*Privy Council Appeal No.* 49 *of* 1948

**Kofi Sunkersette Obu** - - - - - - - - - *Appellant*

*v.*

**A. Strauss & Company Limited** - - - - - - *Respondents*

FROM

## THE WEST AFRICAN COURT OF APPEAL

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JANUARY, 1951

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*Present at the Hearing:*

LORD RADCLIFFE
LORD TUCKER
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* SIR JOHN BEAUMONT]

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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 gave judgment for the plaintiffs (the present respondents) for £1,104 19s. 4d. and dismissed the appellant's counter-claim for accounts and commission.

At the dates material to this appeal the appellant was the agent of the respondents in West Africa for the purchase and shipment of rubber to the respondents in London.

The suit out of which this appeal arises was commenced on the 19th June, 1945, in the Supreme Court of the Gold Coast, Ashanti by the respondents as plaintiffs against the appellant as defendant claiming money alleged to be due from the appellant as such agent. On the 20th July, 1945, the appellant put in a counter-claim in the suit which was in the following terms :—

> " Please take notice that at the trial of the above named case the defendant will counter-claim and he hereby counter-claims against the plaintiffs for an account to be taken between them of all rubber shipped by the defendant to the plaintiff company in Europe from August 1942 to January 1945 inclusive and for the Court to order payment of what is found due to the defendant on the taking of the said account ; and the defendant further claims commission on all the rubber purchased by him for the plaintiff company."

Why the appellant claimed an account on all rubber shipped (which would be after it had been processed) and a commission on all rubber purchased is not apparent.

At the trial oral and documentary evidence was given on behalf of both parties. A Mr. Lewis who was a member of the firm of accountants employed by the respondents in the Gold Coast gave evidence that he had a statement of accounts from the respondents showing a profit in London on sales of rubber shipped by the appellant of £1,553 16s. 0d. but that the local account showed a loss of £4,954 17s. 11d. showing a total loss of over £3,000. This evidence was not challenged by the appellant when he gave evidence, though the result of the local trading was within his special knowledge. The learned trial judge on the 23rd October, 1945, gave judgment for the respondents for part of the sum claimed by them and dismissed the counter-claim of the appellant.

The appellant appealed from the said judgment to the West African Court of Appeal and on the 13th December, 1947, the appeal was dismissed. This appeal is brought from the said judgment of the West African Court of Appeal.

The only part of the judgment of the West African Court of Appeal which was challenged before the Board was the dismissal of the appellant's counter-claim. The facts therefore which are relevant are those relating to the counter-claim for an account and payment of commission.

Business relations between the parties commenced in August 1942 and at first such relations were governed by certain cables and letters. It is not necessary to refer in detail to these documents, suffice it to say that under them the appellant was to receive a payment of £50 per month and it was contemplated that he would also receive a commission to be fixed by the respondents.

Subsequently it was thought desirable that the relations between the parties should be embodied in a formal agreement, and on the 19th April, 1943, an agreement (exhibit 4) was signed by the appellant. By clause 1 of that agreement the appellant agreed faithfully to serve the respondents in the capacity of agent in the business of purchasing, manufacturing and exporting rubber in and from the Gold Coast for the account and to the order of the respondents, and during the continuance of the said agreement to give his time and attention to the management, conduct and superintendence of the said business. Clause 6 of the agreement dealt with the remuneration of the appellant and was in the following terms :—

> "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."

Subsequently the sum of £50 per month was reduced to £20 per month, but nothing turns upon this. The employment of the appellant was terminated as from 31st May, 1945.

The question in this appeal is as to the right of the appellant to commission. The appellant points out that clause 6 of the agreement contemplates that he is to get some remuneration by way of commission in addition to the £50 per month, and he contends that as the respondents have refused to pay any commission he is entitled to a reasonable commission by way of *quantum meruit* for services rendered. The appellant relied on the authority of such cases as *Bryant* v. *Flight* (5 M & W. 114) and a decision of the House of Lords in *Way* v. *Latilla* ([1937] 3 All Eng. L.R. 759). Only the latter case dealt with remuneration by way of a share in business introduced, and in their Lordships' opinion the earlier cases are of no assistance to the appellant. In *Way* v. *Latilla* the agent claimed that there was an agreement to give him an interest in a concession obtained by him which by custom, or on a reasonable basis, the court was asked to define as one-third. The House of Lords rejected this claim on the ground that there was no concluded contract between the parties as to the amount of the share which the agent was

to receive and it was impossible for the court to complete the contract for the parties. The House, however, held that whilst there was no concluded contract as to the amount of remuneration it was plain that there existed between the parties a contract of employment under which the agent was engaged to do work for the plaintiff in circumstances which clearly indicated that the work was not to be gratuitous, and that the agent therefore was entitled to a reasonable remuneration on the implied contract to pay him *quantum meruit*, and the House fixed the amount to be paid. This case again, in their Lordships' view, does not help the appellant, and indeed is rather against him. The right of the appellant to remuneration is governed by clause 6 of the agreement. The sum of £50 per month was to remunerate the services of the appellant though it was to cover his personal and travelling expenses: there is therefore no question, as in *Way* v. *Latilla*, of the services of the appellant being rendered gratuitously. Clause 6 does not provide for the payment of any further sum by way of additional remuneration for the services of the appellant upon which a claim of *quantum meruit* might be founded. The only additional remuneration was to be a commission in the discretion of the respondents. The appellant claims a commission on rubber purchased or rubber shipped but it is clear that the respondents would have to fix, not only the rate, but the basis, of the commission, and such basis might be a share of profits. The correspondence between the parties before the date of the agreement shows that it must have been in the mind of the appellant that his commission might be based on profits. In a letter from the respondents to the appellant dated the 7th October, 1942, the respondents said:

> ". . . your interests will be fully protected and your share of the total net profits of the entire enterprise will be made retrospective."

Again in a letter written by the solicitors for the respondents to the appellant dated the 2nd February, 1943, when the solicitors were seeking from the appellant material on which to base the formal agreement which they were about to prepare they said this:

> "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."

A commission based on profits would be rendered nugatory by the absence of profits. In their Lordships' opinion the relief which the appellant claims, namely an account and payment of commission based on rubber purchased or shipped, is beyond the competence of any court to grant. The Court cannot determine the basis and rate of the commission. To do so would involve not only making a new agreement for the parties but varying the existing agreement by transferring to the Court the exercise of a discretion vested in the respondents. If the appellant is not entitled to any commission it is conceded that he cannot claim an account. For these reasons their Lordships think that the judgments of the Courts in West Africa were right.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondents.

(10751) Wt. 8148—56 100 2/51 D.L./P1/3

**In the Privy Council**

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KOFI SUNKERSETTE OBU

*v.*

A. STRAUSS & COMPANY LIMITED

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DELIVERED BY SIR JOHN BEAUMONT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS.
DRURY LANE. W.C.2.

1950