9,1981

IN THE PRIVY COUNCIL No. 12 of 1979

ON APPEAL

FROM THE GAMBIA COURT OF APPEAL

BETWEEN

SHYBEN A. MADI — First Appellant

- and -

SHYBEN A. MADI & SONS LTD. — Second Appellants

- and -

C.L. CARAYOL — Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal from the Judgment and Order of the Gambia Court of Appeal (Forster, Luke and Anin, JJ.A.), dated 4th December, 1978, which allowed an Appeal from the Judgment and Order of the Supreme Court of the Gambia (Bridges C.J.) dated 30th June, 1977. By the Order of the Court of Appeal the judgment of the court below was set aside and the claim of both Appellants herein for delivery up of their account books, papers and other documents in the custody of the Respondent was dismissed; the counterclaim of the Respondent herein for fees due to him as against the First Appellant for D102,443.75b was allowed as to D70,000 and as against the Second Appellant for D9,225.00 was allowed as to D5,000 with costs in the Court of Appeal and before the Supreme Court. The Court of Appeal further directed that upon payment of the judgment debt in full the Appellants books, documents and other papers in the possession of the Respondent should be returned to the Appellants. The Supreme Court (the Order of which was set aside as set out above) had directed the delivery up as claimed by the Appellants with costs and had dismissed the Respondent's counterclaim with costs.

pp. 54-66

pp. 51-52

p. 66, l. 13

p. 66, ll. 4-11

p. 66, l. 15

p. 66, ll. 20-25

p. 52, ll. 13-15

p. 52, ll. 16-17

Record

2. The principal questions falling for decision in the Appeal are :

pp. 61-63 / pp. 50-52

(a) Whether or not the Gambia Court of Appeal applied the correct principles of law in the consideration and reversal of the findings of fact of the learned Trial Judge;

p. 64, ll. 3-8 / p. 51, ll. 17-23

(b) Whether or not there was any evidence, (or alternatively any sufficient evidence), before the Court of Appeal to enable it to reverse the conclusion of the learned Trial Judge that the fees payable to the Respondent were fixed by a verbal agreement between the parties;

p. 64, ll. 9-12 / pp. 64-66

(c) If, the Respondent's fees were correctly adjudged as being payable upon a quantum meruit, the Gambia Court of Appeal applied the correct principles in relation to the assessment of the claim; and

(d) Whether or not the counterclaim of the Respondent was vitiated through illegality.

p. 7

3. The Appellants herein by Writ of Summons issued on 29th January, 1975 sought the following relief:

p. 2, ll. 1-6

"The Plaintiffs claim from the Defendant Account Books, Income Tax papers and all other books and papers relating to their respective businesses in respect of 1975 and before handed to the Defendant while he acted as Accountant and Income Tax Consultant for the Plaintiffs".

p. 3 / p. 4, ll. 12-18 / pp. 13-15

4. By their Statement of Claim deemed to have been filed by Order pursuant to the Order of Agege J. dated 22nd February, 1976, the Appellants made the following averments subsequently admitted in the Respondent's Defence.

p. 3, ll. 1-8

(a) That the First and Second Appellants were respectively a businessman and limited liability company incorporated in the Gambia and that the Respondent was an Accountant and Income Tax Consultant and a retired Civil Servant;

Record

(b) That the Appellants jointly employed the Respondent as Accountant and Income Tax Consultant for some years and in the course of his employment gave the Respondent their books, papers, etc. for the purpose of preparing the usual balance sheets and other accounting documents required among other purposes, for the purpose of assessing the Appellants' income tax liabilities; p. 3, ll. 9-16

(c) That the Respondent withheld from the Appellants the documents that had been given to him by them; p. 3, ll. 17-19

(d) That the Respondent had refused to hand over the said books, papers, etc. which the Appellants had repeatedly demanded from him. p. 3, ll. 22-24

The single allegation of substance in the Statement of Claim which was not subsequently admitted in the defence, was as follows :

"4. The Plaintiffs do not owe the defendant any sum or sums in respect of work done for them". p. 3, ll. 20-21

5. In his Defence, dated 12th May, 1976, the Respondent, after making the admissions and denial set out in the previous paragraph, hereto pleaded as follows : p. 13 pp. 13-14

"7. The Defendant avers that he reconstructed the accounts of the First Plaintiffs for the years 1966, 1967, 1968 the First Plaintiff not having kept any or any proper books of accounts in respect of his money-lending or merchandise operations over the period. p. 14, ll. 17-22

8. The Defendant avers that he rendered valuable professional services to the Plaintiffs through their Counsel and Solicitors and in particular Mr. Eugene Cotran who was conducting a law suit on behalf of the First Plaintiff. p. 14, ll. 23-28

9. The Defendant avers that he was engaged as a Tax Consultant by the First Plaintiff in September 1971 and by the Second Plaintiffs in December 1973 and is still so engaged. p. 14, ll. 29-32

Record

p.14, ll.33-39 — 10. The Defendant avers that late in December 1975 he handed over to George Madi a director of the 2nd Defendants' Company a draft of the Trading and Profit and Loss Account of the 2nd Defendants' Company covering a period of sixteen months to the 30th April 1975 and supported by certain annexures.

p.14, ll.40-44 — 11. The Defendant avers that he has completed some 3,000 working hours on the business of the first Plaintiff, and some 300 working hours on the business of the second Plaintiffs.

p.15, ll.1-14 — 12. The Defendant avers that there is not in the existence any written contract between the Plaintiffs and the Defendant but that there was an oral agreement between the parties that the Defendant's fees would be calculated with reference to what results were obtained by him at the conclusion of

p.15, ll.1-14 — investigations by the Commissioner of Income Tax into the Plaintiffs' accounts covering a period of six (6) years ending 31st December 1970, and that until such conclusion of the investigation the Defendant could from time to time make withdrawals of sums of money from the Plaintiffs.

p.15, ll.15-19 — 13. In consequence of the matters contained in Paragraph 12 hereinbefore the Defendant has made withdrawals from the Plaintiffs in the sum of D10,450.00 (Ten thousand four hundred and fifty Dalasis).

p.15, ll.20-26 — 14. In consequence of and as a direct result of Defendant's work and skill the First Plaintiff has benefited in the sum of D700,000 (Seven hundred thousand Dalasis) being savings on Income Tax for which he the First Defendant was originally liable.

COUNTER CLAIM

p.15, ll.27-34 — The Defendant repeats paragraphs 7, 8, 9, 10, 11, 12, 13 and 14 of his Defence and the Defendant Counter-claims, as against the First Plaintiff the sum of D102,443.75b (One hundred

Record

and two thousand four hundred and forty three Dalasis seventy-five bututs) and as against the Second Plaintiffs the sum of D9,225.00 (Nine thousand two hundred and twenty-five Dalasis)".

6. The Appellants denied that they were under any liability to the Respondent by reason of the matters pleaded in the Counterclaim and served the following Defence to the Counterclaim on the 11th June,1976.

"1. The 1st and 2nd Plaintiffs deny paragraph 8 of the defence. In fact the Defendant prepared schedules from books of accounts, documents and receipts kept by the 1st Plaintiff in respect of the merchandise and money lending operations. p.16, 11.10-15

2. The 1st and 2nd Plaintiffs deny paragraph 8 of the Defendant's Defence and Counterclaim. They aver that the issue was a legal one and the Defendant is not a lawyer. p.16, 11.16-19

3. The 1st and 2nd Plaintiffs deny paragraph 9 of the Defendant's Defence and Counterclaim. p.16, 11.20-21

4. The Defendant handed over to George Madi, Managing Director of the 2nd Plaintiffs Company, a draft of an incomplete Trading & Profit & Loss Account of the 2nd Plaintiffs Company covering 18 months to the 30th April, 1975 supported by certain annexures which has no use or value as what was required of the Defendant to produce was a balance sheet and a complete Trading & Profit & Loss Account, which could be used for tax, Banks and other purposes. p.16, 11.22-32

5. The 1st and 2nd Plaintiffs deny paragraph 11 of the Defendant's Defence and Counterclaim. p.16, 11.33-34

6. The 1st and 2nd Plaintiffs deny paragraph 12 of the Defendant's Defence and Counterclaim. They aver that the verbal agreement with the Defendant was that the Defendant would be paid D2,500 for preparing balance sheets and goods Trading & Profit & Loss Accounts covering a period of 3 years, i.e. 1967, 1968 and 1969. p.16, l.35 - p.17, l.7

Record

p.17, ll.7-16 — 7. The Defendant also prepared accounts for the 1st Plaintiff for submission to the Tax Authorities for 1971, 1972 and 1973. The Defendant was paid in full in accordance with the above-named agreement, i.e. 1967, 1968 and 1969. And the 1st Plaintiff's figures show that he had in fact been paid more than was agreed because the Defendant had refused to work and had to be made to work by being paid more than was agreed with him.

p.17, ll.17-20 — 8. In respect of 1971, 1972 and 1973 the agreed fee with the Defendant was D1,000 per annum. Here again, he had been overpaid for the same reason as has been given above.

p.17, ll.21-25 — 9. For the 2nd Plaintiffs the agreed fee was D1,500 per the 16 month period referred to above. Here too he was overpaid. He was paid D1,775 - for the same reason as that advanced above.

p.17, ll.26-31 — 10. The 2nd Plaintiffs will show at the Trial that the Defendant has been advanced D650 towards his fees for the year 1975/1976 and he has not only done anything in respect of this period but that he has not even completed the previous years work i.e. 1974/75.

p.17, ll.32-35 — 11. The 1st and 2nd Plaintiffs deny paragraphs 13 and 14 of the Defendant's Defence and Counterclaim.

p.17, ll.36-38 — 12. The 1st and 2nd Plaintiffs deny that they owe the Defendant the sums named in the Counterclaim or any sum at all.

p.17, ll.37-42 — 13. Save as is hereinbefore expressly admitted, the 1st and 2nd Plaintiffs deny each and every allegation contained in the Defendant's Counterclaim as if the same were traversed seriatim."

7. The Trial of the action same on before The Honourable Sir Philip Bridges, C.J. on 23rd June, 1976.

p.18, l.20 — It is recorded in the record that there was no objection by the parties to the learned Chief Justice trying the case;

Record

this was raised because the Respondent (who had formerly been the Commissioner for Income Tax of Gambia) was acquainted with the Chief Justice.

8. The oral evidence called on for the Appellants consisted of six witnesses: Mr. George Madi (the son of the First Appellant who at all material times held powers of attorney on his behalf and was a director of the Second Appellants), the First Appellant himself, Amal Sallan (the Appellant's Assistant Manager), Robert Sanders, Louis Thomassi (Accountants) and Mecurpet Nair (Commissioner of Income Tax).

pp.18-30
pp.18-21 and pp.26-27
p.18, ll.21-23 (Exhibits N1 and N2 not reproduced)
pp.28-30
pp.25-26
pp.22-24
pp.27-28
pp.24-25

9. The most important witness for the purpose of the Appellants' case was Mr. George Madi; in the course of his evidence he stated that oral agreements were reached between himself and the Respondent to carry out the following work :

pp.18-21 and pp.26-27

(a) On behalf of the First-named Appellant to reconstruct accounts (including preparation of balance sheets and Trading Profit and Loss Accounts and necessary schedules therefor) for the years 1967, 1968 and 1969 for D2500.00 by way of fees;

p.18, ll.24-30

(b) On behalf of the First-named Appellant to prepare annual accounts up to the end of 1973 for a fee of D1,250;

p.19, ll.27-28

(c) On behalf of the Second-named Appellants to prepare accounts from 1st January, 1974 for a 16 month period for a fee of D1500.00

p.18, ll.30-36

Mr. George Madi gave evidence of making payments to the Respondent and described the limited extent of the work that had been carried out. He further gave evidence of the additional remuneration that had been paid to the Respondent and explained that he had done this because the Respondent had stated that he would not work unless he was paid more money. Mr. Madi stated that the Respondent was called upon either

p.14, l.6
p.19, ll.8-20
p.19, ll.21-26

Record

p. 20, ll. 12-14 to finish the accounts or to hand over the papers that
p. 20, ll. 15-16 had been entrusted to him; when the Respondent failed to do either of these he had employed a solicitor but
p. 20, l. 19 the books had not been returned. The Respondent had, he stated, produced an incomplete profit and loss account (Exhibit "A") with which he disagreed. Mr.
p. 20, ll. 26-29 Madi stated that the Respondent said another 12 months delay would make the situation right itself. Mr. Madi
p. 26, ll. 35-36 pointed out that the Respondent did not show himself among the creditors in the draft accounts.

pp. 30-41 10. The case for the Respondent consisted of evidence given on his own behalf and that of Malamin Jannah, a
pp. 30-40 senior accountant at the Treasury. The Respondent gave evidence as to the terms upon which the Appellants had engaged him to carry out work on their behalf, he said as follows :

p. 33, l. 40 - p. 34, l. 7

> "We came to an agreement as to fees. In September 1971 I was retained principally to reconstruct the accounts of Shyben (i. e. the First Appellant) for years 1967, 1968 and 1969. I could not know the volume of the work but would be paid in relation to the size of the reduction in tax achieved. In the meantime I was to make drawings against such fees. It was agreed between Shyben George (i. e. Mr. Madi, the First Appellant's Son) and myself".

In cross-examination the Respondent stated :

p. 88, l. 18

> "I did not agree to do the work for £600 - D2500.00 that is"

and subsequently stated :

p. 38, ll. 22-26

> "we agreed at the end of the day I would send

Record

them a bill from which I would deduct whatever drawings I had made. There are two ways to compile the bill but we did not agree upon one.

Either percentage or reduction obtained or by hours worked."

In re-examination the Respondent said :

"There was no agreement on fees as I did not know that there were no standard books. I did not know how long the investigation would go on. I base my claim on hours worked". p.39, l.32 - p.40, l.1

11. The Appellants respectfully submit that the comment of the Respondent as to the absence of 'standard books' does not preclude there being a fixed fee agreement. Preparation of accounts from 'incomplete records' i.e. accounts prepared from Bank statements, paying-in slips, and cheque stubs is standard accountancy practice. The Appellants were under no statutory obligation to keep more extensive records and it was common ground between the parties that the Respondent was employed to "reconstruct" the accounts; see paragraph 9(a) above and the first quotation of the Respondent's evidence in the previous paragraph. Insofar as the Respondent based his claim upon hours worked it is respectfully submitted that a substantial part of the work allegedly performed by the Respondent was work which could be performed by a junior person; this work it is respectfully submitted ought only to be charged at a lower rate suitable for such work. p.39, l.38

12. The Respondent had, it is respectfully submitted, put forward his Counterclaim in this action on the basis not of hours worked but on the rate of reduction in the assessments to Income Tax of the Appellants; in support of this the Appellants refer to the Defence and Counterclaim itself, and to Exhibit FF which was put p.15 pp.13-15 p.35, ll.29-32

Record

into Evidence by the Respondent. In that exhibit, which was inadvertently omitted from the record and is annexed to this case, after purportedly demon-
p.35, l.31 strating that there was a net reduction of the First-named Appellant's liability to Income Tax of D542,785.51 (allegedly a per centage reduction of 10.93%), the Respondent states :

> "Part A of my counter-claim against the First Plaintiff stands in the sum of D102,818.79 being 18.91% of the net reduction shown above. This margin is well within the normal maximum percentage - 25% or 5/- (old five shillings) on every £ which Income Tax Consultants in the United Kingdom and in some other Commonwealth countries charge on amounts of rebates and/or reductions secured by them against clients' income tax assessments. Compared with debt collectors charges this percentage cannot be said to be neither excessive nor high."

13. Immediately after Exhibit FF was introduced into evidence the Respondent stated :

p.35, ll.32-37 "I prepared this to support my case. I am counter-claiming against the First Plaintiff sum of D102,443.75 in respect of work done - number of hours worked 2763 hours I claim D37.50 per hour. Against Second Plaintiff D11,700. 293 hours at D40.00."

It is to be observed that 2732 hours at the rate claimed of D37.50 an hour produces the sum counter-claimed against the First-named Appellant. It is further to be observed that the Respondent's claim against the Second-named Appellant should be D11,720 on the basis of the figures put forward.

Record

14. The Appellants further submit that in any event the said calculations ought to be disregarded by reason of the Respondent's answers in cross-examination; for it appears that the basis of the calculation was subsequently retracted by the Respondent in cross-examination. He said :

> "I worked for the Company for 190 hours and for Shyben for 293 hours." — p. 38, ll. 15-16

The Respondent admitted receiving money from the Appellants but alleged the same were payments on account. He stated as follows : — p. 35, l. 37

> "In respect of investigation years I drew D5200.00 and years outside investigation years D2775.00 - (Shyben personally). Next claim against Shyben 102,443.75. Claim against Company D11,700 less on account 2,475
> D9,225." — p. 36, ll. 1-7

This sum claimed against the Second Appellants was elsewhere in the Respondent's evidence stated to be D4036.66. This appears from the following passage from the Respondent's cross-examination :

> "In Exhibit A. I'm showing actual expenses of D39,306 - my fees are included in this Exh. AA D3308.88 balance my fees for 1974.
>
> Four months to 30th April 1975 D727.78." — p. 38, ll. 31-34

The Respondent produced as Exhibit "T" a Statement showing the sums of money he had admitted receiving. — p. 37, ll. 23-25; p. 111

15. In the course of his cross-examination the

Record

Respondent was asked to look at various cheques and counterfoils; whereas he acknowledged that he had ticked them so far as they purported to show either his remuneration or a part of his remuneration he stated that that was not a correct record of his remuneration.

This was recorded by the learned Trial Judge as follows :

p. 37, ll. 3-5 "I was never prepared to do it for £500
Looks at cheques and counterfoils (Exh. J.K.).
Looks at counterfoil BA 001802 4th January 1972. MAK
These are my ticks on the counterfoil.

p. 38, ll. 8-9 It says Charles Carayol accountancy fees for 1971, 50% advance D625.00.

p. 37, ll. 10-11 It is not correct. I was not paid D1250.00 per annum fees.

p. 37, ll. 12-14 This D650 was a retainer to spark me off. I cannot remember that I queried the work on the counterfoil.

p. 37, ll. 15-20 Looks at 002446. 23rd January 1973. - Words 'D87.50 Charles Carayol. Fees accountancy. Balance 1972', bears my tick. This is not correct. I cannot remember if I queried this. Looks at 002459 - 30.1.73' Charles Carayol fees accountancy 1972 D87.50' Looks at

p. 37, ll. 21-22 Exh. C 'C.L. Carayol 1973 D250.00. Balance due as at 14th January 1974. Fees 1973'

p. 37, ll. 22-26 Looks at Exh. T Statement showing drawings I had between 2nd March 1974, D1775.00. 14th

Record

January 1974 cheque 002855 - D480.00. Charles Carayol fees accountancy for 1973. D480 balance D250. Exh. C can only mean that I had given them a lot for my fees for 1973 and this is what was left to come. p. 37, ll. 26-28 Looks at Exh. H entry for 1973 - I received D75 Cheque 002922 - 11th December 1974 Cheque 0033251. I received D500 on loan for Christmas - from several clients it was a good year and I wanted to reduce my tax liability. p. 37, ll. 28-38 Looks at cheque 003412 18th March 1975 fees 75/76 D300.00 - counterfoil say 'Charles Carayol fees work For 1975 - 76 - I stopped work on 30th April 1975. I was paid on 1st May 1975.'"

16. The Appellants respectfully submit that in the above passage the Respondent was denying the accuracy of contemporary documents that had been vouched by him. Although as appears in paragraphs 21 and 22 hereafter the Chief Justice expressed himself as rejecting the evidence of the Respondent upon the basis of the Respondent's unsatisfactory answers in relation to questions put to him with regard to Exhibit C, this rejection can, it is respectfully submitted, also be supported upon other answers given by the Respondent in the passage quoted above. The Appellants place special reliance upon the Respondent's answer in relation to Counterfoil BA/MAK 001802 when the Respondent said that, although vouched by him, the entry thereon in relation to accountancy fees for 1971 of '50% advance D625.00' was not correct. p. 37, ll. 5-10

17. He further stated that part of his remuneration (D500) had been received as a loan for Christmas because it was a good year and he wanted to reduce his tax liability. In re-examination the Respondent stated : p. 37, l. 31

"It states "loan" as I asked that it be shown as a loan to reduce my tax liability". p. 39, ll. 25-26

Record

Submissions as to the effect of this action are made in paragraph 51 hereunder.

pp.42-43 — 18. The trial concluded on apparently the twelfth effective hearing day, 2nd February, 1977. The Chief Justice reserved his Judgment until 30th June, 1977.

19. The Chief Justice commenced his Judgment by referring to the circumstances in which the Appellants had come to employ the Respondent and stated that :

p.44, ll.38-41 — "There is no question that the books belong to the Plaintiffs or that the Defendant was retained as accountant and tax consultant. The question is: has he been paid in full for his services?"

p.45 — The Chief Justice then reviewed the circumstances in which the First Appellant had been subjected to an investigation in relation to his tax affairs and touched upon other matters that had given rise to litigation.

p.45, l.46 - p.46, l.9 — After stating that George Madi had instructed the Respondent to reconstruct accounts for the years 1967,

p.46, ll.12-14 — 1968 and 1969 the Chief Justice recalled that Mr. George Madi had said that a fee was agreed between himself and the Respondent of D2,500.00 for the three years in question.

p.45, ll.15-34 — After noting what work had been done the Chief

p.45, ll.39-41 — Justice found that the Respondent had not prepared the balance sheets and profit and loss accounts for those years. The Chief Justice then referred to the employ-

p.47, ll.1-3 — ment of the Respondent to prepare annual accounts to mid 1973 for a fee of D1000 and employment (on the Second Appellant's behalf) to prepare the accounts from 1st January, 1974 to 30th April 1975 for D1500. The Appellants respectfully submit that by reason of the matters set out later in his judgment, the Chief Justice accepted the evidence of Mr. George Madi as to the circumstances in which the Respondent came to be so employed.

p.47, l.9 - p.48, l.38 — 20. The Chief Justice continued his Judgment by dealing with the payments between the parties; this is dealt with in paragraph 25 hereunder. When the Chief Justice came to deal with the evidence of the Respondent as to the terms of his employment he observed that the

p.49, ll.13-22 — Respondent stated that there was an agreement in respect

Record

of his fees and quoted the passage from his evidence which is set out in paragraph 10 hereinbefore; the material part of that evidence is where the Respondent said :

> "I could not know the volume of the work but would be paid in relation to the size of the reduction in tax achieved". — p. 49, ll. 18-20 and p. 34, ll. 2-4

21. The Chief Justice then dealt with other matters including the work performed by the Respondent. This is dealt with below. Subsequently the Chief Justice reinterated, it is respectfully submitted correctly, that the crucial point to be decided was the nature of the contracts between the parties in respect of the Respondent's professional services. After recalling that there was no written agreement between the parties (a matter which the Chief Justice subsequently said caused him considerable embarrassment) the Chief Justice referred to a delivery note Exhibit C written in the Respondent's own hand writing. This document stated that in respect of 1973 fees a balance was due to the Respondent of D250.00. The Chief Justice recalled that in cross-examination the Respondent had said that this document: — pp. 49-50; p. 58, ll. 33-37; p. 51, l. 40 - p. 52, l. 1; p. 106; p. 50, l. 41 - p. 51; p. 51

> " ..... can only mean that I had given them a chit for my fees for 1973 and this is what was left to come". — p. 51, ll. 8-10 and p. 37, ll. 27-29

22. The Chief Justice then stated as follows :

> "The inescapable conclusion it seems to me is that all fees outstanding up to the end of 1973 were satisfied with this payment of D250.00; and if that is so the basis of the contract with Shyben was a straightforward matter of payment in accordance with a verbal agreement and that this was for a fixed sum or sums and not on a time basis. Fees above the original agreement were paid but this did not affect in my view the nature of the agreement." — p. 57, ll. 17-25

The Appellant respectfully submits as follows :

(a) that the Chief Justice was right in

Record

reaching his aforesaid conclusion, alternatively

(b) there was not, as at 14th January, 1974 more than D250 outstanding in respect of fees owed for that year; if this is so then as the balance is fixed there must have been a contractual obligation so far as the Respondent was concerned for the Appellants to pay him a fixed sum for that year.

As the Respondent maintained that he was to be paid a remuneration based upon an unspecified percentage of income tax assessments as they might subsequently be abated and because no such abatement had, as at 14th January, 1974 been agreed upon, the Appellants respectfully submit that this voucher is incapable of reconciliation with the Respondent's evidence. Support is gained for this submission if the words "to be" are interpolated between the words "were" and "satisfied" in the Judgment of the Chief Justice. Such interpolation makes the first part of the passage from the judgment set out above in this paragraph read :

p. 51, ll. 17-19

> "The inescapable conclusion it seems to me is that all fees outstanding up to the end of 1973 were to be satisfied with this payment of D250 ..."

This interpolation, it is respectfully submitted, can properly be read into the Judgment as it is common ground that Exhibit "C" when the Respondent wrote it, recorded that there was then an outstanding amount of D250.00, and thus at the time the liability had not been satisfied. It is further submitted that in the said passage the Chief Justice was referring solely to 1973 fees.

p. 106

p. 51, ll. 26-32

23. The Chief Justice went on to refer to the year 1975/76 and concluded, it is submitted correctly, that because the Respondent had stated that he had been paid for work carried out in that year no claim for fees in respect thereof could lie.

24. The Appellants further respectfully submit so far as this aspect of the case is concerned that the Chief Justice was faced with a conflict of oral evidence between Mr. George Madi and the Respondent; it is evident in

Record

the Appellants' submission that the Chief Justice must have believed the testimony of Mr. George Madi and rejected that of the Respondent even though the Chief Justice made no overt reference to the witnesses' credibility.

25. When he had earlier dealt with the payments that had been made by the Appellants to the Respondent the Chief Justice had set out a table of the payments made according to the Appellants. So far as payment for "Year for 1972" is concerned the total has been miscast and should be D1,175. The overall total has also been miscast and the total amount stated by the Appellants to have been paid to the Respondent should read D9450. It is submitted that these errors are not significant. The Chief Justice observed that the parties were in substantial agreement that more than D10,000 had been paid by the Appellants to the Respondent in respect of professional services. The Chief Justice referred to the evidence given by Mr. Sanders and Mr. Thomassi and, it is respectfully submitted, accepted that the accountants do not normally charge upon a reduction of tax basis.

pp.47-48
p.48, ll.1-10
p.48, l.38 - p.49, l.5
p.49, ll.36-42

26. After considering the evidence as to the work carried out by the Respondent the Chief Justice concluded, it is submitted correctly, that :

p.50, ll.9-18

> "It is apparent, however, that whatever required to be done has not been completed - no accounts for 1967, 1968 and 1969 have been produced and the final accounts of the firm remain in draft; admittedly because the profit figure is thought to be too high by the company."

p.50, ll.19-24

27. The Chief Justice observed, it is submitted correctly :

> "Nothing in the documentation would lead one to suppose that fees were to be charged on a time basis and no time sheets such as professional men use were put in evidence. Mr. Carayol said he kept a note of hours in his diary but none of these were produced to the Court."

p.51, ll.33-38

Record

It is respectfully submitted that in the foregoing passage the Chief Justice was in effect holding that there was no material, or alternatively insufficient material, upon which a quantum meruit award could be properly assessed. Alternatively, it is submitted, that by commenting on the absence of such records without any explanation from the Respondent for such absence, the Chief Justice was expressing doubt as to the Respondent's credibility.

p. 52, ll. 13-18 — 28. The Chief Justice concluded his Judgment by finding for both Appellants both on the claim and Counterclaim with costs.

pp. 52-53 — 29. By an undated Notice of Appeal the Respondent herein gave notice that he intended to Appeal to the Court of Appeal against the whole decision of the Chief Justice upon the grounds :

p. 53, ll. 4-10 — "That the learned Chief Justice erred in that he failed to assess accurately the evidence adduced by the Plaintiff/Appellant."

30. The Respondent's said Appeal came on for hearing before the Court of Appeal at the general sitting holden
pp. 53-66 at Banjul in November, 1978. On the 1st December 1978 Anin J.A. delivered the Judgment with which the other mem-
p. 66 bers of the Court (Forster and Luke JJ.A.) concurred.

p. 54, ll. 11-25 — 31. Anin J.A. commenced his Judgment by summarising the role of the parties and the relationship between
p. 54, l. 26 - them and the issues upon pleadings. The learned Judge
p. 56, l. 25 of Appeal then commented that particulars of when the Respondent was employed by the Appellants and the
p. 56, ll. 26-36 terms of such employment had not been given. Such comment, it is respectfully submitted, was unfounded because, although the Appellants concede such particulars could properly have been ordered it appears from the record of the interlocutory hearing before
pp. 12-13 Agege J. on 14th April, 1976 that the application for such particulars was not pursued.

p. 56, l. 37 - 32. After a summary review of the evidence called on
p. 57, l. 16 behalf of the parties as to the terms of the agreement
p. 57, ll. 16-28, between them, the learned Judge of Appeal quoted the

Record

assessments made by the Chief Justice of the issues in the case. The learned Judge of Appeal then set out the concluding passages of the Judgment of the Chief Justice subsequent to his consideration of Exhibit "C". The learned Judge of Appeal then stated : p.44, ll.28-32 and p.50, ll.34-38 p.57, l.28 - p.58, l.37 and p.51, l.28 - p.52, l.18

> "In this Appeal, argument has centred on two fundamental questions; firstly, whether or not there was a fixed fee contract between the parties with respect to the fees; and secondly, if there was no such contract, whether the Appellant is entitled to claim upon a quantum meruit". p.58, ll.38-43

The learned Judge of Appeal then summarised the arguments advanced by Counsel in relation to those issues. p.59, ll.1-40

33. The learned Judge of Appeal continued his Judgment by stating that it was necessary to consider the course of dealing or the whole correspondence between the parties. These observations, it is respectfully submitted, were irrelevant to the consideration of the Appeal in the instant case. It had been the evidence of George Madi that there was a fixed oral contract; it is submitted that the "course of dealing" approach is only appropriate in cases where direct evidence is lacking. The Appellants furthermore submit that the "whole correspondence" approach is only appropriate in cases where the Court is concerned to find whether a contract was concluded from a series of letters. In such cases the dispute will centre on the question : With which letters in the series should the analysis begin and end? p.59, l.41 - p.60, l.18

34. It is also submitted that the learned Judge of Appeal then fell into further error in considering as a second issue in the appeal that Way v. Latilla /1937/ 3 ALL E.R. 759 H.L. enunciated a principle that was applicable in the instant case; it is submitted that if, (as was apparently done by the learned Trial Judge) the evidence of George Madi is accepted the terms of the contracts are clear. No question of "vagueness", as considered in that case, arises. p.60, ll.19-37

Record

p.60, l.37 — 35. The learned Judge of Appeal then went on to consider the evidence as to a fixed fee contract in the case. He held that the existence of a fixed fee contract must be decided on a consideration of the whole case. He added, it is submitted wrongly, that the Court below had decided the case only on Exhibit "C", which he considered to be inconclusive. In so holding that the ratio of the decision of the Chief Justice depended upon Exhibit "C" the learned Judge of Appeal erred in that he failed to consider that the Chief Justice had heard some twelve days of evidence and submissions.

p.60, l.37-40

p.60, ll.41-42
p.106

p.60, l.43 - p.61, l.16
p.106
p.61, ll.17-21

36. The learned Judge of Appeal then proceeded to consider Exhibit "C". He differed from the Trial Judge in holding that the Exhibit could not be extended to cover all fees outstanding from the previous years. So far as this finding is concerned the Appellants rely upon their submissions set out in paragraph 22 above.

37. The learned Judge of Appeal then went on to consider an explanation that had never apparently been ventilated by the Respondent herein at the Trial. He stated :

p.61, ll.28-35

> "His candid admission under cross-examination that the exhibit represents the balance of D250.00 due after a chit submitted by him to the Respondents (i.e. the Appellants before the Board) for his fees for 1973 must therefore be understood in the general context (sic) whereby he was entitled to withdraw sums from his employers periodically according to his needs".

It is respectfully submitted that in making this finding the learned Judge of Appeal was going beyond the scope of the evidence and the proper function of an appellate judge.

38. The learned Judge of Appeal then, in the Appellants submission, fell into a similar error in his consideration of the evidence of George Madi and the First-named Appellant. After quoting certain passages of their evidence, the learned Judge of Appeal concluded ;

p.61, l.42 - p.62, l.5

Record

"In my view, the Respondents' version taken as a whole, shows such inconsistency as to make it inherently improbable and unreliable". p. 62, ll. 5-7

In reaching this conclusion it is submitted that the learned Judge of Appeal erred in that the passages quoted do not justify the conclusion reached nor did he remind himself (and by implication did not follow) the proper practice for evaluation of the findings of fact of a Trial Judge which ought to be followed by an Appellate Court.

39. This practice is conveniently summarised as "The findings of a trial judge who has had the inestimable advantage of seeing and hearing the witnesses should only in exceptional circumstances be upset by an appellate court" B v W (1979) I.W.L.R. 1041 in the House of Lords per Lord Edmund Davies at p. 1050 H. The practice has also recently been considered in detail in the judgment of the Board delivered by Lord Fraser of Tullybelton in Chow Yee Wak V Choo Ah Pat /1978/ 2 M.L.J. 41). The Appellants further submit that the instant appeal is analogous to another case recently before the Board; that of Muthusamy s/o Tharmalingam v. Ang Nam Cheow (Privy Council Appeal No. 3 of 1978). It is submitted that, as with the Court of Appeal in Singapore in Muthusamy's case, the learned Judge of Appeal failed to appreciate the practical limitations of an Appellate Court to disagree radically with the conclusion of the Trial Judge; in support of this submission the Appellant will rely on the failure of the learned Judge of Appeal expressly to remind himself of the principles upon which an Appellate Court should act.

40. The learned Judge of Appeal then apparently found as a fact that the answer under cross-examination that "Exhibit "C" can only mean 'I had given them a chit for my fees for 1973 and this is what was left to come'" related solely to interim fees. For the reasons set out in the preceding paragraph the Applicants submit that such a finding was both wrong and/or beyond the proper exercise of an Appellate Court's function.

p. 106

p. 62, ll. 16-24

Record

p.62, ll.39-40

41. The learned Judge of Appeal then went on to consider the over-payments that had been made by the Appellants; he concluded, it is submitted wrongly, that the reason advanced by the Appellants for the over-payment was not convincing. The Appellants submit that the existence of the overpayments is, in any event, of marginal relevance to the case.

p.63, ll.1-5
p.51, l.39 - p.52, l.12

42. The learned Judge of Appeal then proceeded to consider the lack of documentation which had been found an embarassment by the Chief Justice. He held, it is submitted wrongly, that this was irrelevant. The learned Justice of Appeal then held, it is submitted correctly,

p.63, ll.25-28

> "It is obvious that the Appellant introduced an estimate of the number of hours devoted to the Respondents' business for the purposes of this litigation and his counterclaim".

43. The learned Judge of Appeal then held

p.63, ll.29-32

> "In my view, it would be wrong to disbelieve Appellant's story simply because he did not opt for the more usual mode of claiming fees employed by accountants generally....."

The Appellants respectfully submit that (contrary to the implication arising from this passage) the mode of claiming fees was not relied upon by the Chief Justice as a ground for preferring the Appellants' version. Alternatively even if such a ground formed part of the basis of the ratio decidendi of the Chief Justice's judgment, this is a factor which the Chief Justice was entitled to take into account. The Appellant further submits that regard ought to have been paid to the legality of such a method of charging as that alleged by the Respondent; further submissions are made with regard to this aspect in paragraph 51 below.

p.63, ll.36-44

44. The learned Judge of Appeal then held that the Chief Justice had erred in his consideration of the case holding that it was incumbent upon the Appellants to prove the agreement for "fixed contract fees". In so

Record

holding the Appellants submit that the learned Judge of Appeal was wrong; the onus probandi lay not upon the Appellants herein because their claim in the action was merely to recover their own property, the onus probandi of the counterclaim lay upon the Respondent herein. It is accordingly submitted that because the "fixed fee contract" is pleaded by the Appellants solely as a defence to Counterclaim it was an issue only in the Counterclaim; any entitlement the Respondent might have to remuneration from the Appellants was an issue for him to prove. The pleading of the 'fixed fee contracts' by the Appellants is to be regarded, it is respectfully submitted, solely as an admission by the Appellants that the Respondent was entitled to certain remuneration; the burden of proving any further entitlement fell upon the Respondent.

45. The learned Judge of Appeal accordingly held that there was a contract of employment between the Appellants and the Respondent for the payment of a reasonable remuneration upon a quantum meruit. Whereas the Appellants have submitted that, in the premises, such a conclusion is erroneous, it is conceded that a quantum meruit award to the Respondent would be appropriate in respect of the work carried out if it should be determined in this Appeal that the Chief Justice was wrong in finding there was an agreement for a fixed remuneration and it is held, contrary to the submissions in the following paragraph, any entitlement to renumeration arises.

p. 63, l. 49 - p. 64, l. 11

46. The learned Judge of Appeal continued his Judgment by citing certain passages from the Judgment of the Chief Justice dealing with the work carried out by the Respondent. The hours alleged to have been worked by the Respondent are set out and the learned Judge of Appeal seems to have accepted the same unreservedly notwithstanding his earlier comment quoted in paragraph 42 above that the same were an estimate. The learned Judge of Appeal did not advert in his judgment to the admission made by the Respondent in cross-examination (quoted in full in paragraph 13 above) that he had in fact worked for the Second Appellant for 190 hours and for the First

p. 64, ll. 13-24
p. 30, ll. 11-32
p. 46, ll. 4-9
p. 64, l. 48 - p. 65, l. 4
p. 35, ll. 33-39

p. 38, ll. 15-16

Record

Appellant for 293 hours: the Appellants therefore respectfully submit that the learned Judge of Appeal erred in his assessment of the hours worked by the Respondent.

47. It is further submitted that the learned Judge of Appeal misdirected himself on the legal principles appropriate to a quantum meruit award. The Appellants so submit because of his statement :

p.65, ll.31-34

> "It is beside the point, as far as his entitlement to quantum meruit is concerned, to consider whether he has accomplished all he was engaged to do."

Such a proposition is only appropriate if the entitlement to be paid upon a quantum meruit has arisen through frustration. It is submitted that the basic rule that a promisor must perform what he undertook to do applies even where the consideration is to be calculated on a quantum meruit basis. In the instant case the failure of the Respondent to perform his contractual obligations by delivering complete accounts within a reasonable time has disentitled him to be paid upon the basis of quantum meruit.

48. If, contrary to the submissions made in the previous paragraph, the Respondent is entitled to be remunerated upon the basis of a quantum meruit for the work, such as it was, that was carried out on behalf of the Appellants, the learned Judge of Appeal fell into error in his approach as to the basis upon which such remuneration should be calculated. It is respectfully submitted that it was not open to the learned Judge of Appeal to award the Respondent damages upon the basis of a quantum meruit until a Counterclaim had been put forward by him claiming relief upon such a basis. It will be recalled that in the Defence and Counterclaim the Respondent had claimed renumeration solely upon

p.65, l.39 - p.66, l.11

p.15, ll.6-9

> '.....what results were obtained by him at the conclusions of investigations by the Commissioner of Income Tax into the Plaintiffs' accounts .....'

Record

It does not appear that any application was ever made to amend the Counterclaim to claim upon the basis of a quantum meruit; no particulars of works carried out by the Respondent were served nor was Discovery given of the Respondent's working papers. It appears, from the passage of the Judgment of the learned Judge of Appeal cited in paragraph 32 hereinbefore, that no argument was directed before the Court of Appeal as to the appropriate amount of any award which might be made upon the Counterclaim under a quantum meruit. It is not clear how the learned Judge of Appeal reached the conclusions he did as to the amount to be awarded to the Respondent upon his Counterclaim, it is however submitted that it appears that the learned Judge of Appeal considered only the work carried out by the Respondent for the First Appellant in respect of the years ending 1967, 1968 and 1969. The learned Judge of Appeal makes no reference to work allegedly carried out for the years ending 1971, 1972 and 1973. The Appellants respectfully submit that in a claim made upon a quantum meruit it is incumbent upon the Trial Judge, or if, as is the situation in the instant case, the matter is being considered for the first time by the Court of Appeal, that Court, to ask itself the following questions (insofar as they may be applicable to any particular case) :

p. 53, ll. 38-43

p. 65, ll. 3-30

(1) has the claimant carried out any work for the benefit of the recipient ?

(2) If so, what work ?

(3) Was that work envisaged by the parties as intended to be performed gratuitously ?

(4) If not, upon what basis did the parties envisage remuneration would be payable ?

(5) Was remuneration to be payable for all work carried out by the claimant or only such work that was of benefit to the party for whom such work was carried out ?

(6) If the latter, what is fair recompense for such work as was of value ?

Record

49. The learned Judge of Appeal in the instant case reached his conclusions as to the amount of remuneration that the Respondent was entitled to without any analysis either in the form suggested in the previous
p.66, ll.8-11 paragraph hereto or at all, he held that such entitlement was D70,000 as against the First-named Appellant and D5,000 as against the Second-named Appellant. It is respectfully submitted, in the alternative to the submissions made in the previous paragraph, that this assessment was wrong on the following grounds; there was no evidence (or alternatively insufficient evidence) that the hours allegedly worked by the Respondent were reasonable or that the rate of charging was appropriate. It is further submitted that there was no evidence of the partial performance by the Respondent of his obligations was of any value to the Appellant, or alternatively what was a fair valuation. The Appellant submits that from the evidence of the Respondent himself it is apparent that he did a poor job. If, contrary to the Appellants submissions, it is held that the Respondent is entitled to be remunerated upon a quantum meruit the Court of Appeal ought, it is submitted, to have directed a trial of this issue. The Appellant further submits that if, at the hearing of this Appeal, it is held that the Appellants ought to remunerate the Respondent on a basis of quantum meruit then the trial of such an issue ought now to be directed.

pp.67-68 50. After the Respondent's said Appeal had been allowed the Appellants applied for Leave to Appeal to the
p.68 Judicial Committee of the Privy Council. By Order dated the 29th March, 1979, the Honourable Sir Philip Bridges, C.J. sitting as a single Judge of the Court of Appeal granted the Appellants Final Leave to Appeal.

51. The Appellants respectfully submit that upon the case presented by the Respondent in the courts below two grounds arise upon which the Court of Appeal ought not to have enforced the Respondent's Counterclaim. It is respectfully submitted following Chettiar v. Chettiar [1962] A.C. 294 that it is incumbent upon all courts to investigate the same. The first ground upon
p.15 which enforcement of the Counterclaim should have been declined is because an agreement to perform accountancy duties upon a percentage remuneration

Record

based on abatement of tax achieved by such performance is not lawful. The second ground arises because of the admission by the Respondent (which is referred to in paragraph 17 above) that he asked to be paid by means of a "loan" for the apparent purpose of avoiding income tax.

p. 39, ll. 25-26

52. 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 that the Judgment and Order of the Chief Justice should be restored or that alternatively a trial should be directed on the issue of how much remuneration, if any, the Respondent is entitled to on a quantum meruit by reason of matters pleaded in the counterclaim hereto for the following, among other

R E A S O N S

1. BECAUSE the Chief Justice was right.

2. BECAUSE the Court of Appeal was wrong.

3. BECAUSE the Court of Appeal made erroneous findings of fact and/or findings it was not entitled to make.

4. BECAUSE the Judgment of the Chief Justice was also correct upon the contemporary written evidence in holding that there was an agreement between the parties for the Respondent to work for a fixed fee

5. BECAUSE the Court of Appeal did not approach the consideration of a quantum meruit award upon the correct principles.

6. BECAUSE the Court of Appeal and the learned Trial Judge ought to have held the Respondent's Counterclaim was unenforceable by reason of the matters set out in paragraph 43.

GERALD GODFREY

NIGEL MURRAY

ANNEXURE
EXHIBIT FF

RE-COMPUTATION OF REVISED ASSESSMENTS FOR THE YEARS 1966/70, INCLUSIVE AS RECOMMENDED IN THE COOPERS AND LYBRAND REPORT DATED THE 4th OCTOBER, 1973, AND THEIR LETTER ADDRESSED TO THE COMMISSIONER OF INCOME TAX DATED 19TH NOVEMBER, 1974

	ASSESSMENT 1966 (31/12/65)	ASSESSMENT 1967 (31/12/66)	ASSESSMENT 1968 (31/12/67	ASSESSMENT 1969 (31/12/68)	ASSESSEMENT 1970 (31/12/69)
Basis Year Ended	£	£	£	£	£
Revised Profit/Loss	7,229	21,344	22,994	35,981	(Loss) 28,710
Deduct: Initial & Annual Wear & Tear Allowances.	880	119	337	834	* 1,534
	6,349	21,225	22,657	35,138	(30,244)
Section 19 I.T.A. Adjustment of Loss Year of Assessment 1969				30,244	
Revised Net Assessable Income	6,349	21,225	22,657	4,894	NIL
Deduct: Personal Reliefs:-					
Allowance Married	350	350	350	350	
Children's Allce. (Max)	600	750	750	750	
Passage Allce. (")	200	-	-	-	
Life Assurance (")	1,000 2,150	1,000 2,000	1,000 2,100	979 2,079	
Revised Chargeable InCome	4,199	19,125	20,557	2,815	
Revised TAX					
@ 10/-	2500 £456.13.4	2500 456.13.4	2500 456.13.4	2500 456.13.4	
@ 12/6	1699 849.10.0	5500 2750. 0.0	5500 2,750. 0.0	315 157.10.0	
@ 15/-		2000 1250. 0.0	2000 1,250. 0.0		
		9125 6843.15.0	10557 7,917.15.0		
	4199 1,306.3.4	19125 11300.8.4	20557 12,374. 8.4	2815 614. 3.4	
	1,306.3.4	11300.8.4	12,374. 8.4	614. 3.4	= £24,595. 3.4
	= D6,530.83	D56502.08	D61,872.08	D3,070.83	=£127,975.82

Tax on Original Revised Assessments (issued March, 1971) 1966/70 inclusive = £134,166.13.4 = D670,833.33
" as re-computed above -do- -do- = 25,595. 3.4 = 127,975.82

Therefore, NET REDUCTION = £108,571.10.0 D542,875.51

% Reduction = $\frac{542857}{670833}$ X 100 = 80.93%

Average Rate of Reduction = D542857 724375 = 0.75 bututs (approx.) in the Dalasi.

Part A of my counter-claim against the First Plaintiff stands in the sum of D102,618.79 being 18.91 of the net reduction shown above. This margin is well within the normal percentage -25% or 5/- (old five shillings) on every £ which Income Tax Consultants in the United Kingdom and in some other Commonwealth Countries can charge on amounts of rebates and/or reductions secured by them against clients' income tax assessments. Compared with Debt Collectors charges this percentage cannot be said to be neither excessive nor high.

18, Hagan Street,
P.O. Box 67,
Banjul, The Gambia.
17th May,1976

(C.L. Carayl)

No. 12 of 1979

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE GAMBIA COURT OF APPEAL

B E T W E E N

SHYBEN A. MADI — First Appellant

- and -

SHYBEN A. MADI & SONS LTD. — Second Appellants

- and -

C.L. CARAYOL — Respondent

CASE FOR THE APPELLANT

PHILIP CONWAY THOMAS & CO.,
61 Catherine Place,
London, SW1E 6HB.

Solicitors for the Appellants