

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE GAMBIA COURT OF APPEAL

B E T W E E N :

BRITISH PETROLEUM LIMITED

Appellants
(Plaintiffs)

- and -

EMILE ABOURITZ

Respondent
(Defendant)

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CASE FOR THE APPELLANTS

Record

1. This is an Appeal from the Judgment and Order of the Court of Appeal of The Gambia (Forster, Livesey Luke and Anin JJ.A.) dated the 15th day of November, 1979 allowing the Respondent's Appeal against the Judgment and Order of the Supreme Court of The Gambia (Sir Phillip Bridges C.J.) dated 6th April, 1977 in the consolidated civil suits numbered respectively 1975-A-6 and 1975-A-10. At the trial of the consolidated actions (1975-A-6 and 1975-A-10) the learned Chief Justice had ordered that Judgment be entered for the Appellants against the Respondent in the sum of D23,629.00 with costs and that the Appellants should have possession of a petrol station sub-leased to the Respondent at Barra. On Appeal the learned Justices of Appeal set aside Orders of the Chief Justice save that relating to possession, dismissed the Appellants' claim, ordered rescission of the Free Management Reseller Contract more particularly described hereinafter and ordered that Judgment be entered for D57,808.58 on the Respondent's Counterclaim together with all costs of the claim and counter-claim.

pp.93-113

pp.65-88

p.88,11.
18-26

p.113

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2. The question that will fall for consideration in the Appeal is how far, if at all, the Court of Appeal was entitled, and/or ought, to have varied the Order of the Chief Justice.

<p>Record pp.147-149</p> <p>p.144</p> <p>pp.73-84 and pp.123-134</p> <p>pp.67-70 and pp.120-123</p> <p>pp.151-152</p> <p>p.142</p> <p>p.3 pp.5-6</p> <p>pp.14-19</p> <p>p.10</p>	<p>3. On 23rd February, 1965 the Lower Nuimi Native Authority leased to the Respondent some 1,810 square yards of land at Barra. On 21st April, 1969 the Respondent entered into an Agreement with the Appellants (acting as or by the Societe des Petroles BP D'Afrique Occidentale) whereby the Respondent agreed to sub-lease one third of the area demised to him so that the Appellants could erect a petrol service station. The Agreement further provided that the Respondent would operate the petrol service station under the terms of a Free Management Contract. Provision was made for the rent of the property to be increased if the Free Management Contract should be determined. Pursuant to that Agreement the Respondent entered into a Free Management Reseller Contract which was not dated. Further pursuant to the Agreement an undated Lease deemed to come into operation as from the 1st April, 1969 was entered into between the parties of the property in 1973. The effect of these Agreements was that the Appellants were, during the continuation of the contractual arrangements and subject to force majeure bound to supply the Respondent with petroleum products for resale at the service station.</p> <p>4. By letter dated 13th January, 1975, the Appellants called upon the Respondent to discharge indebtedness of D20,945.40 in respect of deliveries of fuel between August and November 1974; the indebtedness not having been discharged Notice to Quit the service station was given on 16th January, 1975.</p> <p>5. On 24th January, 1975 the Appellants issued Writs commencing both civil suits, number 1975-A-6 and civil suit 1975-A-10; the Appellants in the Writs and Statements of Claim in both actions were described as Societe des Petroles BP D'Afrique Occidentale and as British Petroleum Limited. In Suit 1975-A-6 a claim was made for petroleum products supplied and delivered; in Suit 1975-A-10 the Free Management Reseller Contract was pleaded and it was alleged that the Appellants were dissatisfied with the manner in which the service station was being operated.</p> <p>6. An Application to stay the proceedings for Arbitration was rejected by the Master of the Supreme Court on 9th May, 1975. Thereafter Directions were given for pleadings and the Statements of Claim already filed were deemed to have been filed by Order but before Defences were served the Statement of Claim was amended in Suit 1975-A-10. Pursuant to the Leave of the Master</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p> <p>50</p>
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of 2nd June, 1975 the Amended Statement of Claim was further amended so that the Appellants' claim in Suit 1975-A-10 was for Record

- (1) Possession of the said station, and P.20,1.20
and
- (2) D2,500.00 damages and costs and further P.25,11.
relief or reliefs as the Court may 30-35
order.
- (3) Loss of profits/use until Judgment at
D28,676.20 per year.
- 10 7. On 12th July, 1975 the Respondent served a pp.38-39
Defence and Counterclaim in Suit 1975-A-6. No
material admissions were made in the Defence and
in the Counterclaim the sub-demise of the land at
Barra by the Respondent to the Appellants was
pleaded together with the Free Management p.39,11.
Reseller Contract. After alleging that supplies 2-30
of petroleum had been effected under the Contract
by the Appellants' agents delivering it to the
Respondent against an invoice signed to signify
20 receipt the Respondent alleged that the p.39,11.
Appellants had never supplied the Respondent with 31-37
the Statement of Account. It was then alleged
- "... but the Defendant, for fear of losing
the business to this unequal partner (the
Plaintiffs) kept up this (sic) regular
payments in the account aforesaid. p.39,11.
37-48
- 30 8. That the Defendant made a total payment
of D108,854.83 to the Plaintiffs for the
final year of the said Agreement, that is,
January 1974 to December 1974 against the
Plaintiffs' supply of D17,929.00.
9. The said station has been closed since
November 1974 because the Defendant could not
procure no further supplies (sic) from the
Plaintiffs nor could the Defendant get
supplies elsewhere."
- The Counterclaim continued by making a claim for p.40,11.
D3,600.00 in respect of the hire of a petrol 1-16
tanker.
- 40 8. In Suit No. 1975-A-10 a Defence and Counter- p.41,11.
claim was served on 14th July, 1975. After 11-35
making certain admissions and denials the
Respondent alleged that it was the act or
omission of the Appellants which made it
impossible for him to operate the station under
the time (sic ?terms?) of the Free Management
Contract aforesaid. The Respondent made a

Record
pp.41-42

Counterclaim; pleading therein that it was a term of the Free Management Contract that the Appellants were to supply the Respondent with petrol or other petroleum products and that the Respondent had ceased (sic) the station only because he could not get supplies either from the Appellants or from anywhere else. It was then alleged that the Appellants' conduct frustrated the further operation of the Agreement. The relief sought in the Counterclaim was

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p.42,11.
17-24

- "(a) For a Declaration that the Free Management Contract is inoperative and that the Defendant is discharged from further liability under it.
- (b) General damages for breach of contract.
- (c) Costs."

p.43

9. It appears that a Defence to Counterclaim was only filed in Suit No. 1975-A-10 in which the allegations made against the Appellants were denied.

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p.47,11.
8-14 and
p.36,11.
35-39

10. On 9th January, 1975 the Suits came on for hearing before the learned Chief Justice; on the application of Counsel for the Appellants the two Suits were consolidated.

pp.47-50

11. The first witness called by the Appellants was Momodou Babucar N'jie, the manager for The Gambia of the Appellants. He produced in evidence a statement of account of the Respondent's transactions with the Appellants between 26th August, 1974 and 13th December, 1974 (Exhibit A) and a summary of deliveries not paid for (Exhibit B). These documents were supported with delivery orders, invoices, monthly clients' advice and return cheque notice. The sub-demise from the Respondent to the Appellants and the Free Management Reseller Agreement were also proved by this witness as Exhibits C and D. In rebuttal of the allegation raised on the Counterclaim correspondence relating to the Appellants' obligation to honour a Bank Guarantee in relation to the use of a petrol tanker was also proved (Exhibits E1-6). At the resumed hearing on 13th January 1976 the witness' evidence was amplified and he was subsequently cross-examined. Further formal evidence was called to verify the documents that had been put into evidence.

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p.118

p.118
p.119
p.48,11.
12-14
These documents are not reproduced
p.120 and
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p.135
p.139

pp.51-53

p.52,11.
5-13

12. During the course of the Appellants' case an application was made informally to join Farid Abourisk as a co-defendant by Counsel for the

Respondent. That application having been rejected for lack of an affidavit a formal Motion was lodged and an Affidavit in support sworn and a formal ruling delivered on the Application on 7th April, 1976. It is respectfully submitted that as no relief was claimed against Farid Abourisk he should not have been joined as a co-defendant. Even if the Order subsequently made by the Court of Appeal of The Gambia was correct as to costs it is respectfully submitted that the costs of this joinder should be borne by the Respondent in any event.

13. Thereafter Farid Abourisk gave evidence on his own behalf and on behalf of the Respondent. The gravamen of his evidence appears from the following passage

20 "From 1970 up to date we have received no statement of account. I was always at Mr. N'jie's office asking for statements but I only ever got chits. These are they (Exhibit Pl-7). Letter from Drammeh in by consent (Q) dated 13th January 1975. I wrote this to Drammeh Exhibit R. p.54,1.45- p.55,1.18 Not reproduced p.151 p.153

30 November 1974 N'Jie said your brother is owing us so much - I said give us statement of account. Since 1970 you have never given one statement of account. I said let us have accountants look into the matter and in the meantime supply us against cash payments. He did not agree. He said pay D10,000 and the balance we will see about - D21,000 was still to be owed.

I get statement of accounts from Texaco for my station. BP said they were going to summons me but they closed the station by giving us no supplies. No notice was ever given. I have no right to sell petroleum products other than BP."

40 Thereafter the witness dealt with the evidence relating to the use of the petrol tanker.

14. Farid Abourisk's cross-examination commenced at the hearing on 7th April, 1976 and was adjourned until 29th April, 1976 when it took the whole day. The witness admitted that he had no books in respect of the operation of the service station. pp.55-56 p.55,1.38

15. Emile Abouritz, the Respondent herein, gave evidence on 4th May, 1976. He alleged that there had been an overpayment of D90,925.83. In cross- pp.56-58 p.57,11.

<p><u>Record</u> 17-18 P.57,11. 44-45</p>	<p>examination the witness stated that he only had the cheques as his accounting system.</p>	
<p>p.58,11. 14-22 Cheques not produced pp.58-59 & pp.63-64 p.59,11. 1-24</p>	<p>16. After the cleared cheques for the period 1971-1974 for Emile Abouritz's account had been produced by Mr. Sulayman Drammeh, Louis Lucien Thomassi was called as a witness. It appears that when the witness's examination commenced on 4th May, 1976 he was insufficiently familiar with the documents to be able to give any evidence; this led to the matter being adjourned on 5th May, 1976 with the witness having access to the Exhibits in the meantime. On 29th June, 1976 the witness's evidence was resumed. He claimed that there was a balance on the account due to Emile Abouritz of D28,710.58. This witness's evidence is particularly difficult to comprehend from the learned Chief Justice's Note. It is apparent that the witness reached his views upon consideration of Exhibits L and Z; this arithmetical exercise was one, it is respectfully submitted, which the Chief Justice was entitled to carry out for himself as he did. It is respectfully submitted that it was the prerogative of the Chief Justice to determine for himself how much assistance he obtained from Mr. Thomassi's evidence.</p>	<p>10</p>
<p>Neither reproduced</p>		<p>20</p>
<p>p.65 pp.65-66</p>	<p>17. After submissions had been made by Counsel for both parties on 29th June, 1976 the learned Chief Justice reserved his Judgment until 6th April, 1977. The learned Chief Justice commenced his Judgment by setting out the positions of the parties and the nature of the claims in the actions and counter-claims. He went on to explain the interest of the parties in the relevant land.</p>	<p>30</p>
<p>pp.147-150</p>	<p>18. In considering the Lease (Exhibit O) the Chief Justice noticed the proviso</p>	
<p>p.67,11. 4-8 and p.149,11. 37-40</p>	<p>"This lease shall, if not registered at the Colonial Registry within sixty days of the date hereof, be and become void and of no effect."</p>	
<p>p.67,11. 7-17</p>	<p>After correctly noticing that this provision was not necessary to comply with the Lands (Provinces) Act Cap.103 which merely provides such a tenancy as being voidable for want of registration the Chief Justice observed that the Lease was in fact delivered for registration on 30th August, 1966 eighteen months after its execution. The Chief Justice, it is respectfully submitted, fell into error in holding</p>	<p>40</p>
<p>p.67,11. 17-19</p>		

"It seems to me and I so hold that this became void and of no effect under its terms sixty days after execution namely on 23rd April, 1965."

Record
p.67,11.
19-22

10 The Appellants' submit that as both parties treated the Lease as being valid at the trial it was not open to the Chief Justice to hold otherwise. The true position, it is respectfully submitted, is that the parties had either waived the time limit or were estopped from disputing its validity.

19. The Chief Justice went on to consider the Lease by way of sub-demise granted to the Appellants and quoted the same in full. With regard to this Lease the Chief Justice stated

p.67,1.23-
p.71,1.15
and
pp.100-123

20 "It has not apparently been registered and is therefore voidable by either party under the provisions of Section 13 of Cap 103 set out above. Since it has not been dated and no evidence appears to exist as to when it was executed presumably it became voidable sixty days after 31st December, 1973."

p.71,11.
8-15

30 It is again submitted that the Chief Justice should have taken notice that the parties had taken no steps to avoid the said Lease and its validity was not in issue at the trial. Alternatively he should have considered that if the document was invalid as a lease it would operative effectively as an agreement for a lease. Of course the earlier Agreement of 21st April, 1979 between the Respondent and the Appellants for the grant of the Lease expressly operated for that purpose. The Chief Justice referred to this immediately after referring to the sub-lease itself.

p.71,1.16-
p.73,1.5

20. The Chief Justice then turned to the Free Management Reseller Contract and set the same out in full.

p.73,1.7-
p.84,1.10 &
pp.123-134

40 21. The Chief Justice then dealt with a sub-lease granted on 25th March, 1974 in the same terms as the allegedly abortive Lease of 1973. The Chief Justice went on, it is respectfully submitted erroneously, to hold that the registration of the Lease was incomplete and the document not having been registered within sixty days remained voidable at the instance of either party. It is submitted that the Chief Justice erred in the same respects as in relation to the other Leases set out above.

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p.84,11.
11-31

<p><u>Record</u> p.84,1.32- p.86,1.8</p>	<p>22. The learned Judge then turned to dealing with the transactions between the parties. Before doing so the learned Chief Justice made, as he was entitled to do, an observation in relation to the credibility of the Respondent and his brother Farid Abourisk. Insofar, as appears hereinafter, the Court of Appeal sought to reverse primary findings of fact they failed to take this observation into account. The observation was</p>	
<p>p.84,11. 35-39</p>	<p>"... the Abouritz brothers, whose attitude throughout the case I regret to say did not appear to me to be motivated by any desire to help the court to arrive at the truth".</p>	<p>10</p>
<p>p.85,11. 21-22</p>	<p>In relation to the use of the tanker, the Chief Justice held, it is submitted correctly, that after appropriate credits had been given for money paid by the Appellants under the guarantee to the International Bank for Commerce and Industry D17.64 remained owing by the Respondent. The Chief</p>	
<p>p.85,11. 27-48</p>	<p>Justice went on to consider the trading arrangements between the parties and after setting out the claim for D21,129.00 as being supported in evidence by delivery notes he made his finding thereon. The Appellants respectfully submit that by accepting the delivery notes as genuine by necessary implication in his Judgment the learned Chief Justice made a finding of primary fact</p>	<p>20</p>
<p>p.85,11. 49-51</p>	<p>thereon. After observing that monthly statements rather than running statements of account were operated between the parties, the learned Chief Justice held, it is submitted correctly, that the Respondent still owed D21,129.00 as claimed. The Chief Justice also held, it is submitted correctly, that the Free Management Reseller Contract was breached by the Respondent's failure to pay his indebtedness to the Appellants and that liquidated damages had become payable to the Appellants.</p>	<p>30</p>
<p>p.86,11. 4-9</p>	<p>23. The Chief Justice went on to consider the claim for possession. The Chief Justice fell into error in holding -</p>	
<p>p.86,11. 12-19</p>	<p>"The District Authority lease out of which the various attempted sub-demises spring is void and of no effect under its own terms for want of registration within the strictly prescribed time limit and as the head lease falls all sub-leases under it must fall."</p>	<p>40</p>
<p>p.86,11. 20-35</p>	<p>After holding that the unregistered sub-demise of 1973 was voidable he held that because the petrol station had been built at the Appellants' expense the Appellants must be tenants in equity of the station. The rationale is, it is respectfully</p>	<p>50</p>

submitted, incorrect but the conclusion reached is accepted as correct. It is respectfully submitted that the Chief Justice fell into error in holding the agreements between the parties to be a legally abortive succession of documents. It is convenient to notice at this stage how the matter was dealt with in the Judgment of the Court of Appeal which, on this point, is submitted to be preferable. Livesey Luke, J.A. said in the course of his Judgment

Record

p.86,11.
36-51

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"I think that for the avoidance of doubt it is necessary to state that the validity of the appellant's (Respondent before the Privy Council) lease was never in issue. The uncontested legal position therefore is that the appellant is the lessee of the piece of land at Barra, that the Petrol Filling Station is erected on a portion of that piece of land, that the Company is a tenant of the appellant of that portion of land under a sub-lease granted by the appellant to the Company and that both parties are entitled to exercise their rights and are liable to perform their obligations under the sub-lease."

p.112,11.
41-55

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The Chief Justice then turned to the counter-claim in Suit No. 1975-A-6. After recalling that the Respondent in breach of his obligation under the Free Management Reseller Contract did not keep any books he set out that the substance of the counter-claim appeared to be this

pp.87-88

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"Emile paid D107,816.83 *to BP but only received D79,106.25 worth of petroleum products leaving a balance due to him of D28,710.58."

p.87,11.
13-17

The Chief Justice then noticed the difference between the figure counterclaimed in the pleading of D90,925.83 in distinction from the sum claimed at trial. The Chief Justice noticed the relevant documentation and recalled that so far as 1974 was concerned the Respondent said that in that year he was billed for supplies not received and then held that there was no evidence that this was so. The Chief Justice after further examining the evidence concluded that he could not find that there was any short delivery or breach of contract by the Appellants and held that the counterclaims in both actions should be dismissed. It is submitted that in holding the counterclaim in the second action followed the first action the Chief Justice was correct.

p.87,11.
17-22

P.87,11.
47-53

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24. The Chief Justice gave Judgment for the Appellants for D23,629.00 with costs and an Order for possession of the relevant petrol station was made in favour of the Appellants. The Chief Justice dismissed Farid Abouritz from the Suit.

25. Before dealing with the Notice of Appeal to the Court of Appeal in The Gambia in the instant case it is convenient to refer to the legal provisions governing appeals to The Gambia Court of Appeal. Application of English Law in The Gambia is dealt with by the Law of England (Application) Act (Cap.104) by Section 2 of that Act

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"Subject to the provisions of this and any other Act, the common law, the doctrines of equity, and the statutes of general application in force in England on 1st November, 1888, shall be in force in The Gambia."

By Section 96(1) of the Constitution of The Republic of The Gambia an appeal lies of right to the Court of Appeal from any decision given by the Supreme Court in the specified cases which include the instant case. The Gambia Court of Appeal Act (Cap.80) amplifies the right to appeal in civil cases by Section 3 thereof. It is clear that the instant Appeal was correctly brought under that Section. Subsidiary legislation under The Gambia Court of Appeal Act include The Gambia Court of Appeal Rules. These Rules were originally made under The West African Court of Appeal Orders in Council 1948-1958. They were saved when those Orders in Council were revoked by the Sierra Leone and The Gambia Orders in Council, 1959 and 1960, and again when the latter Orders in Council were revoked by The Gambia Court of Appeal Order in Council, 1961 which provided that they should be deemed to have been made under itself. They were amended by The Gambia Court of Appeal (Adaptation of the West African Court of Appeal Rules) Rules, 1963 and continued in operation and effect as part of the law of The Gambia immediately before the commencement of The Gambia Independence Order, 1965. Consequently they were saved by Section 4 of this last-mentioned Order, notwithstanding that its Section 2 repealed the Order in Council under which they were deemed to have been made. Civil Appeals are regulated by Part 2 of those Rules. The pertinent Rules so far as the instant Appeal is concerned are Rules 12 and 35. They read as follows

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"12.(1) All appeals shall be by way of

10 rehearing and shall be brought by notice
(hereinafter called 'the notice of appeal')
to be filed in the Registry of the Court
below which shall set forth the grounds of
appeal, shall state whether the whole or part
only of the decision of the Court below is
complained of (in the latter case specifying
such part) and shall state also the nature of
the relief sought and the names and addresses
of all parties directly affected by the
appeal, and shall be accompanied by a
sufficient number of copies for service on
all such parties.

(2) If the grounds of appeal allege mis-
direction or error in law particulars of the
misdirection or error shall be clearly stated.

20 (3) The grounds of appeal shall set out
concisely and under distinct heads the grounds
upon which the appellant intends to rely at
the hearing of the appeal without any
argument or narrative and shall be numbered
consecutively.

30 (4) No ground which is vague or general in
terms or which discloses no reasonable ground
of appeal shall be permitted, save the general
ground that the judgment is against the weight
of the evidence, and any ground of appeal or
any part thereof which is not permitted under
this rule may be struck out by the Court of
its own motion or on application by the
respondent.

(5) The appellant shall not without the leave
of the Court urge or be heard in support of
any ground of objection not mentioned in the
notice of appeal, but the Court may in its
discretion allow the appellant to amend the
grounds of appeal upon payment of the fees
prescribed for making such amendment and upon
such terms as the Court may deem just.

40 (6) Notwithstanding the foregoing provisions
the Court in deciding the appeal shall not be
confined to the grounds set forth by the
appellant:

Provided that the Court shall not rest
its decision on any ground not set forth by
the appellant unless the respondent has had
sufficient opportunity of contesting the case
on that ground.

35. The Court may from time to time make any

Record

order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the Court below to enquire into and certify its finding on any question which the Court thinks fit to determine before final judgment in the appeal, and may make any interim order or grant any injunction which the Court below is authorised to make or grant and may direct any necessary enquiries or accounts to be made or taken and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Court as a Court of first instance, and may re-hear the whole case or may remit it to the Court below to be re-heard, or to be otherwise dealt with as the Court directs."

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26. It is respectfully submitted that following the decision in Shyben A. Madi & Anor. v. C.L. Caryol Privy Council Appeal No. 12 of 1979, in which the Judgment of the Lords of the Judicial Committee of the Privy Council was delivered on 17th February, 1981, it is established law that the same principles govern the review of primary findings of fact as in England and Wales. Those principles were recently restated in Chow Yee Wah v. Choo Ah Pat (1978) 2 M.L.J. 41. It is further submitted that where, as in the Court of Appeal of The Gambia, no transcript is available of the evidence before the Court below, the practical fetters surrounding the ability of the Court of Appeal of The Gambia to disagree with findings of a trial judge on the facts are even greater. The Appellants rely on the decision of the Board in Muthusamy S/o Tharmalingam v. Ang Nam Cheow, Privy Council Appeal No. 3 of 1978.

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pp.89-90

27. By Notice of Appeal, dated 12th April, 1977, the Respondent herein appealed to the Court of Appeal of The Gambia against the whole of the Judgment of the learned Chief Justice. The Grounds of Appeal, which differ substantially from the Grounds upon which the Appeal was subsequently allowed by the Court of Appeal, read as follows

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"(i) That the learned Chief Justice erred in law when he held that the Respondents are tenants in equity on the basis of 'legally abortive succession of documents' signed by the parties.

(ii) That the learned Chief Justice erred in law when he failed to hold that the Respondents were in breach of several

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clauses of the 'Free Management Reseller Contract'.

Record

(iii) That the learned Chief Justice erred in law when he failed to aver whether the Respondents made a demand for the sum alleged to be owed by the Appellant.

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(iv) That the learned Chief Justice was wrong when he held that the Appellant still owes D21,129.00 without satisfying himself whether 'a running statement of account with balances carried over' existed between the parties.

(v) That the learned Chief Justice erred in law when he failed to hold that the 'Free Management Reseller Contract' was inoperative and void.

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(vi) That the learned Chief Justice took into account matters not in evidence when he held that the station was 'in fact built at B.P. expense and operated until petrol was withheld by B.P."

28. It appears from the Order of The Gambia Court of Appeal that the Appeal came on for hearing on 22nd November, 1978 when an inquiry was ordered. pp.114-115

The said inquiry was ordered of "the accounts of the various transactions between the parties". p.114,11. 26-28

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It is respectfully submitted that this Order was premature; whereas the Appellants accept that the Court of Appeal has power to order an inquiry such inquiry ought not to be ordered, as a matter of principle, until after the determination of the substantive issue in the Appeal. It appears that

the inquiry took place and that the Master received evidence for reference is made in the Judgment of the Court of Appeal to an account being received in evidence. Reference is also made to the Notes of Inquiry by the Master and the Ruling in the Index of Reference in the Record p.101,11. 28-31

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amongst the documents not reproduced. Following the inquiry the substantive hearing of the Appeal took place and the Judgment of the Court of Appeal was delivered on 15th November, 1979 by Livesey Luke, J.A. as the Judgment of the Court of which the other members were Forster, and Anin JJ.A. pp.93-113

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29. The Judgment of the Court of Appeal commences by setting out the history of the matter and summarizing the pleadings. After setting out the effect of the Judgment of the Chief Justice pp.93-96

Record

Livesey Luke J.A. noticed

p.97,11.
10-13

"Several grounds of appeal were filed on behalf of the appellant and argued by learned counsel on both sides."

It is respectfully submitted that it was incumbent upon the Court of Appeal to deal more thoroughly with the Grounds of Appeal as filed and, if under the provisions quoted above, departure from them had been permitted to explain why such departure was allowed. Livesey Luke J.A. continued his Judgment by listing the main issues as follows

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p.97,11.
15-39

"(i) Did the Company prove that the appellant owed the sum of D21,129 or any other sum on the date of the issue of the writ?

(ii) Did the appellant commit any breach of the terms of the Free Management Reseller Contract entitling the Company to stop supplying the appellant petrol and petroleum products?

(iii) In any event was the Company entitled to stop supplying the appellant petrol and petroleum products?

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(iv) Was the Company entitled to possession of the petrol station at Barra?

(v) Did the Company commit any breach of contract?

(vi) If the appellant was in breach, what damages is the Company entitled to?

(vii) If the Company was in breach, what damages is the appellant entitled to?"

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Insofar as Ground (vii) is concerned it appears that this has been inserted in error. Effectively the issue considered subsequently by Livesey Luke, J.A. was

"Whether the Order for possession should be set aside or what other relief is appropriate?"

The various issues are considered seriatim in this Case hereinafter.

pp.97-100

(i) Did the Company prove that the appellant owed the sum of D21,129 or any other sum on the date of the issue of the writ?

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30. Livesey Luke J.A. stated, it is submitted

correctly that the burden was on the Company to prove the allegation. After reviewing the documentary evidence the learned Judge of Appeal erred in stating

Record

"But surely the mere production of a delivery note cannot conceivably be accepted as proof of delivery."

p.99,11.
1-3

10 It is respectfully submitted that the weight to be attached to the delivery notes was a matter of evidence for the trial Judge. They were in any event, it is submitted, prima facie evidence that deliveries had taken place. The learned Justice of Appeal then held, it is submitted erroneously,

"Indeed at the close of the case for the Company, no evidence had been led to prove the debt claimed."

p.99,11.
12-14

20 31. Livesey Luke J.A. then proceeded to review the evidence of Mr. Thomassi and in effect held that that evidence should have been accepted. In resuscitating the evidence of Mr. Thomassi, which had clearly been rejected by the Trial Judge in the decision he came to, it is submitted that the learned Judge of Appeal exercised functions beyond the role of an appellate judge; it was incumbent upon him to remind himself of the practical fetters surrounding his ability to review evidence. The conclusion reached by Livesey Luke J.A. on this issue

p.99,11.25-
p.100, 1.15

30 "In my judgment the position even at the close of the defendant's case in the Court below was that notwithstanding admissions made by the appellant the company still failed to prove that the appellant owed it the amount claimed in the first suit or any amount at all. In the circumstances that claim should have been dismissed and the learned Chief Justice erred in giving judgment for the Company on that claim."

p.100,11.
16-26

is untenable.

40 (ii) Did the appellant commit any breach of the terms of the Free Management Reseller Contract entitling the Company to stop supplying the appellant petrol and petroleum products?

p.101

32. In considering this matter the learned Judge of Appeal linked it with the claim of the Respondent herein for D90,925.83 for petroleum products not supplied. It is respectfully submitted that the error in relation to the

Record

delivery notes adverted to above was compounded when the learned Judge of Appeal stated

p.101,11.
14-17

"The only evidence that can be relied upon to prove delivery is the admission of the appellant."

The conclusion reached by the learned Judge of Appeal, that the Respondent herein was entitled to judgment for D11,308.58 is, it is respectfully submitted is unsustainable in relation to the evidence as considered by the Trial Judge.

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(iii) In any event was the Company entitled to stop supplying the appellant petrol and petroleum products?

pp.102-104
pp.106,1.50-
p.107,1.7

33. After citing from the Free Management Reseller Contract and the argument advanced by Counsel for the Appellants herein the conclusion was reached by the learned Judge of Appeal that because the Appellants were unable to show a clause in the Contract entitling the Company to stop supplies the refusal to make supplies caused the breach of contract and in the circumstances the Appellants were not entitled to terminate the contract. In reaching this conclusion the Judge of Appeal fell into error in failing to hold that there was an obvious implied obligation to pay for goods supplied.

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pp.107-109

(iv) Was the Company entitled to possession of the petrol station at Barra?

p.112

34. The learned Judge of Appeal held that there was no entitlement to terminate the agreement. In this it is respectfully submitted he fell into error. Besides the cumulative effect of the matters complained of hereinbefore the learned Judge of Appeal omitted to consider the effect of the claim for rescision of the contract which he upheld later in the Judgment. It is submitted that if the contract had been effectively rescinded by the Respondent herein his entitlement to occupy the petrol station is terminated. In those circumstances under the sub-demise the Appellants are entitled to occupy them themselves.

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pp.109-110

(v) Did the Company commit any breach of contract?

35. Livesey Luke J.A. held that the Company committed a breach of contract by failing to supply petrol from November 1974. If the Appellants were not entitled to refuse to supply petroleum products it is conceded that this would be a breach of contract.

(vi) If the Company was in breach what damages is the appellant entitled to?

Record
pp.110-111

10 36. After stating well-known legal principles the learned Judge of Appeal then, it is submitted wrongly, effectively guessed at the loss allegedly incurred by the Respondent herein. There was no evidence to justify this mode of assessment and if there is an entitlement to damages an inquiry ought to have been ordered for the purpose of ascertaining the same.

(vii) Whether the Order for possession should be set aside or what other relief is appropriate?

pp.111-112

20 37. Livesey Luke, J.A. held that the declaration sought in the counter-claim that the Respondent herein be discharged from further liability under the contract amounted to a claim for rescission of the contract. Save that rescission is primarily the act of a party in electing a remedy for breach of contract this is not disputed. It is submitted that if repudiation is accepted and a contract is then, by a party's election, rescinded entitlement to sue for future loss does not arise. In the premises the claim for damages awarded of D4500 is not sustainable. In any event no question of mitigation appears to have been considered by the learned Judge of Appeal.

30 38. After considering the question of the validity of the Appellants' Lease, already dealt with above in paragraph 18, the following Orders were made by the Court of Appeal of The Gambia

"(i) That the appeal be allowed and the judgment and the orders of the Court below except that relating to possession be set aside.

p.113,11.
2-28

(ii) That the claim of the Company for D21,029 be dismissed.

40 (iii) That the Company pays to the appellant the sum of D11,308.58 being total of monies paid by the appellant to Company for goods not supplied.

(iv) That the Company pays to the appellant the sum of D42,000 by way of general damages for breach of contract by wrongful refusal to make supplies to the appellant.

(v) That the Contract be rescinded.

Record

(vi) That the Company pays to the appellant the sum of D 4,500 by way of damages for breach of Contract by wrongful termination of the Contract.

(vii) The Company to pay the costs of both suits and the Counterclaims in the Court below and of this appeal and of all proceedings incidental thereto."

p.117

39. After the Respondent's said Appeal had been allowed the Appellants applied for Leave to Appeal to the Judicial Committee of the Privy Council. By Order dated 17th April, 1980, the Honourable Sir Phillip Bridges C.J. sitting as a single judge of the Court of Appeal, granted the Appellants Final Leave to Appeal. 10

40. The Appellants respectfully submit that this Appeal should be allowed with costs; that the Respondent should be directed to pay the costs of the hearing before the Court of Appeal and the Inquiry ordered before the Master and that the Judgment and Order of the Chief Justice made at the trial of the action should be restored or alternatively further trials of issues and/or inquiries should be ordered insofar as justice may require the same for the following among other 20

R E A S O N S

- (1) BECAUSE, save insofar as he dealt with the issue of the validity of the Lease, sub-leases and the Free Management Reseller Contract, the Chief Justice was right. 30
- (2) BECAUSE the Court of Appeal, save insofar as it dealt with the validity of the Lease, the sub-leases and the Free Management Reseller Contract, was wrong.
- (3) BECAUSE the Court of Appeal made erroneous findings of fact and/or findings it was not entitled to make.
- (4) BECAUSE there was no material upon which the Court of Appeal could conclude that the reasons given by the Chief Justice were not satisfactory. 40
- (5) BECAUSE it does not unmistakably appear from the evidence that the decision of the Chief Justice was wrong.

NIGEL MURRAY

No. 39 of 1980

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE GAMBIA COURT OF APPEAL

B E T W E E N :

BRITISH PETROLEUM LIMITED

Appellants
(Plaintiffs)

- and -

EMILE ABOURITZ

Respondent
(Defendant)

CASE FOR THE APPELLANTS

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