Appeal No. 31 *of* 1960

John Kwesi Taylor – – – – – – – – – *Appellant*

v.

Joshua Fanye Davis – – – – – – – – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE 1961

Present at the Hearing:

LORD DENNING.

LORD MORRIS OF BORTH-Y-GEST.

LORD HODSON.

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

The appellant brought an action in the Supreme Court of the Gold Coast in which he claimed to have an account taken of a timber business carried on by the respondent as his agent, and payment of the amounts found due to him on the taking of the account. By his judgment dated the 30th December 1954 Acolatse J. dismissed the claim and allowed the respondent's counter-claim in the sum of £1,351 6s. 3d. The appellant appealed to the West African Court of Appeal. By judgment dated the 28th June 1956 the appeal was dismissed. From this judgment the appellant now appeals.

After the trial of the action had begun before Acolatse J. an order was made referring accounts to a referee. The main issue which is raised in this appeal is whether the referee who was appointed to go into accounts and report his findings to the Court exceeded his terms of reference by deciding certain questions of law and fact and whether the Courts below should have accepted his findings although no evidence was called before the trial Judge.

On the 31st August 1945 (by an agreement of that date) the respondent was granted a timber concession by the Omanhene of Assin-Apimanim State. The respondent was to be permitted to fell timber for a period of ten years in an area of land measuring twenty miles square and to make such timber into logs to be hauled away. The respondent paid £200 as an advance in respect of the payments which at agreed rates were to be made in respect of the trees that were felled. That amount of £200 was paid to the respondent by the appellant at whose instance and on whose instructions the respondent had entered into the concession agreement. This was recited in an agreement made between the appellant (who was called the principal) and the respondent (who was called the contractor) on the 31st January 1946. By that agreement it was further recited that it was the intention of the parties to carry on timber business in the area covered by the concession and it was agreed that:—

> " in consideration of the premises and of the advance in money already made and to be made in the future by the principal towards the performance of the duties and obligations on the part of the contractor to be discharged in respect of the contract with the Asin Apimanim Stool the said contractor doth hereby COVENANT with the principal that he will

faithfully carry out the said duties and obligations during the currency of the agreement with the Assin Apimanim Stool with the help advice and assistance of the principal and that in return therefor he will after deduction of all working expenses and other out-goings either weekly or otherwise as may be agreed upon pay to the principal one half of the amount of profits realised on the sale and disposition of all timber and timberlike trees, boards, etc. obtained from the said Basofi Land by virtue of the said agreement with the Assin Apimanim Stool AND the contractor doth hereby assign all his claims rights interests and benefits arising under and by virtue of the said agreement to the principal as a disclosed principal under that agreement AND THE PRINCIPAL doth hereby covenant with the contractor that he will continue as heretofore in giving all necessary assistance to the contractor towards the due performance of the said contract."

The agreement also provided that so long as he carried out his part of the contract the respondent was to be entitled to retain one half of the nett profits.

There was an addendum to the agreement which was signed by both parties and which was in the following terms:—

" AND it is hereby further agreed between the parties hereto that the foregoing agreement shall be preparatory to the creation of a partnership under the law for timber and other kinds of ventures and that out of the nett profits accruing from the aforesaid business to which each party is entitled to 50 per cent, the principal shall deposit in an account to be opened at the Bank of British West Africa Ltd., Cape Coast in their joint names one third of the said 50 per cent and that deposits shall be made at the close of every timber deal until the sum of five hundred pounds is deposited from the joint savings whereupon the foregoing agreement shall determine and the parties shall enter into a partnership with the said £500 as capital."

In his action, which was begun by writ of summons dated the 21st January, 1953, the appellant alleged that he had performed his part of the agreement by advancing the sums required by the respondent from time to time for the timber business, but claimed that the respondent had failed to pay to him his share of the nett profits or to furnish him with any accounts. The appellant claimed:—

" (*a*) To have a full and true account of the said timber business carried on by the defendant as the plaintiff's agent.

(*b*) Payment to the plaintiff of his share or interest under the said agreement by the defendant.

(*c*) Fifty thousand pounds (£50,000) damages for breach of the said agreement by the defendant."

In the alternative the appellant claimed that:—

" (*a*) the plaintiff and the defendant were and are partners under the said agreement;

(*b*) an account to be taken of the said partnership transaction or business and for payment by the defendant to the plaintiff what is due to the plaintiff under the said agreement.

(*c*) the dissolution and winding up of the said partnership business."

In his defence the respondent pleaded that it was a condition precedent to any liability on his part that the appellant should from time to time pay sums of money to him when and as required for carrying out the contract but that the appellant had not made such advances with the result that he, the respondent, had been obliged to carry on the contract with his own money. The respondent further pleaded that in the latter part of 1948 at the appellant's request accounts were taken between the parties by a Mr. Ayornoo with the result that it was shown that the appellant was indebted to the respondent and that after those accounts were taken all business relations under the agreement

were terminated by mutual agreement and that the respondent thereafter carried on his own business. The respondent counterclaimed for the sum of £1,351 6s. 3d. as follows:—

" The defendant at the request of the plaintiff supplied to the plaintiff from 31st January 1949 to 22nd June 1951 timber logs and mahogany curls, and also advanced to the plaintiff sums of money on loan to the plaintiff within the said period all to the aggregate amount of £1,351 6s. 3d. which is now outstanding and unpaid, particulars of which are as under:—

		£	s.	d.
31. 1.49	Mahogany Curls	173	0	0
15. 2.50	Wawa Logs	228	6	3
31. 5.49	Loan	100	0	0
22. 6.51	Loan	850	0	0
		£1,351	6	3 "

In the course of his reply the appellant claimed that under the agreement he had from time to time advanced sums of money to the respondent to an amount of £1,980 6s. 5d. " against which " the respondent had supplied timber and curls and had repaid moneys to the extent of £1,351 6s. 3d. The appellant therefore claimed that there was a balance of £629 0s. 2d. in his favour. The appellant denied that accounts were taken by Mr. Ayornoo in 1948 or that business relations between the parties had thereafter ceased.

An issue was also raised on the pleadings as to whether in 1952 the appellant had unsuccessfully tried, by an arbitration, to effect a reconciliation with a view to renewing business relations.

The action came on for hearing before Acolatse J. on the 23rd June 1953. The appellant was in the course of giving evidence when by consent an order was made referring accounts to a referee. In the record it was stated:— " At this stage question of accounts involved to be referred to E.J. Blankson, Court Clerk, to go into accounts and report his findings to the Court." The record also contains the words:—" *By Court:*— Usual Order." No actual order appears to have been drawn up but it would seem to be clear that the reference was under the provisions of Order 38 of the Rules of the Courts (see The Courts Ordinance, Laws of the Gold Coast—1951—Vol. I—page 138). The provisions of Order 38 include the following rules:—

" 1. In any case or matter in which all parties interested, who are under no disability, consent thereto, and also without such consent in any cause or matter requiring any prolonged examination of documents or accounts or any scientific or local examination, which cannot in the opinion of the Court, having regard to the other business before it, conveniently be made by the Court in the usual manner, the Court may at any time, for reasons stated on the minutes, on such terms as it may think proper, order any question or issue of fact, or any question of account arising therein, to be investigated or tried before a referee, who shall be a Magistrate or other competent person, to be agreed on between the parties or appointed by the Court.

2. In all such cases the Court shall furnish the referee with such part of the proceedings and such information and detailed instructions as may appear necessary for his guidance, and shall direct the parties, if necessary, to attend upon the referee during the enquiry. The instructions shall specify whether the referee is merely to transmit the proceedings which he may hold on the enquiry, or also to report his own opinion on the point referred for his investigation.

3. The Court may at any stage of the proceedings direct any such necessary enquiries or accounts to be made or taken notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

9. The proceedings and report in writing of the referee shall be received in evidence in the case unless the Court may have reason to be dissatisfied with them, and the Court shall have power to draw such inferences from the proceedings or report as shall be just.

10. The Court shall have power to require any explanations or reasons from the referee, and to remit the cause or matter or any part thereof for further enquiry or consideration to the same or any other referee, as often as may be necessary, and shall pass such ultimate judgment or order as may appear to be right and proper in the circumstances of the case."

It was contended on behalf of the appellant that the reference was limited in that it was to be concerned only with the accounts whereas, so it was contended, the referee had proceeded to do much more than to " go into the accounts " and had virtually decided the issues in the action. It becomes necessary therefore to consider the proceedings that followed the making of the consent order of the 23rd June, 1953. It must however be apparent that in view of the claims presented by both parties as set out in their pleadings any investigation as to the accounts which was to result in reporting " findings " to the Court would inevitably involve a consideration of and a determination of many disputed issues of fact. An enquiry that resulted in a mere recording of evidence given without setting out any " findings " as to how matters stood financially as between the parties would have been valueless. This seems to have been the view of both parties for they appeared before the referee on over twenty occasions (some of which were concerned with adjournments) on various dates between the 30th June 1953 and the 25th May 1954. They presented their cases fully and called numerous witnesses. One of the witnesses was Mr. Ayornoo. It is significant also to note that during that part of the hearing before the referee which took place on the 17th September 1953 a point arose as to whether the respondent could give evidence that he had paid moneys to the appellant in respect of the business and made loans to the appellant apart from the amounts for which he, the respondent, had counter-claimed. Counsel for the appellant objected to the giving of such evidence. The referee was requested to refer the point to the Court for its ruling. The referee did so. He set out the position in a report to the Court dated the 8th October 1953. That report concluded with the words:—

" In my opinion as this case is one involving accounts for which this reference was appointed, I think all admissible evidence should be produced to enable the referee to arrive at a definite conclusion, particularly in view of the fact that all the account books are not available. It is a matter of credibility and I recommend that the defendant should have the opportunity to lead whatever evidence he desires in proof of his case."

The learned Judge made an order in the following terms:—

" *REFEREE*

Take all available evidence of parties to assist you in the taking of accounts in this matter to arrive at your conclusion of facts.

(Intd.) C.S.A.J."

There were very many further appearances thereafter before the referee. When they terminated the referee prepared a careful and lengthy report for the Court. In regard to the appellant's allegation that he had made advances under the agreement to a total of £1,980 6s. 3d. the finding of the referee was that the correct total was £1,390 6s. 3d. He held that the appellant had withdrawn a total of £740 from the business with the result that the appellant had a balance to his credit of £650 6s. 3d. as money invested in the business by him. He found that the respondent had invested in the business a total of £701 11s. 3d. and he said that in his opinion the respondent was entitled to recover any sums of money paid by him into the business, subject to whatever interpretation was placed on his obligations under the agreement. As to the counterclaim he recommended that judgment be entered for the respondent for the amount he had claimed viz. £1,351 6s. 3d. in respect of timber supplied and money lent between 1949 and 1951.

Further the referee held that accounts were taken by Mr. Ayornoo in 1948 and that the respondent produced all the books for him. The referee also held that the business under the agreement ceased when the accounts were taken and that the books were then removed by the appellant.

The report was received in evidence by Acolatse, J. on the 8th December 1954 and counsel for the appellant submitted that the referee had been wrong in concluding that the business relationship had ceased and that it was for the Court alone and not for the referee to decide that matter. Further argument took place before the learned Judge on the 10th and 13th December, 1954 and he gave judgment on the 30th December, 1954. He stated that one question to be determined was whether the relationship between the parties under the agreement " was to be considered as principal and agent or partners carrying on partnership business ". He had no hesitation in holding that the parties were not partners and were not carrying on partnership business but that the respondent undertook the duty of a contractor for the appellant and that the relationship between the parties under the agreement was " one of a ' disclosed principal ' and a contractor and each entitled to ½ share in the net profit of the operation of the ' concession ' as long as the principal, as plaintiff, advanced moneys for the working of the concession ". As to the balance in favour of the respondent on Capital Account (i.e. the difference between the £701 11s. 3d. advanced by the respondent and the £650 6s. 3d. standing to the appellant's credit) the learned Judge held that such balance ought to be regarded as a bad investment by the respondent who was not obliged to provide money for the business and who had not been requested to do so by the appellant. Furthermore he held that the concession itself was invalid and that it did not come " within the ambit of the Concessions Ordinance ". He held that the referee's report was full and comprehensive on all material facts and he accepted and adopted it and dismissed the appellant's claim and allowed the counterclaim.

The appellant appealed to the West African Court of Appeal. The appeal failed and in giving his judgment K. A. Korsah, C. J. (with whom Coussey, P. and Baker, Ag. J. A. concurred) said:—

> " Counsel for plaintiff-appellant, objected to the admission, of the referee's report and proceedings in evidence, on grounds briefly summarised as follows: (1) Referee exceeded his powers and decided questions of law which he is not entitled to do, therefore the proceedings before the referee should be declared null and void. (2) That the order to the referee was vague and that the Court before referring the accounts to a referee should have decided certain matters, such as whether partnership had been dissolved, and the rights of parties in Basofi Concession.
>
> " In my opinion this proposition cannot be supported. Certainly the referee's opinion on questions of law should in no way influence the Court, which alone decides finally the issues of law and fact arising as to the accounts. It is open to the Court to agree or disagree with the findings of the referee so that, in every respect, it is incumbent on the trial Judge to come to his own conclusions on questions both of law and fact irrespective of what the findings of the referee may be."

The main contentions advanced before their Lordships' Board on behalf of the appellant were that the referee had dealt with questions of fact and law which were outside his terms of reference and that the learned Judge had erred in that he did not himself hear the witnesses but accepted the findings of the referee. It was also contended that the learned Judge erred in holding that the concession itself was invalid. As to this latter contention their Lordships find it unnecessary to consider or to express any opinion as to whether the concession itself was or was not invalid. The parties proceeded on the basis that there was a good existing concession and even if there had been any invalidity affecting it, that circumstance would be immaterial so far as concerned the taking of accounts between the parties. On the major contention advanced on behalf of the appellant their Lordships cannot accept that the referee exceeded his terms of reference. One claim which was put

forward by the appellant in his statement of claim in his action was " to have a full and true account of the said timber business carried on by the defendant as the plaintiff's agent ": another (alternative) claim was for " an account to be taken of the said partnership transaction or business and for payment by the defendant to the plaintiff what is due to the plaintiff under the said agreement ". When the reference was made " to go into accounts " it became an essential part of the referee's enquiry to investigate all the business transactions between the parties and to consider the period of time covered by the accounts: that inevitably involved enquiring as to the period of time during which the respondent carried on the timber business as the agent of the appellant. Furthermore at the stage of the original hearing before Acolatse, J. when the order referring accounts was made the appellant had stated that the books in connection with the business had been and were then still in the possession of the respondent. The respondent had pleaded in his defence that the books had been taken away by the appellant and had been kept by him after Mr. Ayornoo had taken accounts in 1948. The facts in regard to those matters became inevitably in issue before the referee and both parties concurred in investigating them before the referee. The lengthy hearings before the referee were conducted on the footing that it was essential when having a reference " to go into accounts " to come to a conclusion as to the length of time for which the activities were conducted which were the occasion for having accounts between the parties. If the effective relationship between the parties came to an end at some particular date then that date was a vital date from an accounting point of view.

It is to be observed that in regard to the question whether the respondent was entitled to recover any sums of money paid by him into the business the referee only expressed his view subject to whatever interpretation should be placed upon his obligations under the agreement.,

Their Lordships are quite unable to accept the submission that the referee exceeded his terms of reference. He did no more than was necessary and essential in the discharge of the duty imposed upon him " to go into accounts " so as then to report his " findings " to the Court.

Their Lordships will report to the President of Ghana as their opinion that the appeal should be dismissed and that the appellant should pay the respondent's costs of the appeal.

(83076) Wt. 8233/71 100 7/61 Hw.

In the Privy Council

JOHN KWESI TAYLOR

v.

JOSHUA FANYE DAVIS

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LORD MORRIS OF BORTH-Y-GEST

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