(Privy Council Appeal No. 39 of 1980)

British Petroleum Limited – – – – – *Appellant*

v.

Emile Abouritz – – – – – – *Respondent*

FROM:

THE GAMBIA COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY 1982

Present at the Hearing:

LORD DIPLOCK

LORD ELWYN-JONES

LORD RUSSELL OF KILLOWEN

LORD BRIDGE OF HARWICH

LORD BRANDON OF OAKBROOK

[*Delivered by* LORD BRANDON OF OAKBROOK]

This is an appeal against a judgment of the Court of Appeal of the Gambia (Forster, Livesey Luke and Anin JJ.A.) in which British Petroleum Limited (" B.P.") is the appellant and Mr. Emile Abouritz (" Emile ") is the respondent.

By that judgment the Court of Appeal reversed substantially in favour of Emile a judgment given earlier by the Chief Justice of the Gambia (Sir Phillip Bridges) in the Supreme Court in favour of B.P.

The dispute between the parties arises out of a Free Management Reseller Contract (" the contract ") made in 1970 between Emile of the one part and Société des Pétroles B.P. d'Afrique Occidentale (" Occidentale "), apparently as agent or nominee of B.P., of the other part.

The contract related, as its recitals indicate, to a service station for motor vehicles (" the station "), which had previously been built by B.P. at Barra, a river port on the North side of the River Gambia opposite Banjul, and of which B.P. was the owner.

The land on which the station had been built had been leased by the Native Authority of the Lower Niumi District to Emile, who had later sub-leased it to B.P.

Questions arose at the trial about the possibility of the lease and sub-lease being void or voidable because they had not been registered, or their execution had not been witnessed, within the time, or in the manner, required either by their own terms or by the legislation of the Gambia applicable to them.

These questions caused serious concern to the Chief Justice. The Court of Appeal, however, dealt with them on a pragmatic basis, saying, in effect, that the validity of the lease and sub-lease was not, and never had been, in issue between the parties, and that both instruments should accordingly be treated as being of full force and effect. Their Lordships agree with the Court of Appeal on this aspect of the case.

The contract is a lengthy document, the full terms of which are set out in the judgment of the Chief Justice, to which reference can be made if necessary. For present purposes it will be sufficient to state or summarise the effect of those clauses of the contract which bear on the dispute with which the appeal is concerned.

By clause 1.1 the contract was to remain in force for an initial period of 12 months. Thereafter, unless either party gave one month's written notice of termination before the expiry of that initial period, the contract was to continue in force indefinitely, subject to the right of either party to terminate it by giving three months' written notice to the other.

By clause 2.1 B.P. was to supply and instal at the station, at its own expense, all equipment necessary for the effective operation of the station. By clause 2.2 B.P. was to deliver petroleum products to Emile from its depots at Bathurst through its agent, the Gambia Milling and Trading Co. (" G.M.T.").

By clause 3.1 Emile was to operate the station throughout each day and, if B.P. considered it necessary, during the night also. By clause 3.2 Emile was to buy all the products required for sale at the station from B.P. or its agent and not from anyone else. By clause 3.3 Emile was to pay for all the products purchased from B.P.'s agent, G.M.T., following the terms of payment agreed between Emile and such agent. By clause 3.19 Emile was to maintain at all times sufficient stocks of petroleum products to meet the requirements of all customers during the normal hours of operation, or such stocks as B.P. should in its discretion consider adequate to ensure the proper development of the station. By clause 3.21 Emile was punctually to make true, proper and correct entries of all his transactions in books of account as required by B.P., and such books were to be available for inspection by B.P. or its agents at all reasonable times.

By clause 6 B.P. was to be entitled to terminate the contract forthwith on written notice to Emile in a number of specified events. These included, first, any breach or non-performance by Emile of any of the terms of the contract; and, secondly, dissatisfaction of B.P. with the way in which the station was operated.

By Clause 7, on the termination of the contract, Emile was to vacate the station within 48 hours of receipt of notice of such termination from B.P., and, if he failed to do so, he was to pay to B.P. £500 (equivalent to D2,500) by way of liquidated damages for such failure.

The contract appears to have been operated with reasonable success by the parties to it from 1970 to 1973. During 1974, however, a dispute arose in which B.P. alleged, and Emile denied, that he was seriously in

arrears with his payments for petroleum products supplied to him by B.P.'s agent. On the ground of these alleged arrears B.P. refused to supply any further products to Emile, as a result of which Emile, from some time in or about December 1974, ceased to operate the station.

On 16th January 1975 B.P.'s solicitor, Mr. Drameh, of Banjul, sent to Emile a notice requiring him to quit and deliver up the station to B.P. on 18th January 1975 in accordance with the contract which he had contravened by leaving the station closed for at least one month. Emile did not comply with that notice.

On 24th January 1975 B.P. and Occidentale as co-plaintiffs began two actions against Emile in the Supreme Court. The joinder of Occidentale as co-plaintiff is of no significance and need not be referred to again.

By its statement of claim in the first action B.P. claimed D21,029 for petroleum products supplied for which it was alleged no payment had been made. Later, in response to a request for further and better particulars of the statement of claim, B.P. set out in a schedule a list of deliveries the prices of which totalled D21,129, D100 more than the amount specified in the statement of claim itself. That list contained 16 items of petroleum products supplied during the period from 26th August to 13th December 1974.

By its statement of claim in the second action, as finally amended, B.P. claimed, on the ground of breaches of the contract by Emile, (1) possession of the station, (2) liquidated damages of D2,500, and (3) further damages for loss of profit or use at the rate of D28,676·20 per year.

By his defence and counterclaim in the first action Emile denied that he owed D21,029 or any sum to B.P. for petroleum products supplied to him, and alleged instead that he had overpaid B.P. D90,925·83 which he sought to recover by counterclaim. He also raised certain other issues which are not now material.

By his defence and counterclaim in the second action Emile denied any breach of the contract by him, and alleged instead repudiatory breaches of the contract by B.P., accepted as such by him. On this basis he counterclaimed a declaration that the contract was at an end, and an unspecified amount of damages for breaches of it.

By its defences to counterclaim in each action B.P. denied Emile's right to succeed on either of his counterclaims.

On 9th January 1976 the Chief Justice made a consent order consolidating the two actions, and the trial of the consolidated action was then immediately begun before him. The trial occupied some 10 days between 9th January and 29th June 1976.

B.P. called as its principal witness Mr. Momodou Babucar N'Jie ("N'Jie"), who was its manager in the Gambia. He stated in examination-in-chief that B.P. was claiming D21,029 in respect of petroleum products supplied to Emile for which he had not paid. In support of that claim he produced a series of documents, including the following. (1) A photocopy of a statement of account for the period from 26th August to 13th December 1974. This was in fact the same document as had been delivered earlier by B.P. as further and better particulars of its statement of claim. (2) A summary of deliveries for which payment had not been made, containing substantially the same figures as those contained in document (1). (3) A file containing delivery notes, invoices and monthly clients' advices for

the period August to December 1974. (4) A list of total receipts from Emile in 1974. (5) A file containing statements of account, invoices, delivery notes and letters relating to the whole period from January to December 1974.

In cross-examination N'Jie said that at the end of each month clients such as Emile were sent statements showing how much money was owing by them to B.P. for that month. Emile never paid regularly in response to such statements.

In re-examination N'Jie repeated that bills were sent at the end of each month. He also said that invoices were raised on the delivery notes.

For the defence Emile called first his brother, Mr. Farid Abouritz (" Farid "). He said in examination-in-chief that he operated Emile's business as well as his own, a Texaco service station next door. B.P. supplied petrol and he and Emile paid by cheques. From 1970 up to date they had received no statement of account from B.P.

In cross-examination Farid said that he kept no books. It was B.P. who owed money to Emile, not the other way round.

Emile then gave evidence himself. He said in examination-in-chief that he had been in the petrol business from 1970 to 1974. He had received petrol and paid against invoices. He was claiming reimbursement of D90,925·83 overpaid.

In cross-examination he said that all his cheque counterfoils were with his accountant. He had only the cheques as his accounting system. He had overpaid B.P. between January and December 1974.

In re-examination he said that he had never paid in advance for petrol which had not arrived.

Later an accountant, Mr. Louis Lucien Thomassi (" Thomassi ") was called for Emile, after an adjournment of the trial to enable Thomassi to study all the documents which had been put in evidence by B.P. He said in examination-in-chief that the documents showed that the total debits in the year January to December 1974 came to D79,106·25, while the total amount of the cheques paid by Emile to B.P. during the same period came to D107,816·83. B.P. therefore owed Emile D28,710·58.

Thomassi's figures were challenged in cross-examination but he maintained that they were correct.

On 6th April 1977 the Chief Justice delivered a reserved judgment in favour of B.P. By that judgment he awarded B.P. D21,129, as claimed in the further and better particulars of the statement of claim in the first action; possession of the station, together with liquidated damages of D2,500, as claimed in the second action; and costs.

In his judgment the Chief Justice stated that he regretted to have to say that the attitude of the Abouritz brothers throughout the case had not appeared to him to have been motivated by any desire to help the Court to arrive at the truth. In relation to B.P.'s claim in debt he said that the system of supply and billing was by monthly statements, and a running account with balances carried over was not sent because that had not been the method used in this case. He accepted that total payments by Emile during the relevant period, which was 1974, amounted to D107,819·93. But he was satisfied that Emile still owed B.P. D21,129 as claimed.

After dealing with the problems relating to the validity of Emile's head lease and B.P.'s sub-lease referred to earlier, the Chief Justice concluded, with what he admitted was some reluctance, that if B.P. did not wish Emile to remain at the station, it was entitled to an order for possession against him.

The Chief Justice then addressed himself to Emile's counterclaim for D90,925·83. He pointed out that a counterclaim for that amount was not supported by Thomassi's evidence, according to which the sum overpaid was D28,710·58. He went on to say that, in order to come to a decision on the alleged overpayment of D28,710·58 spoken to by Thomassi, it had been necessary for him to look into all the figures in all the documents in evidence as an accountant might do, although he confessed that he was no expert with figures.

The Chief Justice then referred in detail to what he regarded as the vital documents in the case. Having done so, he stated his conclusion that he could not find on the evidence that there had been any short delivery or breach of contract by B.P., and that the counterclaims in both actions should be dismissed.

Then, in the penultimate paragraph of his judgment, the Chief Justice said that there would be judgment for B.P. in the terms set out earlier.

Emile appealed against the whole of the Chief Justice's judgment to the Court of Appeal. On 22nd November 1978 that Court, consisting of the three Judges of Appeal mentioned earlier, made the following interlocutory order:

> "Under Order XXXVII rules 1–2 Rules of the Supreme Court Sch. II, it is ordered that the accounts of the various transactions between the parties be enquired into by the Master together with issues raised in the pleadings.
>
> "It is further Ordered that counsel file detail accounts and all relevant documents within fourteen days and that parties and/or their counsel do attend during the Inquiry before the Master, as and when summoned.
>
> "The Master to transmit to this Court records of the proceedings and his report on the points referred for his investigations within three months of the date hereof."

The Master held an inquiry in accordance with that order during five days between 6th and 17th February 1979 and made his report on 20th February 1979.

In the first paragraph of his report the Master said that the relevant accounts had been gone into and commented on, and that the contention of counsel for B.P. that he relied on the accounts and documents already submitted could not be faulted.

Further on in his report the Master, in connection with the cross-claims in debt, said:—

> "(1) It is to be observed that Abouritz in his submission tried to isolate the year 1974 transactions from those of previous years. Since a relationship existed between the two in the years before 1974, any transactions during those years remaining outstanding in 1974 must necessarily form part of the total outstandings for that year.
>
> (2) The payments made by Abouritz in 1974 include settlements of previous invoices carrying various dates in 1973. A complete list

is attached as annexure 1. The implication is that supplies were delivered to Abouritz before 1974, but he only paid for those supplies during the year 1974.

(3) At annexure 2 is a list of invoices for supplies delivered and paid for in 1974, but omitted from Exhibit ' L '. The result is that the total value of deliveries to Abouritz during 1974 is understated by the value of the 12 invoices listed in the annexure.

(4) The claim by Abouritz of an overpayment in 1974 therefore has no basis, since i.e. (*sic.*)

(i) Earlier supplies unpaid for before 1974.

(ii) Supplies during 1974, not included in his record of supplies.

He can only rely on not receiving deliveries, or evidence of settlement of invoices in Exhibit ' A '.

The conclusion that must be arrived at, therefore, is that the claim of B.P. for D21,129·00 must stand.

There is no basis or justification for the counterclaim."

It will be observed that, in this passage of his report, the Master referred to two annexures numbered 1 and 2 respectively. Annexure 1 contains a list of invoices for supplies delivered to Emile prior to 1974, which remained outstanding at the beginning of 1974, but were paid for during the course of that year. The total amount of those invoices is D24,610·97. Annexure 2 contains a list of invoices for supplies delivered to Emile and paid for during 1974 but omitted from exhibit ' L '. The total of these invoices is D8,130·90. Exhibit ' L ' referred to in the passage from the Master's report set out above, and again in annexure 2, was a list of deliveries and payments for the period 12th January to 13th December 1974 put in evidence before the Master on Emile's behalf.

Earlier in his report the Master had said, in connection with B.P.'s claim for possession of the station, that there was no doubt that B.P., by its solicitor's notice of 16th January 1975 addressed to Emile, had terminated the contract.

It is to be presumed that the record of the proceedings before the Master and his report were duly transmitted to the Court of Appeal. It is further to be presumed that this new material, for which the Court of Appeal itself had asked, was fully before it when the hearing of the appeal was continued.

On 15th November 1979, in a judgment delivered by Livesey Luke J.A., with whom the other two members of the Court of Appeal agreed, Emile's appeal was substantially allowed. The order made by the Court of Appeal was to the following effect: (i) that the appeal be allowed and the orders of the court below, except that relating to possession, be set aside; (ii) that B.P.'s claim for D21,029 be dismissed; (iii) that B.P. should pay to Emile the sum of D11,308·58 being the total amount of monies paid by Emile for goods not supplied; (iv) that B.P. should pay to Emile the sum of D42,000 by way of general damages for breach of contract; (v) that the contract be rescinded; (vi) that B.P. should pay Emile's costs of both the suits and counterclaims in the court below and his costs of the appeal and of all proceedings incidental thereto.

B.P. now appeals to this Board, asking that the decision of the Court of Appeal be set aside and that the judgment of the Chief Justice in the Supreme Court be restored.

It appears from the judgment of Livesey Luke J.A., with whom Forster and Anin JJ.A. agreed, that there are two reasons why he reached the conclusion on the state of the accounts between the parties which he did reach, namely, that instead of Emile owing B.P. D21,129 as found by the Chief Justice, B.P. owed Emile D11,308·58.

The first reason is that Livesey Luke J.A. considered that B.P., on which he rightly said that the burden of proof of delivery lay, had failed altogether to discharge that burden, because no witness had been called to prove deliveries, and, although delivery notes had been put in evidence, they did not by themselves constitute evidence of delivery. On that basis the only deliveries by B.P. which could be regarded as having been proved were those which Emile, in the documents put in evidence on his behalf, had expressly admitted receiving.

The second reason is that, although the Court of Appeal had itself earlier referred all questions of account between B.P. and Emile to the Master for inquiry and report, and the Master had duly made a report in the terms set out or summarised above, Livesey Luke J.A. paid no regard whatever in his judgment to the reasoning and conclusions of the Master in that report.

Their Lordships are in no doubt whatever that Livesey Luke J.A., and the other two members of the Court of Appeal who agreed with him, were in error in relation to both these matters.

First, with regard to the delivery notes, it is their Lordships' view that, having regard to the way in which the parties conducted their business, the delivery notes put in evidence for B.P. constituted *prima facie* evidence that the products referred to in them had been delivered. That *prima facie* evidence might have been rebutted by Emile, but it is clear that he had no records of his own which could enable him to do so. The Chief Justice and the Master plainly treated the delivery notes in that way, and their Lordships consider that they were right to do so.

Secondly, with regard to the omission to pay any regard to the reasoning and conclusions contained in the Master's report, their Lordships feel bound to say that they can see no justification for that omission. The Master had, pursuant to the Court of Appeal's own order, conducted an elaborate inquiry, with all the relevant documents before him, into the state of accounts between the parties. In doing so, he was re-treading the same path as the Chief Justice, albeit with some diffidence on the ground of lack of expertise about figures, had trodden before him. Having done all this, the Master had independently arrived at the same conclusions as the Chief Justice, namely, that Emile owed B.P. D21,129, and that there was no basis for his counterclaim at all.

In their Lordships' view, the Court of Appeal, having referred the whole question of the state of accounts between the parties to the Master, and having received his report on that question, should have accepted and acted on the conclusions contained in it, unless there was material to show that those conclusions, which accorded with those reached by the Chief Justice at first instance, were wrong. In their Lordships' view, there was no such material, and there is nothing in the judgment of Livesey Luke J.A. to show that he had any reason, apart from what their Lordships regard as his mistaken view that the delivery notes were not even *prima facie* evidence of delivery, for concluding that there was.

In the opinion of their Lordships, the two errors in the judgment of Livesey Luke J.A. referred to above entirely undermine the reasoning on

which that judgment is based, not only in relation to the cross-claims in debt, but also in relation to the further question whether it was B.P. or Emile who brought the contract to an end.

So far as the cross-claims in debt are concerned, there are two further matters to which their Lordships think it right to draw attention.

The first matter is the succession of changes in the amount of Emile's counterclaim in respect of overpayment for supplies not received. In his pleading the amount was D90,925·83. At the trial his accountant, Thomassi, gave evidence that the amount was D28,710·58. In the Court of Appeal Emile obtained a finding that it was D11,308·58. With these successive changes in mind, it is not difficult to understand why the Chief Justice stated in his judgment that the attitude of the Abouritz brothers throughout the case had not appeared to him to have been motivated by any desire to help the Court arrive at the truth.

The second matter arises out of the two annexures attached to the Master's report. As indicated earlier, annexure 1 contains a list of invoices for supplies delivered to Emile prior to 1974, which remained outstanding at the beginning of 1974, but were paid for during that year; and annexure 2 contains a list of invoices for supplies delivered to Emile and paid for during 1974, but omitted from exhibit 'L', the list of deliveries and payments for the period 12th January to 13th December 1974 put in evidence before the Master on Emile's behalf.

The total in annexure 1 is D24,610·97 and that in annexure 2 D8,130·90. The sum of these two totals is D32,741·87. If this amount is set against the figure of D11,308·58, which the Court of Appeal found was owed by B.P. to Emile, one arrives at an amount of D21,433·29 owed by Emile to B.P. This figure does not differ greatly from the figure of D21,129 which both the Chief Justice and the Master found to be so owing.

For the reasons which have been given their Lordships are of opinion that the Court of Appeal was in error in deciding that B.P. owed Emile D11,308.58, and that it should have upheld the conclusion of the Chief Justice, reinforced by that of the Master, that Emile owed B.P. D21,129.

It remains to consider the further questions which party, if either, lawfully brought the contract to an end, and what damages, if any, for breach of the contract either party is entitled to recover from the other.

Emile's case was that B.P. repudiated the contract by cutting off supplies to him in November 1974. B.P.'s case in the Supreme Court, and presumably also in the Court of Appeal, was that it had terminated the contract by the notice to quit the station sent to Emile by B.P.'s solicitor on 16th January 1975.

In their Lordships' view neither of these cases can be sustained. So far as B.P. is concerned, clause 6 of the contract gave it a power to terminate the contract forthwith in certain events, including any breach by Emile of any of its terms. Clause 7 then provided that, on termination of the contract by B.P., Emile should vacate the station within 48 hours, and that, if he failed to do so, he should pay £500 (D2,500) to B.P. by way of liquidated damages.

The notice given by B.P.'s solicitor on 16th January 1975, however, was not a notice of termination of the contract under clause 6. It was instead a notice to quit the station, for which the contract made no provision. It follows that B.P. cannot rely on that notice as bringing the contract to an end on its behalf.

So far as Emile is concerned, the cutting off of supplies by B.P. was caused by his persistent failure to pay for the petroleum products which B.P. had previously delivered to him. That failure was, in their Lordships' view, a clear breach of Emile's obligations under clause 3.3 of the contract. Livesey Luke J.A. in the Court of Appeal held that no such breach had in any case been proved, because clause 3.3 only obliged Emile to pay for products purchased following terms of payment agreed between him and G.M.T., and B.P. had not proved the making between Emile and its agents, G.M.T., of any agreement on such terms.

In their Lordships' view, Livesey Luke J.A. was in error in forming that opinion with regard to the effect of clause 3.3 in the events which had occurred. As indicated earlier, the contract had been operated reasonably successfully from 1970 to 1973, and it is a necessary inference from that fact that terms of payment had at some much earlier stage been agreed between Emile and G.M.T.

Their Lordships are further of the opinion that, having regard to the long continuation of Emile's breach of clause 3.3, that breach was of such a serious character as to amount to a repudiation of the contract by him. That repudiation was accepted by B.P. by its refusal to supply any more products to him.

For these reasons their Lordships' view is that it was B.P., and not Emile, who lawfully brought the contract to an end.

The Chief Justice awarded B.P. D2,500 by way of liquidated damages for failure to quit the station under clause 7 of the contract. In their Lordships' view, however, B.P. was not entitled to such damages. Clause 7 of the contract is closely linked with clause 6. The provision for the payment of £500 (D2,500) by way of liquidated damages contained in clause 7 only applies when the dealer (in this case Emile), having been served with a notice of termination of the contract under clause 6, fails to quit within 48 hours of receipt of such notice. As has already been pointed out, however, the notice to quit sent to Emile by B.P.'s solicitor on 16th January 1975 was not a notice of termination of the contract under clause 6. It follows that the provision for the payment of liquidated damages under clause 7 did not apply in the present case.

There is no issue between the parties with regard to the order for possession of the station made by the Chief Justice and left to stand by the Court of Appeal.

With regard to the other issues in the case, their Lordships are of the opinion, for the reasons which they have given, that the appeal should be allowed, that the judgment of the Court of Appeal should be wholly set aside, and that the judgment of the Chief Justice in the Supreme Court, save in so far as it awards to B.P. D2,500 by way of liquidated damages, should be restored. Emile must pay B.P. its costs of the appeal to this Board and also its costs in the Court of Appeal.

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In the Privy Council

BRITISH PETROLEUM LIMITED

v.

EMILE ABOURITZ

DELIVERED BY
LORD BRANDON OF OAKBROOK

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