

PC
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Judgment
34/1964

IN THE PRIVY COUNCIL

No.8 of 1964

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF NIGERIA
(ADMIRALTY JURISDICTION)

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

78633

B E T W E E N

BANQUE GENEVOISE DE COMMERCE
ET DE CREDIT (Plaintiffs) APPELLANTS

- and -

10 COMPANIA MARITIMA DE ISOLA SPETSAI
LIMITADA (THE OWNERS OF THE
STEAMSHIP OR VESSEL "SPETSAI
PATRIOT") (Defendants) RESPONDENTS

CASE FOR THE APPELLANTS

Record

1. This is an appeal brought by leave of the Federal Supreme Court of Nigeria against a judgment of that Court dated the 7th November 1962 dismissing with costs an action in rem brought by the Appellants against the Respondents' steamship or vessel SPETSAI PATRIOT and ordering the immediate release of the SPETSAI PATRIOT from arrest.

Part I pp. 103-4
Part I pp. 99-100

2. The nature of this case may be shortly summarised as follows: The Appellants claimed the sum of £380,627 due and payable under a registered mortgage on the ship SPETSAI PATRIOT, dated the 22nd July 1958. The Respondents admitted the execution of the mortgage and conceded that the principal sum secured had not been repaid, but claimed that an agreement in the French language subsequently made on the 26th October 1961 was a novation of the said mortgage or had rescinded or revoked the said mortgage.

Part II pp. 104-124
Part II pp. 128-136

Part I pp. 86-99

The Appellants admitted the subsequent agreement, but denied that its terms cancelled the mortgage or deprived them of their rights under the mortgage. Alternatively, they claimed that the Respondents had repudiated the subsequent agreement by their breaches, and that in those circumstances it was no bar to their action. In addition it was argued on their behalf that if the effect of the agreement was to limit the Respondents' obligation under the mortgage to £50,000, the Appellants were entitled to judgment for that sum. The Federal Supreme Court held that the subsequent agreement, and the Respondents' part performance of that agreement, provided an accord and satisfaction which amounted to a binding compromise of all claims then existing (including the Respondents' obligations to the Appellants under the mortgage) and that although the mortgage remained in force, the Appellants could not do anything inconsistent with the terms of the agreement to enforce their rights under the mortgage. They also held that whatever breaches of that agreement the Respondents might have been guilty of, the Appellants could not claim to treat the agreement as cancelled. Further, the Appellants were not entitled to judgment for £50,000 because by the terms of the agreement, that sum was not due and payable under the mortgage at the time when the action was brought.

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3. The principal questions, therefore, that arise on this appeal amongst others are as follows:- 30

- (i) upon its true construction, what was the effect of the agreement dated the 26th October 1961 upon the deed of mortgage dated the 22nd July 1958 which at all material times was duly registered in accordance with the law of the flag?
- (ii) did that agreement, expressly or by implication, conditionally or unconditionally, rescind, revoke or cancel the mortgage, and discharge the Respondents from their obligations under it, and debar the Appellants' claims? 40
- (iii) did the terms of that agreement leave the mortgage subsisting, and if so, to what effect?
- (iv) did that agreement on its true construction amount to an accord and satisfaction?

(v) did the Appellants accept (a) the performance of the Respondents' obligations under the said agreement, or (b) the Respondents' promise to perform their obligations, as the satisfaction for the accord?

(vi) was satisfaction provided for the accord?

10 (vii) did the accord and satisfaction become inoperative by reason of the Respondents' act or default?

(viii) did the Respondents by their subsequent breaches repudiate the agreement and entitle the Appellants to treat it as discharged?

(ix) if so, were the Appellants' rights under the mortgage in consequence restored in full?

20 (x) alternatively, if the effect of the agreement was to limit the Respondents' obligations under the said mortgage to £50,000, were the Appellants entitled to judgment for that sum by reason of the fact that the Respondents were in breach of Sections 4, 5 and 11 of the mortgage and had, in the premises, imperilled the Appellants' security?

The original agreement dated the 26th October 1961 is in the French language but was produced and admitted in evidence before the Federal Supreme Court without objection together with a translation into English. It appears as Exhibit 6 in Part II of the Record of Proceedings. The Appellants will refer to the original text of the agreement for its full and complete terms, and for its effect.

Part II pp. 128-136

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Part II pp. 136-143

40 4. The Appellants are a corporate body registered under the laws of Switzerland, and they carry on business as bankers in Geneva. The steamship or vessel SPETSAI PATRIOT was, at all material times, registered in the port of Monrovia in accordance with the laws of Liberia. The Respondents are a corporate body registered in Costa Rica, and are the Owners of the SPETSAI PATRIOT.

5. On the 22nd July 1958, the Respondents by their Attorney-in-fact executed a deed of mortgage upon the SPETSAI PATRIOT in favour of the Appellants as mortgagees to secure the repayment by

Part II pp. 104-124

Record

Part II pp. 106-7 the Respondents to the Appellants of the principal sum of £292,790 together with interest thereon at the annual rate of 6½ per cent and a banking charge at the annual rate of 1 per cent. By the said mortgage, the Respondents granted conveyed mortgaged pledged set over and confirmed to the Appellants the whole of the SPETSAI PATRIOT and all her appurtenances to have and to hold the same upon the terms therein set out for the enforcement of the repayment of the said sums and to secure the performance of and compliance with the covenants terms and conditions therein contained, provided only that upon payment by the Respondents of the said principal sum interest and banking charge and of all other secured sums in the manner therein provided, the mortgage and the rights thereunder should cease determine and be void otherwise they should be and remain in full force and effect. 10

Part II pp.105,108 6. Further, the Respondents by the said mortgage covenanted and agreed to repay the principal sum of £292,790 by the following instalments: 20

on the 15th August 1958	£40,000
on the 15th November 1958	£60,000
on the 15th February 1959	£60,000
on the 15th May 1959	£60,000
on the 15th August 1959	£60,000
on the 15th November 1959	£12,790

and to pay interest at the said rate of 6½ per centum per annum and a banking charge at the said rate of 1 per centum per annum on the 15th August, 15th November, 15th February and 15th May in each year. It was further agreed by the Respondents that upon default in the payment of any one of the said instalments of principal interest and banking charge, the remaining instalments of the principal sum should immediately become due and payable without notice together with interest and banking charge at the said rates. 30

Part II p. 108 7. Moreover, by Section 4 of the said mortgage, the Respondents covenanted at their own expense to comply with and satisfy all of the provisions of the Liberian Maritime Code as amended in order to establish and maintain the mortgage as a First Preferred Mortgage thereunder upon the SPETSAI PATRIOT. By Section 5 of the said mortgage the Respondents covenanted not to cause or permit the SPETSAI PATRIOT to be operated in any manner contrary to law, and further, not to do or suffer or permit to be done anything which could or might 40

Part II pp.108-9 or permit to be done anything which could or might

injuriously affect the registration or enrolment of the vessel under the laws and regulations of Liberia and to keep the vessel duly documented thereunder. By Section 11 of the said mortgage, the Respondents covenanted to maintain and preserve the SPETSAI PATRIOT in good running order and repair and in every respect seaworthy and in good operating condition, and to keep the vessel in such condition as to entitle her to the highest classification and rating for vessels of the same age and type in Lloyd's Register of Shipping or other classification of like standing, and at all times to comply with all applicable Liberian laws, treaties and conventions and rules and regulations issued thereunder and to have on board the vessel as and when required thereby valid certificates showing compliance therewith. By Section 21 of the said mortgage, it was agreed that in the event of a default in the due and punctual observance and performance of any provision of (inter alia) Sections 4, 5 or 11, the Appellants should be entitled to declare due and payable all of the principal sum secured and the accrued interest and banking charge, and exercise all of the rights and remedies in foreclosure and otherwise given to mortgagees by the provisions of law, and bring suit at law in equity or admiralty for all amounts due and collect the same out of the Respondents' property.

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Part II p. 110

Part II pp.114-117

Part II pp.104-124

Part II p. 124

Part II p. 125 and separate document

8. The said mortgage deed, together with documentary evidence of its due execution by the Attorney-in-fact of the Respondents, was produced and proved before the Federal Supreme Court and appears as Exhibit 4 in Part II of the Record of Proceedings. The Appellants will refer to the same for its full and complete terms and for their effect.

9. On the 4th August 1958, the said mortgage was duly registered with the Commissioner of Maritime Affairs for the Republic of Liberia and recorded by him as a preferred mortgage in accordance with Chapter 3 of the Liberian Maritime Law (Title 22 of the Liberian Code of Laws of 1956 as amended). A certified copy of the Liberian Maritime Law was admitted and produced before the Federal Supreme Court and appears as Exhibit 5 in Part II of the Record of Proceedings. The Appellants will refer to it for its full and complete terms, and their effect. Ever since, the said mortgage has remained duly registered and recorded as aforesaid, and no formal cancellation or release of the said mortgage, or reconveyance of the SPETSAI PATRIOT has been

Record

executed by or on behalf of the Appellants, or registered with the Liberian Commissioner.

10. The Respondents have failed to pay to the Appellants any of the instalments of the principal sum secured by the said mortgage, and further, have failed to pay to the Appellants any sums by way of interest or banking charge as provided by the said mortgage.

11. On the 21st June 1962, the Appellants received a letter dated the 18th June 1962 from the office of the Deputy Commissioner of Maritime Affairs for the Republic of Liberia informing them, as mortgagees on the record, that because of constant disregard to Liberian laws and regulations, the registered owners of the SPETSAI PATRIOT had been notified that the vessel would be stricken from Liberian Registry unless all outstanding items were taken care of before the 30th June 1962. This letter appears as Exhibit 8 in Part II of the Record of Proceedings.

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Part II pp.147-8

Part I p. 1-2

12. On the 30th June 1962, the Appellants caused to be issued an Admiralty writ in rem out of the Federal Supreme Court of Nigeria against the Respondents as Owners of the steamship or vessel SPETSAI PATRIOT claiming, as mortgagees of the said vessel, the sum of £292,790 together with interest thereon due and payable under the mortgage dated the 22nd July 1958. On the same day, the Admiralty Marshal, acting under a Warrant of the said Court, arrested the SPETSAI PATRIOT which was then lying in Lagos Harbour within the jurisdiction of the Federal Supreme Court.

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Part III No.3
(not reproduced)

Part I pp. 13-14

13. On the 5th July 1962, the Appellants' solicitor and appointed attorney was ordered to enter into a bond on his own recognisance in the sum of £5,000 within 5 days. The said order was duly complied with, and the bond was lodged with the Court on the 10th July 1962.

14. On the 12th July 1962, there being no appearance to the writ, the Plaintiffs filed with the Court a Statement of Claim which recited the deed of mortgage dated the 22nd July 1962 and its due registration with the Commissioner of Maritime Affairs for the Republic of Liberia, and alleged that no part of the loan of £292,790 had been repaid nor any sum by way of interest or banking charge, and claimed that there was due and owing to

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Part I pp. 19-21

the Appellants the following sums:-

(i)	Principal loan	£292,790. 0. 0
(ii)	4 years' interest at $6\frac{1}{2}\%$ p.a.	76,125. 8. 0
(iii)	4 years' bank charge at 1% p.a.	<u>11,711.12. 0</u>
		<u>£380,627. 0. 0</u>

10 It was further alleged that by reason of the contents of the letter received by the Appellants from the office of the Deputy Commissioner of Maritime Affairs for the Republic of Liberia the Respondents, in breach of their covenants under the mortgage, had failed and neglected to maintain the SPETSAI PATRIOT in such manner as to comply with all applicable Liberian laws treaties and conventions and rules and regulations, and that the Appellants' security was thereby imperilled.

20 15. On the 16th July 1962, the Plaintiffs called two witnesses before the Court to prove their claim. On the 25th July 1962, the Appellants filed a Certificate of Non-appearance, and upon their motion, the Court entered judgment for £380,627 with costs assessed at £2,500 against the Respondents, and ordered the appraisal and sale of the SPETSAI PATRIOT not earlier than the 31st August 1962.

Part I pp. 22-25

Part I pp. 26-27
Part I pp. 27-28
Part I p. 29
Part I p. 30

30 16. Later that day, the Respondents caused an Appearance to be entered on their behalf, and on the 15th August 1962 moved the Court to set aside the judgment obtained by the Appellants in default of appearance. An affidavit by the Respondents' managing director Constantin Petroutsis was filed in support of the motion, putting forward an explanation of his failure to appear, and claiming that the Respondents had a good defence to the action. He stated that an agreement dated the 26th October 1961 (of which certain parts were exhibited to his affidavit) was a novation of the deed of mortgage relied upon by the Appellants, and that the Respondents' liability in respect of the SPETSAI PATRIOT was limited to £50,000 payable by instalments that were not then due. An affidavit by Marcel Dubuis was thereafter filed on behalf of the Appellants (exhibiting the complete text of the agreement dated the 26th October 1961) setting out the circumstances in which the agreement had been made, alleging the Respondents'

Part I p. 31
Part I pp. 51-55

Part I pp. 32-35

Part I pp. 38-41

Part I pp. 47-51

Part II pp. 128-143

Record

Part I pp. 55-58
Part I pp. 58-59

repudiation of the agreement by their failure to carry out its terms, and contending that the Appellants were, in the circumstances, entitled to enforce their rights under the existing registered mortgage. On the 24th August 1962, the Federal Supreme Court allowed the Respondents' motion, set aside the judgment entered on the 25th July 1962, ordered a rehearing of the action after delivery of pleadings, and the payment by the Respondents of the Appellants' costs which they assessed at £1,500. 10

Part I pp. 61-63
Part I pp. 19-21
Part I pp. 63-66
Part II pp. 104-124
Part II pp. 128-143

17. Shortly after, the Appellants delivered to the Respondents the Statement of Claim which had been filed with the Court on the 12th July 1962, and on the 7th September 1962, the Respondents delivered a Statement of Defence. By its terms, they admitted the execution of the mortgage, but alleged that it had been rescinded or revoked by the agreement dated the 26th October 1961 which was a novation of the mortgage. They denied that any sum of money was due to the Appellants. They further alleged that the liability of the Respondents in respect of the SPETSAI PATRIOT was £50,000 payable by instalments which were not yet due. That liability was conditioned by the inability of the Appellants to realise other assets made available to them by the Respondents, and £40,000 had already been received by the Appellants from the sale of the SPETSAI GLORY. They further alleged that the relationship between the parties had been governed since the 26th October 1961 by the agreement made that day, and that its terms had been complied with. They further denied that they had failed or neglected to maintain the SPETSAI PATRIOT to the requirements of the Liberian registry, or that the Appellants' interest in the ship (which interest was denied) had been imperilled. They claimed that the Deputy Commissioner of Maritime Affairs for the Republic of Liberia had extended their time for compliance with some formalities for the retention of Liberian registration until the 16th September 1962, and that the Appellants' action in having the ship arrested had prevented them from taking the necessary action. 20 30 40

Part I pp. 66-68
Part II pp. 128-143
Part II pp. 104-124

18. By their Statement of Reply dated the 12th September 1962, the Appellants joined issue with the Respondents upon their defence. They admitted the agreement of the 26th October 1961, but denied that the deed of mortgage was thereby rescinded or revoked. They claimed that it was never the intention of the parties to that 50

10 agreement that the Appellants should at any time
be deprived of the security of the mortgage unless
or until another mortgage of the SPETSAI PATRIOT
was executed in substitution by the Respondents,
and that no such mortgage or other security had ever
been executed. Nor had any reconveyance or release
of the Appellants' mortgage ever been signed
executed or registered. They contended that the
Respondents had failed to effect any transfer of
20 the said mortgage as required by the said agreement,
had failed to make any fresh mortgage, and had
wilfully failed and refused to perform any of their
obligations under the said agreement, and that the
said mortgage had remained subsisting and in full
force and effect. In consequence of the Respondents'
wilful failure and refusal as aforesaid and the
peril to their security as alleged in the Statement
of Claim, the Appellants had elected to treat the
said agreement as at an end, and were entitled to
and exercised their rights under the said mortgage
notwithstanding the said agreement.

19. In those circumstances, the action came on for
hearing before the Federal Supreme Court (Sir
Adetokunbo Ademola C.J. and Sir Lionel Brett, John
Idowu Conrad Taylor, Sir Vahe Robert Bairamian, JJ.)
on the 18th, 19th, 22nd and the 25th September 1962
when judgment was reserved.

Part I pp. 69-86

30 20. The Appellants called one witness, Marcel
Dubuis, a director of their bank. He gave evidence
of the cash advances made to the Respondents and
the mortgage deed which secured them. He produced
the deed (Exhibit 4) and a copy of the Liberian
Maritime Law (Exhibit 5) which were admitted in
evidence without objection. He stated that the
mortgage had been registered in Liberia, that no
part of the sum secured by the mortgage had been
repaid, nor had the Respondents paid any sums by way
of interest. There had been no reconveyance or release
of the mortgage. He referred to disputes that had
40 arisen between the Appellants and the Respondents
in 1959 and 1961, and to an agreement which had
been reached between these and other parties on
the 26th October 1961. He produced a certified
copy of the agreement together with a translation
of the original French text into English (Exhibit
6). These were admitted in evidence without
objection. He identified the second party to the
agreement Spetsai Island Shipping Company as a
company belonging to the Appellants. The third
50 party American Trading Company S.A. was a foreign
company who were brought into the agreement because
they would have taken the place of the Appellants

Part I pp. 69-76

Part II pp.104-124
Part II p.125 and
separate document

Part II pp.128-143

Record

as mortgagees of the SPETSAI PATRIOT if the mortgage had been transferred, and would have paid the sum of £50,000 to the Appellants in consideration of the transfer. He also produced a letter written by Mr. Petroutsis together with a translation (Exhibits 7 and 7a) which were admitted in evidence without objection. He stated that Mr. Petroutsis had failed to carry out the terms of that letter (which were expressed to be undertaken by Mr. Petroutsis in accordance with the agreement dated the 26th October 1961) and further stated that the terms of the agreement itself had not been performed by the Respondents, nor had the Appellants received any benefit under the agreement. He produced letters received from the office of the Deputy Commissioner of Maritime Affairs for the Republic of Liberia (Exhibits 8, 9 and 11) which were admitted in evidence without objection. These showed why the Appellants had not been satisfied with the way in which the Respondents were operating the SPETSAI PATRIOT and why they had taken steps to have the vessel arrested. The Appellants had not forgotten their agreement of the 26th October 1961, but rather, did not think that it was any more binding upon them because the Respondents had not carried out its terms. The Appellants claimed the sum of £380,627 calculated as set out in their Statement of Claim.

Part II pp. 143-147 10

Part II pp. 147-8
Part II pp. 148-9
Part II pp. 155-6 20

Part I p. 62

Part I pp. 73-75 30

21. In Cross-examination, M. Dubuis agreed that in 1958 the Appellants had received the proceeds from the sale of the SPETSAI STAR and a sum which may have been £100,000 in respect of the SPETSAI SAILOR, and that they had sometime after received an assignment of the benefit of certain insurance claims in respect of the SPETSAI GLORY, which they had taken steps to settle. A sum of £40,000 from the sale of the SPETSAI GLORY had been received on the 26th October 1961. He referred to the fact that no letters of credit had been given to the Bank to cover the sale of the SPETSAI ISLAND in Japan. He denied that the Appellants had received anything referred to in the agreement from the Respondents, and reaffirmed that the Appellants had brought the action because of the threats from Liberia to strike the SPETSAI PATRIOT off the Register. In re-examination, he stated that the sums paid in respect of the SPETSAI STAR and SPETSAIT SAILOR had not been paid in reduction of the mortgage on the SPETSAI PATRIOT.

Part I pp. 75-6 40

Part I pp. 76-79 50

22. The Respondents called one witness, Constantine Anastesilis Petroutsis, who described

10 himself as owner and managing director of the Respondent company. He admitted the mortgage, and said that the agreement of the 26th October 1961 was entered into after a number of disputes. The parties resolved their differences by that agreement. The Appellants had collected £40,000 in 1960 on the sale of the wreck of the SPETSAI GLORY before the agreement was signed. The claim for £125,000 in respect of the insurance on the SPETSAI GLORY and the claim for £70,000 disbursements expended by the Appellants had been assigned to them. Mr. Petroutsis was not ready and willing to take the SPETSAI ISLAND to Japan for sale as he had agreed. He would have done so shortly after the agreement had been signed, but the Appellants would not release the ship or transfer it to him at that time. (At this point, the Appellants' Counsel objected to the witness' evidence having regard to paragraph 4 of the Statement of Defence which alleged that the terms of agreement of the 26th October 1961 "had been complied with". An application by the Respondents' Counsel to amend the paragraph was refused.) Mr. Petroutsis claimed that he had complied with the terms of that agreement.

Part II pp. 104-124
Part II pp. 128-143

Part I p. 77

Part I p. 64

23. In Cross-examination, Mr. Petroutsis stated that in 1959, there was an agreement that the SPETSAI ISLAND and the SPETSAI NAVIGATOR should be transferred to Spetsai Island Shipping Company (the Appellants' subsidiary company) and that his sister-in-law had brought proceedings against those ships. That was one of the actions withdrawn when the agreement was made. After the agreement, the SPETSAI NAVIGATOR had been transferred to the Respondents and mortgaged to the American Trading Company S.A. He did not execute any fresh mortgage of the SPETSAI PATRIOT because he was waiting for the Appellants to produce the necessary documents for him to sign. He stated that he had insured the SPETSAI PATRIOT for £125,000 but could not produce corroborative evidence. He agreed that he had not established any letter of credit pursuant to the terms of the agreement, nor was he prepared to send the SPETSAI ISLAND to Japan for sale. He disputed the agreement. Litigation was pending in Geneva. He said that he always complied with Maritime Regulations, but that he had been given an extension of time within which to comply with them after receiving letters from the Liberian authorities about the SPETSAI PATRIOT. In re-examination, he produced a telegram (Exhibit 12)

Part I pp. 78-9

Part I p. 79
Part II p. 148

Record

from the Liberian authorities extending his time for compliance to the 14th July. He said that the Appellants had complained to him that they had not received documents which he was required to send to them - Insurance Certificates and assignment.

- Part I pp. 79-86 24. On the 22nd and the 25th September 1962, Counsel on behalf of each party addressed the Court with arguments and cited a number of authorities. At the conclusion of the speeches the Court reserved judgment. 10
- Part I pp. 86-99 25. On the 7th November 1962, Sir Lionel Brett J. delivered the leading judgment of the Court. He referred to the Admiralty jurisdiction of the Court over the Appellants' claim and its power to order the arrest of a foreign ship to enforce the rights of a mortgagee. He found as facts that the principal sum secured by the mortgage had not been repaid, that the mortgage had been duly registered in accordance with Liberian law, that it had not been formally cancelled nor had there been a release or reconveyance of the ship, and he further found that the safety requirements of the Maritime authorities of Liberia had not been complied with. 20
- Part I pp. 86-7
- Part I p. 88
- Part I p. 89 The essential part of the Defence, he said, was the Respondents' reliance upon the agreement of the 26th October 1961 to debar the Appellants from enforcing the mortgage, and it was for the Court to give it its true legal effect.
- Part I pp. 89-95 26. Having referred to the Appellants' evidence and the submissions made on their behalf, he thought that the Court had only to consider whether the agreement entitled the Appellants to obtain judgment for a sum of money and enforce it by sale of the ship, and that, in his view, was a matter of the construction of the agreement, to which the question whether there had been breaches of it was irrelevant. 30
- Part I p. 95
- Part I p. 96 In gathering the intention of the parties from the agreement to which they had set their hands, he attached great significance to the last paragraph of the preamble, and the first sentence of Article 5. Those passages, coupled with the waiver of accounts and the provision that the Appellants should be enabled to obtain from various sources the whole sum agreed to be due, indicated to him that it was the intention of the parties that the agreement by itself was to be taken in accord and satisfaction, and furthermore the Respondents had carried out at least part performance in withdrawing, or procuring the withdrawal of litigation, and in executing a mortgage on the SPETSAI NAVIGATOR. He held that the 40
- Part I p. 97 50

agreement was a binding compromise of existing claims on each side and that although the mortgage to the Appellants remained in force for the time being, the Appellants could not do anything to enforce their rights under the mortgage which would be inconsistent with the terms of the agreement.

Part I p. 97

10 27. He went on to hold that whatever breaches of the agreement the Respondents may have been guilty of, he did not consider that the Appellants, having taken advantage of, for example, the withdrawal of various lawsuits, could claim to treat the agreement as cancelled. So long as the agreement remained in force, the Appellants were unable to sue for the sums secured by the mortgage. The submission that in the alternative the Appellants were entitled to sue on the mortgage for £50,000 failed because by the terms of the agreement, that sum was not due on the 12th July 1962. In 20 his judgment, the action should be dismissed with costs to be taxed by a single judge in chambers, and the SPETSAI PATRIOT should be released from arrest at once. The other members of the Court concurred and judgment was entered in those terms.

Part I p. 97

Part I p. 98

Part I p. 99

Part I pp. 99-100

30 28. On the 20th November 1962 the Respondents' costs were taxed in the sum of £3,906. On the 28th January 1963 the Federal Supreme Court granted the Appellants leave to appeal to Her Majesty in Council upon certain conditions that were in due course fulfilled, and on the 9th August 1963, granted final leave to appeal to the Privy Council.

Part I pp. 100-101

Part I pp. 101-103

Part I pp. 103-104

40 29. The Appellants respectfully submit that the agreement dated the 26th October 1961 was not capable of affecting their position under Liberian law as mortgagees of the SPETSAI PATRIOT under a First Preferred Mortgage which, at all material times, was properly constituted, registered and recorded with the appropriate officer in accordance with Chapter 3 of the Liberian Maritime Law (Exhibit 5). No certificate of discharge had been filed by the Respondents as required by Section 111(2) of that Chapter. The Appellants were therefore entitled under Liberian law to exercise the remedies provided to them by Section 112 of that Chapter.

Part II pp.128-143

Part II p. 125 and separate document

30. Further, the Appellants will contend that upon its true construction, the agreement dated the 26th October 1961 did not expressly or by

Part II pp.128-143

Record

Part II pp.128-136

implication rescind, revoke or cancel the mortgage, or discharge the Respondents from their obligations under it, or deprive the Appellants of the benefit of their security. The Appellants will refer to the terms of the original French text of the said agreement. Insofar as it referred to the mortgage or to the Respondents' obligations thereunder, the Appellants' agreement to its terms was conditional upon the Respondents' future performance of their part of the agreement as a whole. Upon the evidence, the Court ought to have found that that condition was not fulfilled. Further, the agreement stipulated the future execution by the Respondents of a mortgage on the SPETSAI PATRIOT in favour of the American Trading Company of Panama in substitution for the Appellants' mortgage, but on the evidence that was never done. The mortgage could not, in any event, have been rescinded because the Appellants had performed their part of it, and the Respondents were in breach of it.

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Part II pp.128-143

31. It is also respectfully submitted that the Court was wrong in treating the agreement of the 26th October 1961 (which was not under seal) as an Accord and Satisfaction. On a true construction, the Appellants' acceptance of the terms of the agreement was given in consideration of the future performance of each of the Respondents' obligations thereunder, and on the evidence, satisfaction was not in fact provided by the Respondents. Amongst other things, the contemplated mortgage to the American Trading Company was not executed, nor was the Appellants' mortgage limited to £50,000, nor did the Respondents carry out their promise to sell the SPETSAI ISLAND to Japan and to provide the Appellants with letters of credit from a purchaser. The Court was wrong in holding that satisfaction had been given. There was no evidence that the execution of a mortgage on the SPETSAI NAVIGATOR in favour of the American Trading Company was a benefit to the Appellants, and the only evidence about the withdrawal of litigation concerned proceedings to which the Appellants were not party and vessels which the Respondents had previously agreed to transfer to the Appellants' subsidiary company.

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Part II pp.128-143

32. If the Court was right in holding that the agreement dated the 26th October 1961 was an Accord and Satisfaction which deprived the Appellants of all or part of their rights under

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10 their mortgage, or limited their security to
£50,000, the Court was wrong in treating the
allegations that the Respondents were in breach
of that agreement as irrelevant to the issue before
them. The Appellants had throughout the proceed-
ings contended that the Respondents by their
breaches had repudiated that agreement, and had
thereby entitled the Appellants to treat it as
discharged. Upon the evidence, there had been
serious breaches by the Respondents. Mr.
10 Petroutsis, on behalf of the Respondents, stated
in evidence that he was not prepared to sell the
SPETSAI ISLAND to Japan (because he disputed the
agreement?) and showed that he had had for some
time past no intention of performing that
obligation. If the Court had been concerned to
make findings upon this part of the evidence, it
would have been satisfied that the stipulations
20 contained in Exhibits 7 and 7a, which were
expressed to be undertaken in accordance with the
agreement dated the 26th October 1961, had not
been carried out. It found as a fact that there
had been a non-compliance with the requirements
of the Liberian authorities in respect of the
registration of the vessel, and that was a breach
of the terms of the Appellants' mortgage which in
turn was referred to in the agreement. In the
circumstances, it is submitted that the
Respondents had by these and other breaches,
30 repudiated the agreement of the 26th October 1961,
and the Appellants by bringing these proceedings
had, as they were entitled to, elected to treat
the Accord and Satisfaction as discharged, and to
claim the benefit of their rights under the
mortgage.

Part I p. 76

Part II pp. 143-147

Part I. p. 88

33. Further, if the Court was right to hold (as
the Respondents pleaded) that the effect of the
agreement dated the 26th October 1961 was to limit
the Appellants' rights under their mortgage on the
40 SPETSAI PATRIOT to a security for £50,000, the
Court was wrong to hold that the Appellants were
not entitled in these proceedings to recover that
sum. The Appellants proved and the Court found
as a fact that the Respondents had not complied
with the regulations of the Maritime authorities
in Liberia, and therefore they were in breach of
Sections 4, 5 and 11 of the mortgage. Accordingly,
by reason of the provisions of Section 21, the
Appellants were entitled to declare payable the
50 whole of the sums secured and to take immediate
steps to enforce their security. In the premises,
they were entitled to the relief claimed, and

Part I p. 97

Part I p. 88

Part II pp. 108-110
Part II pp. 114-117

Record

judgment for £50,000 payable out of the proceeds of sale, and costs.

Part I pp. 99-100 34. The Appellants therefore respectfully submit that this appeal should be allowed, and that the judgment of the Federal Supreme Court of Nigeria should be reversed or varied as necessary for the following amongst other

R E A S O N S

- (i) BECAUSE the Appellants were entitled to judgment for the sums claimed under the mortgage; 10
- (ii) BECAUSE that mortgage had not been rescinded, revoked, cancelled or discharged by the subsequent agreement on its true construction;
- (iii) BECAUSE on the evidence and on the true construction of the subsequent agreement there was no accord and satisfaction;
- (iv) BECAUSE the subsequent agreement between the parties had been repudiated by the Respondents, and the Appellants were entitled to treat it as discharged; 20
- (v) BECAUSE the Appellants were in any event entitled to judgment in the sum of £50,000, an order for the appraisalment and sale of the SPETSAI PATRIOT and costs.

MICHAEL THOMAS

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL SUPREME
COURT OF NIGERIA
(ADMIRALTY JURISDICTION)

B E T W E E N :

BANQUE GENEVOISE DE
COMMERCE ET DE
CREDIT (Plaintiffs)
... .. APPELLANTS

- and -

COMPANIA MARITIMA DE
ISOLA SPETSAI LIMITADA
(the Owners of the
Steamship or Vessel
"SPETSAI PATRIOT")
(Defendants)
... .. RESPONDENTS

CASE FOR THE APPELLANTS

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