Privy Council Appeal No. 12 of 1979

Shyben A. Madi and Another – – – – – *Appellants*

v.

C. L. Carayol – – – – – – – – *Respondent*

FROM

THE GAMBIA COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH FEBRUARY 1981

Present at the Hearing:

LORD FRASER OF TULLYBELTON

LORD SCARMAN

LORD BRIDGE OF HARWICH

[*Delivered by* LORD SCARMAN]

In this appeal from The Gambia Court of Appeal two questions have emerged as being of decisive importance:—

(1) was the Court of Appeal entitled, or, as their Lordships would prefer to put it, obliged to set aside the crucial finding of fact by the trial judge, and thereafter to deal with the case at large? The answer to the question depends upon the correct application of the principles governing the intervention of an appellate court in matters of fact, which were stated by Lord Thankerton in *Watt or Thomas* v. *Thomas* [1947] A.C. 484, at p.487.

(2) if the Court of Appeal was right to set aside the trial judge's crucial finding of fact, was it able, on the evidence available, to reach a decision as to the value to be put upon the respondent's services upon the basis of a quantum meruit?

The appeal is from the judgment and order of The Gambia Court of Appeal, dated 1st December 1978, which allowed an appeal from the judgment of the Supreme Court (Bridges C.J.) dated 30th June 1977. The appellants' claim was for delivery up of their account books, papers and other documents in the custody of the respondent. His defence was that he had a lien on them for unpaid fees earned by him as their income tax consultant and accountant. He counter-claimed for fees due to him which he assessed on a quantum meruit basis as D102,443.75 from the first appellant and D9,225 from the second appellant. He based his counter-claim on his averment that he had worked 2,763 hours for the first appellant and 293 hours for the second appellant.

The Chief Justice gave judgment for the appellants on their claim and dismissed the counter-claim. On appeal, the Court of Appeal allowed the respondent's appeal on claim and counter-claim, and awarded him on his counter-claim D70,000 against the first appellant and D5,000 against the second appellant. He was ordered to deliver up the documents in his custody upon payment of these sums.

The appellants' case was that they had paid in full the fees which they had agreed with the respondent. They pleaded three agreements, all of them oral:—

(1) in paragraph 6 of the Defence to Counter-claim, for preparing for the first appellant balance sheets and goods Trading and Profit and Loss Accounts covering the years 1967, 1968 and 1969, a fee of D2,500;

(2) in paragraph 8 of the Defence to Counter-claim, for preparing and submitting the first appellant's accounts to the tax authorities for the years 1971, 1972 and 1973, a fee of D1,000 for each year;

(3) in paragraph 9 of the Defence to Counter-claim, a fee of D1,500 for preparing the accounts of the second appellant's trading for the period of 16 months from the 1st January 1974 to the 30th April 1975.

The total fees payable to the respondent, therefore, according to the appellants' pleaded case, were D7,000, of which D5,500 were payable by the first appellant and D1,500 by the second appellant. In evidence, these figures were modified, the fee for the accounts of the years 1971, 1972, 1973 being said by the appellants to be not D1,000 but D1,250 per annum. This would make the total payable D7,750. The appellants further alleged that these fees had been paid. They admitted in evidence that they had, in fact, over-paid the respondent. It was accepted on both sides that they had paid him more than D10,000.

The respondent's case was that no fixed fee was agreed. He said that there was an agreement, but not for a fixed sum or sums. It was oral, and he put it thus in his evidence:—

> " We came to an agreement as to fees. In September 1971 I was retained principally to reconstruct the accounts for Shyben [the first appellant] for years 1967, 1968, 1969. I could not know the volume of 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."

He further said that there was a ceiling for drawings pegged at D2,000 for any given year and that there was no agreement on the way his bill would be compiled, though he was, of course, expecting a settlement in relation to the tax reduction achieved and ready to deduct drawings from whatever fee was ultimately agreed.

The issue was, therefore, one of fact. Who was to be believed? Indeed the appellants in their written case (paragraph 45) concede that a quantum meruit award to the respondent would be appropriate if it should be determined that the Chief Justice was wrong in finding there was an agreement for a fixed remuneration and it is held that the respondent did in fact work the hours he said he did.

It will be convenient to refer at this stage to the law. As Lord Fraser of Tullybelton said when delivering the judgment of the Board in *Chow Yee Wah* v. *Choo Ah Pat* [1978] 2 M.L.J. 41, the principles on which an appellate court should act in reviewing the decision of a judge of first instance on a question of fact have been stated frequently in the House of Lords and in this Committee. In *Watt or Thomas* v. *Thomas* (*supra* at p.487), Lord Thankerton said:—

" I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The mere absence of any observations by the judge as to the credibility of the witnesses is no reason for departing from these principles. The judgment of a judge who has heard and seen witnesses and has reached a conclusion or drawn an inference as to the weight of their evidence is entitled to great respect, whether or not he comments on their credibility or says expressly that he prefers one to another: see Lord Sankey L.C., in *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243, at pp.249, 250.

In the present case the Chief Justice heard and saw the witnesses, but made no observations upon their credibility. However, he concluded, and found as a fact, that the parties agreed on a fixed fee (or fees, for three agreements were alleged). Unless, therefore, this case falls within the scope of the third of Lord Thankerton's principles, the Court of Appeal, though disposed, as they clearly were, to come to a different conclusion, would not be justified in setting aside his finding.

The respondent's submission, which succeeded before the Court of Appeal and is now renewed in face of the appellants' challenge before this Board, is that the reasons given by the Chief Justice were not satisfactory and that this unmistakably so appears from the evidence.

Notwithstanding the very able argument of counsel for the appellants, their Lordships accept this submission. Not only were the reasons given by the Chief Justice demonstrably unsatisfactory: but they reveal also a failure by the Chief Justice to understand the nature of the respondent's case.

The Chief Justice had to consider a situation in which, despite many confusions and obscurities, much was clear. The first appellant, Shyben Madi, had been in business as a trader and moneylender for many years. He was joined in his later years by his son, George. In 1971 he was faced with a tax investigation. He enlisted the professional services of the respondent, Mr. Carayol, who after his retirement from the post of Commissioner of Income Tax had established himself as an income tax consultant in Banjul. Mr. Madi initially instructed Mr. Carayol to reconstruct his accounts for the years 1967–1969. He later requested him to prepare accounts for the years 1971–1973 for submission to the tax authorities. This work involved Mr. Carayol in negotiations with the accountants appointed by the tax authority to investigate Mr. Madi's affairs. The Chief Justice found, without doubt correctly,

> " that Mr. Madi's tax affairs involved Mr. Carayol in a great deal of work—and moreover work not normally required to be carried out by accountants."

Final accounts were, however, never completed by Mr. Carayol either for the years 1967–1969 or for the years 1971–1973, or for the period January 1974 to the end of April 1975, when the second appellant, Shyben A. Madi & Sons Ltd., had taken over the first appellant's business. The reason for this failure was a subject of dispute; the appellants alleged that the reason was the respondent's refusal to continue the work unless he was paid more money, while the respondent claimed, and it would seem that the Chief Justice accepted, that the reason was that the appellants were dissatisfied with the profit figure revealed by the respondent's draft accounts. Whatever the reason, the first appellants withdrew their instructions in October or November 1975 before the respondent had completed his work or was in a position to calculate his fee which, according to him, was to be settled having regard to the tax reduction achieved.

The termination of his instructions was followed almost at once by legal action. The appellants consulted solicitors in November or December 1975 and issued their writ on 29th January 1976. The respondent's counsel said, with some justification, that his client was catapulted into litigation. Since, as he saw it, no fee had been agreed because of the premature withdrawal of instructions, he had no option, if his view of the matter was correct, but to counter-claim upon a quantum meruit.

There are clearly inherent improbabilities in the appellants' case that a fee, or fees, were agreed in fixed sums before the scale or the duration of the work to be done was known. " I could not know the volume of work " the respondent said in evidence. And it is to be observed that, even on the appellants' evidence, he was paid more than what, according to them, had been agreed. But their Lordships accept that such improbabilities are not sufficient in themselves to displace the trial judge's finding of fact after hearing and seeing the witnesses. More has to be shown. Can his finding be shown by a study of the evidence or of the reasoning developed in his judgment to be unsatisfactory?

Their Lordships bear in mind that the record of the evidence is not the full evidence in print, *e.g.* a transcript, but the judge's notes of the evidence. If, therefore, the judgment is criticised solely on the ground that the judge was wrong to prefer the Madis' evidence to that of Mr. Carayol, it would not suffice to set aside his finding. But this is not the criticism which is made. The Chief Justice never said in so many words that he found Mr. Shyben Madi and his son George credible witnesses, and Mr. Carayol not credible. His approach was to emphasise the scarcity of contemporary written evidence which could assist him to reach a decision. Clearly he was reluctant to decide the case merely on a preference for one set of witnesses over the other, an understandable reluctance in the circumstances of the case. He gave his reasons for preferring the evidence of the appellants in the following critical passage of his judgment:—

> " No written agreement in respect of fees was entered into and very little in writing is in evidence on the matter, but on 14th January 1974 Mr. Carayol wrote on a Shyben Madi delivery note in his own handwriting the following words and signed them:
>
> ' C. L. Carayol Fees 1973
>
> Balance due Mr. C. L. Carayol as at 14th January 1974 D250.00 (Two hundred and fifty Dalasis)
>
> (Sgd.) C. L. Carayol
> 14.1.74.'

This paper writing is in evidence as Exhibit C and when learned counsel put this to him in cross examination Mr. Carayol said:—

'Exhibit C can only mean that I had given them a chit for my fees for 1973 and this is what was left to come'.

The cheque paid to Mr. Carayol on this date was for D480.00 (No. 002855) and the counterfoil reads:—

'C. L. Carayol Fees for 1973

Accounting
D480.00
Bal. D250.'

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."

The passage, however, contains two major defects, which undermine the reasoning. First, on the evidence, it was not an inescapable conclusion from the terms of the note (Exhibit C) and the cheque counterfoil that the balance of D250 must be the balance of an agreed fee (or fees). It could equally well have been the undrawn balance of permitted, or agreed, annual drawings on account of fees as yet unascertained. In other words, the two notes were as consistent with the respondent's evidence of agreed drawings as with the appellants' evidence of agreed fees. The notes, therefore, afforded no help in determining who was to be believed: and they certainly were no foundation for an "inescapable conclusion" that fees were fixed by agreement in advance of the work being done.

Secondly, the Chief Justice would seem not to have had in mind the respondent's case. Or, if he did have it in mind, he misunderstood it. He appears to have thought that the conflict was between an agreement for fixed fees and an agreement, express or implied, for the respondent to be remunerated "on a time basis". He commented in his judgment shortly after the passage already quoted:—

"Nothing in the documentation would lead one to suppose that fees were to be charged on a time basis."

But the respondent did not suggest that this was the agreement. He claimed a quantum meruit only because the withdrawal of his instructions before he had completed his work deprived him of the opportunity of negotiating a fee in relation to the tax reduction he achieved. In truth, neither party suggested that they had agreed a remuneration on a time basis: the respondent claimed it only because he was prevented, as he saw it, from completing his task.

Their Lordships consider, therefore, that counsel for the respondent was justified in his submission that the Chief Justice failed to isolate, or identify, the true issue between the parties, and that he failed to appreciate the true nature of the counter-claim. This failure led him to treat as conclusive two documents which were, in truth, inconclusive for they were as consistent with the respondent's case of agreed drawings as they were with the appellants' case of fixed fees.

The appellants sought to support their case by seeking leave to introduce at the hearing before the Board fresh evidence. They claimed to have found in the files of the second appellant a letter dated 17th February 1973 addressed to "Messrs. Shyben Madi" for the attention of Mr. George Madi and signed by the respondent. The letter was said to have been

misfiled and to have been discovered by accident. Their Lordships refused to admit the letter. Due diligence should surely have uncovered before trial the letter, which at all times was in the appellants' possession. Their Lordships did, however, read the letter in order to determine whether, if admitted, it was likely to be of critical importance. It proved to have no such importance; it carried the matter no further than "Exhibit C" and the cheque counterfoil. It was as consistent with agreed drawings pending a final settlement (the respondent's case) as with an agreed fixed fee, or fees (the appellants' case). Their Lordships would add this comment. The letter, even if its terms had appeared to be decisive in favour of the appellants, could not in justice have been admitted without giving the respondent an opportunity of explaining in evidence the circumstances in which he came to write it.

In their Lordships' view, therefore, the judgment of the Chief Justice was fatally flawed, and its reasoning in its decisive phase unsound and unsatisfactory. Its defects emerged clearly not only from the state of the evidence which it was his duty to consider but from the pleaded cases of the parties and the internal reasoning of the judgment itself. Perplexed, understandably, by the conflict of evidence and reluctant, also understandably, to decide who was telling the truth in the absence of some confirmation from contemporary documents, he founded his judgment on documents, the effect of which he misunderstood because of his failure to appreciate the nature of the case which by evidence and in argument the respondent was seeking to make. This is a case, therefore, in which "the reasons given by the trial judge are not satisfactory" (Lord Thankerton, *supra*). The matter then became at large for the appellate court. Their Lordships, therefore, answer the first of the two decisive questions in the affirmative. The Court of Appeal was right to set aside the Chief Justice's finding that the parties had agreed specific fees.

Subject to one point, to which their Lordships will later briefly refer, it is conceded that, if the Chief Justice's finding is to be set aside, a quantum meruit award on the counter-claim is appropriate. The respondent's claim of D102,443.75 against the first appellant was based on 2,763 hours worked at D37.50 per hour: his claim against the second appellant was based on 293 hours worked at D40 per hour. He had to give credit for D10,450. In their Lordships' view there was evidence upon which the Court of Appeal could reach a decision. The Court's award of D70,000 against the first appellant and D5,000 against the second appellant was a reasonable assessment in the light of the evidence and of the finding by the Chief Justice that the respondent did a great deal of work. Their Lordships, having concluded that the Court of Appeal acted correctly in treating the case as at large because of the errors of the trial judge, would not disturb the Court's finding, even if, which they are not, they were disposed themselves to take a different view. The answer to the second of the two questions is, therefore, also an affirmative.

Lastly, the appellants did submit that an agreement to remunerate a tax consultant on the basis of the tax reductions he might achieve was illegal. The point does not appear to have made any headway with the Court of Appeal: nor was it pressed at all strongly before the Board. Their Lordships reject it.

For these reasons this appeal will be dismissed with costs.

313008—2 Dd 0074336 70 3/81

In the Privy Council

SHYBEN A. MADI AND ANOTHER

v.

C. L. CARAYOL

DELIVERED BY
LORD SCARMAN

Printed by HER MAJESTY'S STATIONERY OFFICE
1981