

29/82

O N A P P E A L

FROM THE COURT OF APPEAL OF THE GAMBIA

B E T W E E N :

BRITISH PETROLEUM LIMITED

Appellants

- and -

EMILE ABOURITZ

Respondent

CASE FOR THE RESPONDENT

RECORD

10 1. This is an appeal from a judgement of the Court of Appeal of the Gambia (Livesey Luke, Forster and Anin JJA,) dated 15th November 1979 which allowed with costs the Respondent's appeal from a judgement of the Supreme Court of the Gambia (Sir Philip Bridges C. J.) in which the learned Chief Justice gave judgement for the Appellants in the sum of D23, 629. 00 with costs and he made an order for possession of the B. P. Station at Barra and that the Respondent should give quiet enjoyment therefore for the residue of the agreed term.

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The Court of Appeal made the following order:-

- 20 (i) that the appeal be allowed and the judgement and the orders of the Court below except that relating to possession be set aside,
- (ii) that the claim of the (Appellants) for D21, 029 be dismissed,
- (iii) that the (Appellants) pay to the (Respondent) the sum of D11, 308. 58 being total of monies paid by the (Respondent) to (Appellants) for goods and supplies,
- (iv) that the (Appellants) pay to the (Respondent) the sum of D42, 000 by way of general damages for breach of

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contract by wrongful refusal to make supplies to the (Respondent),

- (v) that the Contract be rescinded,
- (vi) that the (Appellants) pay to the (Respondent) the sum of D4, 500 by way of damages for breach of contract by wrongful termination of the Contract,
- (vii) the (Appellant) to pay the costs of both suits and the Counterclaims in the Court below and of this appeal and of all proceedings incidental thereto.

2. The Appellants brought two actions against the Respondent namely 1975-A-6 and 1975-A-10. The actions were consolidated. The claims on the pleadings were summarised in the judgement of the learned Chief Justice as follows:- 10

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"In the first suit (1975-A-6) the plaintiffs' claim is for D21, 029 being the balance of price of petrol products sold and delivered to the defendants'. This claim was denied and a counterclaim made claiming:

- (a) damages for breach of contract
- (b) D90, 925 being money paid and received by the plaintiffs from the defendant in respect of petroleum products paid for but not delivered; 20
- (c) D2300. 00 owed by the plaintiffs to the defendant for the hire of the defendants tanker GA 9219;
- (d) Interest
- (e) other just relief, and
- (f) costs.

In the second suit the plaintiffs claim possession of the defendant's petrol filling station at Barra following breach by the first defendant (Mr. Farid Abowitz, the brother of the original defendant, having been joined as a defendant in the course of the trial) of a Free Management Reseller Contract executed by the original parties to the suit, D2500. 00 liquidated damages, other just relief and costs. To this claim the defendant Emile entered a defence that the free management contract is inoperative and that he should be discharged from further liability thereunder and damages for breach of contract and costs. 30

3. The principal issue which arises on this appeal is whether the Court of Appeal were correct in reversing the finding of the learned Chief Justice on the basis of the material which was before them and not before the Chief Justice, or at all.

4. The legal relationship between the Appellants and the Respondent was set against the following material facts:-

- 10 (i) By a lease dated 23rd February 1965 and expressed to be made between the Lower Niimi Native Authority for the Lower Niimi District in the Lower River Division of the Gambia of the one part and the Respondent of the other part a piece of land situate at Barra was demised to the Respondent for a term of twenty-one years from 10th day of October 1964 with an option of twenty-one years.
- 20 (ii) On 21st April, 1969 the Respondent entered into a written agreement to sub-lease part of the land to the Appellants for a term of fifteen years for the erection of a petrol service station. The agreement contemplated that the Respondent would operate the service station under the terms of a 'Free Management Contract' with the Appellants.
- 30 (iii) In 1973 the Respondent and the Appellants executed a deed of lease whereby the same land covered by the Agreement dated 26th April 1969 was subleased to the Appellants for 15 years from 1st April 1969. The sub-lease also contemplated that the Respondent would operate the service station under the terms of a 'Free Management Contract' with the Appellants.
- (iv) The Free Management Reseller Contract was signed by the Appellants and the Respondent sometime in 1969.
- (v) The Appellant was put into possession of the service station on completion of its construction in 1970 and he started operating the station.
- 40 (vi) business dealings between the Appellants and the Respondent proceeded normally under the terms of the Free Management Reseller Contract until the latter part of 1974 when a dispute arose regarding the payment for supplies,
- (vii) that dispute led to the Appellants bringing these proceedings against the Respondent.

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5. The Free Management Reseller Contract (Exhibit "D") is set out in full in the judgement of the learned Chief Justice. The relevant clauses of which the Respondent was said to be in breach are:-

Operations

"3.1 At the commencement of this Agreement the Dealer shall enter upon and commence to operate the Station throughout each day and also at night if B. P. consider it to be necessary during the continuance of this Agreement. 10

3.2 Purchase of Products

The Dealer shall buy from B. P. or its appointed agents all the products required for sale at the Station, and not buy from any other person, company or firm whatsoever any petroleum or other products for sale at or supply from the Station, and not advertise, sell or expose for sale at the Station any petroleum or other products marketed by any person, company or firm other than B. P., except with the written permission of B. P. The products supplied to the Dealer hereunder shall be sold by him under such brand names and trade marks and under such colours as B. P. may from time to time prescribe. Nothing in this Agreement shall give the Dealer any proprietary right, title or interest in any brand names, trade marks or colours so prescribed. On the termination of this Agreement the Dealer shall discontinue immediately the use in any manner whatsoever of any brand names, trade marks and colours prescribed by B. P. 20 30

3.3 The Dealer shall pay for all the products purchased from B. P.'s Agent (G.M.T.) following the terms of payment agreed between the Dealer and G.M.T.

3.19 Stocks

The Dealer shall maintain always stocks of petroleum products sufficient to supply the requirements of all customers during the normal hours of operation as stipulated in sub-clause 3.1. herein, or such stocks as B. P. shall in its sole discretion from time to time consider adequate to ensure the proper development of 40

the Station, unless at the time of any request for supplies B. P. or its agents shall be unable to supply a sufficient quantity of any product. It shall be deemed a breach by non-performance of this Agreement for the purposes of sub-clause 2. 2 hereof (but without prejudice to the generality of that sub-clause) if the Dealer shall fail to requisition B. P. or its agents for a fresh supply within twenty-four hours of having run out of supplies of any product. It is further agreed that B. P. , its agents and servants shall have the right at all reasonable times to check the stocks maintained by the Dealer provided that such checks take place in the presence of the Dealer or any responsible member of his staff.

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3. 24 B. P. 's Stocks

If B. P. so require the Dealer shall stock such quantities of its products as B. P. may from time to time require the property therein remaining with B. P. and account for such stocks in a manner to be prescribed by B. P. "

6. Termination in the event of Liquidation or Default

20 Notwithstanding anything to the contrary expressed or implied elsewhere herein B. P. (without prejudice to any other rights or remedies available to it hereunder) may terminate this Agreement forthwith on giving to the Dealer notice in writing to the effect that

(a).....

(b) There is any breach or non-performance by the Dealer of any of the terms and conditions of this Agreement.

(c) B. P. is dissatisfied with the manner in which the Station is being operated. "

30 6. The trial of the actions in the Supreme Court of the Gambia lasted for 12 days between the 9th January 1976 and 29th June 1976.

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7. In order to prove their case in relation to the sums claimed for non payment (and therefore also in relation to the alleged breaches of the management contract) the Appellants called Momodou Babucar N'Jie, the manager of their Gambia branch. He produced and spoke to a number of documents which were admitted in evidence including Exhibit A (Statement of Account of the Appellants' supplies to the Respondent for the period

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40 26th August 1974 to 13th December 1974), Exhibit B. (summary of deliveries to the Respondent not paid for), Exhibit D (the Free

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pp. 125-136 Management Reseller Contract) and Exhibit H (a list of total receipts from the Respondent in 1974). The witness also produced as Exhibits 'F' and 'L' files containing delivery notes, invoices and 'monthly client advices' for the period August to December 1974.

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p. 58-60 8. The Respondent gave evidence himself. He said that between 1970 and 1974 he received petrol and paid against an invoice, that in 1974 the total payment made was D108, 854. 83 but that the total received was only D17, 929 and that he therefore claimed D90, 925. 83 reimbursement. In cross-examination he said that his driver was Yaya Bayo who signed for the petrol at the Appellants' premises. He also gave evidence that he only had the cheques as his accounting system and that his current account statements could be produced by his accountant. 10

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pp. 60-61 The Respondent called Louis Lucien Thomassi, an accountant, who tendered in evidence, and spoke to, documents including Exhibits AA1 and AA2 which are statements prepared by Mr. Thomaasi of supplies duly received by the Respondent from the Appellants for the periods 12th January to 6th August 1974 and 26th August to 13th January 1974 respectively. The total value of the receipts on Exhibits AA1 and AA2 is D58, 038. 45 and D21, 067. 80 respectively. Exhibit AA3 listed payments made by the Respondent to the Appellants during the period January to December 1974 and giving particulars thereof. The total payments listed amount to D107, 816. 83. That figure accorded with the figure in Exhibit 4, a document prepared by the Appellants, by which the Appellants admitted receiving from the Respondent D107, 816. 83 between 4th January and 31st December 1974. 20

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p. 167 9. Judgement was given by Sir Phillip Bridges C. J, on the 6th April 1977 when he gave judgement for the Appellants in both actions in the sum of D21, 129. 00 plus D2500 - in all D23, 629. 00, with costs. He made an order for possession of the BP station at Barra and that the Respondent give quiet enjoyment to the Appellants for the residue of the agreed term. The learned Chief Justice also dismissed the counterclaims in both actions with costs and he dismissed Mr. Farid Aboutritz from the suit with costs. 30

pp. 67-90

p. 90 10. The learned Chief Justice dealt very shortly with the claim for the balance of the price of petrol 40

products sold and delivered to the Respondent. He said:-

The claim in 1975-A-6 is for D21,129.00 supported in evidence by delivery notes and invoices (he set out the invoices relied on).

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10 The system of supply and billing by monthly statements and a running statement of account with balances carried over was not sent to the Defendant because that was not the method used in this case. Total payments by Emile during the relevant period - 1974 - totalled D107,819.93 : I am satisfied that he still owes 21,129.00 as claimed on the writ.

I am also satisfied that the Free Management Reseller Contract has been breached by Emile's failure to pay what he owes to B. P. and that the D2500.00 liquidated damages are payable to B. P.

20 Turning to the claim for possession the learned Chief Justice took the view that the head lease of 1965 "was 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."

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As a result he concluded :-

30 "The petrol station the building of which was the object of those manoeuvres was in fact built at B. P. 's expense and operated until petrol supplies were withheld by B. P. and thus it seems to me that B. P. must be the tenant in equity of the station on the basis of the agreement between the parties evidenced by the legally abortive succession of documents signed by the parties. B. P. as tenants of Emile on a fifteen year sub-demise are entitled to quiet enjoyment and if they do not want him running their station for them they only have to ask him to go. With some reluctance, I admit, I will make an order for possession but only to the extent that B. P. may enjoy the benefit of their tenancy from Emile their landlord.

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The learned Chief Justice then considered the evidence in relation to the counterclaims. He concluded:-

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40 Emile says that in (1974) he was billed for supplies not received but it seems to me that there is no evidence before me that this is so..... I cannot find on the evidence that there has been short delivery or breach of contract by B. P. and the counterclaims in both actions are dismissed with costs.

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11. The Respondent appealed to the Court of Appeal of the Gambia against the learned Chief Justice's decision on the grounds that :-

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- (i) that the learned Chief Justice erred in law when he held that the Appellants 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 Appellants were in breach of several clauses of the 'Free Management Reseller Contract'. 10
- (iii) That the learned Chief Justice erred in law when he failed to aver whether the Appellants made a demand for the sum alleged to be owned by the Respondent.
- (iv) That the learned Chief Justice was wrong when he held that the Respondent still owes D21, 129.00 without satisfying himself whether "a running statement of account with balances carried over" existed between the parties. 20
- (v) That the learned Chief Justice erred in law when he failed to hold that the 'Free Management Reseller Contract' was inoperative and void.
- (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."

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12. On 22nd day of November 1978 the Court of Appeal of the Gambia made the following order:-

"Under Order 37 rules 1-2 Rules of the Supreme Court Sch. II, it is ordered that the accounts of the various transactions between the parties be enquired into by the Master together with issues raised in the pleadings. 30

It is further ordered that the counsel file detailed accounts and all relevant documents within fourteen days and that parties and or their counsel do attend during the Inquiry before the Master, as and when summoned.

The Master to transmit to this court records of the proceedings, and his report on the points referred for his investigations within three months of the date hereof 40

13. Thereafter the learned Master held an inquiry which lasted five days between 6th and 17th February 1979. He gave his ruling on 25th February 1979. During the inquiry a statement of account dated 22nd June 1976 was admitted in evidence. The notes of the inquiry by the learned Master together with his ruling and the statement of account dated 22nd June 1976 are not part of the record of proceedings but are annexed to the Respondent's case as Appendix A.

Appendix 'A'

10 14. The judgement of the Court of Appeal was delivered by Livesey Luke J.A. The learned Justice of Appeal set out the background to the case and summarized the pleadings before describing the main issues in the Appeal as follows :-

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- (i) Did the Company prove that the (Respondent) owed the sum of D21, 129 or any other sum on the date of the issue of the writ?
- (ii) Did the (Respondent) commit any breach of the terms of the Free Management Reseller Contract entitling the Company to stop supplying the (Respondent) petrol and petroleum products?
- 20 (iii) In any event was the Company entitled to stop supplying the (Respondent) petrol and petroleum products?
- (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 (Respondent) was in breach, what damages is the Company entitled to?
- 30 (vii) If the Company was in breach, what damages is the Respondent entitled to?

15. The learned Justice of Appeal found that the learned Chief Justice erred in giving judgement for the Appellants on their claim for sums due on the basis that there was no evidence which adequately proved the claim. He reviewed the evidence of Mr. N'Jie and concluded:-

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40 "In my opinion if the company intended to rely on the delivery notes as proof of delivery of goods specified therein, it should have gone further and led evidence that the delivery notes were signed by the (Respondent) himself or by his servant or agent or that the (Respondent) or his

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servant or agent otherwise acknowledged the receipt of the goods. No such evidence was led."

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The learned Justice of Appeal then considered the Respondent's counterclaim for D90,925.83. He accepted that the learned Chief Justice found that the total payments by the Respondent during the relevant period amounted to D107,859.93 and considered the only question in dispute to be whether the Appellants supplied products to the value of the total payments made. The learned Justice of Appeal accepted the evidence of the statement of account dated 22nd of June 1976 (which was not before the learned Chief Justice) as showing that the products supplied were of a total value of D96,511.25. The best evidence was therefore of an admission by the Respondent of receiving products to the total value of D96,511.25 and an admission by the Appellants of receiving D107,859.83 from the Respondent. It followed that the Respondent was entitled to the difference namely D11,308.58.

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The learned Justice of Appeal then considered the question whether the Appellants had been entitled to stop supplying the Respondent with petrol products. He recites the relevant clauses of the Free Management Contract (as set out in paragraph 4 supra). He considered that in the light of the evidence the Respondent had not been in breach of any of the clauses and he considered that it was the Appellants refusal to make supplies of petrol products to the Respondent which resulted in the closure of the station. It therefore follows that the Appellants were not entitled to terminate the contract under clause 6(c) of the Contract.

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The learned Justice of Appeal then considered the question of the Appellant's entitlement to possession of the petrol station. He considered the notice to quit (Exhibit 'J') and clause 7 of the Contract and concluded that on the facts the purported termination by the Appellants was invalid, that the Respondent was entitled to continue in possession of the station and that the learned Chief Justice erred in granting possession of the station to the Appellant and in awarding D2500 liquidated damages against the Respondent for failure to give up possession.

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It followed from the learned Justice of Appeal's view of the evidence that the Appellants were in breach of contract in refusing or failing to supply petrol products

to the Respondent and in assessing the quantum of general damages to be awarded the learned Justice of Appeal applied section 50 of the Sale of Goods Act (Cap. 170 of the Laws of the Gambia.) He assessed average monthly profit at D1500. The period over which that loss of profit was sustained was between November 1974 and April 1977 (when the Court ordered the Respondent to deliver up possession). On that basis the learned Justice of Appeal assessed general damages at D1500 per month for 28 months, totalling D42, 000.

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The learned Justice of Appeal considered the Appellants' breach of contract was sufficiently serious to amount to a repudiation of the contract. In his opinion the Respondent was entitled to rescind the contract and he declared that the Respondent was no longer bound by the contract.

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On the question of damages resulting from the rescission of the contract, the learned Justice of Appeal held that the proper measure of damage was the profit the Respondent would have made during the period of valid notice had he been given a valid notice of termination. By clause 1.1. of the contract that period was "not less than three months" and it therefore followed that the Respondent was entitled to damages resulting from the rescission of the interest in the sum of D4, 500.

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Before making the orders as set out at paragraph 1 infra the learned Justice of Appeal concluded:-

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"I think that for the avoidance of doubt it is necessary to state that the validity of the (Respondent's) lease was never in issue. The uncontested legal position therefore is that the (Respondent) 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 (Respondent) of that portion of land under a sub-lease granted by the (Respondent) to the Company and that both parties are entitled to perform their obligations under the sub-lease.

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16. On 17th April 1980 the Court of Appeal of the Gambia (Sir Philip Bridges C.J.) granted Final leave to appeal to the Judicial Committee of the Privy Council and granted a stay of execution of the judgement of the Court of Appeal pending the appeal.

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17. The Respondent respectfully submits that this Appeal should be dismissed. All the relevant issues in the case follow from the resolution of the critical issue

whether the Appellants owed money to the Respondent by reason of his overpayment or whether the Respondent had failed to pay the Appellants in full for goods supplied to him. In resolving that issue the learned Chief Justice erred for, in the view of the issue on the pleadings and the evidence, documents evidencing delivery should not have been presented as proof of delivery. There was no adequate evidence before the Court of goods actually delivered. Having erred in law in deciding that issue the learned Chief Justice's conclusions on the contract were inevitably incorrect. 10

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18. The Court of Appeal received fresh evidence of the state of the Respondent's account with the Appellant following the inquiry held by the Master. Because the best evidence was contained in the admissions contained in the document dated 22nd June 1976 (see Appendix A) and in Exhibit H and because that evidence was not all before the learned Chief Justice the Court of Appeal was not bound by his Findings of fact. On the evidence before them the Court of Appeal was correct in reaching the decision it in fact reached. The Respondent respectfully submits that the analysis of the effect of this finding of fact that the Appellants owed the Respondent D11, 308. 58 was also correct and that the orders made by the Court of Appeal should be upheld. 20

19. The Respondent respectfully submits that this Appeal should be dismissed with costs for the following (among others)

R E A S O N S

1. BECAUSE the learned Chief Justice erred in law in making a primary Finding of fact from documents, of the contents of which there was no or no adequate proof. 30
2. BECAUSE having so erred the learned Chief Justice's construction of the Free Management Reseller Contract was based on a false critical premise, namely that the Respondent was in breach of contract.
3. BECAUSE the Court of Appeal was correct in receiving better evidence that had been before the learned Chief Justice, following the inquiry, held by the Master. 40
4. BECAUSE upon that evidence the findings of fact in the judgement of the Court of Appeal are correct.

5. BECAUSE the orders made by the Court of Appeal were correct.

GEORGE NEWMAN

JONATHAN HARVIE

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF
THE GAMBIA

BETWEEN:

BRITISH PETROLEUM LIMITED Appellants

- and -

EMILE ABOWITZ

Respondent

CASE FOR THE RESPONDENT

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