

UNIVERSITY OF LONDON  
 W.C.1.  
 15 JUL 1953  
 INSTITUTE OF ADVANCED  
 LEGAL STUDIES

In the High Court.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL  
(GOLD COAST SESSION).

BETWEEN

KOFI SUNKERSETTE OBU - - - - - *Appellant*

AND

10 A. STRAUSS AND COMPANY LIMITED by their  
Attorney ROBERT SIMMONS - - - - - *Respondents.*

Case of the Appellant.

1. This is an appeal from the judgment of the West African Court of Appeal (Gold Coast Session) dated the 13th December 1947 dismissing with costs the Appellant's appeal from the judgment of the Supreme Court of the Gold Coast dated the 23rd October 1945 whereby the learned trial judge (Smith J.) gave judgment for the Plaintiff (the present Respondents) for £1,104.19.4 and dismissed the Appellant's counter-claim for accounts and commission. p. 26 p. 13

2. The principal issues to be determined in this appeal, which arise from the aforesaid counter-claim, are as follows :—

(A) Whether the Appellant is entitled to an account of all rubber shipped by him to the Respondents from August 1942 to January 1945 inclusive.

(B) Whether the Appellant is entitled to commission on all rubber purchased by him for the Appellants between the said dates.

3. The Respondents are a limited company who carry on business in London. The Appellant is and at all material times was resident in the Gold Coast Colony. On the 11th April 1942 the Respondents sent the following telegram to the Appellant :—

30 " Referring mutual friend Percy Martins cable we are importing rubber for Ministry Supply and would welcome your regular offerings any quantity any quality fullstop Ministry will provide shipping space fullstop Please airmail us immediately type samples principle grades and on receipt will cable you regular FOB orders payment Capecoast eighty per cent when rubber ready for loading p. 38, l. 20

balance after inspection here but meanwhile strongly recommend you consign us immediately any quality now available payment prompt cash for fifty per cent of estimated value balance after sorting upon arrival fullstop Cable soonest when and for what likely tonnage shipping space required for consignment."

pp. 39-40  
p. 40, l. 40

After various further telegrams had been exchanged the Appellant telegraphed to the Respondents as follows on the 14th June 1942 :—

" Proceeding Accra thence Ashanti to start operations fullstop As your representative suggest allowing me monthly remuneration to cover travelling other personal expenses starting July also fix 10 commission yourself fullstop Repeat immediately prices dont follow figures 12 and 11 send all cables letters Capecoast usual."

On the 18th June the Respondents replied :—

p. 41, l. 20

" Agreeable in principal (*sic*) but quite impossible fix adequate allowance and commission without first knowing roughly what monthly quantities you can secure and what prices stop Please hurry this information and cable offers basis yours samples also all will grades."

By a further telegram dated the 28th June they continued :—

p. 41, l. 36

" Agreeable supply finance pending formation syndicate have 20 you mailed details fullstop Will pay all reasonable expenses but impossible nominate figure you must cable estimated amount required."

By a telegram dated the 29th June 1942 the Appellant asked for the immediate transfer of £1,000 to pay for latex cost smoking rooms and stated (*inter alia*) :—

p. 42, l. 26

" Conservative figures personal monthly expenses fifty pounds suggest payments quarterly or monthly in advance please add this to thousand pounds required."

On the 14th July 1942 the Respondents telegraphed (*inter alia*) :— 30

p. 48, l. 33

" Agree your expenses arranging monthly . . . "

On the 7th October 1942 the Respondents addressed to the Appellant a letter containing the following passage :—

p. 53, l. 18

" On the question of the formation of a new company, this matter will need very thorough discussion at this end, but this cannot be done until Mr. Bennett's reports are to hand. You may rest assured, however, that whether a company is eventually formed or not, the writer has informed our mutual friend, Percy Martin, that your interests will be fully protected and your share of the total net profits of the entire enterprise will be made 40 retrospective. We cabled you a word to that effect quite recently."

On the 2nd February, 1943, Messrs. J. J. Peele and Co., the Respondents' solicitors in the Gold Coast, addressed to the Appellant a letter containing the following passage :—

p. 74, l. 15

" We confirm our interview with you at Cape Coast on the 1st instant when you informed us that you had received advances from Messrs. A. Strauss & Co. Ltd. amounting approximately to

£5,000. You further informed us that you receive a monthly remittance of £50 for expenses and that it was agreed you should share in the profits arising from the sale of rubber but that no percentage had been fixed, this percentage was in the Company's discretion."

4. On the 19th April, 1943, the Appellant entered into a service agreement with the Respondents whereby he undertook (*inter alia*) to act as the Respondents' Agent in the business of purchasing, manufacturing and exporting rubber in and from the Gold Coast, to keep accounts of all dealings and transactions in connection with the said business and to produce such accounts to the Company's Auditors whenever required by the Company or its Agents; and to account to the Company for all advances up to the present, totalling £5,250, in respect of which he had handed to Messrs. J. J. Peele and Co. the documents of title of the Ayinasu Plantation and Plots 20 and 21 Cape Coast, and for all advances which the Company might make thereafter. The agreement also contained the following provision :—

“ The Company has agreed to remunerate my services with a monthly sum of fifty pounds to cover my personal and travelling expenses for the time being which I have accepted. A commission is also to be paid to me by the Company which I have agreed to leave to the discretion of the Company.”

5. On the 18th December 1944, one Simmons acting for and on behalf of the Respondents addressed to the Appellant a letter containing the following passages :—

“ In terms of the agreement made between us, it is hereby confirmed that from the 1st January 1945 the salary payable to you by Messrs. A. Strauss & Co. Ltd., of 37-9 Lime Street, E.C.3, will be Twenty Pounds Stg. per month, your duties to be as before, to supervise the work of collecting, manufacture, curing, packing, and despatch of the rubber to the port of shipment, and preparation of all necessary shipping documents.”

\* \* \* \* \*

“ It is also agreed that as soon as the output of rubber reaches the amount of your estimates of 100 tons per month, upon which estimates the amount of your original salary was based, this salary will again become payable to you, or in proportion to the monthly increase in output of rubber above the present average of three and one third tons per month.”

\* \* \* \* \*

“ In view of the fact that you have continued to advise our London Office that your previous estimated output of 100 tons per month is obtainable, no doubt, you have the rubber producing areas in sight which are capable of producing the 100 tons per month, so it is probable that you will soon attain the required output to restore your monthly salary to the original amount.”

The Appellant's reply, dated the 19th December 1944, contained the following passage :—

p. 88, l. 13

“ Being personally anxious to see the rapid growth of the rubber business which I have established in the country, I am prepared to accept a reduction of the original amount paid me per month by Messrs. Strauss & Co. Ltd., London, in connection with same and this must be £25 instead of the £20 you offer. This will be quite inadequate to contribute to my personal monthly overhead. The original amount allowed me was not based on a 100 ton output of rubber per month as I would not have agreed to that figure in any case.” 10

p. 95, l. 31

6. By a letter dated the 30th April 1945 the said Simmons informed the Appellant that the Respondents had decided to close their rubber business in the Gold Coast Colony and gave the Appellant notice that his services as Superintendent would terminate on the 31st May 1945.

pp. 97 & 99

7. By letters dated the 19th and 21st May 1945 Messrs. J. J. Peele and Co. asked the Appellant to account for moneys received by him for and on behalf of the Respondents. On the 26th May 1945 the Appellants' solicitor replied in a letter which contained the following passage :—

p. 100, l. 15

“ He further informs me that he is not owing Strauss & Company 20 any money rather they are to send him account sales for all the rubber he had been shipping to them for the last two and a half years. He also maintains that he is entitled to commission on the value of rubber shipped which was to have been decided by mutual agreement.”

p. 1

p. 7

8. By a writ of summons dated the 19th June 1945 and amended on the 3rd August 1945 the Respondents instituted

#### THE PRESENT SUIT

claiming £365.8.4 as balance due by the Appellant to the Respondents in respect of moneys drawn by him for his personal benefit from funds managed 30 by him as agent or trustee for the Respondents ; the sum of £6,838.18.11 as the balance owing by the Appellant to the Respondents on general account for advances and credits as stated in the Ledger kept by the Appellant ; and a declaration that two leases had been entered into by the Appellant for and on behalf of the Respondents.

p. 3

9. On the 20th July 1945 the Appellant filed a counter-claim claiming an account of all the rubber shipped by him to the Respondents in Europe from August 1942 until January 1945 inclusive and for the court to order payment of what was found due to him on the taking of the said account, and commission on all the rubber purchased by him for the Respondents. 40

10. The said Simmons, called on behalf of the Respondents, produced the agreement of 19th April 1943 and deposed (*inter alia*) as follows :—

p. 6, l. 35

“ This Agreement bears Defendant's signature which I know. He won't get any commission unless he does enough business.”

11. Frank Ernest Lewis, a member of a firm of accountants in the Gold Coast employed by the Respondents, a witness for the Respondents, deposed in cross-examination (*inter alia*) as follows :—

“ No information in books as to further costs after loading at Takoradi or what profits, if any, Strauss made. I don't know if Government pays railway transport. It may be free. I have not received any account sales from London—only a statement of account which is at folio 31 of our report.” p. 10, l. 36

In re-examination this witness deposed as follows :—

10 “ I have statement of accounts from Strauss showing a profit in London on sales of rubber shipped by Defendant of £1,553.16.0. This would have to be set off against any local loss to arrive at the nett profit or loss. Local account shows a loss of £4,954.17.11, making a nett loss of £3,000 odd. Shipping documents against which Banks advance 90 per cent. are F.O.B. prices. The transport charges are very small, and are not necessarily for rubber.” p. 11, l. 1

Save as aforesaid no statement of accounts was produced by the Respondents.

12. The Appellant gave evidence and was cross-examined as follows :— p. 12

20 “ Plaintiffs never accepted syndicate proposition, but they continued to made advances to me. I asked for £1,000 for factories. Didn't spend quite. Moore my agent in Cape Coast. He received rubber. Not caretaker. I didn't pay him £11 as caretaker for store. I haven't signed mortgages transferring leases to Strauss & Co.” p. 12, l. 36

“ All my expenses entered in the books. Didn't get Plantation referred to in cable 15/8/42—‘ Planting more para on our land.’

“ Cabled ‘ Plantations agreement executed yesterday.’ ”

30 13. On the 23rd October 1945 Smith, J., gave judgment for the Respondents for £375.8.4 on the personal account and £729.7.0 on the building account. He also gave judgment for the Respondents on the counter-claim and awarded the Respondents £51.11.0. costs. The learned judge gave no reasons for his findings. p. 13, l. 18

14. The Appellant appealed from the said judgment to the West African Court of Appeal. An order granting final leave to Appeal was granted by Korsah, J., on the 8th December 1945. p. 19

40 15. On the 4th February 1947 the West African Court of Appeal ordered the trial court to record the reasons for its judgment. Smith, J., while expressing considerable doubt as to the power of the Appeal Court to make the aforesaid order of the 4th February 1947 furnished a statement of the reasons for his judgment which included the following :— p. 22

“ As to part 2 of the Plaintiff's claim, the Defendant's own accounts showed a heavy deficit (see Auditors' Statements at pp. 41-53 of Bundle ' B ' in trial Court docket) but I was unable p. 24, l. 1

to decide how much of this deficit was a genuine loss in the business and how much was a defalcation, though the general impression which the evidence gave me was that the Defendant had not properly applied or accounted for all the moneys which he had received from the Plaintiffs or on their account.”

“ It was clear to me however that the Defendant had applied some of the money in erecting buildings on properties which belonged to himself or his brothers, which he claimed to be his own property and not the Plaintiffs, and that further he had charged the Plaintiffs for these buildings far more than they could possibly have cost (see evidence of Simmons—Record pp. 8–10 and Defendants Record p. 17).” 10

\* \* \* \* \*

p. 24, l. 34

“ As to the Defendant’s counter-claim, there was nothing in the Agreement (Exhibit ‘ 4 ’) which obliged the Plaintiffs to account to him. He had to account to them.

“ Paragraph 6 of the agreement, providing for the Defendant’s remuneration clearly stated ‘ a commission is also to be paid to me by the Company which I have agreed to leave to the discretion of the Company.’

“ Nothing is stated as to the basis upon which this commission, 20 if given, is to be calculated, whether on total value of rubber shipped or on profits, or in any other way.

“ So far as the evidence went, the accounts showed a heavy deficit on the transaction in the Gold Coast and even if the profit made in London was taken into account (see evidence of Lewis)—Record p. 15—the Plaintiffs had still suffered a substantial loss in their dealings with the Defendant.

“ Furthermore the evidence as a whole revealed the Defendant as a plausible rogue, full of grand promises which he didn’t fulfil and I could find no justification whatever for holding that the 30 Plaintiffs ought to have exercised their discretion in the Defendant’s favour.

“ I therefore gave judgment against the Defendant on his counter-claim.”

pp. 26–29

16. The judgment of the West African Court of Appeal (Verity, C.J., M’Carthy and Coussey, JJ.) which was read by Coussey, J., began by stating that, although the appeal was from the judgment, it was clear from the grounds of appeal that the appeal now before the Court with one exception was only as to the Appellant’s counter-claim. Having disposed of the exception, the Court held that where the parties had made an express 50 contract the agent’s right to an account and the conditions under which that right would arise must be ascertained by reference to the terms of the contract and that there was nothing in the agreement between the

parties which obliged the Respondents to account to the Appellant. The Court then proceeded to deal as follows with the Appellant's claim for commission :—

10 “ To support his contention that the Appellant is entitled to something by way of commission reference is made to two cases *Bryant v. Flight*, 151 Eng. Repts. 49, and *Bird v. M'Gahey*, 175 Eng. Repts. 296. In the first case, on a contract ‘ the amount of payment I am to receive I leave “entirely to you,” ’ and in the second case, where the expression was ‘ whatever recompense the board might allow as right and proper,’ the Plaintiffs were held entitled to recover in an action on a *quantum meruit*. p. 28. l. 43

The cases on this subject were considered in *Loftus v. Roberts*, 18 T.L.R. 533. There the promisor agreed to engage the Plaintiff who was an actress ‘ at a west end salary to be mutually agreed upon between us.’ Vaughan Williams, L.J., summed up the case in the Court of Appeal as follows :—

20 ‘ It seems that there is some misapprehension as to the true ground of the decisions in the common law cases which have been cited, viz. *Taylor v. Brewer*, *Bryant v. Flight* and *Roberts v. Smith*. The decision in the first of these cases and the third and the dissentient view of Baron Parke in the second, was this—that wherever words which by themselves constitute a promise are accompanied by words which show that the promisor is to have a discretion or option as to whether he would carry out that which purported to be a promise, the result is that there is no contract on which an action can be brought at all.’

By an analogy if a house is taken for one year and at the end of the year the tenancy is to be continued at a rent to be agreed upon, the latter clause is not an enforceable contract.

30 When the contract in this case is looked at it will be seen that there was a remuneration of services at £50 monthly. That would seem to be reasonable remuneration. The words that follow ‘ to cover my personal and travelling expenses ’ are ambiguous but we are satisfied, on a construction of the document, that this was payment for the Defendant-Appellant's services ; and then follows a promise to pay commission in the company's discretion. It is true that the words used are ‘ a commission is also to be paid ’ but the absence of any rate of commission or basis of calculation clearly leaves it to the honour of the company and we do not think  
40 the company in all the circumstances disclosed in this case are open to criticism in resisting the claim.”

The Court therefore dismissed the appeal with costs.

17. By a notice of motion dated the 29th December 1947 the Appellant applied for leave to appeal to His Majesty in Council. Conditional leave was granted on the 10th February 1948 and final leave on the 17th June 1948. p. 31  
p. 33  
p. 37

18. The Appellant respectfully submits that the judgments of the West African Court of Appeal and of the Supreme Court of the Gold Coast should be set aside and judgment entered for him on his aforesaid counter-claim for the following amongst other

### REASONS

- (1) BECAUSE the West African Court of Appeal should have held that, in the absence of express agreement to the contrary, an agent has a right to have an account taken, and that the Appellant was therefore entitled to the account claimed. 10
- (2) BECAUSE the said Court of Appeal should have held that on the true construction of the agreement of the 19th April 1943 the monthly payment of £50 was intended to cover only the personal and travelling expenses incurred by the Appellant when acting as agent for the Respondents.
- (3) BECAUSE the said Court of Appeal should have held that the said agreement contained an express or implied term that the Respondents would make some *quantum meruit* payment to the Appellant by way of commission. 20
- (4) BECAUSE the said Court of Appeal should have held that the transactions entered into by the Appellant for and on behalf of the Respondents between August 1942 and the 19th April 1943 were in pursuance of the agreement contained in the Appellant's telegram of the 14th June 1942 and the Respondent's telegrams of the 18th and 28th June 1942 ; that by the said agreement the monthly payment of £50 was intended to cover only the personal and travelling expenses incurred by the Appellant when acting as agent for the Respondents ; 30 and that the said agreement contained an express or implied term that the Respondents would make some *quantum meruit* payment to the Appellant by way of commission.

DINGLE FOOT.



**In the Privy Council.**

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**ON APPEAL**

*from the West African Court of Appeal  
(Gold Coast Session).*

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BETWEEN

**KOFI SUNKERSETTE OBU**

*Appellant*

AND

**A. STRAUSS AND COMPANY  
LIMITED** by their Attorney  
**Robert Simmons** *Respondents.*

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**Case for the Appellant.**

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