IN THE PRIVY COUNCIL No. 18 of 1962

ON APPEAL
FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N :

A.G. IJALE (Defendant) Appellant

- and -

A.G. LEVENTIS AND COMPANY LIMITED (Plaintiff) Respondent

AND (by cross Appeal)

A.G. LEVENTIS AND COMPANY LIMITED (Plaintiff) Appellant

- and -

A.G. IJALE (Defendant) Respondent

CONSOLIDATED APPEALS

C A S E FOR THE RESPONDENT
(Appellant in Cross-Appeal)

Record

1. This is an appeal and cross-appeal from a judgment of the Federal Supreme Court of Nigeria, pronounced on the 12th day of May 1959, varying a judgment of the High Court of Lagos dated the 29th November 1955 for the Plaintiff Company (the Respondent in this Appeal and Appellant in this cross-appeal) for the sum of £25,917.17. 2 inclusive of interest by reducing the said sum by the sum of £10,657.10. 0 to the sum of £15,260.12. 2 and ordering the Plaintiff Company to pay to the Defendant (the Appellant in this Appeal and Respondent in this Cross-Appeal) costs assessed at fifty guineas.

pp. 51-58

pp.24-31

Record

2. The Plaintiff Company's claim against the Defendant was inter alia for the sum of £25,025.19. 8. with interest thereon at the rate of ten per centum per annum from the 27th day of July 1953 until payment or judgment. By its Statement of Claim, the Plaintiff Company claimed the
pp.5-7 said sum upon an account stated between the parties on the 10th June 1953 in a document headed "Return of Transactions" (Exhibit "A") and, alternatively,
p.63 as money had and received by the Defendant from the Plaintiff Company for the use of the Plaintiff Company.

3. The circumstances in which the said claim arose and in which Exhibit "A" came into existence are set out in the judgment of de Comarmond J. before whom the action came for trial in terms of which the following are the material extracts:-

p.26 LL.23-30 "In order to understand Exhibit "A", it is necessary to explain that the Plaintiff Company is a buying agent licenced by the Nigerian Cocoa Marketing Board for the purchase of cocoa for sale to the Board, and that the Defendant was employed by the Plaintiff for the purpose of buying ungraded cocoa".

p.26 LL.37-51. "The Defendant carried on his work in a store known as Store No. 1, Alakore, Lagos. His salary was £25. per month and he also received commission on the sale of graded produce. Whenever he needed money to purchase ungraded cocoa, he used to apply for it and the Plaintiff Company supplied the money. The cocoa was kept in Store No.1 until graded by the appropriate officials. After grading, the cocoa was transferred to Store No.2 and the Store Keeper in charge of Store No.2 issued a way-bill for the graded cocoa thus received by him. At that stage, the Defendant's account was credited with the value of the graded produce."

p.17 LL.42-46. p.63 4. The Defendant admitted in evidence, if not also by his Statement of Defence, that the sum of £25,625.19. 8. as shown on Exhibit "A" as money received by him from the Plaintiff Company for the purchase of produce was standing to his debit, but claimed that (in addition to the sum of £600

Record

in respect of his salary, already credited to him by the Plaintiff Company on Exhibit "A" and reducing its claim from the said £25,625.19. 8 to the said £25,065.19. 8.) he was entitled to be credited with the value of 73½ tons of ungraded cocoa and with the value of a quantity of palm kernels.

5. In his Statement of Defence (paragraphs 11 and 12 thereof) the Defendant also made mention of four motor-lorries, alleged to have been handed by him to and accepted by the Plaintiff Company on or about the 12th May 1953 on the understanding that the Plaintiff Company would overhaul and sell the same and credit the Defendant's account with the proceeds, but the Defendant did not claim an account to be taken or damages or any specific relief or remedy in respect of the said motor-lorries. At the commencement of the trial of the action, Counsel for the Plaintiff Company stated that the said motor-lorries would be sold and that the proceeds would be credited to the Defendant. The Defendant led no evidence as to the value of the said motor-lorries and did not pursue any remedy or relief at the trial in respect of them save as to the contention by Counsel for the Defendant that the Plaintiff Company could not litigate inter alia its claim for the said sum of £25,025.19. 8. until the said motor-lorries had been sold.

p.9

p.10 LL.12-13

p.22 LL.29-35

6. The interest claimed by the Plaintiff Company on the said sum of £25,025.19. 8. was claimed at the rate of ten per centum per annum on the whole of the said sum. Paragraph 8 of the Statement of Claim averred that it was a term of each of certain mortgages executed by the Defendant to secure the advances to be made to him that interest at the rate of ten per centum per annum should commence to run from the due date of payment if the principal monies secured should remain unpaid one month after demand in writing. Paragraph 9 of the Statement of Claim averred that it was in the contemplation of the parties that the monies advanced to the Defendant should not exceed the sum secured, that greater sums had in fact been advanced to the Defendant, but that the mortgage terms relating to interest constituted an agreement between the parties to the effect that all sums outstanding (irrespective of amount) should carry interest at the rate aforesaid from a date one month after demand in writing.

p.7

p.7

Record

pp.8-9. 7. The Statement of Defence did not deny the said claim as to interest, either specifically or by any general traverse. In consequence, the said claim stood admitted on the pleadings and for this reason or from other causes, no evidence was adduced either on the part of the Plaintiff Company or on the part of the Defendant with regard to it except that the Plaintiff Company made known to the Court, as appears from the final judgment in the action, that the sums secured by the said mortgages did not exceed £5,000.

p.43. LL.15-37.

8. In these circumstances, the predominant and, it is respectfully submitted, the only issues of substance at the hearing of the action were whether the whole of the said £25,025.19. 8 was the amount due to the Plaintiff Company or whether, in reduction of the said sum, the Defendant was entitled to be credited with the 73½ tons of ungraded produce also recorded on Exhibit "A" and thereon recorded as having been in the Defendant's store on the 10th June 1953, the date on which the parties signed Exhibit "A" and, if the Defendant was entitled to be credited with the said 73½ tons of ungraded produce, with what sum in respect of its value he was entitled to be credited. In his judgment delivered on the 12th March 1954, de Comarmond J. so dealt with the issues before him.

p.63.

pp.24-25.

9. At the hearing of the action, Ernest Matheron, the Plaintiff Company's supervisor of its produce buyers, produced Exhibit "A" in the course of his evidence on behalf of the Plaintiff Company. He stated in examination in chief :-

p.11. LL.15-16.

p.10. LL.30-31. That the Defendant was in charge of produce Store No. 1.

p.11. That the figure of 73½ tons of ungraded cocoa shown on Exhibit "A" was arrived at by deducting from the total returns of cocoa purchased, the weight of cocoa, already graded and that this figure was arrived at by looking at the books and records.

p.63. LL.31-36

p.11. LL.36-38. That he knew, at the time Exhibit "A" was made, that there was in fact no ungraded cocoa in Store No. 1 and no ungraded palm kernels either.

That towards the end of June 1953, he obtained the key of No. 1 Store from the Defendant's clerk and that there was no ungraded cocoa or kernel in the store except ungraded cocoa coming from No. 4 Store which had been moved to Store No. 1 by the produce Inspectors. — Record p.11 LL.41-48.

That, after the 10th June, no produce was bought. — p.11.L.52 p.12.L.1

10. In cross-examination, the said Ernest Matheron stated :-

That he could not remember going to Store No. 1 on the 10th June 1953 to check. — p.13. LL.11-12.

That he knew that everything had been graded when Exhibit "A" was signed. — p.13. LL.12-13.

That he signed Exhibit "A" as being correct according to the books and returns. That he knew that there was something wrong, however, because there was no ungraded produce in the store and that he knew that there would be a deficiency. — p.13. LL.14-18

11. Ademola Adamofe, a storekeeper employed by the Plaintiff Company, was the other witness on behalf of the Plaintiff Company. He testified:- — pp.13-14.

That, when he received produce, it had been graded and that he dealt only with graded produce. — p.13.LL.37-38 p.14.L.8.

That the last delivery received from the Defendant of (graded) cocoa was on the 5th June 1953 and of (graded) palm kernels was on the 8th June 1953. — p.13. LL.40-46.

That there was no ungraded produce in Store No. 1 after the said deliveries. — p.13. LL.46-48.

That Store No. 1 was taken over from the Defendant on the 26th June when Mr. Matheron took the key from one of the Defendant's clerks. — p.14. LL.3-6.

That from January 1953 onwards, the Produce Inspectors started using No. 1 store for re-grading and kept it sealed at night. — p.14. LL.31-34.

Record		
p.14. LL.35-37.		That any ungraded produce in Store No. 1 was graded by the dates he received the (graded) consignments from the Defendant (on the 5th and 8th June 1953).
pp.15-19.	12.	The Defendant gave evidence. He stated:
p.15.L.15.		That he had signed Exhibit "A".
p.15. LL.21-24.		That the tonnage of cocoa mentioned in Exhibit "A" had not been valued and credited to him.
p.15. LL.24-26.		That the same thing applied to the tonnage of palm kernels shown on Exhibit "A".
p.15. LL.44-48.		That the stock of cocoa and palm kernels mentioned in Exhibit "A" was still ungraded in Store No. 1 when Exhibit "A" was signed and that the Plaintiff Company had agreed to take the ungraded produce.
p.17. LL.5-7.		That it was finally on the 10th June 1953 that Mr. Matheron agreed to take over the ungraded produce.
p.17. LL.7-8.		That he did not have the store key until the 26th June 1953.
p.17. LL.37-39.		That he did not admit any indebtedness to the Plaintiff Company until the ungraded produce had been graded and credited to his account.
p.17. LL.42-46.		That he agreed that the figure of £25,625.19. 8. shown on Exhibit "A" was standing to his debit, but that against this was the value of the ungraded produce shown on Exhibit "A" and also the sale price of his four lorries.
p.18. LL.3-6.		That on the 10th June 1953, Mr. Matheron checked the stock, found it correct and that Exhibit "A" was signed and that there was ungraded produce in the store on that day.
p.18. LL.49-50.		That Mr. Matheron took the key of Store No. 1 in March 1953.

That graded cocoa was delivered from Store No. 1 until the beginning of June and that Exhibit "A" showed the balance of ungraded cocoa in store on the 10th June. — Record p.19. LL.1-4.

That it was not true that produce Inspectors graded cocoa in Store No. 1 coming from another store. — p.19. LL.26-28.

13. C.O. Eloyade, a clerk employed by the Defendant, also gave evidence. He stated :- — pp.19-21

That there were ungraded cocoa and palm kernels in Store No. 1 on the 10th June 1953. — p.20. LL.7-8.

That he could not remember whether grading was done after the 1st June and before the 10th June. — p.20. LL.19-21.

That the graded produce was entered in a book the entries of which were signed by the Produce Examiner and the buyer in charge of the store and that the cocoa Register or Receipt Book (Exhibit "D") produced to him showed that no grading took place after the 1st June 1953. — p.20. LL.27-34.

That the last delivery of graded cocoa by the Defendant to the Plaintiff Company was made on the 5th June 1953. — p.21. LL.4-6.

14. On the 12th March 1954, de Comarmond J. delivered his judgment which included the following passages in addition to the passage already cited :- — pp.24-31. p.26.LL.23-30. LL.37-51.

(a) "On the evidence before me, I have reached the conclusion that the Plaintiff has failed to establish that there was no ungraded produce as shown on Exhibit "A" in the store on the 10th June 1953". — p.29. LL.47-51.

(b) "I cannot say, at the present stage how much should be credited to the Defendant in respect of the ungraded produce in the store on the 10th June. — p.30 LL.27-44.

No attempt has been made by either side to set a value for such produce. The Plaintiff, of course, did not do so because his case

Record

was conducted on the lines that there was no produce in the store. The Defendant seems to be waiting to be told what the value is. Now that I have found against the Plaintiff as regards the existence of ungraded produce on the 10th June 1953, it seems to me that the value of the ungraded produce must be ascertained in order to reach a final conclusion on the first item of the claim". 10

p.31. LL.18-22. (c) "However, some step must be taken to settle the sole remaining point, namely, the value of the ungraded produce in store on the 10th June. By doing so further unnecessary litigation will no doubt be avoided".

p.31. LL.27-30. (d) "The parties may agree that the matter may be settled between them or they may suggest an enquiry before the Court, instead of a reference."

15. The parties failed to reach agreement as to the value of the ungraded produce and on the 29th pp.35-38. June 1955 Abbott J. took the enquiry as to the said value and heard the evidence tendered by the parties. 20

16. At the said enquiry, R.J. Welch, acting Principal Produce Officer, Port Harcourt was called by the Plaintiff Company and stated in examination in chief :-

p.36 LL.8-11. "I was then" (in June 1953) "Senior Produce Officer, Lagos and was investigating certain offences in relation to cocoa in the Defendant's store." 30

p.36. LL.12-20 "73 tons 5 cwts of ungraded cocoa would have no value, quite worthless. Because when I went to the store at the end of March 1953 I found a lot of ungraded cocoa. I ordered its examination by my staff as a large quantity, I could see, was of inferior quality. All gradable cocoa in the store was graded, including some cocoa of no grade quality but not sufficiently bad to warrant prosecution." 40

"On the 1st June 1953 we completed grading and bagging all gradable cocoa including that of bad quality as above. I believe the quantities were about 100 bags of Grade 1, 200 of Grade 2 and 400 of bad quality cocoa." — Record p.36. LL.22-27.

"On the 1st June 1953 grading ceased because there was no more cocoa in the store which ever reached the lowest of the three standards. Value of cocoa which does not reach that lowest standard is nil." — p.36. LL.29-33.

In cross-examination, the said R.J. Welch stated that, to the best of his recollection, at the material time the price of low quality cocoa was £145. per ton, of Grade 2 was £150 per ton and of Grade 1 was £160 per ton. — p.36. LL.36-41.

17. At the conclusion of the evidence of the Plaintiff Company, Counsel for the Plaintiff Company conceded that the sum of £276. 2. 6 should be deducted from its claim in respect of 7 tons 13 cwts. 2 qrs. 7 lbs. of palm kernels at £36. 3. 6 per ton which had to be assumed to have been in the store. — p.36.L.45. p.37.L.2.

18. The Defendant then testified. His evidence inter alia was :- — pp.37-38

That he denied delivering bad quality cocoa to the store — p.37. LL.26-27

That the value of the cocoa delivered to the store was £174. 9. 6. per ton. — p.37. LL.29-30.

In the course of his examination in chief, he produced a letter from the Plaintiff Company's Solicitors (Exhibit "F") in respect of the said value. — p.66

In cross-examination, he stated inter alia:-

That he knew that the cocoa in question was graded by Produce Officers and that he did not say that he did not accept their grading, but that all his cocoa there was Grade 1 main crop, and that, when he put a value of £174. 9. 0. on his cocoa, he was relying on Exhibit "F". — p.37. LL.38-43.

Record

pp.39-44 19. On the 4th July 1955, Abbott J. delivered his finding as to the value of the ungraded produce.
p.36 Accepting the evidence of the said R.J. Welch, he
p.41.LL.10-15. held that the value of the ungraded cocoa in the store on the material date was nil and sent the case back to de Comarmond J. for final judgment.

20. On the 29th day of November 1955,
pp.42-43. de Comarmond J. gave final judgment which included the following passages :-

p.42. LL.17-20. "On the 12th March 1954, I gave a judgment in this suit. The judgment was not a final one because there remained to ascertain the value of some ungraded produce. Such value when ascertained, was to be credited to the Defendant."

p.42. LL.23-25. "Abbott J., after hearing evidence, decided that the ungraded produce (cocoa) was of no value".

p.42.L.35-p.43.L.4 "Learned Counsel for the Plaintiff conceded in the course of the enquiry before Abbott J. that a sum of £276. 2. 6. (advances for palm
p.66 kernels shown in Exhibit "F") had to be deducted from the amount claimed. This is the only deduction that has to be made, being given that the value of the ungraded produce in the store had been found to be of no value. The balance i.e. £24,749.17. 2. is therefore due to the Plaintiff and he is entitled to judgment in that principal sum."

p.43. LL.26-37. "The averments contained in paragraphs 8 and 9 of the Statement of Claim were not challenged in the Statement of Defence. However, I am not prepared to agree that the provisions regarding payment of interest contained in the Deed or deeds of mortgage can be held to have been extended by tacit agreement. I therefore allow interest calculated at ten per centum per annum on £5000 monthly from the 27th July 1953 to date of this judgment, that is £1,168. in round figures".

He accordingly entered judgment for the Plaintiff Company for the sum of £25,917.17. 2. inclusive of interest.

Record

21. On the 29th November 1955, the Defendant gave Notice of Appeal to the West African Court of Appeal. The said Notice contained six grounds of appeal. After the Federal Supreme Court of Nigeria had acquired jurisdiction, the Defendant on the 23rd November 1957 filed two further grounds of appeal. On the 17th March 1959, the Federal Supreme Court gave leave to argue the said additional grounds of appeal and heard the arguments of Counsel for the Defendant and for the Plaintiff Company on the appeal. pp.44-45. p.46. pp.47-50.

22. On the 12th day of May 1959, Ademola F.C.J. delivered a reserved judgment which contained, inter alia, the following passages :- pp.51-55.

"The issue resolved by de Comarmond J. on the 12th March 1954 was that on the 10th March 1953, as shown on Exhibit "A", there was in the Appellant's store 73.5 tons of ungraded cocoa. The Learned Judge, however, was unable to ascertain the value of these 73.5 tons. The Appellant's account having been credited with the value of graded cocoa, the effect on the learned Judge's findings was that the Appellant's account was also to be credited with the value of 73.5 tons of ungraded cocoa. Any balance remaining would then be the amount due to the plaintiff - respondent from the defendant-appellant." p.52. LL.37-50.

"The case somehow found its way before Abbott J. who, despite Counsel's protests, proceeded to hear the case. The only issue left at that stage that could be heard was the market value of the 73.5 tons of ungraded cocoa as either side made no attempt to set a value for such cocoa. Abbott J., however, heard evidence and adjourned for judgment. He later gave a judgment in which he found that the value of the ungraded cocoa in the store on the 10th March 1953 was NIL. In coming to this conclusion he relied on the evidence given by the Produce Officer, Mr. Welch, which he said 'amounts to very much the same thing as saying that there was no ungraded produce in the store'." p.53. LL.10-26.

Record

p.53.L.34.- p.54.L.9. "The appellant has now appealed against this judgment and of the various grounds of appeal filed as well as the additional grounds filed later, only ground 3, 3 (1) and 3(2) were argued by Counsel for the appellant. These grounds of appeal are as follows:-

> 3. Judgment was against the weight of evidence.
>
> 3(1). That Mr. Justice de Comarmond and/or Mr. Justice Abbott were wrong in law and/or in fact in failing to assess the value of 73½ tons of ungraded cocoa at the valuation put on the same by the plaintiffs.
>
> 3(2). Alternatively and without prejudice to the foregoing that Mr. Justice de Comarmond and/or Mr. Justice Abbott were wrong in law and/or in fact in failing to give credit to the defendant for the 73½ tons ungraded cocoa at the figure at which the defendant purchased the same".

p.54. LL.7-9. "The issue argued by Counsel was that the Appellant must have credit for the 73.5 tons of ungraded cocoa".

p.54. LL.10-23. "It is clear that Abbott J. went beyond the terms of enquiry before him, for a specific finding had been recorded by de Comarmond J. on the issue whether or not there was ungraded produce in the store. In a detailed judgment on the point on the 12th March 1954, de Comarmond J. has, for various reasons, accepted the entry made on Exhibit "A" and signed by both parties as showing 73.5 tons of ungraded cocoa. The evidence of Mr. Welch before Abbott J. about the non-existence of the cocoa in the store was, in my view, out of place; it should not have been accepted as they were in conflict with the findings already made by de Comarmond J."

p.55.L.18. pp.55-57. Mbanefo F.J. concurred with the judgment of Ademola F.C.J. de Lestang J.F.S.C. delivered a

judgment which included the following passage :- Record

"The other point for decision in this appeal is whether Abbott J. was right to hold that the value of the ungraded cocoa was nil. In my view he was not in the circumstances of this case, because that finding was really based on evidence that there was no cocoa in the store at all. Evidence completely inconsistent with the finding of de Comarmond J. that there were 73½ tons. On the other hand there was evidence that none of the cocoa in the store was ungradable because had there been any it is fair to assume that a prosecution would have been instituted by the Produce Controller and we know that no such action was taken. The minimum value of gradable cocoa is £145. per ton and there being no evidence that the ungraded cocoa in the store was of superior quality I consider that it should be valued on that basis. p.57. LL.23-43.

I agree with the orders proposed by the Learned Chief Justice."

Accordingly, the Federal Supreme Court varied the judgment of de Comarmond J. by reducing the said sum of £25,917.17. 2. awarded by him to the Plaintiff Company to the sum of £15,260.12. 2. and ordered the Plaintiff Company to pay to the Defendant the costs of the appeal assessed at fifty guineas. p.58.

23. On the 12th September 1960, the Defendant and the Plaintiff Company were granted final leave to appeal to Her Majesty in Council. pp.59.60.

24. The Plaintiff Company humbly submits that the Appeal should be dismissed and that the Cross-Appeal should be allowed and that the judgment of the learned trial judge restored or, alternatively, reduced by a sum not exceeding £6,500 for the following, amongst other

R E A S O N S

(1) BECAUSE the onus of proving to the satisfaction of the learned trial judge that the quantity and value of the ungraded produce with which the

Defendant claimed to be entitled to be credited was and remained upon the Defendant and the Defendant did not discharge that onus as to the value

(2) BECAUSE the learned trial judge, having found or the Plaintiff Company by its conduct having conceded the presence of 73½ tons of ungraded produce in Store No. 1 on the 10th June 1953, was right, the Plaintiff Company consenting thereto, in directing an enquiry as to the value of the said ungraded produce.

(3) BECAUSE the finding of Abbott J. that the value of the ungraded cocoa in Store No. 1 on the 10th June 1953 was nil was in accordance with the weight of the evidence and was right upon the facts before him.

(4) BECAUSE the Federal Supreme Court misdirected itself in holding that the finding of Abbott J. as to the value of the ungraded cocoa in Store No.1 was inconsistent with the finding of de Comarmond J.

(5) BECAUSE there was no evidence upon which the Federal Supreme Court could have held or inferred that 73½ tons of ungraded cocoa was of Grade 3 or of any other or any value.

(6) BECAUSE, in the alternative, if contrary to the Plaintiff Company's contention any inference was capable of being drawn in favour of the Defendant from the evidence and from the finding of de Comarmond J. (that 73½ tons of ungraded produce were in Store No. 1 on the relevant date) and the finding of Abbott J. (that grading to the value, it appears inferentially, of £6,500 had ceased on the relevant date and that the balance of the produce remaining ungraded at that date was worthless), such inference should be that the Defendant is entitled to a credit of £6,500 and no more.

BERNARD LEWIS

No. 18 of 1962

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL SUPRME COURT
OF NIGERIA

A.G. IJALE

- v -

A.G. LEVENTIS AND COMPANY LIMITED

AND (by cross-Appeal)

A.G. LEVENTIS AND COMPANY LIMITED

- v -

A.G. IJALE

C A S E

FOR THE RESPONDENT
(Appellant by Cross-Appeal)

HALSEY LIGHTLY & HEMSLEY,
32, St. James's Place,
London, S.W.1.