

23, 1950

31266

UNIVERSITY OF LONDON
W.C.1.

Appeal No. 1 of 1950. 28MAR1951

In the Privy Council.

INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL UNIVERSITY OF LONDON
FROM THE COURT OF APPEAL, MALTA. W.C.1.

BETWEEN

JOSEPH AND GEORGE GRISCTI, *proprio et nomine*

INSTITUTE OF ADVANCED
LEGAL STUDIES
Appellants
Defendants,

AND

EMMANUELE BORG, *proprio et nomine*

- Respondent -
Plaintiff.

10

CASE FOR THE APPELLANTS

1. This is an appeal from a judgment of the Court of Appeal, Malta, dated the 15th March, 1948, which affirmed the judgment of His Majesty's Commercial Court of the 22nd April, 1947.

RECORD.

2. The issues to be determined on this appeal are:—

“ (a) Whether two orders for the purchase of a quantity of fish given by the Appellants who were then trading as Manufacturers' Agents under the name ' Vincent Griscti & Sons,' Malta, to Messrs. Allan & Dey of Poynerook Road, Aberdeen, Scotland (hereinafter called the ' Assignors') on the 2nd and 5th October, 1935, respectively, the one for delivery to one John Mazitelli and the other to one Felix Blanc were genuine transactions or whether Mazitelli and Blanc were mere *prête-noms* for the Appellants;

20

“ (b) Whether the Appellants were then or subsequently became obliged to pay to the assignors the debts thereby incurred by Mazitelli and Blanc.

“ (c) Whether the assignment of the said debts by the assignors to the Respondent, without notice given to the said Mazitelli and Blanc, gave any cause of action to the Respondent against the Appellants.

30

“ (d) Whether on a true construction of the transaction between the assignors and the Respondent, the purchase of the said credit by the Respondent was a mere speculation,

RECORD.

and that for this reason he was disentitled to recover from the Appellants more than he had paid for the said credit."

3. The material facts arising out of this appeal are as follows:—

pp. 88 & 92.

A. On the 2nd October, 1935, the Appellants transmitted to the assignors the order of John Mazitelli of 20, Strada Tesoreria, Valletta, for 300 cases of kippers, 300 cases of bloaters and 300 cases of fresh herrings. On the 5th October, 1935, they transmitted a further order for fish on behalf of Messrs. Felix Blanc of 12, Psaila Street, Birchircara. In pursuance of the said orders, the assignors 10 supplied 900 cases of fish to Mazitelli at a price of £260 and 600 cases to Blanc at a price of £173 6s. 8d. At all material times the assignors recognised the Appellants as the agents of themselves, the assignors. Mazitelli took delivery of the goods ordered on his behalf, accepted the Bill of Exchange drawn on him by the assignors, but failed to pay the assignors. Blanc failed to take delivery of his order for fish and the Appellants took over the fish and disposed of it on behalf of the assignors.

p. 90.

pp. 6, 7.

pp. 95, 97, 98.

p. 13, ll. 9 & 10 and p. 110.

pp. 6 & 7.

pp. 7, 8, 16.

B. The Appellants were at that time hard pressed by their own creditors. Without prejudice to their denial of liability, however, 20 and with a view to assisting the assignors, as their agents in Malta, they offered to pay the assignors 20 per cent. of the sums due to them from Mazitelli and Blanc. Shortly afterwards and acting on legal advice, the Appellants absconded from Malta.

pp. 7, 14.

p. 16, ll. 12—14 and ll. 20—21.

C. In October, 1939, again without any prejudice, the Appellants, in an effort to compromise any claim which the assignors might have against them, offered to put at the disposition of the assignors a sum of money lying to their credit at the Midland Bank in England. The assignors accepted this offer and the Appellants thereupon instructed the said Bank to pay to the assignors the sum of £209 4s. 7d., plus 30 interest. The outbreak of war, however, appears to have brought negotiations to an end.

p. 16. pp. 7, 117, 118, 119, 120, 121.

pp. 16 & 122.

D. In November, 1943, Dr. John Pullicino, the then legal representative in Malta of the assignors, served upon the Appellants a judicial letter for the alleged purpose of interrupting the run of prescription, and thereafter the Appellants re-opened negotiations through the said representative with a view to settling any claim which the assignors might have against them by the payment of 40 per cent. of the total debts. Notwithstanding these negotiations, the assignors, counselled by their said representative, by an Instrument 40 of Assignment dated the 5th September, 1944, purported to assign to the Respondent for the sum of £108 6s. 8d. the debt of £433 6s. 8d. due to them in respect of the said consignments of fish as debt due to them from the Appellants, together with the accessories and privileges appurtenant thereto and interest thereon according to law. By notice in writing dated the 9th October, 1944, the said

pp. 17, 129.

p. 83.

representative gave notice to the Appellants of the said purported assignment of the said alleged debts. By letter dated the 28th October, 1944, the Appellants informed the assignors of their offer to settle the assignors' claim for 40 per cent. of the total sum together with interest thereon. By a Judicial Letter dated the 27th October, 1944, and addressed to the Respondent, the Appellants claimed to treat the said alleged debts assigned to him as a litigious credit and to exercise their right to purchase it from him for the sum which he had paid for it, to wit the sum of £108 6s. 8d. together with the expenses, amounting to £26 6s. 0d., as per the said Instrument of Assignment. On the 31st October, 1944, the Appellants paid into Court the sum of £700, authorising the Respondent to draw therefrom the said sum of £134 12s. 8d., together with interest thereon at 6 per cent. from the date of the said purported assignment.

4. By a Writ of Summons issued in His Majesty's Commercial Court on the 27th November, 1944, the Respondent commenced proceedings for the recovery from the Appellants of the total sum which the assignors had purported to assign to him, to wit £685 18s. 11d. The said sum was made up as to £433 6s. 8d. for the invoice value of the goods delivered by the assignors, as to £226 6s. 3d. for interest accruing on the principal sum, and as to £26 6s. 0d. for legal costs.

5. On the 22nd April, 1947, His Majesty's Commercial Court adjudged as follows:—

- (1) With regard to the Mazitelli transaction, Mazitelli was merely acting for the Appellants as a *prête-nom* and the Appellants were therefore liable for the price of the goods sold to him and the credit assigned in respect of this debt was therefore an actual and real credit;
- (2) The credit assigned was not a litigious credit within the meaning of Section 1565 of the Malta Civil Code because it was not an unliquidated debt; and, moreover, the right of assignment could not be exercised as it arose out of a commercial transaction. On these grounds, the Court allowed the claim with costs against the Appellants.

6. Against this judgment, the Appellants entered an appeal to the Court of Appeal which held by a judgment delivered on the 15th March, 1948:—

- (i) That the Appellants' plea that the action was barred by the fact that no notice of the said assignment had been given to either Mazitelli or Blanc was a dilatory plea and therefore inadmissible;
- (ii) That the Appellants themselves had ordered the two consignments of fish in the names of fictitious customers and the names Mazitelli and Blanc were mere *prête-noms* for the Appellants and the Appellants had repeatedly acknowledged their debt to the assignors;

- (iii) That by trying to compromise the matter with the assignors the Appellants had acknowledged their liability;
- (iv) That the Court below was right in holding that the credit was not a litigious credit and was not therefore subject to a right of recovery by the Appellants.

The Court of Appeal accordingly upheld the judgment of His Majesty's Commercial Court and dismissed the appeal with costs.

7. The Appellants submit that the said judgment of the Court of Appeal, Malta, dated the 15th March, 1948, is wrong and should be reversed with costs for the following, among other, 10

REASONS:—

1. Because the Court of Appeal was wrong in law in rejecting the Appellants' contention that the action was barred by the fact that no notice of the said purported assignment was given to either Mazitelli or Blanc, both of whom had been recognised as debtors by the assignors.
2. Because the Court of Appeal was wrong in law in holding that the said contention constituted a mere dilatory plea which should have been raised *in limine litis* and not a peremptory plea which could have been raised on appeal both on the merits and with regard to the action. 20
3. Because the Court of Appeal was wrong both in law and on the facts of the case in holding that the Appellants had any personal obligation to answer for the debts of either Mazitelli or Blanc.
4. Because the Appellants were acting, at all material times, as agents for the assignors and therefore the purported assignment of the alleged debt which was no debt of the Appellants could not give and did not give the Respondent any right of action against the Appellants. 30
5. Because the finding of His Majesty's Commercial Court and of the Court of Appeal that Mazitelli and Blanc were mere *prête-noms* for the Appellants was contrary to the weight of the evidence.
6. Because if the contention of the Respondent was right that the Appellants had misled the assignors, the only remedy of the assignors was by way of an action for damages, which remedy was not open to the Respondent.
7. Because the Court of Appeal was wrong in law in holding that the credit was not a litigious credit and wrong therefore in holding that the Appellants were not entitled to exercise a right of recovery against the Respondent. 40

8. Because on a true construction of the transaction between the assignors and the Respondent, the Respondent purchased the alleged credit as a speculation and it is therefore contrary to natural justice that he should unjustly enrich himself at the expense of the Appellants.

C. J. COLOMBOS.
W. P. GRIEVE.

HY. S. L. POLAK & Co.,
20 and 21, Took's Court,
Cursitor Street, E.C.4.
Solicitors for the Appellants.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL AT MALTA.

BETWEEN

JOSEPH GRISCTI AND
ANOTHER - *Appellants—
Defendants,*

AND

EMMANUELE BORG - *Respondent—
Plaintiff.*

CASE FOR THE APPELLANTS

HY. S. L. POLAK & CO.,
20 and 21, Took's Court,
Cursitor Street, E.C.4.
Solicitors for the Appellants.