#### ON APPEAL

### FROM THE GAMBIA COURT OF APPEAL

#### BETWEEN

SHYBEN A. MADI and SHYBEN A. MADI & SONS LIMITED

Appellants

- and -

C.L. CARAYOL

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Respondent

# CASE FOR THE RESPONDENT

10 This is an appeal from a judgment of the Gambia Court of Appeal (Mr. Justice S.J. Forster JA., Mr. Justice E. Livesey Luke JA., Mr. Justice P.D. Anin, JA) dated the 1st day of December, 1978, which allowed an appeal of the Respondent against a judgment in the Supreme Court of Gambia (Sir Philip Bridges, CJ.) dated the 30th of June, 1977 whereby judgment was given for the Appellants on their claim with costs and the Respondent's Counterclaim was dismissed with costs. The Court of Appeal set aside the judgment below, dismissed the Appel-20 lants' claim and gave judgment on the Counterclaim for the Respondent for a total sum of D75,000. The Court of Appeal further ordered that the Respondent should have his costs in the Court of Appeal and in the Supreme Court and that upon payment in full of the judgment debt the Appellant should be entitled to the return forthwith of the books, documents and other papers in the possession of the Respondent, which had been the subject matter of the Appellants' claim.

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- p. 44-52
- p.66, 1.12

- 2. The substantial question raised by this appeal concerns the entitlement of an Appeal Court to vary findings of fact made by the trial judge and whether in the circumstances of this case the Gambia Court of Appeal was entitled to vary such findings.
- 3. The first Appellant was for many years a general trader and money lender in Gambia and the second Appellant is an incorporated company of the Gambia which took over the business of the Appellant in about 1975. The Respondent is now retired but he was for many years a Commissioner of Income Tax for the Gambia Government and after his retirement he established himself as an accountant and income tax

Record			
	both the Ap issue with or not ther and the Res paid a fixed	It is not in dispute that as an income tax and accountant he rendered services to pellants over a number of years. The only which this appeal is concerned is whether e was an agreement between the Appellants spondent that for such services he should be if fee or whether the Respondent was entitled apon a quantum meruit.	
p. 3	4. By their Statement of Claim the Appellants sought from the Defendant delivery up of books, papers and other documents which they alleged they had handed to the Respondent to enable him to carry out his work.  The Respondent did not deny that he had in his possession a number of books and documents belonging to the		
p. 13-15	Appellants	but he asserted by his Defence:	
p.14, 1.40	(i)	that he had completed some 3,000 working hours for the First Appellant and some 300 working hours for the Second Appellant;	
p.15, l.1	(ii)	that there was no written contract between the parties;	20
p.15, 1.1-10	(iii)	that there was an oral agreement in relation to fees that his fees would be calculated by reference to what results were obtained by him at the conclusion of the investigation by the Commissioner of Income Tax, who was inquiring into the First Appellant's accounts and that until such inquiries had been concluded that the Respondent could from time to time make withdrawals of money;	30
p.15, l.15	(iv)	that he had withdrawn from the Appellant the total sum of D10,450.	
	D102,443.	nterclaim the Respondent claimed the sum of 75b against the First Appellant and against the cellant the sum of D9,225.00.	
p.16-17	5. By their Defence to Counterclaim the Appellants did not deny that the agreement between the parties was an oral agreement but alleged that so far as it related to fees it had been fixed as follows:		
p.17, 1.1	(i)	D2,500 for preparing balance sheets trading profit and loss accounts for covering a period of three years 1967, 1968 and 1969;	40
p.17, 1.17	(ii)	D1,000 per annum for the preparation of accounts for the First Appellant for the years	

1971, 1972 and 1973;

(iii)

p.17, 1.21

 ${\tt D1,500}$  for the preparation of accounts for the Second Appellant.

	The Defence to Counterclaim accepted in terms that the Respondent had been paid more than the asserted agreed fees but alleged in relation to such over-payment that the Respondent had refused to work "and had to be made to	Record
	work by being paid more than was agreed with him."	p.17, 1.15
10	6. The action came on for hearing before Sir Philip Bridges, CJ. on the 23rd June, 1976. Oral evidence was given by George Madi, the son of the First Appellant, that for the work of reconstruction of the accounts for his father for the years 1967, 1968 and 1969 he had	p.18-43
	agreed fees with the Respondent at D2,500 for three years.  And that after the Respondent had been paid that amount he had not prepared the balance sheet or profit and loss	p.18, 1.30
	accounts and had stated that he would not work any more unless he was paid more money. As a result George Madi stated the Respondent had been paid D3,800. According to George Madi subsequent to this further payment the Respondent was employed to prepare annual	p.19, 1.20
20	accounts up to mid-1973 and that a fee of D1,000 was agreed for that. That sum had been paid. At the end of 1973 his father had ceased trading and that the Second Appellant Company was incorporated and began trading on the 1st January 1975. The Second Appellant had then	p.19, 1.28
	engaged the Respondent and agreed fees for 16 months at D1,500. Mr. Madi stated that by the end of the account-	p.19, 1.33
	ing year 1975 the Respondent was not co-operating and had not finished the accounts despite the fact that he had been paid his fees in full and in advance. George Madi put in evidence a note dated the 14th January, 1974	p.20, 1.1
30	marked exhibit C in this Appeal but made no particular comment about it.	p. 20, 1.37
	7. Oral evidence was also given by a chartered accountant, Mr. Robert Christopher Sprigett Sanders a manager of Pennell Fitzpatrick, the international firm of chartered accountants. He stated that accountant's fees were usually computed on a time basis and not on a percentage basis and that an accountant would not be entitled to charge on a 'tax saved basis'.	
40	8. The Respondent gave oral evidence of the work which he had done for both the Appellants and also explained the basis upon which his Counterclaim was calculated namely by the number of hours worked. No objection was taken to this evidence on the ground that	p.30-40
	a quantum meruit had not been expressly pleaded. So far as the First Appellant was concerned he claimed 2,763 hours at D37.50 an hour, and against the Second Appellant 293 hours at D40 an hour. When cross-	p.35, 1.33
50	examined he was asked about exhibit C to which his reply was: "Exhibit C can only mean that I had given them a chit for my fees for 1973 and this is what was left to come."	p. 37, 1. 28
	9. The learned trial judge in his judgment stated that the crucial point to be decided in the case was the	p. 44-52
	nature of the contract between the Appellants and the	p. 50, 1.32

 $\frac{\text{Record}}{\text{p. 50, 1.39}}$ 

p. 51, 1.17

Respondent. He found that there was no written agreement in respect of fees but concluded that the basis of the contract was a straightforward matter of payment in accordance with a verbal agreement and that this was for a fixed sum or sums and not on a time basis. The learned trial judge was apparently driven to this conclusion, which he stated to be 'inescapable', because of the terms of Exhibit C.

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The judgment of the Court of Appeal was delivered on the 1st December 1978 by Patrick D. Anin, JA. By their judgment the Gambia Court of Appeal held that the learned trial judge had paid too much regard to Exhibit C and that his view that the "inescapable conclusion" upon consideration of that Exhibit was that the basis of agreement was for a fixed sum or sums was simply not warranted from a proper consideration of the Exhibit. The Court of Appeal considered that all the evidence should be looked at to determine the terms of the contract and that the learned judge had fallen into error in concentrating his attention so heavily, if not exclusively, upon the terms of Exhibit C. Secondly, the Gambia Court of Appeal were of the view that the probabilities of the matter lay in favour of there being no agreement that the fees should be fixed. Thirdly, the Court of Appeal were much impressed by the fact that on the Appellant's own case there had been overpayment to the Respondent. In the circumstances they held that the Respondent was entitled to claim upon a quantum meruit and upon the basis of the evidence which had been put before the trial judge the Court of Appeal awarded the Respondent judgment against the First Appellant for D70,000 and against the Second Appellant for D5,000.

It is respectfully submitted that the Gambia Court of Appeal were entitled to come to their own view on the facts in the case, particularly since no issue of credibility arose upon the findings of the learned trial judge. It is submitted that the Court of Appeal were in just as good a position to come to a conclusion as the learned trial judge. apparent from the judgment of the learned trial judge that he paid inadequate regard to all the evidence which was before him and allowed himself to be misled by the significance he attached to one item of documentation in a case in which he himself commented that the documentation was poor and inadequate. Further since the trial judge had substantially, if not exclusively, based his judgment upon the construction of one document, the Court of Appeal were fully entitled to construe that document themselves and come to their own conclusion.

12. Further it is respectfully submitted that even though the learned trial judge came to the conclusion that the contract was for a fixed sum or sums he made no finding as to what the fixed sum or sums were. It is submitted that had he addressed himself to this aspect of the case it would have been apparent that there was no material before him upon which he could make any such finding. For although the Appellant's case as pleaded and in evidence was that

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certain fixed sums had been originally agreed, it was also apparent from the pleadings and from the evidence that further sums had been paid, and although it was lightly suggested that such sums had been paid because the Respondent had refused to do any further work until he was paid more money, no plea was raised and no argument was addressed to the Court that such sums as had been paid were not lawfully retained by the Respondent. As a result it is respectfully submitted even if 10 (which is denied) there was an original agreement for a fixed fee such agreement was surpassed by a subsequent arrangement between the parties that further sums should be paid and no agreement was reached as to the quantum of those sums. In the circumstances it is respectfully submitted that the true contractual position between the parties was that the Respondent should be paid a fee but that no fixed agreement was reached as to the amount of that fee. It follows that recovery on a quantum meruit was justified. Further it is submitted 20 that it was inherently improbable that the Appellants would have employed the Respondent in 1973 and 1975 if as was alleged, he had demanded more than the agreed fee for his first assignment. At the very least they would have put their agreement in writing.

- 13. There was ample material before the Court of Appeal to come to a conclusion on the quantum of the Counterclaim, there being the evidence of a chartered accountant as to the basis upon which fees are normally paid, and the Respondent's own evidence.
- 30 14. The Respondent respectfully submits that this Appeal should be dismissed with costs for the following, among other:

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## R E A S O N S

- 1. BECAUSE the judgment of the Court of Appeal was right.
- 2. BECAUSE there was no evidence to justify a finding that a fixed fee had been agreed for the services of the Respondent and since there was no dispute that he was to be paid for his services a claim upon a quantum meruit was plainly open to him.
- 3. BECAUSE weighing all the evidence on the balance of probabilities no fixed fee had been agreed.

GEORGE NEWMAN

IN	THE	PRIVY	COUNCIL
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B E T W E E N

SHYBEN A. MADI and SHYBEN A. MADI & SONS LIMITED

Appellants

- and -

C.L. CARAYOL

Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO., Hale Court, Lincolns Inn, London, WC2A 3UL

Solicitors for the Respondent