Privy Council Appeal No. 48 *of* 1950

Amoah Ababio, Ohene of Asamangkese representing the Stool of Asamangkese and another – – – – *Appellants*

v.

John Edmund Turkson – – – – – – – *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MARCH, 1954

Present at the Hearing:

LORD PORTER
LORD REID
LORD KEITH OF AVONHOLM

[*Delivered by* LORD KEITH OF AVONHOLM]

This appeal raises a short but troublesome question as to the extent of the jurisdiction conferred upon the Courts of the Gold Coast Colony, by a certificate of the Governor in Council, to entertain legal proceedings against the Asamangkese and Akwatia Stools. The certificate was issued to the respondent in this appeal and following upon its issue he brought proceedings against representatives of the Stools, in the Divisional Court of Accra. In the writ of summons it was stated that in or about August, 1921, it was agreed between the plaintiff and the defendants that (1) if the plaintiff introduced to the defendants a company or companies who would enter into mining leases with the defendants and (2) financed the prospecting of the stool lands for minerals, the defendants would pay to the plaintiff a commission of 5 per cent. on all moneys paid by the company or companies to the defendants by way of rents or royalties during the continuance of a mining lease or leases. The writ states that in consequence of the agreement the defendants' Stool lands were prospected at the expense of the plaintiff and on the discovery of diamonds the plaintiff introduced to the defendants a company and a syndicate who entered into mining leases with the defendants. The writ further states that in pursuance of the agreement the defendants paid the plaintiff the commission of 5 per cent. as from 1921 to 1935; that the plaintiff is not aware of what sums of money the defendants have received from the company and syndicate since 1935; and that the defendants have not paid the plaintiff any money or commission or rendered him any account of moneys received from the companies, although requested orally and by letters to do so. He therefore claims (1) For an account of all moneys by way of rent and royalties received by the defendants from the companies and of the amount of the commission due to the plaintiff and (2) For the payment of the amount found due on the accounting. The defendants entered a defence denying the plaintiff's allegations and stating various other defences including invalidity of the agreement by native customary law, the Statute of Frauds, and the Statute of Limitation. The parties joined issue on the allegations and defences and after hearing evidence the trial judge found that the agreement and the consideration for it was never entered into. He also

rejected a contention for the plaintiff that by the terms of the certificate of the Governor in Council he was precluded from finding that no binding contract existed between the plaintiff and the defendant because the Governor in Council must be deemed to be satisfied as to the existence of such a contract and that the Court was called upon to adjudicate only as to the amount which ought to be paid to the plaintiff. He accordingly found no money due to the plaintiff and gave judgment for the defendants. On appeal, the West African Court of Appeal, for reasons which the Board will consider in a moment, took the view that the trial judge, by considering the validity of the claim instead of confining himself to the question of the amount to be paid to the plaintiff, had gone beyond the matter to be adjudicated upon by the terms of the certificate of the Governor in Council. He had thus acted in excess of the jurisdiction conferred upon him. By their judgment the appeal was allowed, the order of the trial judge was set aside and it was ordered that the case be remitted to the Court below to determine the sole issue which had been left to the Court by the certificate of the Governor in Council, namely the amount which ought to be paid in respect of the appellants' claim.

The certificate issued by the Governor in Council is as follows:

> "WHEREAS a claim by John Edmund Turkson against the Asamangkese and Akwatia Stools for moneys alleged to be due to him from the said Stools under an agreement made in or about the year 1921, whereby the said Stools agreed to pay to the said John Edmund Turkson 1/- in the £1 of all moneys received by the said Stools in respect of certain concession granted to the Consolidated African Selection Trust Limited and the West African Diamond Syndicate, has been referred for consideration to the Executive Council pursuant to the terms of the proviso to subsection (2) of section 6 of the Asamangkese Division Regulation Ordinance (Cap. 78):
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> AND WHEREAS the Governor in Council considers it desirable that the amount which ought to be paid in respect to the said claim should be adjudicated upon in an action against the said Stools:
>
> NOW THEREFORE pursuant to the terms of paragraph (ii) of the proviso to subsection (2) of section 6 aforesaid, the Governor in Council, hereby certifies that in his opinion the circumstances are such that the matter, to wit, the amount which ought to be paid in respect of the said claim, may properly be the subject of legal proceedings by the said John Edmund Turkson against the said Stools."

To appreciate the purpose and effect of this certificate it is necessary to have regard to certain legislation affecting the control and regulation of the property, revenues and expenditure of the Stools in the Asamangkese Division. The matter starts with an Ordinance of the 30th March, 1935, enacted by the Governor of the Gold Coast Colony, with the advice and consent of the Legislative Council, which had for its purpose to prevent the incurring of any debt or liability on behalf of a Stool without the consent of the Treasurer of the Stool Treasuries appointed under regulations made by the Governor in Council. The Ordinance also enacted that as from its commencement no action should lie against a Stool and no execution should issue or be enforceable against the revenues of the Stool or any Stool property in respect of any debt or liability incurred whether before or after the commencement of the Ordinance by a person on behalf of the Stool, unless such debt or liability if incurred after its commencement was incurred with the consent of the prescribed officer, i.e., the Treasurer of the Stool Treasury. The effect of this Ordinance was to withdraw entirely from the jurisdiction of the Courts any claim against the Stool for a debt or liability incurred before the date of the Ordinance. But under a power given by section 8 of the Ordinance to the Governor in Council to permit and regulate

the discharge of debts due and liabilities incurred by a Stool prior to the commencement of the Ordinance, Regulations were made, to which it is unnecessary to refer in detail, prescribing certain procedure upon which the Governor could approve of the payment of such debts and expressly providing that no claim for debts existing prior to the commencement of the Ordinance should be paid by the Treasurer of the Stool Treasury unless such debt had been first approved by the Governor. So matters stood until 1945 when an amendment of subsection 2 of section 6 of the Ordinance of the 30th March, 1935, was made by an Ordinance of the 7th April, 1945. It is upon the interpretation of section 6 (2) of the Ordinance of 1935, as so amended, that the question in issue in this appeal depends. As amended the subsection reads as follows:—

> " (2) From and after the date of the commencement of this Ordinance no action save as is hereinafter provided shall lie against a Stool or against any officer appointed under section 8 (*e*) for the collecting, safe custody, and management of the revenue of a Stool and no execution shall issue or be enforceable against the revenues of the Stool or any Stool property in respect of any debt or liability incurred whether before or after the commencement of this Ordinance by a person on behalf of the Stool, unless such debt or liability if incurred after the commencement of this Ordinance was incurred with the consent of the prescribed officer ;
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> Provided that in any case where a claim in respect to a debt or liability alleged to have been incurred by or on behalf of the Stool before the commencement of this Ordinance has been the subject of an enquiry in accordance with any regulations made under this Ordinance, and the Governor, upon consideration of the record of the enquiry and of any recommendation transmitted to him in connection therewith is in doubt as to whether or not any payment ought to be made in respect to the claim or any part thereof, or as to the amount which ought to be paid, the following provisions shall have effect :—
>
> (i) The Governor, if he thinks fit, may refer the matter to the Executive Council for consideration as to whether or not it is desirable, in the interests of justice, that the claim or any part thereof, or the amount which ought to be paid, should be adjudicated upon in an action against the Stool ;
>
> (ii) Where, upon any such reference, the Governor-in-Council considers it desirable that there should be any such adjudication, he may, in his absolute discretion and without assigning any reason, certify that in his opinion the circumstances are such that, notwithstanding anything in this Ordinance, the matter may properly be the subject of legal proceedings ;
>
> (iii) In any case where the Governor-in-Council has so certified, nothing in this subsection shall be deemed to preclude any court of competent jurisdiction from adjudicating upon the matter to which the certificate relates or to prohibit the issue or enforcement, after judgment, of execution against the Stool property or revenues."

Their Lordships have come to the view that, on a sound construction of this provision, the words " the amount which ought to be paid " cannot be read in the restricted sense put upon them by the Court of Appeal. These words, in the context in which they are used, are not in the opinion of their Lordships unambiguous, as the learned judges in the Court below seem to have thought. The word " ought " in itself introduces an element of ambiguity. Does it mean ought as a mere matter of assessment or accounting or ought as a matter of law? The support for the first meaning lies in the contrast between the words " as to whether or not any payment ought to be made in respect to the claim or any part thereof " in the one branch of the alternative and the words " as to the amount which ought to be paid " in the other branch. But in their Lordships' opinion

the difference can be explained by the contrast between "debt" and "liability" in the first part of the subsection and in the opening words of the proviso. This contrast their Lordships think is between a claim to an ascertained or liquid sum and a claim to an unascertained or illiquid amount. On this reading the question whether any payment ought to be made refers to a claim in respect to a debt and the question as to the amount that ought to be paid refers to a claim in respect of a liability. Their Lordships find support for this meaning in the fact that in each of sub-heads (i), (ii) and (iii) of the proviso "the matter" there mentioned refers naturally to the claim as a whole. If accordingly under sub-head (ii) the Governor in Council may certify that "the matter" may properly be the subject of legal proceedings there seems to be no point, and maybe even a doubt as to the competence, of excluding any part of the claim from legal proceedings. In their Lordships' opinion accordingly it accords best with the natural and reasonable meaning of the language used to construe the words "the amount which ought to be paid" as covering the question of liability upon the claim as a whole and not as referring to a mere question of quantum.

It is not out of place to point to the difficulties and inconveniences which would result from the more restricted meaning being put upon these words. It was conceded that it would be relevant to consider whether the "amount" had been satisfied by payment, in whole or in part. But if so, why should a defence based on the statute of Limitation, or the statute of Frauds, or on the invalidity of the agreement, or the absence of agreement, be excluded? These may all bear on the question whether any sum "ought" to be paid. There are also, in their Lordships' view, practical difficulties and inconveniences in part of a claim being determined by the Governor and part by the Courts, and as to the manner of its enforcement. Where there is ambiguity, as in their Lordships' view there is here, these are relevant considerations.

The view was apparently taken by at least one of the learned Justices of Appeal in the Court below that the trial judge should have proceeded on the basis that the claim had already been admitted by the Governor in Council. If the conclusion reached by the Court of Appeal were a sound one that may have been a proper assumption to make, but for the reasons stated it falls to be rejected. There is in fact no such statement in the certificate of the Governor.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal should be set aside and the case remitted to the Court of Appeal to adjudicate upon the other grounds of appeal contained in the appeal from the judgment of the trial judge. The costs of the appeal and of the hearing in the West African Court of Appeal which led up to the judgment dated the 9th February, 1949, must be paid by the respondent. The costs otherwise will be dealt with by the West African Court of Appeal after the case has been determined on the merits.

(20281) Wt. 8267—24 100 3/54 D.L.

In the Privy Council

AMOAH ABABIO, OHENE OF ASAMANGKESE REPRESENTING THE STOOL OF ASAMANGKESE AND ANOTHER

v.

JOHN EDMUND TURKSON

[DELIVERED BY LORD KEITH OF AVONHOLM]

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