

G.S.H.G.S.

13,1951

In the Privy Council.

31289

No. 9 of 1950.

ON APPEAL FROM THE COURT OF APPEAL,
MALTA

UNIVERSITY OF LONDON
W.C.1.

17 JUL 1953

BETWEEN

ANTONIO CARUANA, MICHELE MAGRO, for and on behalf of
the firm of JOSEPH MAGRO, JOSEPH STELLINI, for and on behalf of the firm of S. STELLINI & SONS, ANTONIO BONNIGI,
EMMANUELE FARRUGIA, JOHN TABONE, SALVATORE MIFSUD, CARMELO MUSCAT, PAOLO MICALLEF,
ROSARIO SCHEMBRI, for and on behalf of the firm of GIOVANNI SCHEMBRI, CARMELO LOPORTO, for and on behalf
of the firm of PACE & LOPORTO, ANTONIO VELLA, MICHELANGELO SCIBERRAS, PAOLO FARRUGIA,
CARMELO BELLIZZI, for and on behalf of the firm of CARMELO BELLIZZI & Co., GIUSEPPE PORTELLI, for and on
behalf of the firm of EDGAR PORTELLI, FELICE CUTAJAR, GIUSEPPE DEBRINCAT, for and on behalf of the firm of
A. DEBRINCAT & SONS, GEORGE DEBATTISTA, JOSEPH GAMBIN, GIUSEPPE BUHAGIAR, JOSEPH GRECH,
ANGELO BRIFFA, for and on behalf of the firm of VINCENZO BRIFFA; and JOSEPH & WILFRED STELLINI vice their
father JOSEPH STELLINI, deceased ... (*Plaintiffs*) APPELLANTS

AND

JOSEPH DEBONO, PHILIP AGIUS, JOHN CALLEJA,
AGOSTINO AZZOPARDI, ANTONIO CUSCHIERI, ANGELO
BONELLO and DOMENICO CACHIA, respectively in their
capacity as CHAIRMAN, SECRETARY and DIRECTORS of the
WHOLESALE FOODSTUFFS POOL ... (*Defendants*) RESPONDENTS.

CASE ON BEHALF OF THE APPELLANTS

RECORD

1.—This is an Appeal from a Judgment of H.M. Court of Appeal, p. 26
Malta, dated the 16th May, 1949, which varied a judgment of H.M. p. 10
Commercial Court, Malta, dated the 25th November, 1948.

2.—On the 27th February, 1945, the Plaintiffs-Appellants, with many p. 43
others, entered into a contract whereby they formed and constituted

p. 48 between them a Limited Liability Company, The Wholesale Foodstuffs Pool, Ltd., with the object of sharing between them, according to quotas therein established, the percentage of gross profits payable to the Company by the Distributors appointed, or to be appointed, by the Competent Authorities.

The percentage was to be that mentioned in a letter dated the 23rd November, 1943 (Number 6551/42) sent by the Assistant to the Lieutenant Governor to the Honorary Secretary of the Chamber of Commerce, copy whereof, marked "A" was attached to and formed part of the said Contract, or any other percentage which the Competent Authorities might fix from time to time. 10

3.—The said Company was formed under conditions :

p. 49 *Under Conditions 1 and 2* the Company was styled "The Wholesale Food Stuffs Pool, Ltd.", and the subscribed capital was declared to be £1,904, divided into 1,904 shares of £1 each.

p. 49 *Under Condition 3* the business of the Company was to be conducted by a Board of Directors, composed of seven members, and holding office for one year. Provision was made for the appointment of officers and the constitution of a quorum.

p. 49 *Condition 4* defines the powers of the Board of Directors and these include the convening of a General Meeting of Shareholders. 20

p. 50 *Condition 8* says that a General Meeting of Shareholders is to be convened at least once in every six months.

p. 50 *Conditions 9 and 10* deal with the procedure at General Meetings.

p. 51 *Condition 11* defines the powers to be exercised at a General Meeting, and these powers include "(c) *To extend the life of the Company in accordance with Clause 14 of the present agreement.*"

p. 51 *Condition 12* deals with resolutions proposed at General Meetings.

p. 52 By *Condition 13* "any amendment or cancellation of any of the conditions herein set forth, or any addition of any condition, may be made only with the consent of at least two-thirds of all the shareholders of the Company." 30

p. 52 *Condition 14* reads as follows :—

"The Company is being formed for the period of two years which, to meet the ends and purpose of the aforesaid letter of the 23rd November, 1943, is to be deemed as commencing from the twenty-fourth January One Thousand Nine Hundred and Forty-four. The aforesaid period is subject to extension for further periods of one year. However, if in view of any instructions issued by the Competent Authorities, the object for which the Company has been formed were to come to an end 40

“ before the termination of the initial period of two years or the
 “ subsequent extension, or extensions, thereof, the present
 “ agreement shall be deemed to have elapsed from the date
 “ mentioned in any such instructions.

RECORD

“ The Board of Directors in office at the time of the
 “ termination of the Agreement is hereby empowered at once to
 “ wind up the Company.”

4.—The question at issue in this appeal is whether, as the Appellants contend, the Wholesale Foodstuffs Pool ended *ipso jure* at the end of the
 10 period for which it had been set up under the Contract of the 27th February, 1945, no general meeting of the shareholders having, as the said contract provided, extended the period for which the Pool was constituted, or whether, as the Respondents contend, the contract setting up the Pool is not a contract of commercial partnership but a contract *sui generis* and that the Pool in the circumstances is still in existence and can not be dissolved without the authorisation of the Government.

5.—By a Writ of Summons, dated the 7th February, 1948, the p. 1
 Plaintiffs stated that the Pool was constituted for a period of 2 years with effect from the 24th January, 1944; that the period expired on the
 20 23rd February, 1946; and that no extension had been made in terms of the contract. They called upon the Defendants to shew cause (1) why it should not be declared and adjudged that the Wholesale Foodstuffs Pool came to an end *ipso jure* on termination of the period for which it was set up, and (2) why the Defendants should not proceed to effect the liquidation of the Pool.

The Plaintiffs' Declaration dated the 10th February, 1948, stated that p. 3
 the Pool was constituted by virtue of an instrument which was enrolled in the Records of Notary Victor Bisazza, on the 20th March, 1945; and that at the end of the period of two years no General Meeting was convened
 30 for the purpose of extending the life of the Pool in terms of Clauses 11 and 14 of the instrument referred to.

6.—The Statement of Defence was to the effect that the Wholesale p. 4
 Foodstuffs Pool is not a Commercial Partnership in the strict juridical sense of the term, but an association *sui generis*, the setting up of which was enforced by the Civil Government, and that consequently, once the Government is still in need of that association, the action brought by the Plaintiffs is premature.

The Declaration of the Defendants was to the effect that, although, p. 4
 so far as appearances go, the Pool in question partakes of the nature of a
 40 Limited Liability Company, in actual fact it is but an association *sui generis* which was set up and which had necessarily to be set up during the emergency like all the other Pools; that this fact was established by the judgment given by the Court of Appeal of Malta on the 18th November,

RECORD 1946, in the case of *Fava v. Bonnici*; that the associations in question were imposed by the Government, and they differ to that extent from ordinary Commercial partnerships which are voluntarily entered into and which last so long as the *affectio societatis* endures; and that once the Pool in question is still required by the Government, it cannot be wound up and liquidated.

p. 5 to p. 9 7.—Oral evidence was adduced by the Food and Commerce Control Officer and five others. Filippo Agius, Secretary of the Pool, said “ After “ the first two years had come to an end, we held a General Meeting for “ the purpose of extending the life of the Pool from one year to another. 10 “ The Meeting in question was held almost a year after the end of the first “ two-year period.”

p. 10 8.—On the 25th November, 1948, Mr. Justice A. J. Montanaro Gauci, p. 11 sitting in the Commercial Court, dismissed the claim of the Plaintiffs, with costs—saving any action to which the Plaintiffs may be entitled when the Pool comes to an end, according to law and if according to law.

9.—The Judge held that the contract setting up the Wholesale Food Pool was not a commercial partnership (*Société*) within the juridical meaning of the term as held by the Courts in Malta; that it was a Pool which consisted of the amalgamation of a number of traders promoted by the Government with the object of facilitating the importation and distribution 20 of rationed commodities in the abnormal conditions of the world markets; that those who joined the Pool were at liberty to quit as soon as the period agreed upon ran out; that the Pool was still in being and still required by the Government; that it did not fall to the plaintiffs to demand its liquidation even though the contractual period has elapsed; that the Pool was subject to the final decision of the Government which brought it about; that the pool must continue in being so long as the circumstances that justified its creation persisted and endured and that the claim for liquidation of the Pool was premature. 30

p. 12 10.—On the 2nd December, 1948, the Plaintiffs entered an appeal to the Court of Appeal from the aforesaid judgment of the 25th November, 1948.

p. 13 The Petition of the Plaintiffs, filed in the Court of Appeal on the 9th December, 1948, *inter alia*, is to the effect that the Court below erred in holding that a Pool and not a Commercial Partnership had been set up by the contract; that in the contract the parties had agreed to form between them a Commercial Partnership; that none of the requisites for the validity of a contract for a Commercial Partnership are lacking; that the Court, in stating that it has been consistently held that a Pool is not a Commercial Partnership, misconstrued the judgments referred to; that 40 those judgments concerned the question whether the external and internal requisites of a Commercial Partnership were necessary for the validity and existence of a Pool—to which the Courts returned a negative answer; that

in the present case, the point at issue is whether there is any legal obstacle that impedes the constitution of a Pool by means of a Partnership Deed, and there is none ; that it is not quite correct to say that the Pool is required by the Government, but rather that the Government is in need of Distributors ; that there is no law or regulation whereby the Government ordered the formation of a Pool ; that when trade was placed under certain restrictions, and the Government had appointed Distributors for certain essential commodities, the Pools were set up to ensure fairness towards the traders who had not been appointed Distributors ; that whether a Pool is
 10 a Commercial Partnership or any other form of a business undertaking, there is in this case a lawful contract, the terms of which are binding on the parties to it ; that, on the facts, the Plaintiffs had every right to obtain a judicial declaration that the Wholesale Foodstuffs Pool, formed on the 24th January, 1944, had come to an end and that there should be an Order for its liquidation ; and that if the claim were premature, the Court, instead of dismissing the claim, should have non-suited the Plaintiffs.

11.—Further evidence was given by The Food and Commerce Control p. 17
 Officer on the 4th April, 1949, to the effect that the Pool was autonomous.

12.—On the 3rd May, 1949, the Plaintiffs filed a Note of Submissions, p. 20
 20 while the Defendants filed their Note of Submissions on the 12th May, 1949.

In both cases, the Submissions were largely a re-capitulation of former p. 23
 pleadings and arguments.

Judgment was delivered by the Court of Appeal on the 16th May, 1949. p. 26

The Court found that the Pools that were formed during the war could not be considered as true commercial partnerships within the meaning of the commercial laws and that having regard to the intervention of the Government the Pool could not be dissolved without the authorisation of the Government. The Court held that the principle maintained by the Appellants that all concerned were set free on the expiration of the
 30 contractual period of two years, must be reconciled with the interest of the public and that the Pool was still in existence and was required by the Government to meet present-day exigencies.

The Court decided that the action was premature as the Appellants had continued to hold their appointment as Distributors and remained Members of the Pool, and therefore could not advance any claims against the Pool until they relinquished their appointment as Distributors and their Memberships of the Pool. The Court, to the extent that the Appellants' claims were dismissed by the Court of First Instance, allowed the Appellants' appeal but declared the action premature and therefore
 40 non-suited the Plaintiffs.

13.—On the 16th December, 1949, there was a Decree granting Final p. 40
 Leave to Appeal.

14.—The Appellants humbly submit that the said judgment of the Court of Appeal, Malta, is wrong and should be reversed, for the following, among other,

REASONS

1. BECAUSE by the Contract dated the 27th February, 1945, under which "The Wholesale Foodstuffs Pool Ltd." was constituted, the parties thereto bound themselves to carry out its terms.
2. BECAUSE under Clause 14 of the said contract, the Company was formed for a period of two years, commencing from the 24th January, 1944, the said period being subject to further periods of one year, and which extensions were governed by Clause 11 (c). 10
3. BECAUSE Clause 14 further provided that if, in view of any instructions issued by the Competent Authorities, the object for which the Company had been formed, were to come to an end before the termination of the initial period of two years or the subsequent extension thereof, the present agreement should be deemed to have elapsed from the date mentioned in any such instructions, and no such instructions had been issued or date mentioned. 20
4. BECAUSE under Clause 4 of the Contract the Board of Directors was empowered to convene a General Meeting of Shareholders, which meeting it was obligatory for the Board to convene at least once every six months, under Clause 8, and this was not done.
5. BECAUSE the initial period of two years expired on the 23rd January, 1946, and no General Meeting was held to extend the period until almost a year after the expiration of the period. 30
6. BECAUSE by reason of the failure of the Board of Directors to hold a timeous General Meeting for the extension of the original period, the Pool had legally come to an end.
7. BECAUSE on the Pool so coming to an end it was obligatory on the Defendants as directors of the Pool to wind up the Pool.
8. BECAUSE the said Pool was a commercial partnership under the Law of Malta.
9. BECAUSE the Appellants were not precluded by reason of their appointment as Distributors and their membership of the Pool, from bringing the action. 40

10. BECAUSE when the Pool had come to an end, in terms of the contract, the Plaintiffs were right in asking for (A) a judicial declaration to the effect that the Pool had come to an end, and (B) an Order directing the Defendants to wind up the Pool.

11. BECAUSE both Courts below were wrong in refusing to make the said Declaration and Order.

JOHN FOSTER.

T. B. W. RAMSAY.

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MALTA.

BETWEEN

ANTONIO CARUANA AND
OTHERS (*Plaintiffs*) APPELLANTS

AND

JOSEPH DEBONO NOMINE
AND OTHERS (*Defendants*) RESPONDENTS.

CASE ON BEHALF OF THE
APPELLANTS

THOMAS COOPER & CO.,
27 Leadenhall Street,
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Solicitors for the Appellants.