by Frankel dated the 15th November which was forwarded to him by the defendant with a covering letter of that date. The letter of the 15th written by Frankel is of importance. Its terms were as follows:—

" Dear Sirs,

I hereby confirm my acceptance of your order for 30 Bedford Trucks, long wheelbase model OLBC Chassis cab, at factory price of £673 12s. 0d. delivered London Docks, plus 12 per cent. plus 5 per cent., representing agreed commissions to be paid to myself and my Agents.

Delivery will take place within 60 days of my receiving the sum of £15,000 to augment the £5,000 already acknowledged by me, which I will take at 30/50 proportion of the overall contract for 50 Trucks, and credit you with the sum of £3,000 for the above mentioned 30 Trucks.

I hereby undertake to indemnify you against any loss or losses whatsoever that may arise from this deal through my inability to deliver to Lagos Port.

As soon as shipment will commence you will have to cover me for the difference in the sum received and the final C.I.F. costs. It is understood that part-deliveries are acceptable.

My Bankers are Messrs. Barclays Bank, Ltd., 232, Bishopsgate, London, E.C.3, to whom enquiries can be made to your satisfaction.

Yours faithfully,

(Sgd.) B. FRANKEL "

The plaintiff did not respond to Frankel's suggestion that enquiry of Barclays Bank could be made. The plaintiff knew that though £5,000 had been already paid to Frankel no trucks had been shipped. Trust was being reposed in Frankel but now Frankel was asking for three times as much

money as before. The learned Judge held that the plaintiff took matters into his own hands, that he relied on Frankel's letter of the 15th November before paying the £15,000, that he was deceived by Frankel's promises, that he negotiated with Frankel in disregard of a known risk in doing so (which he had come to know both by what the defendant had told him and from what he had learnt from Frankel) and that the payment by him of the £15,000 was uninfluenced by the defendant's previous conduct in words or writing. The learned Judge expressed his conclusion very clearly when he said:—

> " Notwithstanding plaintiff's repeated and very much repeated assertions in evidence that defendant throughout was the medium of negotiation with Frankel it is my 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. Frankel was a very persuasive fellow. The plaintiff in cross examination said that he discussed with Frankel " not his financial position " of which the defendant had told him of previously but that his, Frankel's " expectations in the return of his business had failed to materialize ". This was a trenchant admission on the part of the plaintiff. So putting together what the defendant had told the plaintiff regarding Frankel's difficulties and what the plaintiff discussed direct with Frankel, when he was armed with this knowledge, it must be held that the plaintiff had ample information to put him on his guard and to employ caution to the fullest extent."

McVicker gave evidence to the effect that the defendant supported Frankel in his request for £15,000: this evidence was definitely rejected by the learned Judge. The learned Judge considered that McVicker entertained doubts about Frankel but failed to disclose his doubts to the plaintiff who had confidence in him (McVicker). In the Federal Supreme Court this view was criticised on the ground that the plaintiff and McVicker met for the first time on the 13th November. The Federal Supreme Court considered that the defendant had lied as to what had happened at the meeting of the 13th November and as to other matters and considered that " 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 ". Their Lordships observe however that the learned Judge who saw the witnesses said that McVicker was not a reliable witness and was plausible. The Federal Supreme Court considered that the defendant owed a duty to the plaintiff to let him know the whole truth about the risk that the plaintiff was running by agreeing to advance more money and that the defendant failed in his duty. The Court considered that the learned Judge " misdirected himself on the evidence when he held that the plaintiff paid the sum of £15,000 to Frankel without the agency of the defendant and that the payment was uninfluenced by the defendant's previous conduct in words or writing ".

Their Lordships are unable to concur in the views of the Federal Supreme Court. The learned Judge had said in terms that he rejected McVicker's evidence that the defendant supported Frankel in his request for £15,000. Their Lordships are not persuaded that there were sufficient reasons for reversing this finding of fact by a Judge who had seen the witnesses. But quite apart from this their Lordships do not consider that it was shown that the loss of the £15,000 was attributable to negligence on the part of the defendant. While it must be recognised that the events leading to the payment of the £15,000 cannot be entirely divorced from those which lead to the payment of the £5,000 the reasons which their Lordships have earlier given for concluding that the defendant was not negligent in regard to the £5,000 apply with added force in regard to the £15,000. The plaintiff knew that Frankel had originally asked for and received the sum of £5,000, that thereafter no trucks had been shipped and that the demand was then made for a further and very much larger sum. In Lagos there was a new situation for the plaintiff to face. Frankel was persuasive. The plaintiff saw Frankel and could form his own opinions. Doubtless the plaintiff was impressed. He sought no assurance from Frankel's bank and he was content to accept

that Frankel would do all that he promised. He cannot blame the defendant for the loss that resulted from Frankel's later failures. While it may be that in looking back over the events of 1952 and looking at them in the light of what was later known and later became apparent all concerned might at different moments have acted differently, their Lordships are not satisfied that there was negligence in the defendant which brought about the lamentable loss of either the £5,000 or the £15,000. Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the judgments below be set aside and that judgment be entered for the defendant. The respondent must pay the costs in the Supreme Court and in the Federal Supreme Court and before their Lordships' Board.

(83160) Wt. 8233/71 100 8/61 Hw.

In the Privy Council

OLATUNJI OMOTAYO

v.

A. Y. OJIKUTU

DELIVERED BY

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