

UGANDA / JUDGMENT

Patel Brothers v Hasmani (Civil Appeal No. 65 of 1951) [1952] EACA 170 (1 January 1952)

[1952] EACA 170

COURT

East African Court of Appeal

BEFORE

Nihill P, Worley VP

CASE / FILE NUMBER

Civil Appeal No. 65 of 1951

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL (President), SIR NEWNHAM WORLEY (Vice-President) and Cox, C. J. (Tanganyika)

PATEL BROTHERS, Appellants (Original Plaintiffs)

H. D. HASMANI, Respondent (Original Defendant) Civil Appeal No. 65 of 1951

(Appeal from the decision of H. M. High Court of Tanganyika—Mahon, J. Tanganyika.)

Cheque—Consideration—Forbearance—Onus of rebutting presumption of consideration.

The appellants sued respondent in the Tanganyika High Court as drawer of a cheque payable to appellants.

At the trial the agreed issues were: \$-\$

- (1) Did the defendant deliver the said cheque to the plaintiff's firm?
- (2) Was there any consideration for the cheque?
- (3) Was presentation of the cheque excused?
- (4) Was the plaintiff firm entitled to interest?

The second issue was the main one and the onus of rebutting the presumption of consideration lay on the defendant-respondent. The appellant opened his case and called evidence and closed his case. The respondent called no evidence and submitted there was no case to answer on the ground inter alia of absence of consideration for the cheque. The trial Judge accepted this contention and dismissed the action.

Held \$(20-10-52)\$.—(1) It is not necessary for the plaintiff to prove any special circumstances which exonerated him for liability on the cheque.

(2) There had been a forbearance to sue the defendant's son at defendant's request and such is valuable consideration.

Appeal allowed.

Cases referred to: Crears v. Hunter. (1887) L. R. 19 Q. B. D. 341, Oliver v. Davis, (1949) 2 A. E. R. 353.

H. K. Patel for appellant.

Vellani for respondent.

JUDGMENT (delivered by SIR NEWNHAM WORLEY (Vice-President)).—This is an appeal from a judgment of the High Court of Tanganyika dismissing the appellant firm's claim for Sh. 18,000, interest and costs. The appellant firm sued the respondent as drawer of a cheque for Sh. 18,000 dated 10th September, 1947, on the Exchange Bank of India and Africa, Ltd., and made payable to the appellants. After the pleadings were closed the trial proceeded upon four agreed issues, namely:-

1. Did the defendant deliver the said cheque to the plaintiff firm?
2. Was there any consideration for the cheque?
3. Was presentation of the cheque excused?
4. Was the plaintiff firm entitled to interest?

(I assume that this last issue refers to the claim for Sh. 2,970 being interest as damages on Sh. 18,000 at 6 per cent per annum from 10th September, 1947, till the date of filing the suit: plus further interest at 9 per cent per annum from date of filing to date of decree.)

The second issue was clearly the leading one and the onus of rebutting the presumption of consideration lay on the defendant-respondent, as his advocate concedes. It would therefore have been more in accordance with the usual procedure had the defendant been called upon to begin, but the plaintiff-appellant's advocate appears to have accepted without protest the task of opening his case and calling evidence. The point of procedure is therefore now of no significance unless it should appear that the course followed at the trial misled the learned trial Judge as to where the onus of proof lay. When the plaintiff's case was closed, the defendant's advocate called no evidence and submitted he had no case to answer, resting his submission upon two points:

\$(a)\$ the absence of consideration for the cheque; and

(b) limitation (which had not been pleaded).

The learned trial Judge in a considered judgment accepted the former point and dismissed the action but, at the request of the defendant's advocate, made no order as to costs. The judgment does not specifically deal with the first and third issues, but it is implied in his statement of the facts that the learned Judge found for the plaintiff on these two issues, and indeed the first issue was not contested by the defendant.

The plaintiff now appeals to this Court on the grounds that the learned trial Judge erred—

(a) in placing the burden of proof on the plaintiff-appellant;

(b) in finding that there was no consideration for the cheque.

The material facts are simple and the judgment is very short but it is unfortunately not very clear exactly what facts the learned Judge accepted as proved or on what grounds he came to his conclusion that there was no consideration for the cheque in suit. It is not in dispute that in September, 1947, the defendant-respondent's son, Esmail, owed the plaintiff firm about Sh. 27,000 for money lent and that the defendant himself owed the plaintiff nothing. The plaintiff's case, set out in the reply, was that the suit cheque was made and delivered to them by the defendant in discharge of their claim up to Sh. 18,000 against the son and the statement of defence admitted that the cheque was given by the defendant at Esmail's request in order to accommodate the said Esmail. The learned trial Judge does not in his judgment refer to this aspect of the case at all: he appears to have accepted all the evidence led for the plaintiff firm except the allegation that the defendant-respondent promised to pay the amount of the cheque in cash on the afternoon of 11th September, and to have assumed that this was the only consideration he need consider. The relevant passage in the judgment reads: -

"There is clearly no consideration for this cheque. If, as the plaintiff now asserts, he withheld presentation in consideration of a promise by the defendant to pay in cash no such consideration has been pleaded. Even had this claim been based on any such consideration Mr. Patel's evidence in regard to it is not convincing. On the evidence I cannot agree that the defendant is liable as the drawer of this cheque."

I think, with respect, that this passage shows that the learned Judge was misled as to the burden of proof by the course of the proceedings: it was not necessary for the plaintiff to plead consideration; the onus lay on the defendant to prove any special circumstances which exonerated him from liability on the cheque: section 102 of the Indian Evidence Act.

The real question of fact in this case, which is not discussed in the judgment. was whether there had been a forbearance to sue the son, Esmail, at the request of the defendant, *Crears v. Hunter*, (1887) L. R. 19 Q. B. D. 341 C. A. is authority for the propositions that in law a promise to forbear is a good consideration, and that actual forbearance at the request, express or implied, of the defendant is also a good consideration. Such consideration is of course valuable consideration for

a bill within the meaning of section 27 (1) (a) of the Bills of Exchange Ordinance (Chapter 215): see *Oliver v. Davis*, (1949) 2 A. E. R. 353, in which *Crears v. Hunter* was followed. I think it only fair to the learned trial Judge to say that these cases do not appear to have been cited to him in the argument. In *Crears'* case, the defendant signed a promissory note whereby he and his father (who was indebted to the plaintiff) jointly and severally promised to pay to the plaintiff the amount of the debt with interest half-yearly until the amount was paid. The plaintiff forebore to sue for several years. All the eminent Judges who comprised the Court thought that the transaction was not capable of any other reasonable or rational explanation except that it was for the purpose of benefiting the defendant's father by procuring for him time to pay the debt. Lindley, L. J., said, at page 346: "To say otherwise appears to me inconsistent with human nature and the whole character of the transaction." Lopes, L. J., said, at page 347, "Unless it were to procure forbearance, it is inconceivable why the defendant should have signed the note at all."

These observations appear to me very apt to the matter now before us. It is undisputed that there was actual forbearance by the plaintiff-appellant and the respondent has actually pleaded that the cheque in suit was given by him at Esmail's request "in order to accommodate the said Esmail": paragraph 3 of the Statement of Defence. It is true that in the same paragraph he has averred that the plaintiff well knew that Esmail was to provide funds to meet the cheque, but this allegation was not put to the plaintiff's witness, M. U. A. Patel, in cross-examination, nor has the respondent called any evidence to substantiate it or, indeed, to explain in what way Esmail was to be "accommodated" otherwise than by a release or by forbearance to sue. According to Mr. Patel's evidence, the defendant had previously on 4th September, 1947, given him a cheque for Sh. 13,000 which was not presented on the defendant's request and Esmail had made over to him a promissory note for Sh. 5,000 which was dishonoured and the suit cheque was given "in consideration of this promissory note and cheque". He also swore (and this the learned Judge appears to have overlooked) that he did not present the suit cheque on 11th November because the defendant had promised to pay in cash. In my opinion, there was ample evidence that the "substance of the transaction contemplated in the minds of the parties", to quote the words of Lord Esher, M. R., in *Crears'* case, was that the defendant was giving the plaintiff the cheque in part-payment of Esmail's debt on the understanding that the plaintiff would forbear to sue his debtor. In that case, there was consideration for the cheque and judgment should have been entered for the plaintiff.

I must now consider the claim for interest, which I take to be founded upon section 57 (a) (ii) of the Bills of Exchange Ordinance (Cap. 215 of the Laws of Tanganyika, 1947). There was, as I have said, no finding on this issue in the Court below and it was not referred to in the course of the argument on appeal. I think therefore we should give the respondent's advocate an opportunity to be heard on this claim and particularly as to the rates of interest claimed. Subject to this, I would allow the appeal with costs here and in the Court below; set aside the judgment of the High Court and direct that judgment be entered for the plaintiff-appellant in the sum of Sh. 18,000 and such interest as may be fixed after hearing counsel on that question.

SIR BARCLAY NIHILL (President).—I concur in the judgment delivered by the learned Vice-President and judgment will be entered for the appellants in the sum of Sh. 18,000 with costs here and in the Court below.

As regards the claim for interest, I suggest that if counsel can agree on this issue an award for interest as agreed can be embodied in the Order of this Court. Failing this the matter will be remitted to the High Court of Tanganyika for trial of this issue.

Cox, C. J. (Tanganyika).—I also concur in the judgment of the learned Vice-President as regards the merits of this appeal, and agree with the order proposed by the learned President.

$\mathcal{L}_{\mathcal{L}}$

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/aa/judgment/eaca/1952/170/eng@1952-01-01>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/patel-brothers-v-hasmani-civil-appeal-no-65-of-1951-1952-eaca-170-1-january-1952-unknown-topic-unknown-court-1952--6a3ea4dc3b1caa91297e9556>

Prepared on 14 October 2026 · Esheria